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Reinterpreting Statutory Interpretation

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REINTERPRETING STATUTORY INTERPRETATION

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What principles should courts apply when they interpret statutes? While this perennial question has continued to spark debate, Carlos González argues that, at a fundamental level, the debate has failed to comprehend the proper relationship between the judiciary and the legislature. Mr. González first groups several current theories of interpretation into textualist, intentionalist, and dynamic categories, discussing each in turn. He contends that most of these theories view the courts to some extent as subordinate agents of the legislature. The author then explains that this "honest agent" approach results from a mistaken historical concept of the judicial/legislative relationship. The approach relies too heavily upon the popular faith in legislative supremacy that was prevalent during and immediately after the American Revolution. Mr. González demonstrates that by 1787 Americans had modified their views considerably, coming to see the courts more as direct agents of the people than as agents of the legislature. This background of the federal Constitution suggests that scholars and judges today should view the proper institutional role of the courts as partners, and not merely agents, of the legislature. To do otherwise ignores both the important transformations in American constitutional theory leading up to the Founding, and the unique structure of government ratified into the Constitution. The author concludes by demonstrating the incompatibility between existing interpretive approaches and the institutional relationship between the first and third branches of government embedded in the federal Constitution. In place of current interpretive approaches, he offers a tentative interpretive approach that is compatible with that institutional relationship.

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I. INTRODUCTION

The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.[1]

Twenty years ago, Henry Hart and Albert Sacks's quotation from the late 1950s served as an epigram for the most important work on statutory interpretation of the 1970s. This latter work began as follows: "It would be hard to think of a field of law that needs clarifying more than that of 'statutory interpretation.' "[2] Twenty years later, statutory interpretation remains in great need of clarification.

For a long period, despite the state of confusion in the field, judges and scholars considered statutory interpretation a poor relation in the family of legal scholarship.[3] Beginning in the early eighties,

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1. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1201 (tentative ed. 1958).

2. REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 1 (1975).

3. The general contemporary American view of statutory interpretation is that there is "not a great deal to say about the subject." Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983); *see also* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 88 (1991) ("[S]tatutory interpretation has never received scholarly . . . attention equal to its practical importance. Instead, legal scholars typically have focused on constitutional law or nonstatutory areas like tort law."); William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 691 (1987) ("A growing body of opinion bemoans legislation's 'second class' status as an academic discipline . . . ."); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 800 (1983)

however, an explosion of scholarly writings, and a handful of opinions by Justice Antonin Scalia[4] and Judge Frank H. Easterbrook,[5] transformed the once sleepy debate.[6] For well over a decade now, the legal community has busied itself arguing over statutory interpretation theory, from its nitty-gritty doctrinal rules to its airy meta-foundations. Yet despite the renewed debate (and perhaps because of it), statutory interpretation remains as complex, convoluted, and in need of clarification today as when Professors Hart and Sacks wrote in the fifties, if not more so. As the recent Supreme Court case of *Smith v. United States*[7] illustrates, American courts still have no "generally accepted and consistently applied theory of statutory interpretation."[8]

In *Smith*, an unwitting subject of a police sting operation offered to trade a gun for two ounces of cocaine.[9] Federal statutory law requires a mandatory prison sentence enhancement of up to thirty years for anyone who "*uses*" a firearm "during and in relation to . . .

("It has been almost fifty years since James Landis complained that academic lawyers did not study legislation in a scientific . . . spirit, and the situation is unchanged."); Robert F. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803, 804 (1984) (noting the "lag of legal education behind the dramatic increase in the importance of statutes in the American legal system").

4. *See, e.g.*, Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment).

5. *See, e.g.*, Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc., 814 F.2d 358 (7th Cir. 1987).

6. FARBER & FRICKEY, *supra* note 3, at 88-89 (stating that public choice theory has "helped revitalize scholarship about statutory interpretation"); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281 (1989) (stating that "there has been something of a renaissance of scholarship about statutory interpretation"); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 244-45 (1992); Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 4 (1993).

Professor Eskridge argues that the "traditional," or Hart and Sacks, legal process approach "has been well received by judges," but that "[t]he traditional approach is in trouble" due to challenges from a number of judges and scholars. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 640-41 (1990). Briefly, the federal decisional law doctrine on statutory interpretation holds that the will of the legislature is supreme, and the words are a very strong indicator of the enacting legislature's will, but that courts nonetheless may abandon this standard in order to avoid extreme results that could not have been the will of the enacting legislature. New conceptions of legislative process are challenging the very core of this approach.

7. 113 S. Ct. 2050 (1993).

8. HART & SACKS, *supra* note 1, at 1201.

9. *Smith*, 113 S. Ct. at 2052.

[a] drug trafficking crime."[10] The straightforward issue of statutory interpretation before the Supreme Court was whether *trading* a gun for narcotics constitutes a "use" of a firearm under the statute.[11] Applying a literalist brand of textualism,[12] Justice Sandra Day O'Connor, writing for the majority, interpreted the statute to encompass cases in which the defendant uses a gun as an item of barter, and thus upheld the mandatory prison sentence enhancement.[13] In dissent, Justice Scalia applied a conventionalist form of textualism,[14] arguing that the word "use" in the statute encompasses only those instances where a defendant puts a gun to its normal use to threaten, harm, or kill another and not those cases in which a gun is used as a medium of barter or exchange.[15] Justice O'Connor rejoined that if Congress intended such a meaning, it could have included language qualifying the word "use" in the statutory text; the Court's role, she stated, does not include "introduc[ing] that additional requirement on [its] own."[16]

Smith is not a tricky case. The statute involved is not complex. It contains no technical terminology. Its language does not require elaboration by the administrative machinery's rule-making process. Its subject matter—sentencing—could not be a more familiar one for

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10. 18 U.S.C. § 924(c)(1) (1994) (emphasis added). The relevant statutory text reads:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

Id.

11. *Smith*, 113 S. Ct. at 2054.

12. Indeed, Justice O'Connor put much weight on Webster's and Black's dictionary definitions of the word "use." *Id.* at 2054, 2055.

13. *Id.* at 2060.

14. Justice Scalia showed his conventionalist stripes when he scolded the majority by stating "[t]he Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used." *Id.* at 2061 (Scalia, J., dissenting). Justice Scalia has elsewhere derided literal textualism. In KMart Corp. v. Cartier, Inc., 486 U.S. 281 (1988), a case involving a trade statute, Scalia offered the following illustration:

> Words . . . acquire meaning not in isolation but with their context. While looking up the separate word "foreign" in a dictionary might produce the reading the majority suggests, that approach would also interpret the phrase "I have a foreign object in my eye" as referring, perhaps, to something from Italy.

Id. at 319 (Scalia, J., concurring in part and dissenting in part).

15. *Smith*, 113 S. Ct. at 2060-63 (Scalia, J., dissenting).

16. *Id.* at 2054.

the federal courts. Only one statutory word was in question. Still, the Justices of the Supreme Court could not agree on the statute's meaning. The troubling fact, however, is that the Supreme Court could not agree on *how* to arrive at the statute's meaning, because the justices were unable to reach consensus on the *proper institutional role* of the Court when interpreting statutes. Justice O'Connor's literalism suggests that she believes the institutional role of the Court is simply to apply in a mechanical fashion the verbatim command of Congress; a literalist textualism is well suited to this task. Justice Scalia's conventionalism implies that he thinks the institutional role of the Court encompasses discovering the intent of the entire enacting Congress; limiting statutory words to their conventional meanings at the time of enactment is an effective means toward that end. *Smith* should be a cause for concern, for it illustrates that disagreements over how to interpret statutes (and therefore over the meanings of statutes) are often rooted in intractable but often ignored differences over the proper institutional role of the federal courts and their structural relationship with the more overtly political branches of government.

As with *Smith*, much of the scholarly debate over statutory interpretation glosses over foundational issues centering on the proper institutional role of the federal courts and the structural relationship between the first and third branches. Scholarship and opinions instead focus on the more practical issue of which rules of statutory interpretation ought to govern the federal courts or the case at hand. Rules of statutory interpretation, however, must be rooted in a solid theoretical foundation. Before deciding how the federal courts ought to interpret statutes, one must first discover the normatively proper institutional role of the federal courts and how the relationship between the federal courts and Congress ought to be structured. This Article, therefore, takes a "bottom up" approach by critically examining and evaluating both the institutional premises underlying different approaches to statutory interpretation and the institutional role of the federal courts. The aim is to test the premises underlying different approaches to statutory interpretation against the normatively proper institutional role of the federal courts. By the end of the Article, a crucial institutional assumption that statutory interpretation theorists have long taken as a given will be called into serious question, as will the interpretive rules built upon that assumption.

First, however, the Article provides a primer on statutory interpretation theory. Part II surveys the statutory interpretation

literature and organizes disparate interpretive approaches into three main families—textual, intentional, and dynamic.[17] The aim of the section is not to provide encyclopedic coverage of theoretical writings in the field, but rather to identify the main themes of the debate. Imposing an organized structure onto the complex theoretical conversation provides a framework for understanding the leading positions and issues. Of particular importance, Part II highlights a key distinction between textual and intentional interpretive approaches as compared with dynamic interpretive approaches. The former theories presuppose the normative principle that the federal courts ought to act as subordinate "honest agents" of Congress when interpreting statutes.[18] On this view, the institutional role of the federal courts is simply to carry out Congress's command or will. Disagreements between textualists and intentionalists, or even disagreements among textualists and among intentionalists, are at bottom technical disputes about which set of interpretive rules operate to render the federal courts optimal honest agents of Congress.[19] In contrast to both textualist and intentionalist theories, dynamic interpretive theories are founded on the normative principle that the first and third branches ought to act as collaborators in a dialogic statutory law-creating process.[20] Under this view, the institutional role of the federal courts is to shape and refine the statutory law enacted by Congress, keeping in mind factors such as the intent of the enacting Congress, the policy preferences of the current Congress, the statutory interpretations agencies have adopted, the interpretations the Chief Executive has adopted, past interpretations of courts, evolving social values, current majoritarian sentiments, or the court's notions of justice and equity. This crucial underlying distinction between textual and intentional interpretation theories on the one hand, and dynamic interpretation theories on the other, will be revisited throughout the Article.

While Part II serves as a primer on the theory of statutory interpretation, Part III analyzes the honest agent conception underlying textual and intentional statutory interpretation, and to a lesser extent the dialogic model underlying dynamic statutory interpretation, from the perspective of two foundational constitutional prin-

17. *See infra* parts II.A-C.
18. *See infra* part II.D.
19. *See infra* notes 191-96 and accompanying text.
20. *See infra* note 197 and accompanying text.

ciples—popular sovereignty and separation of powers.[21] Popular sovereignty involves a principal-agent relationship between a sovereign people and their constituted government, under which an agent/government's power and authority are derived from a constitutive act of a principal/people.[22] Part III argues that the honest agent conception—the normative institutional assumption underlying textual and intentional approaches to statutory interpretation—is incompatible with the unique version of popular sovereignty theory ratified into the federal Constitution of 1789.[23] In 1776, at the height of the Revolution, Americans embraced a radically democratic form of popular sovereignty theory. Under this version of the theory, which Americans ratified into the early state constitutions of 1776 and 1777, populist legislatures were considered the sole legitimate agents of the people in government.[24] By the time of the Founding of the Constitution just eleven years later, however, Americans rejected the Revolutionary-era version of popular sovereignty, and instead embraced what can be called a federalist version of popular sovereignty theory.[25] Rather than viewing legislatures as the sole agents of the people, by 1787 Americans came to see all three branches of government as coequal or peer agents of the principal/people.[26] This transformed version of popular sovereignty theory animates and was ratified into the federal Constitution.[27] Part III explains the centrality of popular sovereignty to American constitutionalism, the evolution in popular sovereignty theory that occurred between 1776 and 1787, and, most importantly, the fundamental inconsistency between the honest agent conception underlying textual and intentional theories of statutory interpretation and the federalist form of popular sovereignty theory animating the Constitution of 1789. In short, rather than cohering to federalist popular sovereignty theory, the honest agent conception coheres to the radically democratic Revolutionary-era popular sovereignty theory, which had been rejected by the time of the Founding.

The Article next considers separation of powers, a central institutional device for effectuating the federal Constitution's version

21. *See infra* part III.
22. *See infra* notes 203-04 and accompanying text.
23. *See infra* part III.A.3.
24. *See infra* notes 235-37, 325-36 and accompanying text.
25. *See infra* notes 239-54.
26. *See infra* notes 258-81 and accompanying text.
27. *See infra* notes 207-34 and accompanying text.

of popular sovereignty.[28] Though most commentators deploy separation of powers as an argument in favor of textualist or intentionalist interpretive theories, Part III demonstrates that the version of separation of powers theory ratified into the federal Constitution is inconsistent with the honest agent conception underlying those interpretive approaches.[29] As with popular sovereignty theory, separation of powers theory underwent radical transformations in the period between the Revolution and the Founding.[30] At the time of the Revolution, Americans adopted a virtually "unalloyed" separation of powers, which incorporated legislative supremacy and a rejection of checks and balances.[31] The Revolutionary-era separation of powers theory, in other words, sought to divide government powers, and to locate the bulk of those powers in unchecked populist legislative bodies. By the late 1780s, however, when state constituent assemblies gathered to ratify the federal Constitution, the unalloyed separation of powers theory of the Revolution had been discarded.[32] In its place, Americans adopted a separation of powers theory emphasizing overlapping powers, an even distribution of powers between the three branches of government, a rejection of legislative supremacy, and a strengthened independent judiciary that could check legislative power at both constitutional and statutory levels.[33] Part III demonstrates that the honest agent conception underlying textual and intentional theories of statutory interpretation is more consistent with the separation of powers theory espoused at the time of the Revolution, than with the altogether different separation of powers theory that emerged in the 1780s and was ratified into the federal Constitution.

The incompatibility between the foundational institutional premise underlying both textual and intentional statutory interpretation theories—the honest agent conception—and the peculiar versions of popular sovereignty and separation of powers theory ratified into the federal Constitution, calls into serious question the rules of statutory interpretation most commonly employed in the federal courts and suggests that a fundamental reconsideration of the basic aims of those rules is in order. Consistency with the popular

28. *See infra* part III.B.
29. *See infra* part III.B.4.
30. *See infra* part III.B.2.a-b.
31. *See infra* part III.B.2.a.
32. *See infra* part III.B.2.b.
33. *See infra* part III.B.3.

sovereignty and separation of powers theories of the federal Constitution demands that the federal courts act not as subordinate honest agents of Congress, but rather as agents of We the People. Thus, rather than simply seeking to reconstruct and then effectuate the command or will of the enacting legislature, the institutional role of the federal courts when interpreting statutes should center on the shaping of statutes along public-regarding lines.

As is made clear in the first section of Part IV, since existing approaches to statutory interpretation are aimed at either rendering the federal courts honest agents of Congress, or affording the federal courts an updating role in statute creation, they often work to frustrate judicial shaping of statutes along public-regarding lines. A new approach to statutory interpretation—one consistent with the popular sovereignty and separation of powers theories of the federal Constitution—is needed. The second section of Part IV proposes a two-step interpretive approach, under which a federal court facing an open-textured or ambiguous statute first employs traditional interpretive tools to discover the range of plausible statutory interpretations, and next exercises a channeled discretion to shape or bend statutes along public-regarding lines. The statute-shaping powers of federal courts under the two-step interpretive approach are constrained in two ways. First, courts may shape statutory meaning only within the limited range of plausible interpretations, the breadth of which is under congressional control. Second, a set of generally applicable interpretive rules, presumptions, and canons guide judicial determinations of what does and does not constitute a public-regarding statutory scheme. The proposed two-step approach represents only a first tentative step toward a normative theory to statutory interpretation consistent with the institutional structure of government embedded in the popular sovereignty and separation of powers theories of the federal Constitution.

II. NORMATIVE THEORIES OF STATUTORY INTERPRETATION

Statutory interpretation theories are divisible into three main families: textual, intentional, and dynamic. Pure textual theories hold the words and only the words of statutes as legitimate guides to discerning statutory meaning. Pure intentional theories attempt to interpret legal texts in accord with the intentions or purposes of the enacting Congress. Under pure dynamic theories, the meaning of statutes can change over time and circumstance; statutes are interpreted with an eye toward shaping statutory law in light of changing social and contextual conditions. Of course, actual

interpretive approaches, whether advanced as theories or practiced by judges, are often hybrids of the three. For example, a hybrid approach might follow the plain meaning of the text; if the text is unclear, the purpose or intention of certain relevant actors may be consulted; finally, if the first two steps yield a determinate interpretation that would be unjust or anachronistic, the court may develop a novel interpretation aimed at doing justice or updating the law.[34]

Each of the three theoretical families can be associated with underlying conceptions of what statutes are, or of their role or function, and also with normative accounts of the proper structural relationship between courts and legislatures. Both descriptive theories of statutes and normative ideas regarding the court-legislature relationship serve as underlying yet often unstated premises in arguments supporting different normative theories of statutory interpretation. The pure textualist considers statutes to be commands from the sole politically legitimate statutory law-creating body. The role of the judge is simply to apply that command verbatim. Interpretation that goes beyond statutory text operates in an extra-legal domain. Thus, when applying the legislative command, judges should rely only on a statute's text to determine the meaning of the command.[35] The pure intentionalist views statutes only as evidence of the true law, which is the intention of the enacting legislature, or alternatively the personified purpose of the statute. The role of the judge in interpreting statutes is simply to effectuate the legislative intent or statutory purpose. The judge ought to use the inscribed words of a statute as guide posts in the search for intent or purpose, but should give statutory text no weight independent of legislative intent or statutory purpose.[36] The pure dynamicist thinks of statutes as mere starting points in the politically legitimate statutory law-creating process, which extends from the point of congressional enactment, through the agency process, to litigation in courts, and possibly back to the beginning with reconsideration by Congress. For the pure dynamicist the normative role of courts is to update statutory

34. This sort of cybernetic approach is similar in form to Professor Eskridge's normative theory of statutory interpretation. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483-84 (1987); *see also* Rudd v. California Casualty Gen. Ins. Co., 219 Cal. App. 3d 948, 952 (1990) (applying a cybernetic approach that looks first to the ordinary meaning of statutory text, then to the statute as a whole, and finally to the policies and purposes of the statute).

35. *See infra* part II.A.

36. *See infra* part II.B.

law in light of the other actors in the process, a changed legal landscape, shifting majoritarian sentiments, or altered underlying assumptions.[37]

Note the following key distinction between the textual and intentional approaches on the one hand, and the dynamic approaches on the other hand: The former two view statutes as laws created in the past, and somehow fixed or unchanging; the latter views statutes as laws always changing, never solidified, or never at a state of rest or completion.[38] Under both textual and intentional approaches to statutory interpretation, the task is to discover what the law already is, while under dynamic approaches the task is to shape law from the mass of politically legitimate legal material available. We will return to this fundamental distinction between textualist/intentionalist and dynamic interpretive approaches in section D of this Part.

A. Textual Theories

The common thread linking the family of textual theories of statutory interpretation is their uniform reliance on the words of statutes as an interpretive guide. One may perceive, however, several permutations of the textual approach.[39] Some textualists read the words of statutory text according to their conventional meanings, while others read textual words according to their literal dictionary definitions.[40] Debates among textualists often concern *how* text should be used when interpreting statutes, or in other words the proper *degree of reliance* on text when interpreting statutes. Some

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37. *See infra* part II.C.

38. This distinction is not entirely watertight, for even under pure textualist or intentionalist interpretive methods the meaning of a given statute may change. Under a pure textualist method, the conventional meaning of the words constituting a statute may slowly change over time, as may grammatical forms. (This, however, is not true where the conventional meaning sought is that of the meaning of the words of a statute at the time of enactment). Under a pure intentionalist method, new evidence of the relevant actors' intentions could come to light, thus leading to an enhanced and different interpretation of legislative intent.

Still, a fundamental difference remains between dynamic interpretive theories on the one hand and intentionalist and textualist theories on the other: In the former case, change in the meaning of statutes is a conscious possibility, while change in the latter case is unintended or accidental.

39. Farber and Frickey find distinctions between textualist theories similar to those discussed here. Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 452 (1988).

40. *See, e.g.*, Smith v. United States, 113 S. Ct. 2050 (1993) (containing a majority opinion reading statute in literalist terms and a dissent reading statute in conventionalist terms).

textualists urge a "four-corners rule," under which judges interpret statutes with the sole guidance of text.[41] Other textualists argue that statutory text ought to be the primary interpretive guide, but that judges may in a cybernetic fashion resort to secondary and tertiary guides when the primary guide inevitably fails.[42] Another cleavage within the textualist camp concerns the *reason* to use text when interpreting statutes. Some textualists believe that only the text of a statute should be relied upon when interpreting statutes because only the text is legitimate legal material.[43] Unlike statutory text, they argue, statements of legislative intent have not crossed the twin constitutional hurdles of bicameralism and presentment.[44] Other textualists, however, accept legislative intent as legitimate, and argue that text should be solely or primarily relied upon because it is by far the best available heuristic device for discovering legislative intentions.[45] Below, the textual family is divided into two main strains, which are briefly outlined.

1. Four-Corners Textualism

This more purely textualist strain argues that the text and only the text ought to be the guide to judicial discovery of statutory meaning in any given case.[46] A similar rule, known as the four-corners rule, once operated in contract law.[47] Rather than striving to interpret statutes so as to be consistent with the intent of the

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41. *See, e.g.*, *Smith*, 113 S. Ct. at 2060-63 (Scalia, J., dissenting).

42. *See, e.g.*, Rudd v. California Casualty Gen. Ins. Co., 219 Cal. App. 3d 948, 952 (1990).

43. *See, e.g.*, United States v. Taylor, 487 U.S. 326, 334-46 (1988) (Scalia, J., concurring in part).

44. *See, e.g.*, Continental Can v. Chicago Truck Drivers, 916 F.2d 1154, 1157 (9th Cir. 1990); Wallace v. Christensen, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring in judgment).

45. *See, e.g.*, United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940).

46. Justice Scalia and Judge Easterbrook are often cited as proponents of what Professor Eskridge has termed "the new textualism." *See, e.g.*, FARBER & FRICKEY, *supra* note 3, at 89-95. Judge Easterbrook has written:

> The text of the statute, and not the private intent of the legislators, is the law. Only the text survived the complex process for proposing, amending, adopting, and obtaining the President's signature (or two-thirds of each house). It is easy to announce intents and hard to enact laws; the Constitution gives force only to what is enacted. So the text is law and legislative intent a clue to the meaning of the text, rather than the text being a clue to legislative intent.

Continental Can, 916 F.2d at 1157-58.

47. David W. Slawson, *Legislative History and the Need to Bring Statutory Interpretation under the Rule of Law*, 44 STAN. L. REV. 383, 415 (1992).

enacting Congress, four-corners textualists argue that statutes ought to be interpreted with the sole aid of a statute's inscribed words.[48]

The four-corners approach has been justified with a positive claim, an epistemological claim, an analytical claim, and a formalist claim. Four-corners proponents often argue that the intent of an enacting legislature is undiscoverable, and therefore illegitimate as an interpretive device.[49] Textualists may view congressional intent as undiscoverable for two reasons, the first of which is a positive claim, and the second of which is an epistemological claim.

First, four-corners proponents argue that congressional intent cannot exist. While individuals can have intents, the argument goes, collectives such as legislatures cannot.[50] Thus, Judge Easterbrook writes,

> Because legislatures compromise many members, they do not have "intents" or "designs," hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes . . . .
>
> This follows from the discoveries of public choice literature. Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice. . . . The existence of agenda control [in legislatures] makes it impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact. . . .

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48. Or as Professors Farber and Frickey have put it, "Justice Scalia would replace the current approach to statutory construction with a 'four corners' rule, under which the meaning of a statute would be determined solely on the basis of statutory language." Farber & Frickey, *supra* note 39, at 455.

49. *Id.* at 453.

50. The argument is based on the findings of public choice literature, and especially upon Arrow's impossibility proof, which demonstrates that, given a set of intuitively attractive limitations, no method can be said to combine individual values into a meaningful social welfare function. Arrow's proof appears in KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963). Simpler treatments of Arrow's proof and discussions of its meaning and implications can be found in FARBER & FRICKEY, *supra* note 3, at 38-42, DENNIS C. MUELLER, PUBLIC CHOICE II 384-407 (1989), and WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 115-36 (1988). For a treatment of the implications of Arrow's theorem and public choice scholarship in general with respect to statutory interpretation, see Farber & Frickey, *supra* note 39, at 425-37. Note, however, that public choice theorists are not the only ones to argue that congressional intent is incoherent. Max Radin, a legal realist, made largely the same point more than sixty years ago. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

> [A] court has no justification for deciding cases as it thinks the legislature would in [its] absence.[51]

From this perspective, reliance on evidence of legislative intent when interpreting statutes results in ex post constructions of fictive congressional intent.[52] Given that congressional intent cannot exist, statutory text becomes the sole interpretive guide by default.[53]

The claim that congressional intent does not and cannot exist is a positive claim. The second argument advanced by four-corners textualists for viewing congressional intent as undiscoverable is an epistemological claim. Briefly, even if congressional intent does exist, because the documentary record of legislative history is incomplete and unreliable,[54] and may be used as a way of "passing" unpassable law,[55] judges interpreting statutes can never really "get inside the

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51. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983).

52. In this vein, Judge Leventhal of the D.C. Circuit has said that using legislative history as an interpretive guide is like "looking over a crowd and picking out your friends." Patricia Wald, *Some Observations of the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

53. One should recognize that even if legislative intent is an incoherent concept, and therefore ought not be consulted when interpreting statutes, it by no means follows as a matter of logical necessity that statutory text be the only interpretive guide available to judges. The various canons of construction and interpretive presumptions could be employed to resolve ambiguities in statutory text.

54. The opinion of Ninth Circuit Judge Kozinski in Wallace v. Christensen, 802 F.2d 1539 (9th Cir. 1986), contains an excellent example of this argument:

> The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. . . . Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports; they are not voted on by the committee whose views they supposedly represent, much less the full Senate or House of Representatives; they cannot be amended or modified on the floor by legislators who may disagree with the views expressed therein. Committee reports that contradict statutory language or purport to explicate the meaning or applicability of particular statutory provisions can short circuit the legislative process, leading to results never approved by Congress or the President.

Id. at 1559-60 (Kozinski, J., concurring in judgment).

Likewise, Justice Scalia has advocated the idea that "even if legislative intent is a coherent concept, legislative history provides an exceedingly poor documentary record." Farber & Frickey, *supra* note 39, at 437. Judge Easterbrook has stated that "[o]ften there is so much legislative history that a court can manipulate the meaning of law by choosing which snippets to emphasize." *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

55. Professor Slawson argues:

> When courts and agencies use legislative history to find more specific intent than the statute expresses, legislators have an incentive to "manufacture" legislative history on points of interest to them. . . .
>
> Manufacturing legislative history offers two advantages over amending. First, it is quicker and easier than drafting, debating, and voting on an amendment. Second, [it] increases the chances that the member's intentions will

minds of legislators" and know what they were trying to say or do when passing statutes.[56] Stated another way, even if omniscient agents could discern the true legislative intent, judges are not such agents and therefore can rarely know what the enacting Congress intended, if anything. Since only fragments of the legislative process are preserved in documentary records, judges lack enough "data points" to make accurate assessments of congressional intent. The data points that are preserved will likely sketch a skewed portrait. Documentary history of the legislative process preserves, for example, committee reports, which are likely to represent different views from those of the chamber as a whole. Further, members of Congress may strategically create a misleading documentary record. Since statutory text must cross the twin hurdles of bicameral passage and presentment, while evidence of legislative intent need not, strategically minded legislators may implant "unpassable" clauses or elaborations into the congressional record or into a committee report.[57] Textualists argue that statutory text is both legitimate law and a knowable interpretive aid, while the fragmentary and skewed record of congressional intent is neither. Even if in theory a true legislative intent exists, in practice judges can rarely reconstruct it. Statutory text, in contrast, is eminently knowable and needs no reconstruction.[58] Since an accurate picture of legislative intent is

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become law if they are controversial.
Slawson, *supra* note 47, at 397.

Justice Scalia used a variation of this argument in his concurring opinion in United States v. Taylor, 487 U.S. 326 (1988), when he cited a colloquy between two House members where one stated to the other, "I have an amendment [to the proposed bill] here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it." *Id.* at 345 (Scalia, J., concurring in part).

Finally, Judge Kozinski argued in *Wallace* that the use of legislative history creates "strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process." *Wallace*, 802 F.2d at 1559 (Kozinski, J., concurring in judgment).

56. Easterbrook, *supra* note 51, at 550-51. In a frontal attack on his colleague Richard Posner's imaginative reconstruction theory, Judge Easterbrook quotes Posner and writes, "The number of judges living at any time who can, with plausible claim to accuracy, 'think [themselves] . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar,' may be counted on one hand." *Id.* Though Posner is cognizant of the public choice literature, he is more cautious than Easterbrook in reading it to mean that the concept of congressional intent or purpose is incoherent. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 195-96 (1986).

57. Judge Antonin Scalia, Speech on Use of Legislative History (1985-86), *discussed in* Farber & Frickey, *supra* note 39, at 442.

58. Of course, however, it needs construction.

virtually impossible to capture, judges ought to rely solely on statutory text when interpreting statutes.

A third argument four-corners proponents advance is a weaker version of the idea that congressional intent (though not an incoherent concept) is unknowable. The claim is that plausible contradictory legislative intents can be constructed from a statute's legislative history.[59] While legislative intent may exist, at least for judges attempting ex post reconstruction, it is indeterminate and therefore cannot be helpful in discerning the meaning of statutory texts that are likewise indeterminate. This line of argument makes the analytical point that indeterminacy (of legislative intent) is of little utility in resolving indeterminacy (of a statute's meaning). It differs from the argument in the previous paragraph in that it does not necessarily view the legislature as a place where the historical record of congressional intent is purposefully skewed, intent is manufactured, and constitutional provisions circumvented. Rather, this line of argument is sympathetic with the view that legislators are well-intentioned and refrain from strategic behavior. Still, this line of

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59. Judge Mikva provides the following example of incoherent legislative history:

> My favorite story along these lines involves Representative Morris Udall's passage of [a] strip mining law .... Because strip mining is one of the more confrontational issues that the nation faces, there were directly opposing views to reconcile in fashioning a bill. The miners and mine owners, the "states' righters," and environmentalists each have very strong views on what the strip-mining laws should be.
>
> Representative Udall fashioned a compromise and got it out of the committee and onto the floor. . . . [During floor debate o]ne of the congressmen from West Virginia, a strip mining state, arose and asked if the gentleman from Arizona would assure him that this bill would carefully protect states' rights and state sovereignty and that the states would continue to perform their role in managing strip mining within their borders. Representative Udall solemnly assured the gentleman that he was absolutely correct . . . state sovereignty was not impinged upon in any form. Twenty minutes later a pro-environmentalist congressman arose and asked if the gentleman from Arizona would assure him that the bill, once and for all, set single standards for strip mining and ensured that one federal law would cover strip mining throughout the country. Representative Udall assured the gentleman that he was absolutely correct, that this bill ... set uniform federal standards. Some of us were sitting in the cloakroom during this exchange; when Representative Udall came out for a drink of water one of the congressmen who had been listening in told him that both positions could not be right. Udall then assured that gentleman that *he* was absolutely correct.

Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 380-81 (citations omitted). While Judge Mikva's tale illustrates how contradictory legislative intents could be drawn from the documentary record of legislative history, it should be noted that Judge Mikva nonetheless endorses the use of legislative history in interpreting statutes. *Id.*

argument views the historical record of congressional intent as full of even more contradictions, ambiguities, and plausible interpretations than a related statutory text contains. As such, the historical record of congressional intent is of little utility in resolving textual ambiguities.

Finally, four-corners proponents offer what has been termed a "formalist" critique of congressional intent as a guide to interpreting statutes.[60] The essential thrust of the critique is that the use of congressional intent as an interpretive guide shifts law-creating power from the first branch to the third branch, which is inconsistent with representative democracy and the idea that law should be made by those parts of government directly accountable to the people.[61] Further, the use of congressional intent subverts the formal law-making process set up by the Constitution, that is, passage in both houses and presentment to the executive.[62] The argument is that the use of legislative history leads to the alteration or rewriting of statutes by courts, for example, by emphasizing the views of committee members in determining statutory meaning. Such a process bypasses the views of the Committee of the Whole, and the Chief Executive.[63] On this view only the inscribed words of statutory text may be considered a legitimate part of a statute. While the statutory text passes constitutionally-mandated hurdles,[64] the intent of Congress, or of specific members of Congress, does not. When legislators vote "yea" or "nay," and when the President decides whether to sign a bill

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60. Professor Eskridge has labeled this the formalist critique. Eskridge, *supra* note 6, at 646-50.

61. *See generally* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988) (arguing that while the original meaning of a statute is a useful tool in statutory interpretation, the original intent of Congress in enacting the statute is irrelevant).

62. *Id.* at 64-65.

63. *See* Kenneth Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (1987).

64. U.S. CONST. art. I, § 7, cl. 2:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Id.; *see also* Continental Can v. Chicago Truck Drivers, 916 F.2d 1154, 1157 (9th Cir. 1990) (arguing that only the text of a statute has passed the complex process of creating statutes).

into law, the goals, aims, or purposes of the committee, or the sponsor of a bill, or certain legislators who make statements during floor debate, are not known and therefore are not ratified. Thus, judicial elaborations upon statutory text based on supposed congressional intent is in truth illegitimate lawmaking at odds with Constitutionally mandated procedures.

In review, proponents of the four-corners approach make the following arguments against the use of congressional intent as an interpretive guide: First, they argue that congressional intent is undiscoverable, since collective intent is an incoherent concept. Second, even if the idea of congressional intent is accepted, judges cannot hope to reconstruct it from a very likely skewed and possibly manipulated historical record. Third, even an honest record of congressional intent is fraught with greater uncertainty than statutory text. Finally, the use of legislative history is at odds with the lawmaking scheme set up by the Constitution. Thus, since the text of a statute is knowable, cannot be covertly manipulated, is relatively clear in its meaning, and can only be altered via constitutional bicameral passage and presentment, it ought to operate as the sole guide to statutory meaning and interpretation.

2. Textual Intentionalism

This second main strand of textualism is really an intentionalist theory in disguise. Textual intentionalism argues that courts ought to interpret statutes so as to effectuate the intentions of the enacting legislature. The inscribed words of the statute, however, are viewed as the most reliable predictor, and, by some, the only legitimate indicia of an enacting legislature's intentions.[65] Other "external sources" such as legislative history are considered poor indicators for divining legislative intent, and therefore ought to be either completely eliminated or kept to a bare minimum in the interpretive process. Justice Scalia has exhibited the textual-intentionalist line of thinking in some of his written opinions. Concurring in the judgment in *Green v. Block Laundry Machine Co.*, for example, Justice Scalia wrote:

> The meaning of terms on the statute-books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage, and *thus most likely to have been understood by the whole Congress which voted*

65. *See, e.g.*, United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.").

> *on the words of the statute*. . . . I would not permit any of the historical and legislative material discussed by the Court, or all of it combined to lead me to a result different from the one that these factors suggest.[66]

Judges, in short, ought to effectuate the intent of the entire enacting Congress, and statutory text is the surest device for correctly estimating the whole legislature's intent. A focus on legislative documentary history, in contrast, will shed light only on the intent of members of a given committee, or worse yet, committee staffers who write committee reports. Further, reliance on legislative history creates incentives for manufactured legislative intent, which is easy to include in a statute's legislative history, but not necessarily representative of the median policy position of the enacting Congress. The conventional meaning of the words in a statute, in light of the legal context, provides the best indication of the entire enacting Congress's intent, for this is what the entire Congress deliberates upon. While the text may not always operate as a reliable indicator of congressional intent, it is nonetheless a far better indicator of Congress's intent than any "external" piece of evidence.[67]

Textual-intentionalist reasoning can be contrasted with the four-corners textualist argument that legislative intent cannot be accurately reconstructed by parsing the selective documentary record of a statute's passage.[68] The textual-intentionalist argument is subtly different. While the textual-intentionalist believes that legislative history is a poor guide to congressional intent, and that the text ought to serve as the judge's interpretive guide, the textual-intentionalist argues that the text ought to be viewed as a means for discerning

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66. 109 S. Ct. 1981, 1994 (1989) (emphasis added). Justice Scalia in his academic commentary has suggested that legislative history ought not be considered at all when interpreting statutes. Scalia, *supra* note 57, *discussed in* Farber & Frickey, *supra* note 39, at 442. In his opinions, however, Justice Scalia appears to be more mild mannered, and has given the intent of Congress weight in statutory interpretations.

67. Note here the emphasis on the intent of the enacting body, as opposed to the intents of enacting legislators. The former assumes some sort of collective intent, while the latter envisions only the intents held by individual legislators. Do only the majority intents of legislators constitute the legislature's collective intent? Or do the views of those who voted against a statute play a role in the legislature's collective intent? Further, a legislature may possibly pass a statute by a majority vote although no majority exists regarding the intended effect of the statute. What then? Should the statute lack legal force? Or should a judge consider the plurality intent, that is, the intent held by the largest non-majority coalition of legislators? Or should the judge try to combine the largest coalitions of intents held by coalitions of legislators until a majority coalition is formed? Clearly, taking intent seriously involves substantial dilemmas.

68. *See supra* note 59 and accompanying text.

legislative intent. The textual-intentionalist, in other words, privileges text as vital to interpreting statutes, but only because text is the best guide to congressional intent. The four-corners proponent, in contrast, privileges the text independently from any utility it might have in discovering legislative intent. Stated another way, a crucial difference between the textual-intentionalist approach and the four-corners textual approach is that the former ultimately hopes to effectuate the *will* of the enacting legislature as conveyed by statutory text, while the latter hopes to effectuate the *command* of the enacting Congress as expressed by statutory text.

B. Intentional Theories

Intentional theories attempt to interpret statutory law in accord with the intentions of the enacting legislature.[69] The words of a statute are important only in that they are evidence of the enacting Congress's intentions or purposes, or the personified purpose of a given statute. The pure intentionalist, unlike the textual-intentionalist, gives external evidence beyond the statutory text weight in determining legislative intent.[70] Under some intentional interpretive theories the words of the statute take on a life of their own, and are said to exhibit personified purposes distinct from the specific intentions of their legislative creators.[71] More commonly, however, the intent a court seeks to discover is that of the enacting Congress. Even more so than textual approaches to statutory interpretation, intentional interpretive methods are a diverse lot.

1. Law as Legislative Intent[72]

Under the purest form of intentional statutory interpretation—the theory of law as legislative intent—"[t]he law *is* legislative intent."[73]

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69. In the words of Learned Hand, "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

70. The Supreme Court has implied that a statute is not necessarily the best evidence of intent, and has trumped the intent that can be inferred from statutory text with intent that can be gleaned from legislative history. *See, e.g.*, Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 454 (1989).

71. *See, e.g.*, HART & SACKS, *supra* note 1, at 1157.

72. For a full discussion of law as legislative intent, see Slawson, *supra* note 47, at 349-415. The label "laws as legislative intent" is Professor Slawson's. *Id.* Slawson identifies law as legislative intent, but is not among its proponents. *Id.* at 383-84.

73. *Id.* at 396.

The text of a statute is merely a conduit for communicating Congress's intentions to relevant actors. While statutory text is often an important indication of congressional intent, other factors, such as committee reports, lack of repeal, or floor debate statements, are also given substantial weight. Under law as legislative intent, where both the text of a statute and the enacting Congress's intent are clear but contradict one another, the clear intent of the enacting Congress prevails. In short, intent trumps text, but text is evidence of intent.[74]

Law as legislative intent is not too different from the textual-intentionalist approach. The key distinction between the two is that the former sanctions a broader set of evidentiary sources for discerning congressional intent than does the latter. Where textual-intentionalism views the words of the statute as the primary, and in the eyes of some, the only legitimate evidence of congressional intent, law as legislative intent views statutory text as only one of many admissible pieces of evidence regarding congressional intent. Other pieces of information are just as probative—legislative history, the congressional record, post-enactment words, presidential understanding, and even previous judicial determinations of legislative intent. Indeed, depending upon the circumstances, under law as legislative intent, statutory text may be given less weight than other evidence of congressional intent.

Professor Slawson argues that the federal courts have never adopted the "law as legislative intent" approach, but that it is nevertheless implicit in the Supreme Court's recent statutory construction opinions.[75] The law as legislative intent approach is captured in the following passage from *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.[76]

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74. Of course, congressional intent standing alone, without enacted statutory text, has no legal force. Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501-04 (1988).

75. Slawson, *supra* note 47, at 395-96.

76. 467 U.S. 837, 842-43 & n.9 (1984). Notice that the Court in *Chevron* states that the clear legislative intent of Congress, rather than the clear meaning of statutory text, is controlling.

For Professor Slawson, *Chevron* and other recent Supreme Court decisions demonstrate that "the status of the statute as the best evidence [of congressional intent] has become questionable."[77] In *Public Citizen v. United States Department of Justice*,[78] for example, the Court adopted a statutory interpretation based on clear congressional intent over clear statutory language.[79] According to Professor Slawson, *Public Citizen* marks the ultimate demise of the plain meaning rule, under which legislative history is consulted only when statutory text lacks a clear meaning.[80] Justice Scalia has argued against law as legislative intent, most notably in his concurrence in *INS v. Cardoza-Fonseca*,[81] where he criticized the majority for relying on legislative history to discern congressional intent and statutory meaning even though the enacting Congress's intentions could have been gleaned from statutory language.[82]

In sum, the law as legislative intent approach views any given statute as probative evidence of the intention of the enacting legislature, which is the ultimate source of law.[83] This stands in contrast to what Professor Slawson believes are more traditional approaches to statutes, where the object of interpretation is "the meaning of the statutory language," rather than the intent of the enacting Congress.[84]

2. Imaginative Reconstruction

Imaginative reconstruction is the form of intentional statutory interpretation exhibited in the opinions of Judge Learned Hand and currently advanced by Judge Richard Posner.[85] The theory contemplates a role for both the actual and imagined intents of enacting

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77. Slawson, *supra* note 47, at 396.
78. 491 U.S. 440 (1989).
79. *See id.* at 454.
80. Slawson, *supra* note 47, at 414.
81. 480 U.S. 421 (1987).
82. *Id.* at 452 (Scalia, J., concurring).
83. Slawson, *supra* note 47, at 396.
84. *Id.* at 421. Professor Slawson proposes his "law as statute" theory as a substitute for law as legislative intent. *Id.* at 415-24. For Professor Slawson, law as statute is both descriptive of practices in the federal courts prior to the current heavy reliance on legislative history, and a normative substitute for the law as legislative intent approach. *Id.* at 419.
85. *See, e.g.*, Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d. 785, 787-91 (2d Cir.) (opinion of Judge Learned Hand), *aff'd*, 328 U.S. 275 (1946); Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552-53 (2d Cir. 1914) (opinion of Judge Hand), *cert. denied*, 235 U.S. 705 (1915); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985). Posner himself cites Judge Hand in Posner, *supra* note 3, at 817.

Congresses. Regarding imagined intents, in cases where no clear congressional intent on the issue at hand can be discerned, according to the theory, a judge ought to put himself in the shoes of the enacting Congress and determine what it would have done had it squarely faced the novel issue.[86] Imaginative reconstruction thus goes one step beyond law as legislative intent, in that the law is not just actual congressional intent, but also imaginatively reconstructed congressional intent. In cases where reconstructing congressional intent fails to yield a unique interpretation, Judge Posner argues:

> [T]he judge must decide what attribution of meaning to the statute will yield the most reasonable result in the case at hand—always bearing in mind that what seems reasonable to the judge may not have seemed reasonable to the [enacting] legislators, and that it is their conception of reasonableness, to the extent known, rather than the judge's, that should guide decision.[87]

According to Posner, "[t]he judge's job is not to keep a statute up to date in the sense of making it reflect contemporary values, but to imagine as best he can how the legislators who enacted the statute would have wanted it applied to the situations they did not foresee."[88]

Posner's imaginative reconstruction theory[89] involves a three-step cybernetic process: First, the judge should make a "scrupulous search for the legislative will."[90] Second, if the search is fruitless, he should imagine what the enacting legislators would have willed had they specifically considered the issue at hand. Third, if this second

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86. POSNER, *supra* note 85, at 287.

87. *Id.*

88. *Id.* Professor Eskridge has described this element of Posner's theory as an attempt to "recreate the general assumptions, goals, and limitations of the enacting Congress." Eskridge, *supra* note 6, at 630. Judge Posner has stated that the judge applying imaginative reconstruction must "not only consider the language, structure, and history of the statute, but also study the values and attitudes, as far as they can be known today, of the period when the legislation was enacted." POSNER, *supra* note 85, at 287. Posner has also written that judges should be sensitive to Congress's intent regarding the way courts interpret a given statute. Posner, *supra* note 3, at 818. Some statutes explicitly set out requirements on how courts should interpret them; others, such as the Sherman Act, virtually cry out for a common law type approach by the courts. POSNER, *supra* note 85, at 287-88.

89. Posner's theory is actually what Judge Easterbrook has termed "a meta-theory of statutory construction." Easterbrook, *supra* note 51, at 539. Posner offers, in his own words, "not a substitute algorithm but only an attitude, or maybe a slogan." Posner, *supra* note 3, at 817.

90. POSNER, *supra* note 85, at 289.

approach yields indeterminacy, the judge should attribute the most reasonable meaning to the statute, bearing in mind the conception of reasonableness held by the enacting legislature.[91] The general enterprise of Posner's approach is to discern the most likely specific and/or general intentions of the enacting Congress.[92] Like the law as legislative intent theory, Posner's theory privileges the enacting Congress's intents over statutory text. For example, he advocates giving effect to the legislative "deals" that resulted in a statute, over the text of a statute.[93] Unlike law as legislative intent, however, Posner explicitly advocates that the judge creatively "fill the gaps" in actual congressional intent with "imaginatively reconstructed" intent, thus allowing courts the power to make interstitial law, not just in the gaps of congressional text, but rather in the gaps of congressional intent. Easterbrook's textualism, in contrast, affords the courts no interstitial law-creating powers.[94]

Posner views the judicial enterprise not as mechanical interpretation of statutes, but rather as communication between the Congress, the superior, and courts, the subordinate.[95] Posner offers his famous military analogy to convey the core intuition of his interpretive approach:

> Suppose the commander of the lead platoon in an attack finds his way blocked by an unexpected enemy pillbox. . . . He radios the company commander for instructions. The commander replies, "Go-"; but the rest of the message is garbled. . . . If the platoon commander decides that, not being able to receive an intelligible command, he should wait and do nothing until communications can be restored,

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91. On this last point Posner has written,

> [W]hat if the Judge's scrupulous search for the legislative will turns up nothing? . . . It is inevitable, and therefore legitimate, for the judge in such a case to be moved by considerations that cannot be referred back to legislative purpose. These might be considerations of judicial administrability . . . or considerations drawn from some broadly based conception of the public interest.

Posner, *supra* note 3, at 820. *See, e.g.*, Standard Office Bldg. Corp. v. United States, 819 F.2d. 1371, 1379 (7th Cir. 1987) (opinion of Judge Posner).

92. FARBER & FRICKEY, *supra* note 3, at 102.

93. POSNER, *supra* note 85, at 269-70.

94. Thus, Posner contrasts his theory with Judge Easterbrook's textualism as follows: "Being highly skeptical of the possibility of reconstructing legislative intent in other than simple cases, Easterbrook proposes 'declaring legislation inapplicable unless it either expressly addresses the matter or commits the matter to common law.' Gapfilling based on references to legislators' presumed goals is ruled out." *Id.* at 292 (quoting Easterbrook, *supra* note 51, at 552).

95. Posner, *supra* note 56, at 189.

> his decision will be wrong. For it is plain from the part of the message that was received that the company commander wanted him to get by the enemy pillbox, either by frontal attack or by bypassing it. And surely the company commander would have preferred the platoon commander to decide by himself which course to follow rather than to do nothing and let the attack fail. For the platoon commander to take the position that he may do nothing, just because the communication was garbled, would be an irresponsible "interpretation."
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> The situation with regard to legislative interpretation is analogous. In our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts. . . . If the orders are clear, the judges must obey them. Often, however, because of passage of time and change of circumstance the orders are unclear. . . . The judges are thus like the platoon commander in my example. It is irresponsible for them to adopt the attitude that if the order is unclear they will refuse to act. They are part of an organization, an enterprise—the enterprise of governing the United States—and when the orders of their superiors are unclear, this does not absolve them from responsibility for helping to make the enterprise succeed. The platoon commander will ask himself, if he is a responsible officer: what would the company commander have wanted me to do if communications failed? Judges should ask themselves the same type of question when the "orders" they receive from the framers of statutes and constitutions are unclear: what would the framers [of the statute] have wanted us to do in this case of failed communication?[96]

Thus, the imaginative reconstruction theory views statutes as often unclear or incomplete communications or commands from Congress, the principal, to courts, the agents.[97] The job of courts is to interpret the communications in a way most consistent with the will of the Congress. The claim is that by applying the imaginative reconstruction approach to statutory interpretation courts will most often and

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96. *Id.* at 189-90. Posner recognizes that the military analogy is imperfect and addresses possible criticisms in RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 270-73 (1990).

97. Posner, *supra* note 56, at 190.

most closely approximate the will of its superior, or in other words, be most likely to act as honest agents of Congress.[98]

3. The Hart & Sacks Legal Process Approach[99]

Hart and Sacks's unpublished but influential work *The Legal Process* offers a third version of intentionalism.[100] Where law as legislative intent focuses on the intentions of actual legislators, and Posner's imaginative reconstruction argues that judges ought to interstitially fill gaps in actual legislative intents, Hart and Sacks argue that judges ought to determine the purposes of statutes themselves. Hart and Sacks summarize their prescriptive theory of statutory interpretation as follows:

> In interpreting a statute a court should: 1. Decide what *purpose ought to be attributed to the statute* and to any subordinate provision of it which may be involved; and then 2. Interpret the words of the statute immediately in question so as to *carry out the purpose* as best it can, making sure, however, that it does not give the words either (a) a meaning they will not bear, or (b) a meaning that would violate any established policy of clear statement.[101]

For Hart and Sacks, the "purpose" of a statute is not synonymous with legislative intent.[102] As such, the judge should not reflectively ask "how did the enacting legislature intend to resolve the dilemma,

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98. *Id.* Professors Farber and Frickey offer a variation on Posner's imaginative reconstruction theory. They accept Posner's underlying assumptions that judges are agents of Congress, and that the job of judges, therefore, is to interpret statutes in accord with the will of Congress. They believe, however, that they have a better method for decoding unclear congressional statutes. In short, where Posner argues that judges should adopt the interpretation that most probably reflects the will of the enacting Congress, Farber and Frickey argue that judges ought to consider both the most probable intent of the enacting Congress, and the consequences of various plausible interpretations. Thus, judges should adopt the interpretation that maximizes the product of these two factors. *See* FARBER & FRICKEY, *supra* note 3, at 102-06; Farber & Frickey, *supra* note 39, at 461-65.

99. One commentator has lumped Hart and Sacks's, Posner's, and Calabresi's interpretive theories, under the rubric of the "legal process approach," since all three can be seen as critiques of older methods of statutory interpretation. *See* William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 835 (1985). Posner, however, has pointed out key differences between his theories and those of Calabresi. *See, e.g.*, Posner, *supra* note 56, at 196-97.

100. *See supra* note 1 and accompanying text; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031 (1994) (tracing the making and influence of Hart and Sacks's work).

101. HART & SACKS, *supra* note 1, at 1411 (emphasis added).

102. *Id.* at 1410; Blatt, *supra* note 99, at 832; WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 575 (1988); Eskridge, *supra* note 34, at 1546.

or how would the enacting legislature have resolved it had it been considered?" Instead, the judge should use the technique found in *Heydon's Case*:[103] it should discern the purpose of *the statute* by examining the "mischief" the statute is designed to remedy.[104] Hart and Sacks write:

> The function of a court in interpreting a statute is to decide what meaning ought to be given to the directions of the statute in the respects relevant to the case before it. . . . [This statement] *does not say that the court's function is to ascertain the intention of the legislature with respect to the matter in issue.*[105]

This represents a key difference between Posner's imaginative reconstruction and Hart and Sacks's legal process approach. For Hart and Sacks, judges ought to discern the rational purposes of statutes. Posner, in contrast, urges judges to look to the intent of the enacting Congress. *J.I. Case Co. v. Borak*[106] exemplifies the Hart and Sacks

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103. 76 Eng. Rep. 637, 30 Co. Rep. 7a (Ex. 1548). The "mischief rule" from Heydon's Case reads as follows:

> [F]our things are to be discerned and considered :—
>
> 1st. What was the common law before the making of the act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3d. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy ; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Id. at 638, 30 Co. Rep. at 7b.

104. HART & SACKS, *supra* note 1, at 1415.

105. *Id.* at 1410 (emphasis added); *see also* ESKRIDGE & FRICKEY, *supra* note 102, at 575 ("Hart & Sacks stressed that this approach is different from a search for legislative intent.").

106. 377 U.S. 426 (1963). One commentator cites the "troika" of *Borak*, Moragne v. States Marine Lines, 398 U.S. 375 (1970), and Bingler v. Johnson, 394 U.S. 741 (1969), as examples of the once dominant Hart and Sacks approach. Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 893 (1982).

In *Moragne* a longshoreman was killed while on an unseaworthy ship docked in a Florida port. His survivors brought a suit for wrongful death against the owner of the ship. Several statutes bore upon the case, but none explicitly afforded a wrongful death cause of action in cases of the death of a longshoreman on an unseaworthy vessel in coastal waters. Had the facts been only slightly different—had the deceased been at sea, for instance, or had he been a seaman rather than a longshoreman—an existing statute would have clearly afforded a wrongful death cause of action. The Supreme Court, however, reasoned in classic Hart and Sacks fashion:

approach. In *Borak*, the Supreme Court recognized an implied private right of action under section 14(a) of the Securities Act of 1933. The Court reasoned that since the purpose of the statute is to protect investors from "deceptive or inadequate disclosures in proxy solicitation,"[107] private investors must have a cause of action against those who violate proxy solicitation rules even though the text of the statute does not provide one.[108] This line of argument is very different from the argument that Congress intended investors to have a private cause of action under section 14(a). It is but a short hop from the notion that the statute's *purpose* is to protect investors to the conclusion that the statute gives investors a private cause of action. The argument that the enacting Congress *intended* that inventors have a private cause of action, however, involves a far more difficult leap of reasoning.

Hart and Sacks view law creation as an ongoing and purposeful process of solving problems that society constantly poses.[109] Thus, they argue that judges interpreting statutes should "assume . . . that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably,"[110] and that "[e]very statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law."[111] Hart and Sacks' assumption that the legislature is a purposive body probably stemmed from their acceptance of the then-dominant pluralist view of American politics.[112]

> In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations . . . .

Moragne, 398 U.S. at 392. Thus, applying the "mischief rule" from *Heydon's Case*, the Supreme Court held that the longshoreman's survivors could sue for wrongful death.

107. *Borak*, 426 U.S. at 431.

108. *Moragne*, 398 U.S. at 433. While *Borak* has never been overruled, its interpretive logic has. In Cort v. Ash, 422 U.S. 66 (1975), the Supreme Court set out a four-part test for determining whether a cause of action can be implied from a statutory prohibition. The purpose of the statute is but one factor to consider. *Id.* at 78.

109. *See* Eskridge & Frickey, *supra* note 3, at 695.

110. HART & SACKS, *supra* note 1, at 1415.

111. *Id.* at 1156.

112. Professors Eskridge and Frickey argue that the Hart and Sacks legal process school rested on three premises: statutes as purposive acts of Congress, the centrality of procedure, and pluralism. Eskridge & Frickey, *supra* note 3, at 694-98.

C. *Dynamic Theories of Statutory Interpretation*

Under dynamic theories of statutory interpretation, judges may shape the meaning of statutes over time or when the circumstances surrounding a statute change. Statutes are interpreted with an eye toward making the law ideal in light of evolving social and contextual conditions, keeping in mind the path of the statute and its treatment by other relevant political actors. Though not gaining the legitimacy that textual and intentional theories of interpretation enjoy, dynamic interpretive approaches are on occasion employed in the federal courts, either explicitly or implicitly.

1. Dworkin's Chain Novel Method

Ronald Dworkin's dynamic theory of statutory interpretation is based upon his famous chain novel analogy.[113] Under this approach, a legislatively enacted statute constitutes a first chapter in a chain novel, and judges adjudicating statutory claims should treat the interpretive endeavor as if they were writing subsequent chapters in the chain novel. The task of judges is simply to make the chain novel the best coherent story possible in light of previous chapters written by the legislature and other judges.[114] Thus, the process of statutory interpretation is, in Dworkin's words, "fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began."[115] Though a constructive process, statutory interpretation under the Dworkinian approach is clearly constrained. A judge operating under the Dworkinian approach is not free to do what his own judgment, all things considered, finds just or right. Instead, a judge must strive to give the best interpretation of the statute, in light of prior interpretations of the statute. In Dworkin's words,

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113. Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 541-43 (1982).

114. Thus, according to Dworkin,

> Hercules [Dworkin's fictional judge] will use much the same techniques of interpretation to read statutes that he used to decide common-law cases. . . . He will treat Congress as an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own, and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began. He will ask himself which reading of the act . . . shows the political history including and surrounding that statute in the better light.

RONALD DWORKIN, LAW'S EMPIRE 313 (1986).

115. *Id.* at 313. The view that courts are a partner of the enacting Congress stands in contrast to the views of those theorists who assume that the courts are agents of Congress.

> Each judge is . . . like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done* . . . . Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.[116]

For Dworkin, the way judges ought to interpret statutes is truly a function of his concept of what statutes are, or more generally his concept of what law is. Dworkin argues for twin principles of integrity: the legislative principle of integrity, which "asks lawmakers to try to make the total set of laws morally coherent," and the adjudicative principle, "which instructs that the law be seen as coherent."[117]

Further, he claims that "integrity is the key to the best constructive interpretation of our distinct legal practices."[118] Thus, for Dworkin, law consists of a coherent fabric. In the terms of his own analogy, law is not a book of disjointed short stories; rather, it is a novel written over time by different authors striving for internal coherence. The chain novel analogy thus operates not only as a normative concept, but also as a description of our legal practice. Law is a chain novel, and statutes are the first chapter. Since Dworkin considers law to be a coherent scheme of principles,[119] it

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116. Dworkin, *supra* note 113, at 542-43.

117. DWORKIN, *supra* note 114, at 176.

118. *Id.* at 216.

119. In Dworkin's own words:

> We have two principles of political integrity: a legislative principle, which asks lawmakers to try to make the total set of laws morally coherent, and an adjudicative principle, which instructs that law be seen as coherent in that way, so far as possible. . . . [T]he legislative principle is so much a part of our political practice that no competent interpretation of that practice can ignore it.

Id. at 176.

> [I]ntegrity is the key to the best constructive interpretation of our distinct legal practices and particularly of the way our judges decide hard cases at law. . . . I

naturally follows that judges ought to interpret statutes according to the chain novel method, or in other words to "treat our present system of public standards as expressing and respecting a coherent set of principles, and, to that end, to interpret these standards to find implicit standards between and beneath the explicit ones."[120]

Dworkin contrasts his "law as integrity" approach to what he calls the "speaker's meaning" approach.[121] To Dworkin law never has a meaning fixed in time; rather, law is the continual process of interpretation. While this approach may seem uncontroversial for the common law, prevailing doctrine rejects this notion in relation to statutory law. Dworkin, however, holds his approach applicable to both statutory law and common law.[122] "The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness."[123] Dworkin goes on to say, "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[124]

2. Eskridge's Quasi-Dynamic Statutory Interpretation[125]

Professor Eskridge's prescriptive theory of statutory interpretation is built around the "central proposition . . . that statutory interpretation [is] influenced by the ongoing, not just original, history of the statute."[126] His proposed method involves the present-day interpreter's understanding of text, original legislative expectations, and the evolution of the statute's social and legal context—or what he calls the textual, historical, and evolutive

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> do not claim . . . that our political practices enforce integrity perfectly. I conceded that it would not be possible to bring all the discrete rules and other standards enacted by our legislatures and still in force under any single, coherent scheme of principle.

Id. at 216-17.

120. *Id.* at 217.

121. *Id.* at 315-37.

122. For another who argues that the judicial role ought not differ between common and statutory law, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

123. DWORKIN, *supra* note 114, at 225.

124. *Id.*

125. Eskridge, *supra* note 34.

126. *Id.* at 1497.

perspectives. In Eskridge's own words, the three perspectives are applied as follows:

> In many cases, the text of the statute will provide determinate answers, though we should trust our reading of the text primarily when the statute is recent and the context of enactment represents considered legislative deliberation and decision on the interpretive issue. This is one end of the continuum: the text controls. At the opposite end of the continuum are those cases where neither the text nor the historical context of the statute clearly resolves the interpretive question, and the societal and legal context of the statute has changed materially. In those cases, the evolutive context controls. In general, the more detailed the text is, the greater weight the interpreter will give to textual considerations; the more recent the statute and the clearer the legislative expectations, the greater weight the interpreter will give to historical considerations; the more striking the changes in circumstances (changes in public values count more than factual changes in society), the greater weight the interpreter will give to evolutive considerations.[127]

Note, however, that Eskridge is not entirely clear in his prescriptive theory. In the above quote, the implication is that the judge must exercise judgment in deciding how to apply the three interpretive perspectives—textual, historical, and evolutive—in a given case. At other times, however, Eskridge seems to imply a more mechanistic, or cybernetic, interpretive theory, as is exhibited in the following quote:

> [T]he textual perspective is critical in many cases. . . . When the statutory text clearly answers the interpretive question . . . it normally will be the most important consideration. . . . The historical perspective is the next most important interpretive consideration; given the traditional assumptions that the legislature is the supreme lawmaking body in a democracy, the historical expectations of the enacting legislature are entitled to deference. Hence, when a clear text and supportive legislative history suggest the same answer, they typically will control.[128]

Thus, the dynamic model views the evolutive perspective as most important when the statutory text is not clear and the original

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127. *Id.* at 1496.
128. *Id.* at 1483-84.

legislative expectations have been overtaken by subsequent changes in society and law.

Like Dworkin, but unlike both textualists and intentionalists, Eskridge does not conceive of statutes as static texts. Intentionalist approaches assume that the legislative will is fixed at the time of enactment.[129] Likewise, textual approaches argue that the meaning of statutory text is frozen until superseded or modified by the legislature. Eskridge and Dworkin, however, argue that statutory texts have no fixed meanings at time of enactment,[130] and that legislatures have no fixed will.[131] Instead both text and intent are fraught with gaps and ambiguities. Statutes are attempts to address issues and problems, new variations of which develop over time. In Eskridge's words, "[S]tatutes are dynamic things: they have different meanings to different people, at different times, and in different legal and societal contexts. . . . [Thus] courts should interpret statutes in light of their current as well as historical context."[132]

Though Eskridge labels his theory dynamic, in fact it is only a quasi-dynamic interpretive approach. Where the text of a statute is clear and original legislative expectations remain intact, Eskridge counsels courts to adhere to traditional honest agent-style interpretive methods. Only where text and legislative history leave an ambiguous meaning, and original legislative expectations have changed, does a dynamic element enter into Eskridge's approach to statutory interpretation.

3. Calabresi's Common Law Courts[133]

Judge Guido Calabresi offers his dynamic theory of statutory interpretation as a response to the "orgy of statute making" that has occurred over the last eighty years[134] and the problem of "legal obsolescence" it has spawned.[135] For much of the eighteenth century, courts were the primary shapers of American law. Common law tort, contract, and property, fabricated and applied by common

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129. Eskridge points out that originalist approaches to statutory interpretation "assume that the legislature fixes the meaning of a statute on the date the statute is enacted." *Id.* at 1480.

130. *Id.* at 1554.

131. *Id.* at 1538-39 & n.241.

132. *Id.* at 1554.

133. *See generally* CALABRESI, *supra* note 122 (describing the dynamic theory of interpretation).

134. *Id.* at 1 (crediting Grant Gilmore for the phrase "orgy of statute making").

135. *Id.* at 2.

law courts, ordered much of private and commercial life for the first 100 years of the nation's existence.[136] Statutory law was rare,[137] and when Congress did create statutory regimes they were either confined to areas not fit for judicial law creation, such as the granting of licenses,[138] or were codifications of common law principles vaguely phrased and leaving much room for judicial elaboration.[139] Further, when a statute did intrude into areas traditionally regulated by the common law, it underwent strict interpretation by common law judges designed to give the statute its narrowest possible impact.[140] As a result, much of American law in the nineteenth century was shaped by the slow, accretional, decentralized common law method.

Today, of course, statutes are the primary source of American law. The movement away from common law and toward statutory law began with the Progressive era and accelerated during both the New Deal[141] and the "rights revolution" of the 1960s and 1970s.[142] Today we are, in Calabresi's words, "choking on statutes."[143] The fallout from this shift in the primary source of American law includes an increasing use of the Constitution, especially the Equal Protection Clause, to invalidate statutes,[144] the use of statutory interpretation methods that stray far from attempts to discern legislative intent,[145] and the delegation of much authority to administrative agencies.[146] Most importantly, however, as a consequence of the " 'statutorification' of American law,"[147] we face the problem of "legal obsolescence."[148] Due to "legislative inertia," statutes that

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136. *Id.* at 4; CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 17-18 (1990).

137. CALABRESI, *supra* note 122, at 4.

138. *Id.* at 184 n.1.

139. *Id.* at 5, 83, 188 n.22; GRANT GILMORE, THE AGES OF AMERICAN LAW 71-72 (1977).

140. CALABRESI, *supra* note 122, at 4, 186 n.15. The phrase of the day was that "statutes in derogation of the common law will be strictly construed." 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 61.01, at 171 (5th ed. 1992); Shaw v. Railroad Co., 101 U.S. 557, 560 (1879).

141. CALABRESI, *supra* note 122, at 5; SUNSTEIN, *supra* note 136, at 19-24.

142. SUNSTEIN, *supra* note 136, at 24-31.

143. CALABRESI, *supra* note 122, at 1.

144. *Id.* at 8-15.

145. *Id.* at 31-43.

146. *Id.* at 44-58.

147. *Id.* at 1.

148. *Id.* at 2. *In re* Erickson, 815 F.2d 1090 (7th Cir. 1987), is a prime example of legal obsolescence. In *Erickson*, a 1935 statute made certain farm implements, including a "mower," unavailable for satisfaction of civil judgments. The court had to decide whether a modern "haybine" qualified as "mower" under the statute. Judge Easterbrook, the author of the opinion, wrote, "The problem in this case comes from the fact that

have been passed are very difficult to repeal.[149] Once passed, a statute is likely to remain on the books even if it no longer can claim majoritarian support and no longer fits the legal landscape.[150] Judges, Calabresi argues, do not sit idly by while statutory law becomes obsolete. Though "taught to honor legislative supremacy," judges have also been "trained to think of the law as functional, as responsive to current needs and current majorities, and as abhorring discriminations, special treatments, and inconsistencies not required by current majorities."[151] While unwilling to blatantly ignore clear but anachronistic statutes, judges have resorted to the use of various "subterfuges"[152]—striking down statutes as unconstitutional that would otherwise be upheld,[153] employing questionable approaches to statutory interpretation,[154] relying upon "passive virtues" such as "void for vagueness"[155]—in an attempt to keep statutory law current and functional.

But the use of subterfuges to keep law consistent with the legal landscape, Calabresi argues, is an inadequate remedy to the problem of legal obsolescence. On the one hand, subterfuges are blunt instruments for updating the law. For example, regarding the use of questionable methods of statutory interpretation as a subterfuge, Calabresi writes, "No matter how 'functionally' courts approach [statutory interpretation], as long as it is tied to a search for original legislative intent, interpretation is bound to give courts too much scope in reworking some statutes and, at the same time, to leave courts powerless before other statutory anachronisms."[156] Rather

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technology has done more to change farm implements than the Wisconsin legislature has done to change § 815.18(6)." *Id.* at 1092. Judge Easterbrook, usually the narrow textualist, relied on the purpose of the statute, and the evolution in farm equipment, to hold that a modern haybine qualifies as a mower, thus updating the statute. *Id.* at 1092-95.

149. CALABRESI, *supra* note 122, at 188 n.23 (citing GILMORE, *supra* note 139, at 95).

150. *Id.* at 6.

151. *Id.*

152. *Id.* at 172-77.

153. *Id.* at 8-15.

154. *Id.* at 31-43.

155. *Id.* at 16-31.

156. *Id.* at 42. On the other hand, the use of subterfuges can distort the meaning and function of legal principles. When, for example, a court stretches constitutional principles in an effort to strike down an anachronistic law, the meaning of these constitutional principles may change in ways that can have unforeseen and perhaps unwanted consequences in later adjudications. For example, in order to do away with an anachronistic Connecticut statute banning the sale of contraceptives (CONN. GEN. STAT. § 53-32 (1960)), in Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court had to stretch constitutional law in ways that were at the time, and today remain, controversial. *See, e.g.*, Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1391

than rely on subterfuge to deal with the problem of statutes that "could not be repealed and yet . . . would never be reenacted,"[157] Calabresi argues that courts should

> have the power to treat statutes in precisely the same way they treat common law. . . . [to] alter the written law or some part of it in the same way (and with the same reluctance) in which they can modify or abandon a common law doctrine or even a whole complex set of interrelated doctrines . . . [and] use this power either to make changes themselves or, by threatening to use the power, to induce legislatures to act.[158]

Calabresi's common law approach is tempered by a handful of guidelines. A court, for example, should exercise its common law powers only where a statute is "out of phase" with the "legal landscape,"[159] should maintain a conservative bias against the exercise of revisionary power,[160] and should presume that newly enacted statutes enjoy current majoritarian support even if they are out of phase with the legal landscape.[161] Once a court has decided that a particular statute is obsolete, however, Calabresi advocates that the court go as far as to "strike down the existing rule and substitute a new one . . . [or] strike down a rule and leave no rule in effect."[162]

Like the other dynamic theories of statutory interpretation, Calabresi's common law approach envisions a dialogic statutory law creation process in which both the legislature and courts play a role. Calabresi, however, allocates the powers and responsibilities in this process differently than Dworkin and Eskridge. Under Dworkin's chain novel approach, when shaping statutory law a court would be constrained to working within the parameters set by the enacting Congress. Stated in terms of the chain novel metaphor, a court must write a chapter in the chain novel of law that cohere with the initial chapter written by the legislature. Though Dworkin's theory of statutory interpretation leaves courts plenty of leeway for shaping statutory law, it nonetheless demands that a statutory interpretation in any given case is minimally consistent with the initial action of the

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(describing *Griswold* as the origin of the "most controversial, boldly-constitutional species of privacy").

157. CALABRESI, *supra* note 122, at 8.
158. *Id.* at 82.
159. *Id.* at 121.
160. *Id.* at 123-24.
161. *Id.* at 132.
162. *Id.* at 147-48.

legislature. In Dworkin's words, a judge interpreting a statute "must justify the story as a whole, not just its ending."[163] Calabresi's common law method, in contrast, demands no consistency between the way a court shapes a statute and the initial actions of the legislature. Instead, Calabresi suggests that a judge try to shape statutes so that they are consistent with current majoritarian preferences and the current legal landscape. Where a statute has become an anachronism a court should disregard it and reform the law to be consistent not with the initial actions of the legislature, but with current majoritarian preferences and law. Calabresi's common law method also differs from Eskridge's approach. Under Eskridge's dynamic theory of statutory interpretation the evolutive perspective exclusively controls only where the statute is old and its language does not directly address the issue at hand.[164] Where a statute is new and specifically addresses the issue before a court, however, the textual perspective controls. Under Calabresi's common law approach, in contrast, only a rebuttable presumption that a recent statute enjoys majoritarian support keeps the court from exercising revisionary powers.

One is tempted to see Calabresi's approach as the most radical of the dynamic theories or statutory interpretation. Actually, however, Calabresi's common law method is no more radical than are Eskridge's or Dworkin's dynamic theories. The difference between the three lies in the constraints each places upon the law-shaping function of courts. Dworkin cabins courts' law-shaping function by insisting that any judicial gloss on a statute coheres with the initial legislative enactment. Eskridge limits the law-shaping function of courts to situations in which a statute does not specifically address the question before the court and the statute is old. Calabresi argues that courts may operate as common law-style courts only when a statute is of the kind that, due to legislative inertia, cannot be repealed, but nonetheless could not be enacted again today. In the end, however, all three approaches place well-defined (albeit nontraditional) constraints on judicial statute-revising powers.

163. DWORKIN, *supra* note 114, at 338.
164. Eskridge, *supra* note 34, at 1497.

4. Aleinikoff's Synchronic Coherence[165]

Professor T. Alexander Aleinikoff has put forth a final dynamic theory of statutory interpretation. His theory is very simple. When interpreting statutes, Aleinikoff argues, judges should "treat the statute as if it had been enacted yesterday and try to make sense of it in today's world."[166] Aleinikoff explains his approach with the aid of *Boutilier v. INS*,[167] which interpreted § 212(a) of the McCarran-Walter Act,[168] as an exemplar. The McCarran-Walter Act sets forth grounds for excluding aliens from entering the United States, which included "aliens . . . afflicted with [a] psychopathic personality . . . or mental defect."[169] In *Boutilier* the Supreme Court read this language to include homosexuality, therefore excluding homosexual aliens from entry into the United States. The Court employed an intentional interpretive method, relying heavily upon extrinsic evidence of congressional intent. Aleinikoff concedes that under the intentionalist approach used by the Court, *Boutilier* was correctly decided.[170] Legislative history provides fairly clear evidence that Congress intended to include homosexual aliens within the meaning of the statutory words "psychopathic personality . . . or a mental defect."[171] Rather than the intentional approach the Court employed, however, Aleinikoff argues for a "present-minded analysis" which would ask the following questions:

> Would a reader of the statute [the McCarran-Walter Act] today be likely to think it requires the exclusion of homosexuals? Why would a legislature [today] enact this law? What could it have been trying to accomplish? If a legislature today sought to exclude aliens based on their sexual orientation, would it be likely to choose the words of the statute to do so? If the statute is read to exclude homosexuals, how would we [today] then be inclined to state

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165. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 46-54 (1988).

166. *Id.* at 49 (emphasis in original omitted).

167. 387 U.S. 118 (1967).

168. Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163, 182 (1952) (codified at 8 U.S.C. § 1182(a)(4) (1988)).

169. *Id.* § 212(a)(4), *quoted in* Aleinikoff, *supra* note 165, at 48.

170. Aleinikoff, *supra* note 165, at 52.

171. A Senate report on the bill stated that "[t]he Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts." S. REP. NO. 1137, 82d Cong., 2d Sess. 9 (1952).

> the objective of the statute? Would this reformulated purpose cover other cases that the words would lead us to believe ought to be covered? Would this reformulated purpose make us understand the words in a new way? If read to cover homosexual aliens, how would the statute fit with other laws on the books? Does such an interpretation appear consistent with broader prevailing common law and constitutional norms?[172]

These are the familiar questions a judge asks when interpreting statutes, but, Aleinikoff argues, they are concerned with "present-mindedness" rather than backward-looking original legislative intent.[173] By asking the typical questions of statutory interpretation, but with a present-minded spin, an old statute is woven into today's legal system and today's conditions, achieving what Aleinikoff calls "synchronic coherence."[174] Applied to the McCarran-Walter Act, a present-minded approach to statutory interpretation would ask not whether legislators in 1952 thought that homosexuality constituted a psychopathic personality or a mental defect, but instead whether homosexuality constitutes a psychopathic personality or a mental defect by today's standards.

D. The Honest Agent Conception in Textual and Intentional Statutory Interpretation

The different permutations of textualism, intentionalism, and dynamicism either directly employ or imply a variety of descriptive conceptions of statutes. Under Hart and Sacks's legal process approach, statutes are purposive problem-solving devices put forth by rational, well-intentioned legislatures.[175] Under Posner's imaginative reconstruction theory, statutes are commands issued by a superior to a subordinate which must be carried out even if unclear.[176] Under Easterbrook's new textualism, statutes are, unlike legislative intent, a clear memorialization of compromises that ought not be upset.[177] Where Dworkin views statutes as the first chapter in a chain novel,[178] and Eskridge views statutes as text created in the past but

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172. Aleinikoff, *supra* note 165, at 49.
173. *Id.*
174. *Id.* at 49-50.
175. *See supra* part II.B.3.
176. *See supra* part II.B.2.
177. *See* Easterbrook, *supra* note 51, at 540, 550-51.
178. *See supra* notes 113-24 and accompanying text.

applied to present problems,[179] Aleinikoff views statutes as vessels embarked on a voyage into constantly changing conditions.[180]

Despite these differences, one can draw a fundamental line of demarcation between two groups of interpretive theories and their corresponding positive conceptions of statutes. Both intentionalist and textualist interpretive theories view statutes as having fixed meanings at the moment of enactment,[181] while dynamic interpretive theories view statutory meaning as a fluid thing that takes its first form upon enactment, but can bend or change shape as it works its way through time, varying contexts, and different parts of the legal process. Even if a statute has a certain meaning when enacted, its meaning can be adjusted in light of new information, unforeseen situations, or a changed legal landscape. Other commentators have noted this subsurface distinction between textual and intentionalist approaches on the one hand, and dynamic approaches on the other. Professor Aleinikoff's analysis, for example, divides statutory interpretation theories into two main camps: archaeological and nautical.[182] Archaeological interpretive theories—textualism and intentionalism—view the "meaning of a statute [as] set in stone on the date of its enactment," while the nautical interpretive model—exemplified by Dworkin's and Aleinikoff's approaches—"understands a statute as an on-going process (a voyage)" in which both Congress and the courts play a role in navigating the ship. Professor Eskridge also has pointed out that textualist and intentionalist approaches to statutory interpretation "treat statutes as static texts" that have a determinate meaning[183] while dynamic theories involve a process of "understanding a text created in the past and applying it to a present problem."[184]

The different descriptive accounts of statutes associated with textual/intentional and dynamic theories of statutory interpretation fit like puzzle pieces with their respective normative foundations.

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179. ESKRIDGE & FRICKEY, *supra* note 102, at 616.

180. *See supra* notes 166-74 and accompanying text.

181. Thus, any disagreement over interpretive methodology between the two is really a debate about which interpretive rules judges ought to employ in discerning those fixed meanings. While textualists emphasize statutory texts and intentionalists stress the intents of enacting Congresses, both approaches are at bottom methods for interpreting statutory meanings fixed at the time of enactment. The idea that statutes have a fixed meaning at the time of enactment stands in polar opposition to the dynamicists' fundamental positive conception of statutes as fluid, mutable, evolving instruments.

182. Aleinikoff, *supra* note 165, at 21.

183. ESKRIDGE & FRICKEY, *supra* note 102, at 613; Eskridge, *supra* note 34, at 1479-80.

184. Eskridge, *supra* note 34, at 1482-83.

Textual and intentional statutory interpretation theories are both founded upon the normative idea that the third branch ought to act as the "honest agent" of the first branch. As honest agents, judges interpreting statutes ought to have as their goal the discovery and application of statutory meanings fixed at the time of enactment. Posner, and Farber and Frickey, who build upon Posner's intentionalist imaginative reconstruction theory, for example, speak explicitly of courts as the "honest agent" of Congress.[185] Textualists such as Scalia and Easterbrook also invoke the honest agent image in their writings. When deploying textual-intentionalist rhetoric, Scalia argues that courts should interpret statutes so as to vindicate the will of the entire enacting Congress.[186] Likewise, Easterbrook supports his "new textualism" by arguing that textualism is the approach that the legislature would want courts to adopt, since it allows the legislature maximal freedom of choice.[187] Further, Easterbrook goes as far as to explicitly refer to courts as "honest agents of the political branches," who ought to "faithfully execut[e] decisions made by others."[188] Professor Aleinikoff has noted the connection between the textualist/intentionalist positive conception of statutes and their normative vision of the relationship between the first and third branches:

> The archeological metaphor conceives of statutory meaning as determined on the date of the statute's enactment. The model is premised on legislative supremacy and separation of powers. In our system of government, the legislature is assigned the chief law-making responsibility; an interpreter's job is to be faithful to the legislative will—as expressed in authoritative utterances called statutes—lest the interpreter become the lawmaker. . . .
>
> Two strategies of interpretation have dominated the archeological perspective: textualism (or plain meaning) and intentionalism (or purpose analysis).[189]

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185. Posner speaks of courts' role vis-a-vis Congress as "a helping one," Posner, *supra* note 56, at 198, and analogizes courts to military subordinates trying to interpret communications from superiors, *id.* at 189-90. Farber and Frickey present their elaboration on Posner's theory in Farber & Frickey, *supra* note 39, at 461-65.

186. *See, e.g.*, Green v. Bock Laundry Mach. Co., 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring in judgment).

187. Easterbrook, *supra* note 51, at 546-47.

188. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

189. Aleinikoff, *supra* note 165, at 22.

Professor Sunstein has also noted the "honest agent" conception underlying textual and intentional statutory interpretation theories. He frames the issue as follows:

> The most prominent conception of the role of courts . . . in statutory construction is that they are agents or servants of the legislature. As agents, courts should say what the statute means, and in that process language, history, and structure are relevant; but background norms, policy considerations, or general principles are immaterial. Above all, those who accept the agency view would bar courts from undertaking value-laden inquiries into (for example) appropriate institutional arrangements, or statutory function and failure, as part of the process of interpretation. The judicial task is one of discerning and applying a judgment made by others, most notably the legislature.[190]

The textual and intentional—or in Aleinikoff's terms, archaeological—theories, which view the federal courts as agents of Congress, stand in sharp contrast to dynamic interpretive theories. Aleinikoff summarizes the normative underpinnings of dynamic, or in his terminology "nautical," interpretive theories as follows:

> Nautical models are built on an understanding of the nature of statutes and the role of interpreters that is fundamentally different from the view that underlies an archeological approach. Archeologists see statutes as once-shouted commands that continue simply to echo through time. Current readers of the statute are not interpreters; they are receivers of messages, capturing and recording the communication precisely as it was uttered long ago. This is a singularly inapt description of statutes and interpreters. Enactment of a statute represents the beginning of a journey, not the end. The statute "means" nothing until it takes its place in the legal system, until it begins to interact with judges, lawyers, administrators, and lay people. Each of these interactions changes, or fills out, the meaning of the statute. . . . Interpreters are not reporters or historians, searching out the facts of the past. They are creators of meaning.[191]

In short, where textual and intentional interpretation theories are built upon the normative assumption that the third branch ought to act as the honest agent of the first, always striving to find the correct

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190. SUNSTEIN, *supra* note 136, at 112.

191. Aleinikoff, *supra* note 165, at 57 (footnote omitted).

or most accurate meaning of the legislative command or intention, dynamic theories are built on the assumption that the first and third branches ought to act as collaborators engaged in a dialogic statutory law-creating enterprise.

Under the honest agent conception underlying textualism and intentionalism, the aim of rules of statutory interpretation is to minimize the "costs" inherent in the principal-agent relationship between Congress and the federal courts. The costs of the agency relationship are of two types. First, there are costs of *discretion.* Here the fear is that the federal courts, when interpreting open textured statutory language, will divine some interpretation not intended or commanded by the enacting Congress. The interpretation may be under-inclusive in that it fails to cover instances the enacting Congress wished to include, or it may be over-inclusive in that it covers certain instances that Congress intended to exclude. In *Smith v. United States*,[192] for example, if in fact Congress did not intend federal sentencing statutes to require sentence enhancement in cases where a gun is used merely as an item of barter, then the Supreme Court's holding would be over-inclusive. One may read Justice Scalia's dissent in *Smith* as arguing that the set of interpretive rules the majority opinion applies—a literalist form of textualism—results in an over-inclusive interpretation. Justice Scalia believes that a conventionalist textualism works better for capturing no more and no less than the intent of the entire enacting Congress than does Justice O'Connor's literalism.[193]

The second type of cost inherent in the agency relationship between Congress and the federal courts is the cost of *constraint.* Here the problem is that a set of statutory interpretation rules or practices may tie a court's hands from probing information that would illuminate the actual command or intent of the enacting Congress. As with discretion, constraint can result in over-inclusive or under-inclusive interpretations. Again, to take *Smith* as an example, one could imagine a second dissent arguing that the textual interpretive approaches of both Justice O'Connor's majority opinion and Justice Scalia's dissent fail to look at relevant information that could shed light on the interpretive issue. A committee report, floor debate transcripts, or post-enactment comments by key legislators might give a clear indication of whether the enacting Congress intended sentence

192. 113 S. Ct. 2050 (1993).
193. *See id.* at 2061 (Scalia, J., dissenting).

enhancement where a defendant trades a firearm for illicit narcotics. Since textualist interpretive rules employed by both Justices O'Connor and Scalia exclude potentially illuminating information from the interpretive analysis, the Court's analysis may be needlessly over- or under-inclusive.

The problem is that the costs of discretion and the costs of constraint cannot be simultaneously minimized. If the set of statutory interpretation rules gives courts enough discretion to avoid over- or under-inclusive interpretations resulting from an overly constraining interpretive regime, courts will unintentionally but *inevitably* go beyond the legislative command. Worse, a court with too much discretion may strategically use evidence of legislative intent to interpret statutes willfully in ways the enacting Congress never intended. Under Posner's imaginative reconstruction theory, for example, nothing stops a court from exercising discretion in a way that intentionally or unintentionally reads ambiguities into the legislative "command" along the lines of judicial, rather than legislative, policy preferences. In principal-agent terminology, if the agent/courts are afforded too much interpretive discretion, they will *inevitably* (and possibly intentionally) misconstrue the principal/legislature's command or will, engaging in self-dealing behavior. The costs of agent discretion are inherent in any principal-agent relationship. On the other hand, an attempt to limit the costs of discretion with constraining interpretive rules will result in interpretive errors due to the exclusion of relevant information from the interpretive inquiry. By guarding against misuse and abuse of "too much" court discretion, one blinds the court to information that would tend to resolve statutory ambiguities in accord with the enacting Congress's policy command or preference. Courts operating under strict four-corners textualism, for example, will often follow the words of the enacting Congress, but not its will. *Smith v. United States* is a good example of this phenomenon. In principal-agent terminology, if the agent/court's interpretive inquiry is too constrained, then the agent will inevitably ignore information that could make crystal clear an otherwise ambiguous statutory text. As with the costs of discretion, the costs of constraint are inherent in any principal-agent relationship.

Since minimizing the agency costs of discretion maximizes the agency costs of constraint, and vice versa, the different textual and intentional interpretive theories, which afford various levels of discretion and constraint, can be seen as attempts to minimize the sum total costs of the two types of agency costs. Thus, differences

between the textual and intentional schools, and debates within each school, center upon which set of interpretive rules or practices minimizes the sum total costs of discretion and constraint.[194] The debate operates on two levels. At the meta-level, statutory interpretation theorists argue about the relative costs of discretion and constraint. Textualists tend to emphasize the costs associated with discretion. An underlying theme of textualist theory is the paramount importance of limiting the ability of courts to infuse statutory law with their own independent policy judgments. Thus, the textualist Easterbrook stresses that any attempt by a court to discern statutory meaning beyond that clearly expressed in the text "is a transfer of a substantial measure of decision-making authority from the speaker [Congress] to the interpreter."[195] Proponents of intentional statutory interpretation, in contrast, emphasize the costs associated with constraint. Posner's military analogy, for example, argues that when faced with an ambiguous command a subordinate ought not refrain from action, but should instead exercise discretion and ask what the "commander" would want in the case of ambiguous communications.[196]

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194. The cases of West Virginia Univ. Hosps. v. Casey, 499 U.S. 83 (1991) and Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), *cert. granted and judgment vacated*, 499 U.S. 933 (1991), illustrate this point. In *Friedrich*, Judge Posner applied his imaginative reconstruction approach to the issue of whether, under 42 U.S.C. § 1988, the prevailing party may recover fees paid for experts hired to prepare a case and testify. Posner wrote:

> We are quite aware that appeals to literalism are common. The cases are thick with references to "plain meaning" and with such tired saws as that interpretation must begin with the words of the statute—and stop there if they are clear. In fact, interpretation must begin with the linguistic and cultural competence presupposed by the author of the statute.... [L]egislatures, including the Congress of the United States, often legislate in haste, without considering fully the potential application of their words to novel settings....
>
> When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation ... for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly ....

Friedrich, 888 F.2d at 513-14.

On appeal from *Freidrich*, the Supreme Court in *Casey* dismissed Posner's interpretive approach as "profoundly mistak[ing] our role." *Casey*, 499 U.S. at 100. Writing for the majority, Justice Scalia employed a textualist approach, arguing that anything but the strict enforcement of unambiguous statutory language is a "usurpation" by the Court. *See id.* at 100-01. Writing in dissent, Justice Stevens argued in favor of Posner's imaginative reconstruction approach to statutory interpretation. *See id.* at 103-16 (Stevens, J., dissenting); *see also* Frickey, *supra* note 6, at 263-67 (analyzing Justice Stevens's opinion in *Casey*).

195. Easterbrook, *supra* note 51, at 536.

196. *See supra* notes 96-98 and accompanying text.

Beyond the agency costs of discretion and constraint and their relative importance, the statutory interpretation debate operates on a technical level. On this level textual and intentional statutory interpretation theorists concern themselves with empirical matters related to the costs of discretion and constraint, including issues such as whether legislative intent exists, whether historical evidence of legislative intent is likely to be skewed, whether courts afforded substantial interpretive discretion are likely to act as strategic policy actors, the merits of various types of legislative history for discerning intent, and whether non-repeal suggests tacit legislative approval of a controversial statutory interpretation.

Where textual and intentional theories seek an optimal set of interpretive rules or interpretive practices for minimizing the agency costs of discretion and constraint, dynamic theorists aim for interpretive rules and practices that divide up the statutory law-creating task between Congress and the federal courts in the most "efficient" way.[197] Put differently, dynamic theories are efforts to allocate statutory law-creating authority between the first and third branches in ways that maximize coherence of statutory law with the legal landscape, consistency with current majoritarian sentiments, the use of novel information, consideration of changing contextual circumstances, and the continuing vitality of statutory law. Just as business enterprises utilize specialization and division of labor to run an efficient production process, so too does the government under dynamic approaches to statutory interpretation divide labor between Congress and the federal courts. Under Dworkin's chain novel theory, for example, Congress "writes" the first chapter, and the federal courts "write" subsequent chapters. In Aleinikoff's current Congress approach, a past Congress passes a statute, and the federal courts interpret it in accord with the most probable wishes of the current Congress. Dynamic statutory interpretation theories focus more upon the quality of the end product rather than upon which branch of government plays the central role in creating that product, and they are built upon the recognition that allowing courts a role in shaping statutory law results in a more coherent, up-to-date, and enlightened body of statutory law. Institutional roles follow statutory function. Proponents of textual and intentional statutory interpretation, in contrast, are concerned primarily with *who* makes

197. Here I refer to "efficiency" as productive efficiency, rather than Pareto optimality. On the various uses of the term efficiency, see JULES L. COLEMAN, MARKETS, MORALS AND THE LAW (1988).

statutory law, and only secondarily with *how well* it is made, and with the quality of statutes as end products. Under the honest agent conception of textual and intentional interpretation, the institutional role of the federal courts in interpreting statutes arises out of what Congress lacks—time and adjudicative expertise. Indeed, it is a lack of time and special expertise on the part of principals that gives rise to most principal-agent relationships. Under dynamic theories, however, the federal courts' role in statutory interpretation arises out of unique virtues they can bring to the statutory law creation process. Rather than viewing courts as agents doing the principals' bidding, dynamic theories envision the third branch as a collaborator with the first, bringing vital qualities to the law-creating enterprise.

Though dynamic statutory interpretation theorists reject the honest agent conception underlying textual and intentional statutory interpretation, they are nonetheless concerned with the costs of discretion and constraint. Viewing the first and third branches as collaborators implies that each is to play a distinct role in the statutory law-creating process. Though dynamic theories offer courts more discretion than textual or intentional theories, limiting court discretion is clearly central to keeping courts within a distinct institutional role. Thus the real difference between textual/intentional theories and dynamic theories lies in *why* they are concerned with the costs of discretion and constraint. Where the former seek to minimize agency costs inherent in the principal-agent relationship between Congress and the federal courts, the latter are aimed at an optimal allocation of institutional functions between these two branches of government. As such, dynamic theories adjust the level of interpretive discretion and constraint, not in an effort to render the federal courts perfect agents of Congress, but rather in the hope of making the federal courts' role most conducive to the maintenance of a coherent, updated, or rational body of statutory law. In Calabresi's common law method, for example, courts are afforded substantial interpretive discretion in cases where the statute in question is obsolete, and in Eskridge's dynamic theory the level of interpretive discretion rises as textual and historical meanings become less determinate. In both cases the level of discretion afforded courts is sensitive to the courts' unique institutional role in updating statutory law. Stated from the opposite perspective, the level of constraint upon courts under both theories is sensitive to whether or not statutory law is likely to need updating or evolution.

A surprising fact about the scholarly debate over statutory interpretation during the last decade is that it has for the most part

ignored the normative institutional visions underlying textual, intentional, and dynamic interpretive approaches. Perhaps because of the dominance of textual and intentional theories in legal practice, commentators have given little explicit attention to whether the federal courts ought to be considered the honest agents of Congress, or instead considered coequal collaborators in the statutory law-creating process. The following section takes this issue head on.

III. FOUNDATIONS: POPULAR SOVEREIGNTY AND SEPARATION OF POWERS THEORY IN THE FEDERAL CONSTITUTION

Generally, rules may be analyzed in two ways. First, one can examine whether a rule operates to effectuate its background justification. This approach concerns the technical issue of whether a rule is over- or under-inclusive with respect to results the rule is designed to produce.[198] Does a rule capture all of the instances that its background justification would? Does it capture instances that its background justification would not? The second way to analyze rules is to examine their background justifications themselves. Here the question is whether the background justification is worthy of being followed. Much of the debate over statutory interpretation has centered on the first way of analyzing rules. This Part, however, employs the second method. Rather than asking which approach to statutory interpretation, or which set of statutory interpretation rules, best effectuates its background justifications, we will ask which of the background justifications are worthy and which are not.

Central to the analysis is an awareness of the role statutory interpretation rules play in allocating law-creating authority.[199] Both textual and intentional interpretive rules attempt to locate statutory law-creating authority primarily within the first branch, viewing the federal courts as honest agents of Congress, with the sole objective of enforcing the congressional command or will. Congress, the principal, creates law, while the federal courts, the agents, are limited to applying it in specific cases. Under both textual and intentional rules of statutory interpretation, any law-creating role for the federal courts is a mere byproduct of the agency relationship between the first and third branches, an unavoidable but minimizable cost of the agency relationship. Differences between textual and intentional

198. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31-34 (1991).

199. *Id.* at 158-62.

interpretation are technical ones regarding which set of interpretive rules operates to minimize the agency costs inherent in the agency relationship. Textualists, for the most part, emphasize the agency costs inherent in affording the federal courts free-ranging discretion in discerning the legislative command. Thus, they offer a simple but tightly-constraining approach—interpret with the aid of text and only the text. Intentionalists, in contrast, focus more on the agency costs inherent in constraining the federal courts with an overly limiting set of interpretive rules. Judges who only look to text when interpreting statutes will be little more than mechanical literalists, often failing to discern the true legislative will. For this reason, intentionalists emphasize the importance of a diverse array of interpretive tools, which allow the judge enough breathing room to resolve statutory ambiguities in accord with the most probable legislative intent.

The various permutations of dynamic interpretive rules are rooted in a balanced allocation of law-creating authority between the first and third branches. Rather than presuppose a principal-agent relationship between Congress and the federal courts, dynamic theories envision an ongoing dialogic law-creating process between the first and third branches. Rather than aiming to minimize inevitable costs of a principal-agent relationship, dynamic statutory interpretation rules are designed to create a process through which statutory law is continually purified, updated, perfected, and reshaped to incorporate new information, unforeseen events, or changes in the legal landscape. The danger, of course, is that judges will abuse the broad discretion dynamic approaches offer.

Once it is understood that the rules of statutory interpretation at bottom function to allocate statutory law-creating authority between the first and third branches, the question shifts from the technical issue of how courts ought to interpret statutes (are the rules over- or under-inclusive regarding their background justifications?) to the more fundamental normative issue of the proper relationship between the first and third branches (which background justifications ought to be followed?). An answer to the former must be derived from an answer to the latter. At the abstract level, therefore, this Part is concerned with the following questions: Should rules of statutory interpretation be designed to effectuate a principal-agent relationship between Congress and the federal courts? Or instead should the design of statutory interpretation rules be based on the notion that the first and third branches are collaborative players in a statutory law-creating game? Are the federal courts to be commanded by Congress? Or are the two to engage in a dialogue between peers? Ought legislative

supremacy be the root of statutory interpretation doctrine? Or should we seek its roots elsewhere?

We shall address these abstract issues by examining two principles at the core of the federal Constitution—popular sovereignty and separation of powers. Why are these two core constitutional principles helpful in understanding either statutory interpretation or the more fundamental issue of the proper relationship between Congress and the federal courts?[200] Briefly, the federal Constitution embodies and reflects our axiomatic political principles, and current government practices and institutional structure must at least be consistent with these principles.

While proponents of both textual and intentional statutory interpretation have pointed to separation of powers and democratic legitimacy as constitutional principles supporting the honest agent conception,[201] their analyses have been cursory at best. Arguments in support of textual and intentional statutory interpretation too often assume simple models of separation of powers and democratic legitimacy without examining whether they in fact are consistent with the principles animating the federal Constitution. The largely unexamined conventional wisdom among statutory interpretation theorists is that both separation of powers and democratic legitimacy provide strong support for the honest agent conception. Even those theorists who espouse the use of dynamic statutory interpretation are aware of the deeply rooted acceptance of the idea that the federal courts ought to act as the subordinate agents of Congress.[202] To caricature the academic debate on statutory interpretation, dynamic theorists argue that honest agent-style statutory interpretation leads to obsolete and incoherent statutory law, whereas an evolutive perspective allows for a present-minded body of statutory law. In retort, proponents of textual and intentional statutory interpretation argue that separation of powers and democratic legitimacy *require*

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200. The idea that popular sovereignty ought to inform legal practice has been invoked by others. Professor Amar, for example, argues that the law of sovereign immunity is "antithetical" to popular sovereignty, and therefore ought to be reformed. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987).

201. For a description of these principles, see Aleinikoff, *supra* note 165, at 22.

202. Thus, Judge Calabresi devotes much of his book, A COMMON LAW FOR THE AGE OF STATUTES, *supra* note 122, to arguing that his approach is really just an outgrowth of widely accepted traditions, and to explaining the many limitations his approach carries. Likewise, Professor Eskridge calls his dynamic theory a "cautious one" in which the evolutive perspective is appropriate only when a statute is old, when it does not specifically address the issue at hand, and when the policy context or public values have undergone a decisive shift. Eskridge, *supra* note 34, at 1554-55.

that the federal courts act as the honest agents of Congress. Even if dynamic interpretation leads to updated and coherent statutory law, claim textualists and intentionalists, the dynamic approaches are inconsistent with constitutional principles, and are therefore impermissible.

A close look at the popular sovereignty and separation of powers theories in the federal Constitution reveals strong reasons to doubt the retort of honest agent proponents. Briefly, in 1776, at the height of the Revolution, Americans embraced a radically populist form of popular sovereignty and an "unalloyed" version of separation of powers. The populist form of popular sovereignty was characterized by the idea that legislatures were the sole legitimate agents of the people in government, while the unalloyed version of separation of powers was characterized by legislative supremacy and a lack of overlapping powers between the three branches of government. Eleven years later, however, at the time of the Founding, a federalist form of popular sovereignty, and a balanced version of separation of powers, emerged to supplant their Revolutionary-era predecessors. The federalist form of popular sovereignty is characterized by the idea that all three branches of government are coequal or peer agents of the people, while the balanced version of separation of powers is characterized by checks and balances, the rejection of legislative supremacy, and an enhanced role for courts in the institutional structure of government. The honest agent conception is consistent with the popular sovereignty and separation of powers theories favored at the time of the Revolution, but it is incompatible with the Founding era popular sovereignty and separation of powers theories that were ratified into the federal Constitution. Rather than supporting the use of statutory interpretation rules based upon the honest agent conception, fundamental principles of the federal Constitution argue for statutory interpretation rules designed to effectuate a dialogic law-creating game in which both Congress and the federal courts act as peer players.

A. Popular Sovereignty and Statutory Interpretation

The central idea of popular sovereignty is that the people are the one and only sovereign in civil society; as sovereign the people may cede governing authority to a constituted government, which is charged with the duty to pursue public-regarding policies. To borrow Professor Amar's words, under popular sovereignty "[t]rue sovereignty reside[s] in the People themselves. . . . Government officials [are] 'representatives,' 'agents,' 'delegates,' 'deputies,' and

'servants' of the People. . . . As sovereign, the People need not wield day-to-day power themselves, but could act through agents on whom they conferred limited powers."[203] Thus, the essence of popular sovereignty is a principal-agent relationship between a principal/people and their constituted agent/government, under which a sovereign people grant governing power and authority to a government that acts as a trustee over the people's sovereignty.[204]

Under popular sovereignty theory a main purpose of constitutions is the creation of an institutional scheme or structure that minimizes the agency costs inherent in the principal-agent relationship between a principal/people and their constituted agent/government. Much as the law of agency or the law of trusts sets forth rules that guide and constrain agents and trustees, under popular sovereignty theory constitutions set forth rules guiding and constraining an agent/government. Ideally, a constitution affords the agent/government enough power so that it may act for the good and betterment of the principal/people, but at the same time constrains the agent/government from engaging in self-dealing policies or policies at odds with the public interest. James Madison's famous words from *Federalist* Number 51 point to the central dilemma of the principal-agent relationships between a people and their constituted government:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. *In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the*

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203. Amar, *supra* note 200, at 1435-36.

204. The word "agent" as used in connection with popular sovereignty refers to the sort of agent evoked in the economic literature on agency theory. In this literature a principal delegates authority to act on the principal's behalf to an agent. The agent's preferences, however, differ from those of the principal, thus giving rise to actions by the agent which diverge from the interests of the principal. The structures or incentive schemes designed to align the interests of the agent with those of the principal constitute an agency contract. The optimal agency contract minimizes the "costs" of the agency relationship to the principal. Even under the optimal agency contract, however, the agent's actions will diverge from those which are in the principal's best interests, since at the margin the costs of monitoring the agent outweigh the costs of agent self-dealing. *See, e.g.*, THRÁINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS 40-45 (1990). Under popular sovereignty theory the people are considered the principals and their constituted government an agent. A constitution creates an institutional structure that organizes that relationship between the principal/people and their agent/government and minimizes the agency and monitoring costs entailed in the delegation of authority by a people to their government.

> *government to control the governed; and in the next place oblige it to control itself.*[205]

Americans grappled with the "great difficulty" of framing governments both at the time of the American Revolution in 1776, and at the time of the Founding in 1787.[206] In both the Revolutionary and Founding periods, popular sovereignty theory operated as the primary normative underpinning of constitutional government, and carried with it definite notions of the proper structural relationships between the people and their agent government, and between the different components of government. Yet the particular form that popular sovereignty theory took during the two periods, or the peculiar structural relationships embedded in the theory, were radically different. At the time of the Revolution, Americans experimented with a radically populist form of popular sovereignty. By the time of the Founding, however, most considered the populist form of popular sovereignty to have been a failure, and a new federalist version of popular sovereignty theory emerged to supplant it. As we shall see, the normative underpinning of textual and intentional statutory interpretation theory—the honest agent conception—is much more consistent with the institutional structure of government inherent in the populist form of popular sovereignty theory ratified into the Revolutionary-era state constitutions, than with the altogether different institutional structure of government inherent in federalist popular sovereignty theory ratified into the federal Constitution of 1789.

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205. THE FEDERALIST No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

206. Make no mistake about the fact that Americans between 1776 and 1787 were self-conscious about the framing of governments. They realized the rare opportunity they had to create totally new institutions and a totally new order in the period following independence from Great Britain. As Professor Shalhope writes,

> [T]he Revolution . . . engender[ed] an intense excitement over the prospects for new republican governments that would drastically reorder the world Americans had known. Freedom from the corruption and restraints of Great Britain created a chance for a new kind of politics, a new kind of government, that would change the lives not only of Americans but of all people. Given such an opportunity, Americans labored from 1776 to 1788 to perfect constitutions that would embody the republican principles for which they fought the Revolution.

ROBERT E. SHALHOPE, THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760-1800, at 83 (1990). Shalhope calls this era "the most creative period of constitutional development in their [Americans'] history." *Id.* at 84.

1. The Cornerstone of American Constitutional Theory

Though legal scholars and practitioners have written less about it than other important features of American constitutional theory, popular sovereignty is the cornerstone of both American constitutional theory and the federal Constitution.[207] Upon its foundation rest more familiar constitutional pillars including federalism, electoral checks, separation of powers, the jury system, the enumeration of powers, and bicameralism. Though its disaggregated parts are fabricated from these familiar pillars, the federal Constitution as a unified whole embodies the ultimate exercise of popular sovereignty—the creation of an agent/government by a principal/people. The words "We the People . . . do ordain and establish this Constitution for the United States of America" serve as bookends to the Preamble.[208] The Constitution's main body opens with the Preamble's popular sovereignty theme, and ends with Article VII's instructions on ratification by the people through specially assembled conventions. The final two amendments in the Bill of Rights reserve powers not delegated to the agent/government for the prin-

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207. Thus, Professor Tribe's treatise on constitutional law states in its opening paragraphs: "That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-2, at 2 (2d ed. 1988). On American popular sovereignty Tocqueville wrote, "Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 55 (Phillips Bradley ed., 1945); *see also* A.J. BEITZINGER, A HISTORY OF AMERICAN POLITICAL THOUGHT 290 (1972) (discussing James Madison's belief that "all power is originally vested in and consequently derived from, the people"); DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 247 (1988) (indicating that "the essence of the American constitutional tradition [is] . . . that while all governments are derived from the people, constitutional decisions shall never be made by transient majorities"); DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 11-12, 31-32 (1984) (analyzing the role of the Declaration of Independence and *The Federalist* in shaping the idea of popular sovereignty as it was understood in 1787); Additions Proposed By the Virginia Convention: A Proposed Bill of Rights (June 27, 1788), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 219 (Ralph Ketcham ed., 1986) ("[A]ll power is naturally invested in, and consequently derived from, the people; that magistrates therefore are their *trustees* and *agents*, at all times amenable to them."); Donald S. Lutz, *Popular Consent and Popular Control, 1776-1789*, *in* FOUNDING PRINCIPLES OF AMERICAN GOVERNMENT: TWO HUNDRED YEARS OF DEMOCRACY ON TRIAL 60, 64 (George J. Graham, Jr. & Scarlett G. Graham eds., 1977) (discussing Revolutionary and Founding era notions of popular consent).

208. U.S. CONST. pmbl. Further, as Professor Amar points out, the Preamble and the Tenth Amendment serve as bookends to the original Constitution. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1199-1200 (1991).

cipal/people. Beyond these explicit references, popular sovereignty implicitly "informs every article of the Federalist Constitution."[209]

Initially expounded by Locke and Montesquieu, popular sovereignty found its first practical applications on American soil in colonial compacts,[210] then later in the Declaration of Independence,[211] the state constitutions of the Revolutionary period, and in a final incarnation in the federal Constitution of 1789.[212] Emerging as a central idea of constitutional theory and practice at the time of the American Revolution, popular sovereignty was transformed in the eleven years between the Declaration of Independence and the federal Constitutional Convention in Philadelphia. Though its shape and meaning shifted dramatically between the beginning of the Revolution and the Philadelphia convention, popular sovereignty remained as important to constitution making in 1787 (if not more so) as it had been in 1776.

Political thinkers and political actors during both the Revolutionary and Founding eras stressed the centrality of popular sovereignty to constitution-building. In a clear expression of Revolutionary period popular sovereignty theory, the 1776 instructions for the delegates from Mecklenberg, North Carolina, to the Provincial Congress at Halifax, North Carolina, read in part:

> 1st. Political power is of two kinds, one principal and superior, the other derived and inferior.
> 2d. The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.
> 3d. Whatever persons are delegated, chosen, employed and intrusted by the people are their servants and can possess only derived inferior power.[213]

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209. Amar, *supra* note 200, at 1439.

210. Professor Amar suggests that colonial charters were the first "constitutions" to employ popular sovereignty theory. *Id.* at 1432-33.

211. The Declaration of Independence reads in relevant part:

> We hold these truths to be self-evident . . . . Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

212. JULIE MOSTOV, POWER, PROCESS, AND POPULAR SOVEREIGNTY 52-60 (1992).

213. INSTRUCTIONS TO THE DELEGATES FROM MECKLENBERG, NORTH CAROLINA, TO THE PROVINCIAL CONGRESS AT HALIFAX, 1 NOVEMBER 1776, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 56 (Philip B. Kurland & Ralph Lerner eds., 1987).

The Declaration of Independence and the state constitutions written in the Revolutionary period explicitly stated that the people are the ultimate source of political power and authority.[214] On the issue of sovereignty in the Revolutionary period, Professor Shalhope writes: "After the Declaration of Independence dissolved the covenant between king and people, it was a foregone conclusion that state constitutions would exclude any mention of a king. Only one source of power remained, the people. . . . [The new state governments] drew all their authority from the people."[215]

Eleven years later, during the Founding period, popular sovereignty remained on the lips of American political thinkers and actors. For example, James Wilson, one of the federal Constitution's primary architects, said at the Pennsylvania ratifying convention in 1787, "[T]he truth is, that the supreme, absolute and uncontrollable authority, *remains* with the people . . . . [S]upreme power . . . *resides* in the PEOPLE, as the fountain of government."[216] Wilson was not alone. Alexander Hamilton, James Madison, and John Jay peppered *The Federalist* with approving references to popular sovereignty.[217]

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214. *E.g.*, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776):

> We hold these truths to be self-evident . . . Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute a new Government . . . .

See also MD. CONST. of 1776, Declaration of Rights I & IV, *in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 817, 817 (Ben Perley Poore ed., 1877-78) [hereinafter FEDERAL AND STATE CONSTITUTIONS] ("All government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole. . . . [P]ersons invested with the legislative or executive powers of government are the trustees and servants of the public, and, as such, accountable for their conduct."); VIRGINIA BILL OF RIGHTS of 1776, § 2, *in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra*, at 1908, 1908 ("[A]ll power is vested in, and consequently derived from, the people . . . magistrates are their trustees and servants, and at all times amenable to them."). The early state constitutions may be found in Poore's volumes. Other compilations of these constitutions and related sources include THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909) [hereinafter CONSTITUTIONS], and SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (William F. Swindler ed., 1973-79) [hereinafter SOURCES].

215. SHALHOPE, *supra* note 206, at 87.

216. JAMES WILSON, PENNSYLVANIA RATIFYING CONVENTION, 4 DECEMBER 1787, *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 213, at 62; *see also* CHRISTOPHER COLLIER & JAMES LINCOLN COLLIER, DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787, at 213-14 (1986) (discussing James Wilson's views on popular sovereignty).

217. *But see* CAESAR, NO. 2, 17 OCTOBER 1787, *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 213, at 60. Caesar, an Anti-Federalist, argued that the

In *Federalist* Number 22, for example, Hamilton wrote "The Fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."[218] And in *Federalist* Number 49 Madison wrote, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which THE several branches of government hold their power, is derived . . . ."[219] Likewise, Noah Webster wrote in 1787 that "[t]he powers vested in Congress are little more than *nominal*; nay *real* power cannot be vested in them, nor in any body, but in the *people.* The source of power is in the *people* of this country."[220] Anti-Federalists in the Founding period were also enamored with popular sovereignty as the foundation of government power and authority. Thus, Elbridge Gerry, who opposed the Constitution, stated at the Massachusetts ratifying convention "witness the truth of these political axioms . . . [t]hat the origin of all power is in the people, and that they have an incontestible right to check the creatures of their own creation."[221]

Beyond stressing the centrality of popular sovereignty to constitutional government, political thinkers of both the Revolutionary and Founding eras were explicit in wedding popular sovereignty to the idea that an agent/government is an institution

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Federalists employed popular sovereignty as a rhetorical tool to persuade the common man to accept the proposed federal Constitution.

218. THE FEDERALIST No. 22, at 152 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Amar, *supra* note 208, at 1429-66 (discussing the role of sovereignty in constitutional debates). Professor Amar "revives the Federalist ideas that the true sovereignty in our system lies only in the People of the United States, and that all governments are thus necessarily limited." *Id.* at 1427. In Amar's view, " 'We the People of the United States,' through the Constitution, have delegated limited 'sovereign' powers to various organs of government; but whenever a government entity transgresses the limits of its delegation by acting ultra vires, it ceases to act in the name of the sovereign . . . ." *Id.*

219. THE FEDERALIST No. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961).

220. NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES IN THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION, HELD AT PHILADELPHIA (1787), *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 57 (Paul Leicester Ford ed., 1888).

221. ELBRIDGE GERRY, OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS (1785), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, *supra* note 220, at 6.

whose purpose is to advance the welfare of a principal/people.[222] For example, in 1774 James Burgh wrote:

> As the people are the fountain of power, so are they the object of government, in such manner, that where the people are safe, the ends of government are answered, and where the people are sufferers by their governors, those governors have failed of the main design of the institution . . . .[223]

Ten years earlier James Otis voiced a similar argument in championing the cause of rights for the then-British colonies. He wrote:

> I say supreme absolute power is *originally* and *ultimately* in the people; and they never did in fact *freely*, nor can they *rightfully* make an absolute, unlimited renunciation of this divine right. It is ever in the nature of the thing given in *trust*, and on a condition, the performance of which no mortal can dispence with; namely, that the person or persons on whom the sovereignty is confer'd by the people, shall *incessantly* consult *their* good . . . . The *end* of government being the *good* of mankind, points out its great duties: It is above all things to provide for the security, the quiet, and happy enjoyment of life, liberty, and property. There is no one act which a government can have a *right* to make, that does not tend to the advancement of the security, tranquillity and prosperity of the people.[224]

Political thinkers of the Founding era also accepted the linkage between popular sovereignty and government's agency duties to the people. In *Federalist* Number 45, for example, Madison wrote:

> We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the new, in another shape—that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that *the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.* Were the plan of the convention adverse to the public

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222. *See* RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 46-60 (1993).

223. JAMES BURGH, POLITICAL DISQUISITIONS (1774), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 213, at 54.

224. James Otis, *The Rights of British Colonies Asserted and Proved (1764)*, *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 213, at 52-53 (citation omitted).

> happiness, my voice would be, Reject the plan. Were the union itself inconsistent with the public happiness, it would be, Abolish the Union.[225]

Indeed, Madison and his colleagues in Philadelphia enshrined in the Constitution's Preamble the notion that an agent/government that holds authority in trust from the principal/people is duty-bound to act for the good of the people. Whereas the Preamble's bookends refer to popular sovereignty, its middle clauses enumerate government's duties as trustee of the people's sovereignty: "to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[226]

Those at the Philadelphia convention, of course, were not the only Americans of the Founding era to embrace popular sovereignty.[227] Instead, the statements of those at the Philadelphia convention should be seen as a reflection of a widespread consensus on popular sovereignty during the period. At the South Carolina ratifying convention, for example, Charles Cotesworth Pinckney stated that:

> In every government there necessarily exists a power from which there is no appeal, and which for that reason may be termed absolute and uncontroulable.
>
> The person or assembly in whom this power resides, is called the sovereign or supreme power of the state. With us the *Sovereignty of the union is in the People.*[228]

Likewise, both of the state ratifying conventions of Virginia and North Carolina passed resolutions declaring "[t]hat all power is naturally vested in, and consequently derived from, the people; that

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225. THE FEDERALIST No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

226. U.S. CONST. pmbl.

227. Anti-Federalists, too, believed in popular sovereignty. *See, e.g.*, Brutus I (18 October 1787), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 207, at 276.

228. Charles Cotesworth Pinckney Explains America's Unique Structure of Freedom, May 14, 1788, *reprinted in* THE DEBATE ON THE CONSTITUTION pt. 2, at 577, 586-87 (Bernard Bailyn ed., 1993); *see also* JOSEPH LATHROP, A SERMON ON A DAY APPOINTED FOR PUBLICK THANKSGIVING 1787, *reprinted in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730-1805, at 870-71 (Ellis Sandoz ed., 1991) ("But the constitution of the United States . . . is not, in any sense whatever, a compact between the rules and the people; but it is a solemn, explicit agreement of the people among themselves.").

magistrates therefore are their trustees, and agents, and at all times amenable to them."[229]

The notion that constitutions should be based upon popular sovereignty simply was not an issue of contention from the time of the Revolution through the Founding. All sides shared the underlying premises that sovereignty ultimately rests with the people, that legitimate government derives its power from the people, and that legitimate government acts as the agent of the popular sovereign.[230] For this reason we find relatively little debate over popular sovereignty and its possible permutations in the historical record. Instead, the most common debates centered on which institutional structures and designs would best effectuate government rooted in popular sovereignty. There was, at the time, little debate over whether legitimate government ultimately derives its authority from the people. Instead, in the debates on the federal convention, as well as those in the state ratifying conventions, the typical controversies focused upon issues such as the method of choosing House and Senate members,[231] whether the courts and executive branch ought to compromise a "council of revision" as a check on the legislative branch,[232] or whether judges ought to enjoy life tenure during good behavior.[233]

The late 1780s debate over judicial life tenure is instructive. In the period leading up to ratification, both Federalists and Anti-Federalists claimed to be the champions of popular sovereignty. Each side, however, had its own ideas on how best to structure the rules and institutions of a government based on popular sovereignty. On the issue of judicial life tenure during good behavior, Alexander

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229. Resolutions of Virginia, *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra* note 228, pt. 2, at 557, 559; Resolutions of North Carolina, *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra* note 228, pt. 2, at 565, 566; *see also* Henry Lee's Sharp Reply to Patrick Henry's Attacks on the Constitution, *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra* note 228, pt. 2, at 637, 646 ("It goes on the principle that all power is in the people, and that rulers have no powers but what are enumerated in that paper.").

230. *See* MARTIN EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 13 (1984).

231. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, IN 1787, 42 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT]; 3 *id.* 344-45; 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 20, 28, 46, 51-52, 55, 58, 148, 150-60 (Max Farrand ed., 1911) [hereinafter RECORDS].

232. 3 ELLIOT, *supra* note 231, at 563-72; 1 RECORDS, *supra* note 231, at 21, 28, 94, 97-98, 105, 109-10, 131, 138-41, 144; 2 *id.* 294-95, 298-301; 3 *id.* 133, 385.

233. 2 ELLIOT, *supra* note 231, at 446-69; 1 RECORDS, *supra* note 231, at 21, 116, 126, 226, 230, 237, 244; 2 *id.* 44, 132, 146, 172, 186.

Hamilton, a Federalist, argued that life tenure was needed to protect the Constitution, which is law derived directly from the people, from encroachments by the legislature. The Anti-Federalist Brutus, however, argued against judicial life tenure because it "rendered [judges] totally independent [of] both the people and the legislature."[234] Thus, one finds Hamilton arguing that only life tenure would render the judiciary independent enough to protect the people's constitution, and Brutus contending that an independent judiciary would be free to exercise its powers contrary to the good of the people. Hamilton the Federalist and Brutus the Anti-Federalist agreed on the paramount importance of popular sovereignty, but disagreed as to which institutional rules would work as the best means toward that end.

2. Popular Sovereignty Theory in the Revolutionary and Founding Periods

Though popular sovereignty maintained its central importance to constitutional theory from before the Revolution through the Founding period, its particular shape or form changed dramatically in that interval. More specifically, the normative notions of the proper structural relationships between the principal/people and their agent/government, and between the three branches of government, underwent a sea change. In the principal-agent language of popular sovereignty theory, between 1776 and 1787 American constitution builders revised their thinking on which type of institutional scheme would minimize the agency costs inherent in the principal-agent relationship between the people and their constituted government. The shift in thinking on popular sovereignty proceeded along two related fronts. First, at the time of the Declaration of Independence in 1776, American constitution builders by and large believed that governments dominated by powerful populist legislatures represented the optimal institutional structure for governments rooted in popular sovereignty. By the time of the Founding, however, American constitution builders had discarded the idea that a powerful populist legislature alone could serve as a good agent of a sovereign people. On the second front, in 1776 Americans viewed the legislatures in

234. Brutus XI (31 January 1788), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 207, at 293; *see also* Brutus XV (20 March 1788), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 207, at 304-09 (arguing that the "independence" of the Supreme Court would undermine the power and control of the people).

their state governments as their sole legitimate agents in government. By 1787, however, all three branches of government, including the judiciary, came to be seen as agents of the sovereign people. While at the time of the Revolution courts were generally the subordinates of preeminent legislatures, by the time of the Founding placing courts in a peer or coequal status with legislatures was thought a necessary structural ingredient to good government rooted in popular sovereignty. Both aspects of the evolution in popular sovereignty theory stemmed from negative practical experience with the legislative bodies created immediately following Independence in 1776.

(a) Shifting Attitudes Toward Legislatures

Legislative supremacy was a touchstone of constitutional design in the Revolutionary period, a time when Americans placed great faith in populist legislatures as protectors of individual liberty and promoters of the public good.[235] The state constitutions written immediately following the Declaration of Independence were characterized by "frequent elections, a broad electorate, and legislatures that were reasonably representative of the general population,"[236] and few restrictions (other than frequent electoral checks) on the power and authority of legislative bodies.[237]

By the time the delegates to the Philadelphia convention met in 1787, however, distrust and disenchantment with legislative bodies had

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235. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 207, at 3.

236. DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 115 (1980). According to Professor Lutz:

> Between January 1, 1776 and the adoption of the American Constitution in 1789 the original thirteen states, plus Vermont, wrote and adopted a total of eighteen constitutions. . . . The first eighteen constitutions can be divided into two "waves" of constitution writing. The first wave took place within a year after the writing of the Declaration of Independence. . . . [It was characterized by] the universal emasculating of the executive power. . . . The first constitution in the second wave was the 1777 constitution of New York. . . . [It] began the resurrection of the executive branch . . . .

Lutz, *supra* note 207, at 70-71.

237. Leslie Friedman Goldstein, *Popular Sovereignty, the Origins of Judicial Review, and the Revival of Unwritten Law*, 48 J. POL. 51, 58-59 (1986); *cf.* Demophilus [George Bryan?], The Genuine Principles of the Ancient Saxon, or English [,] Constitution, Philadelphia 1776, *in* 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805, at 341, 353-54 (Charles S. Hyneman and Donald S. Lutz eds., 1983) [hereinafter AMERICAN POLITICAL WRITING] (extolling the virtues of populist government, and annual electoral control over government).

become a dominant theme of American politics.[238] Indeed, a main cause for the calling of the Constitutional Convention was disenchantment with the powerful state legislatures that the Revolutionary-era state constitutions, penned only a few years earlier, had entrenched.[239] A decade of factionalism in the powerful state legislatures had prompted a reaction against them, and a "rethinking of the sovereignty of the people."[240] On this fundamental shift in attitudes toward legislative bodies, Gordon Wood writes:

> The people's will as expressed in their representative legislatures and so much trusted throughout the colonial period suddenly seemed capricious and arbitrary. It was not surprising now for good Whigs [in the 1780s] to declare that "a popular assembly not governed by fundamental laws, but under the bias of anger, malice, or a thirst for revenge, will commit more excess than an arbitrary monarch."[241]

The American people did not lose their capacity to hate and fear government that they thought oppressive. Instead, they merely redirected those emotions at different governmental institutions when the revolution and its war had ended. Wood writes:

> In the 1780's the Americans' inveterate suspicion and jealousy of political power, once concentrated almost exclusively on the Crown and its agents, was transferred to the various state legislatures. Where once the magistracy had seemed the sole source of tyranny, now the legislatures throughout the Revolutionary state constitutions had become the institutions most feared. . . . Increasingly, from the outset of the Revolution on through the next decade, the legis-

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238. RAOUL BERGER, CONGRESS V. THE SUPREME COURT 8-12 (1969).

239. GORDON S. WOOD, THE MAKING OF THE CONSTITUTION 14-20 (1987). Wood explains how state constitutions written around the time of the Declaration of Independence placed great trust in legislatures as promoters of the public good and protectors of liberties. Within a decade, however, Americans had grown disillusioned with the virtues of government by legislature. *See also* EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 52 (1934) (discussing the Convention's voting down of every motion proposing property qualifications for officeholders); 2 RECORDS, *supra* note 231, at 228 (quoting Constitutional Convention delegate John Mercer's statement: "What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States.").

240. EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 255 (1988) (arguing that the "misuse by representatives of powers" seen in the state legislatures following the Revolution caused a rethinking of popular sovereignty theory, rather than its repudiation).

241. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 405 (1969) (citing AEDANUS BURKE, AN ADDRESS TO THE FREEMEN OF THE STATE OF SOUTH CAROLINA (1783)).

> latures, although presumably embodying the people's will, were talked of in terms indistinguishable from those formerly used to describe the magistery.[242]

James Madison, a member of the Virginia legislature in the middle 1780s, was well aware of the vices of government dominated by powerful populist legislatures. A paper written by Madison, which Wood calls "the most important document dealing with American constitutionalism written between the Articles of Confederation and the federal Constitution," cataloged the problems with state legislatures.[243] Later, in arguing for the proposed federal Constitution, Madison wrote, "The founders of our republics [the states] . . . seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as if threatened by executive usurpations."[244] Gouverneur Morris, an influential delegate to the federal Constitutional Convention in Philadelphia in 1787, concurred with Madison and proclaimed that "the public liberty is in greater danger from Legislative usurpations from any other source" and that "Legislative tyranny [is] the great danger to be apprehended."[245] Hamilton too, by 1788, was pointing to the problems of government dominated by legislative bodies. He wrote in *Federalist* Number 71 that:

> The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments . . . .[246]

The shift away from legislative supremacy as the ideal institutional scheme for constituting governments rooted in popular

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242. *Id.* at 409; *see also* SHALHOPE, *supra* note 206, at 97-98 (noting the abuses and excesses in the legislative branch that led to "fear and suspicion of [their] political power").

243. WOOD, *supra* note 239, at 15.

244. THE FEDERALIST No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

245. 2 RECORDS, *supra* note 231, at 76, 551.

246. THE FEDERALIST No. 71, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also Remarks by Alexander Contee Hanson*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, *supra* note 220, at 254 (discussing relations between the government and the people); *William Grayson to James Madison*, *in* THE FEDERAL CONSTITUTION IN VIRGINIA 15-16 (Worthington C. Ford ed., 1903).

sovereignty actually began well before the delegates to the Constitutional Convention met in Philadelphia in 1787. As early as New York's state constitution of 1777, the shift to a more balanced allocation of powers between the three branches of government can be detected. Three years later the Massachusetts Constitution of 1780, the first constitution that state had ratified since well before the Declaration of Independence, furthered the shift away from legislative supremacy toward balanced government. Finally, several other states—Delaware, Georgia, New Hampshire, Pennsylvania, South Carolina, and Vermont—revised their constitutions shortly before or shortly after the Founding to reflect the new thinking in constitutional design.

Connected with the emergent and widespread distrust of legislative bodies at the time of the Founding was a growing fear of pure or populist democracy. While the founders and their contemporaries were just as enamored with popular sovereignty as American revolutionaries had been eleven years earlier, they had grown fearful of populism, majority tyranny, and democratic despotism. Reflecting this change of attitude, in *Federalist* Number 10, for example, Madison wrote:

> Pure democracy . . . can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.[247]

Likewise, Dr. Benjamin Rush in 1788 wrote of populist democracy, "A simple democracy, has been very aptly compared by Mr. Ames of Massachusetts, to a volcano that contained within its bowels the fiery materials of its own destruction."[248] By the middle of the 1780s

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247. THE FEDERALIST No. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST No. 51, at 320-21 (James Madison) (Clinton Rossiter ed., 1961) (illustrating that Madison's adherence to separation of powers resembles his advocacy of factionalism).

248. BENJAMIN RUSH TO DAVID RAMSAY, COLUMBIAN HERALD (CHARLESTON, S.C.), APRIL 19, 1788, *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra* note 228, pt. 2, at 417, 418; *see also* MELANCTON SMITH AND ALEXANDER HAMILTON DEBATE

Americans believed their highly representative state legislatures created by Revolutionary-era state constitutions were too close to pure democracy, mirrored "unfiltered" majority sentiments too closely,[249] and were too factional. Elbridge Gerry's attitude expressed at the Philadelphia convention—"the evils we experience flow from the excess of democracy"[250]—was commonplace. In short, by the late 1780s, the solution to the question of how government rooted in popular sovereignty ought to be structured from 1776 had become the central problem. Where earlier thinkers viewed majority will as right and just,[251] by the 1780s Americans began to view majority will as reflected in state legislatures as oppressive. Indeed, a main theme of *The Federalist* is a distrust of legislative bodies. On the widespread disenchantment with the state governments and their powerful legislatures, Madison wrote in *Federalist* Number 10:

> Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.[252]

Thomas Jefferson also had detected the weakness of the state governments constituted at the time of the Revolution. The mere fact that the powerful legislatures were popularly elected did not stop them from acting against the good of the people. Two of Jefferson's most famous quotes on the state legislative bodies—"[a]n elective despotism was not the government we fought for"[253] and "[o]ne hundred and seventy-three despots would surely be as oppressive as

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ROTATION OF THE SENATE, JUNE 25, 1788, *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra* note 228, pt. 2, at 803, 805 (recounting Melancton Smith's argument at the New York ratifying convention that "the impulses of the multitude are inconsistent with systematic government. The people are frequently incompetent to deliberate discussion, and subject to errors and imprudencies").

249. Madison referred to a "filtration" process whereby the small size of the national legislature under the proposed federal Constitution would tend to keep local demagogues out of Congress and admit only those of refined learning and statesmanship.

250. 1 RECORDS, *supra* note 231, at 48.

251. "A democratical despotism," wrote John Adams in 1775, for example, "is a contradiction in terms." John Adams, *Novanglus*, *in* 4 THE WORKS OF JOHN ADAMS 79 (Charles Francis Adams ed., 1851).

252. THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

253. THE FEDERALIST No. 48, at 311 (James Madison) (Clinton Rossiter ed., 1961).

one"[254]—capture the thinking that had emerged in the 1780s. In short, American thinking on the optimal institutional design of government for effectuating popular sovereignty underwent a radical transformation between 1776 and 1787. Where in 1776 powerful populist state legislatures were put forward as the best way to structure governments rooted in popular sovereignty, by 1787 the powerful populist state legislatures were considered a central culprit in a broken political system, and a key impetus toward the calling of the Constitutional Convention in Philadelphia.

(b) The Changing Agency Relationship of Courts and Legislatures

Hand in hand with the repudiation of legislative supremacy as the optimal formula for effectuating popular sovereignty, the thinking on which branches of government serve as the people's agents changed dramatically between 1776 and 1787. At the time of the Revolution, legislative bodies, particularly lower houses, were viewed as the sole agent of the people in government. The grant of authority from the popular sovereign was to the elected legislature, with other branches of government viewed as subordinate to the agent/legislature.[255] Given this Revolutionary-era idea, it quite naturally followed that the institutional design of government would allocate the bulk of government power to legislative bodies. Regarding courts, the dominant idea was the Blackstonian vision of courts as subordinate to the legislature.[256]

After eleven years of experience with legislative supremacy in state governments, however, by 1787 prevailing views rejected the idea that a legislature alone could ably serve as the people's agent. Instead, more and more, Americans viewed the government *as a whole* as the trustee of the people's sovereignty,[257] and understood each part of government, including the judiciary, to owe agency duties directly to the people, rather than through a legislative conduit. Rather than being subordinate to legislatures, both the executive and judicial components of government were increasingly viewed as coequals to or peers of legislative bodies. The Massachusetts

254. *Id.* at 311 (quoting Jefferson); *see also* Thomas Jefferson, Notes on the State of Virginia, *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 213, at 319 (containing essentially the same language).

255. *See* WOOD, *supra* note 241, at 163-73.

256. *Id.* at 301-02.

257. *Id.* at 447-48.

Constitution of 1780, for example, stated that "[a]ll power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, *whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.*"[258] In a similar vein the Massachusetts convention of 1780 argued that "as all powers of government are derived from the people, and as government is itself instituted for their benefit, *every person to whom the power is delegated should feel himself dependent on the people, and be accountable to them for his political conduct.*"[259]

Gordon Wood argues that the branch of government most empowered by the new thinking in the 1780s was the judicial branch.[260] Indeed, the institutional role of courts had undergone such transformations that by the middle of the 1780s Attorney James Varnum could convincingly deploy the emerging view that courts owed agency duties directly to the people in his brief for *Trevett v. Weeden*.[261] Wood captures the essence of Varnum's argument:

> It was the duty of the judiciary, said Varnum, to measure the laws of the legislature against the constitution and the rights of the people. Such fundamental laws were created and hence could be changed only by the people-at-large, not by the legislatures, which were no longer considered uniquely representative of the people. The judges were in a sense as much agents of the people as the legislators; neither could overleap the bounds of their appointment. The judiciary's special task was to "reject all acts of the Legislature that are contrary to the trust reposed in them by the people."[262]

Though Varnum's argument was not without controversy in the middle of the 1780s,[263] it was the sort of argument that would have seemed utterly extreme at the time of the Revolution, when legislatures were viewed favorably as the sole agents of the people in

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258. MASS. CONST. of 1780, pt. 1, Declaration of Rights, art. V, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 958 (emphasis added).

259. WOOD, *supra* note 241, at 448.

260. *Id.* at 453-56.

261. R.I. 1876. In the 1780s there was almost no case reporting as we know it today. Cases, however, were reported in newspapers and pamphlets. 2 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 943 (1953). *Trevett v. Weeden*, therefore, was not included in a case reporter until 1876. *See also* WOOD, *supra* note 241, at 459-60 (discussing Varnum's arguments).

262. *See* WOOD, *supra* note 241, at 460.

263. Goldstein, *supra* note 237, at 62-63.

government.[264] By 1786, however, Varnum's argument could carry the day, and the Rhode Island State Supreme Court could refuse to enforce a state statute and instruct lower courts to do the same.[265] Though such measures would have been an anathema only a little more than a decade earlier, it is no coincidence that the earliest experiments with judicial review "occurred in the 1780s in state supreme court cases,"[266] or that the Judiciary Act of 1789 explicitly granted the Supreme Court the power to declare state laws unconstitutional.[267] Wood, citing James Wilson, summarizes the radical evolution in American thinking on popular sovereignty that occurred between 1776 and the time of the Founding as follows:

> [A]ll government officials, including even the executive and judicial parts of the government, were agents of the people, not fundamentally different from the people's nominal representatives in the lower houses of legislatures. . . . The different parts of government were functionally but not substantively different. "The executive and judicial powers are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are so much the servants, and therefore as much the friends of the people, as those who make them." The entire government had become the limited agency of the sovereign people.
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> The pervasive Whig mistrust of power had in the years since Independence been increasingly directed . . . against the supposed representatives of the people, who now seemed to many to be often as distant and unrepresentative of the people's interests as Parliament once had been. . . . [T]he houses of representatives, now no more trusted than other parts of government, seemed to be also no more representative of the people than the other parts of government. They had lost their exclusive role of embodying the people

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264. According to Professor Graham there was "a lack of firm precedents for judicial review in the colonial period . . . followed by no less Delphic a response under the early state constitutions." George J. Graham, Jr., *The Supreme Court, in* FOUNDING PRINCIPLES OF AMERICAN GOVERNMENT 253, 264 (George J. Graham, Jr. & Scarlett G. Graham eds., 1977).

265. *Id.* at 265.

266. Goldstein, *supra* note 237, at 62. Other instances of state court uses of judicial review in the 1780s include *The New Hampshire Ten Pound Act Case*, (N.H. 1786), *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), *Rutgers v. Waddington* (N.Y. 1784), and *Holmes v. Walton* (N.J. 1780). 2 CROSSKEY, *supra* note 261, at 969-75.

267. COLLIER & COLLIER, *supra* note 216, at 204.

> in government. . . . [Under the proposed federal Constitution a]ll parts of the government were equally responsible but limited spokesmen for the people, who remained as the absolute and perpetual sovereign, distributing bits and pieces of power to their various agents.[268]

The emerging idea that courts as well as legislatures act as agents of the people is seen most clearly in the suddenly persuasive justifications for judicial review.[269] Though judicial review was not without controversy in America in the middle to late 1780s, it was increasingly seen as a legitimate method for checking legislative bodies. The main justification for judicial review, which endures to this day, was stated by Alexander Hamilton in *Federalist* Number 78:

> No legislative act . . . contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid. . . . A constitution is, in fact, and must be regarded by the judges as, a fundamental law. . . . [T]he Constitution ought to be preferred to the statute, the intention of the people to the intentions of their agents. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. . . . [W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.[270]

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268. WOOD, *supra* note 241, at 598-99 (quoting JAMES WILSON, LECTURES ON LAW, 1 THE WORKS OF JAMES WILSON 398-99 (Bird Wilson ed., 1804)); *see also* LUTZ, *supra* note 236, at 98 (discussing the role of direct popular consent in relation to the legislature and judiciary); Gordon Wood, *Democracy and The American Revolution, in* DEMOCRACY: THE UNFINISHED JOURNEY 97 (John Dunn ed., 1992).

269. Professor Goldstein points out that in the 1780s a handful of commentators had championed judicial review in public writings, and attorneys had begun to incorporate judicial review arguments into their appellate briefs. Further, by the 1790s judicial review was no longer considered controversial. Goldstein, *supra* note 237, at 64, 66.

270. THE FEDERALIST No. 78, at 467-68 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Hamilton's justification for judicial review rests on two basic premises. The first is the idea that Constitutional law is superior to statutory law because the former is the expression of the popular sovereign, while the latter is merely the expression of an agent/legislature. The second premise, which had gained a currency it did not have a decade before the Founding, is that courts owe their allegiance directly to the people, rather than to Congress. From these two premises the conclusion naturally follows: Because judges owe an agency duty directly to the people and not to Congress, when a command of Congress—a statute—conflicts with command of the popular sovereign—the Constitution—judges must follow the latter and discard the former. If we take away the second leg of Hamilton's justification for judicial review—the idea that courts owe their agency duties directly to the people—then it by no means follows that courts should follow the Constitution over statutes. If, as was the thinking in the Revolutionary period, legislative bodies are the sole agents of the popular sovereign in government, then legislative bodies and not courts ought to decide the constitutionality of laws.[271] Only a system that accepts courts as legitimate agents of the people would incorporate judicial review of unconstitutional statutes.

Not only had popular sovereignty theory evolved to the point that the courts, along with legislatures, were viewed as agents of the people; views on the *scope* of agency powers wielded by legislatures were also changing. At the time of the Declaration of Independence, legislatures were thought competent to act as the voice of the people in making and ratifying state constitutions. Professor Willi Paul Adams writes:

> [P]opular sovereignty had emerged [by 1776] as the basic principle of legitimate government. But how was this principle to be realized in practice? . . . Somehow "the people" had to be the originator of the basic law of the land. . . . At first the provincial congresses drafted and ratified constitutions in the same way they drafted and passed bills. They considered themselves to be the "full and free representation of the people". . . . Since they were already acting as legislatures, it was only natural for them to take on the new task in legislative fashion. Just as there was

271. Professor Shalhope documents the fact that in the period immediately following the Revolution "the legislatures themselves became the principal interpreters of the fundamental [constitutional] law under which they convened." SHALHOPE, *supra* note 206, at 89.

> no referendum on a new law, so there was no plebiscite on, no popular ratification of, the first of the state constitutions.[272]

The idea that legislatures were competent to speak for the people was rooted in the then-prevalent idea that legislatures were the sole legitimate agents of the people in government.[273] The rising distrust of legislative bodies in the decade following the Revolution, however, led to a narrowing of legislative powers in general, and the use of special constituent conventions of the people to ratify state constitutions in particular.[274] According to Professor Adams,

> Within a few years . . . legislation and constitution making came to be considered two entirely distinct steps in the political process, each requiring a separate representative body. The specially elected "constitutional convention" became the embodiment of the "constituent power" of the people. In addition the convention's proposals had to be submitted for final ratification to the adult free male citizenry.[275]

By the time of the Constitutional Convention in Philadelphia in the summer of 1787, the notion that legislatures' agency powers encompassed making, ratifying, and amending constitutions had died out.[276] After debating the issue the delegates to the Philadelphia

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272. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 63-64 (Rita Kimber et al. trans., 1980).

273. *See* LUTZ, *supra* note 236, at 78-79; *see also* BEITZINGER, *supra* note 207, at 175 (noting the tendency "to identify liberty with the popular legislative house").

274. LUTZ, *supra* note 236, at 78-79; *see also* MORGAN, *supra* note 240, at 258-61 (discussing the Massachusetts constituent assembly that ratified the Massachusetts Constitution of 1780, and its implications for popular sovereignty theory).

275. ADAMS, *supra* note 272, at 64; *see also* LUTZ, *supra* note 236, at 71-73 (observing that the people had allowed representatives to write a constitution that was subject to popular ratification). Most of the constitutions written in the "first wave" of state constitutions after the Declaration of Independence had no procedure for amendment. Maryland, Delaware, and Georgia, which did allow for amendment, required only some form of legislative approval. The amendment procedures of the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784, in contrast, involved ratification by the people. *Id.* at 73-74.

276. WOOD, *supra* note 241, at 306-07, 328. As Professor Shalhope writes,

> [O]nce constitutions came to be viewed as being superior to government, the manner in which they were drafted became crucial. It became apparent that if constitutions were to be made genuinely impervious to legislative tampering, they must be created by a power greater than the legislatures themselves. Gradually, but surely, the institution of the constitutional convention developed.

SHALHOPE, *supra* note 206, at 90; *see also* Goldstein, *supra* note 237, at 61-62 (making similar arguments).

convention opted for special constituent assemblies of the people rather than state legislatures for the ratification of the proposed Constitution.[277] Madison's position at the Philadelphia convention, which carried the day by a vote of nine state delegations to one, was that state legislatures were "incompetent" to ratify the federal Constitution, and that only constitutions created by the people themselves could be considered supreme to legislatively created law.[278] Article V of the federal Constitution of 1787, of course, allows for amendments where either three-fourths of the state legislatures or three-fourths of conventions of the people in the states approve a proposed amendment.[279] Congress's role in the amendment process is limited to proposing amendments to the people.[280] A similar trend in the amendment procedures for state constitutions is evident. The procedure for amending state constitutions written early in the Revolutionary era involved the consent of legislative bodies. Within a few years, however, state constitutions began to require that amendments be ratified by the people.[281]

In sum, the move away from legislative bodies as makers, ratifiers, and amenders of constitutions, the increasing persuasiveness of arguments for judicial review, and the political writings of the period, demonstrate that between the Revolution and the Founding, Americans had totally reconfigured their notions of the proper structural relationships between the principal/people and their agent/government, and between the three branches of that agent/government. While at the time of the Revolution popular sovereignty theory embraced only the legislative bodies as legitimate agents of the people in government, by the time of the Founding courts as well as legislatures were considered direct agents of the people. In Part III.B we will see how this evolution in the theory of popular sovereignty affected the theory of separation of powers, or in other words, how the idea that courts are agents of the people led to a redistribution of power between legislative and judicial branches of government during the Founding period.

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277. *See* SAUL K. PADOVER, TO SECURE THESE BLESSINGS 429-41 (1962).

278. JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 415-16 (E.H. Scott ed., 1893).

279. U.S. CONST. art. V.

280. U.S. CONST. art. V.

281. LUTZ, *supra* note 236, at 74.

3. Popular Sovereignty Theory and the Honest Agent Conception

Under the Revolutionary-era or populist version of popular sovereignty found in the state constitutions, the people appear as the principals, and legislative bodies assume the role of the sole legitimate agents of the people in government. Courts and executives occupy a place further removed from the popular sovereign, lower in "rank" or position than legislatures.[282] The proper institutional design for government rooted in popular sovereignty under the 1776-77 incarnation of the theory can be schematically modeled as below:

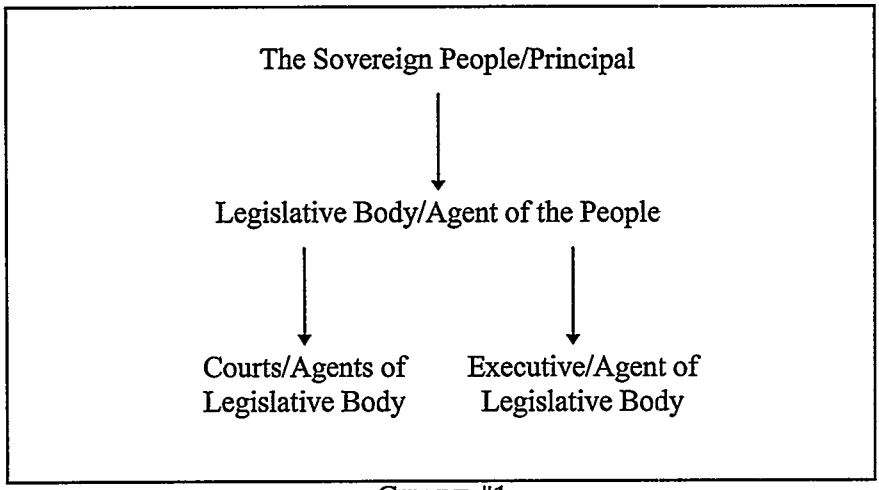

CHART #1

In the model ultimate political power and authority reside in the people, who delegate governing power and authority exclusively to a legislative body. Meanwhile, the executive and courts operate as agents of the legislative body, merely administering and adjudicating the laws spoken for the principal/people by the agent/legislature. The agency relationship between the judicial and legislative branch, in other words, derives from the primary agency relationship between the legislature and the people. The popularly elected legislative body acts as the sole legitimate agent of the people in government, and the unelected judiciary, far removed from the popular sovereign, assists the legislature in carrying out its agency duties by adjudicating cases, enforcing legislative commands, effectuating legislative will, and doing

282. *See supra* notes 255-56 and accompanying text.

what the legislative body would do if it had unlimited time and expertise in adjudicative practices. Thus, under the 1776 model of popular sovereignty theory, the judicial function stems not from the need for an agent of the people in government separate and independent from the legislative branch, but rather simply from the fact that judges possess something legislatures lack: expertise in interpreting and applying law to particular cases.

In contrast to the populist popular sovereignty theory of 1776, under the federalist form of popular sovereignty ratified into the Constitution of 1789, the sovereign people are considered the principals, but each branch of government is a direct agent of the people. Though each branch plays a distinct and separate role in the political process, they are coequals, peers, or counterparts, with no single branch holding a superior status over the others. The proper institutional design of government according to the federalist popular sovereignty theory can be schematically modeled as follows:

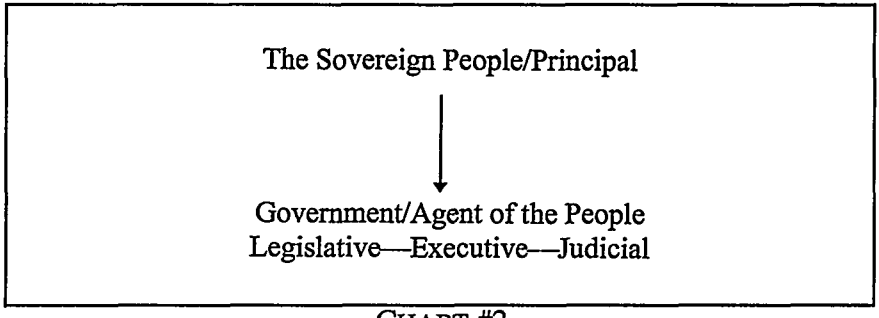

CHART #2

On this version of popular sovereignty theory, all three branches of government, rather than just the legislature, are considered legitimate agents of the people, with each branch owing agency duties *directly* to the popular sovereign.

Despite its electoral removal from the people, the judicial branch plays an institutional role that parallels that of the two electorally accountable branches—it acts as an agent of the popular sovereign, rather than as an agent of a coordinate branch of government. Why? Under the federalist popular sovereignty theory woven into the Constitution of 1789, the agency duties of the judicial branch derive from a constitutive grant from the people made during a period of constitutional politics, rather than from periodic electoral checks

during periods of normal politics.[283] As the schematic models in Charts 1 and 2 illustrate, even though the first principle of American constitutional theory in both the Revolutionary and Founding periods was popular sovereignty, the versions of popular sovereignty employed in those eras resulted in two very different institutional government structures. The popular sovereignty of 1776 can be termed *hierarchical*, with authority flowing from the people to their agent legislatures, and then from the legislatures to the subordinate executive and judiciary. The popular sovereignty theory of 1787, in contrast, can be termed institutionally or structurally *egalitarian*, with authority flowing directly from the principal/people to three peer branches of government, none of which holds a superior position over the others.

Recall the honest agent conception, under which the third branch operates as an agent of the first when interpreting statutes. The honest agent conception can be schematically modeled thus:

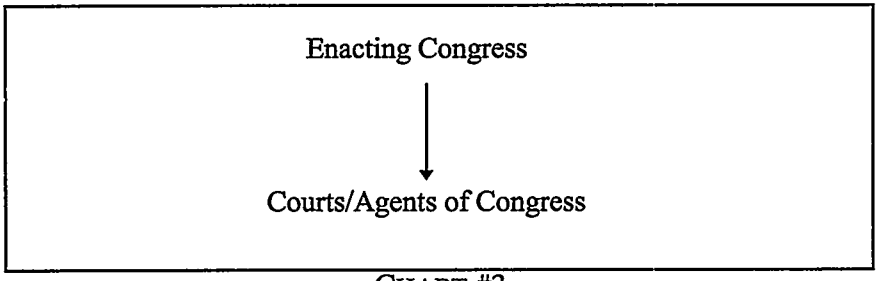

CHART #3

In the above model subordinate courts act as agents of the legislature when interpreting statutes. A judge operating under the honest agent conception essentially is concerned with one question when interpreting statutes: What did the enacting legislature tell the court to do in this situation? Judges who lean towards textualist approaches as a means of effectuating the honest agent conception would apply textualist rules in search of what the legislature "said." Judges who favor intentionalist approaches would answer the question by trying to discern the legislature's "intent" or the statute's "purpose." At

283. On the distinction between constitutional politics and normal politics, see BRUCE A. ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991); Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 461-62 (1989); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022-23 (1984).

bottom, however, both textualist and intentionalist judges are in search of the same Holy Grail—the command or will coming down from the legislative superior.

Upon comparing the model of the honest agent conception with the models of both populist and federalist popular sovereignty theory, one sees clearly that the honest agent conception is far less congruous with the latter than with the former. Indeed, the honest agent model is but a fragment of the populist popular sovereignty model, with the part representing the relationship between the principal/people and their agent/legislature chopped off. The honest agent conception meshes well with populist popular sovereignty theory, because both subordinate courts to legislatures, or in other words, both place courts beneath legislative bodies in the governmental "chain of command." The institutional structure represented by the model of federalist popular sovereignty theory, in contrast, places the courts and legislature in peer positions, with each occupying a station as an agent of the principal/people. Rather than a hierarchical relationship between a superior legislature and subordinate courts, as in the honest agent conception and the populist version of popular sovereignty theory, the federalist popular sovereignty theory locates the legislature and the courts in equivalent (but not identical) positions.

The federalist popular sovereignty theory is incompatible with the honest agent conception because the two place the judicial branch in entirely different institutional roles vis-a-vis the legislative branch. The former makes courts and the legislature peer institutions, while the latter subordinates the courts to the legislature. The populist popular sovereignty theory, in contrast, meshes well with the honest agent conception because both contemplate a similar institutional role for courts. Both, in other words, subordinate courts to the legislative bodies. The incongruity between the federalist popular sovereignty theory ratified into the Constitution of 1789 and the honest agent conception brings the normative underpinning of textual and intentional statutory interpretation rules into serious question. Simply put, a federal court that acts as a subordinate honest agent of the enacting legislature when interpreting statutes flies in the face of the federalist model of popular sovereignty that had evolved by the late 1780s and was ratified into the federal Constitution.

In order to operate in accord with the popular sovereignty theory ratified into the Constitution of 1789, when interpreting statutes federal courts must act as peers, coequals, or counterparts of Congress, instead of honest agents of Congress. Rather than acting on behalf of an institutionally superior legislature, when interpreting

statutes the federal courts must act on behalf of their true principals, the people. Rather than simply seeking to discover and apply the legislative command or will, when interpreting statutes the federal courts must see their primary role as discovering and effectuating a more public-regarding statutory scheme. In brief, when faced with an ambiguous or open-textured statute, rather than asking "what did the enacting legislature command or intend?" as is the main question posed by courts operating in accord with the honest agent conception, federal courts must ask "which of the several plausible interpretations is most public-regarding?" Immediately one can see the different spin the two competing approaches bring to bear on the interpretive process. Under the latter approach, the focus is not backward-looking, but rather is forward-looking. The goal is not reconstruction of past command or intent, but rather setting the trajectory of statutory development in public-regarding ways. The animus of interpretation is not re-creation of an event in the past (the legislative command or intent), but creation of an event in the present with the events of the past serving as parameters. Of paramount importance, however, is the fact that federal courts that ask "which plausible statutory interpretation is the most public-regarding?" act thereby as coequals or peers of Congress, and agents of the principal/people, rather than as subordinate honest agents of the first branch. Federal courts that approach statutory interpretation cases with the development of statutes along public-regarding lines foremost in their minds, in other words, act consistently with the federalist popular sovereignty theory of the Constitution, rather than with the discarded populist popular sovereignty theory of the Revolutionary period state constitutions.

Though the federalist popular sovereignty theory found in the federal Constitution is generally inconsistent with approaches to statutory interpretation rooted in the honest agent conception, it does appear at least consistent with the dialogic model of statutory interpretation espoused by proponents of dynamic statutory interpretation. Generally speaking, dynamic theories of statutory interpretation are not aimed at judicial reproduction of some unchanging legislative command or intent. To the contrary, dynamic theories are premised on the notion that statutory law is never a finished or solidified product, but instead may be judicially shaped depending on time, circumstance, changed context, or other factors. By affording courts a role in the shaping of the meaning of statutory law, dynamic interpretive theories, unlike those rooted in the honest agent conception, do not always place courts in a subordinate

institutional role in relation to legislative bodies. Instead they treat courts and legislatures as players with different but coequal or peer institutional roles in the statute creation game. For this reason dynamic theories are at least minimally compatible with the institutionally egalitarian structure of the federalist popular sovereignty theory found in the federal Constitution of 1789.

This does not, however, mean that the several dynamic theories of statutory interpretation are fully consistent with the federalist version of popular sovereignty theory. Most importantly, the various dynamic theories do not direct the federal courts to act as agents of the people by shaping law along public-regarding lines. Rather, they instruct courts to make statutes consistent with the legal landscape (Calabresi's common law method),[284] to reflect current thinking (Aleinikoff's synchronic coherence),[285] to apply statutes written in the past to today's problems (Eskridge's quasi-dynamic model),[286] or to maintain internal coherence with past political decisions (Dworkin's chain novel method).[287] In order to be consistent with the popular sovereignty theory ratified into the federal Constitution, judicial shaping of open-textured or ambiguous statutes must be aimed at *shaping statutes along public-regarding lines.* Additionally, dynamic theories often operate as limited exceptions to honest agent-style interpretation. Thus, Judge Calabresi argues that courts should exercise revisionary powers over a statute only when the statute could no longer gain majoritarian support and is out of phase with the legal landscape. In all other instances Calabresi would have courts employ traditional honest agent-style interpretive methods. Likewise, Professor Eskridge's quasi-dynamic approach counsels the use of honest agent-style interpretation in all cases except where legislative history and statutory text are indeterminate, and either the legal context or underlying assumptions surrounding the statute have changed. In those instances where dynamic theories counsel the use of traditional honest agent interpretive methods, dynamic approaches subordinate courts to legislatures, and therefore are inconsistent with the popular sovereignty theory of the federal Constitution.

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284. *See supra* part II.C.3.
285. *See supra* part II.C.4.
286. *See supra* part II.C.2.
287. *See supra* part II.C.1.

B. Separation of Powers and Statutory Interpretation

What does the important constitutional principle of separation of powers bring to bear on the issue of how the federal courts ought to approach statutory interpretation cases? Textualists and intentionalists often cite separation of powers as supporting the honest agent conception underlying their respective interpretive theories. The simple notion is that the Constitution commits power to make law to the legislative branch, to implement law to the executive branch, and to adjudicate law to the judicial branch. The honest agent conception, or more accurately textual and intentional rules of statutory interpretation, are designed at least in part to prevent the third branch from encroaching onto the statute-making territory of the first branch. As with popular sovereignty, however, the honest agent conception is less consistent with the particular brand of separation of powers theory ratified into the federal Constitution than with the separation of powers theory found in the state constitutions of the Revolutionary era. Separation of powers at the time of the Revolution meant only a *division* of government powers, with much power allocated to the legislative branch. By the time of the Founding, however, separation of powers had come to mean not only separated but also *overlapping* government powers, a *balanced* distribution of powers between three *coequal* or *peer* branches of government, and an institutional design of government explicitly incorporating *checks and balances*. In brief, the honest agent conception underlying textual and intentional statutory interpretation is consistent with the separation of powers theory widely invoked at the time of the Revolution, and incorporated into several state constitutions in 1776-77, but inconsistent with the evolved separation of powers theory of the 1780s, which was ratified onto the federal Constitution.

1. Why Separation of Powers?

When the delegates to the Constitutional Convention met in Philadelphia in the summer of 1787, popular sovereignty was in danger.[288] The populist state legislatures created by the

288. As Professor Goldstein writes, "Popular sovereignty was very much in the air in 1787, but whether it could be saved from itself was an open question." Goldstein, *supra* note 237, at 63.

constitutions ratified in 1776 and 1777 had led the new states into disarray.[289] The consensus was that those governments had proved to be poor trustees of the people's sovereignty, and that the Revolutionary experiment with popular sovereignty had been a failure.[290] The weighty question facing American constitution builders in the middle and late 1780s was how, if at all, could a government rooted in popular sovereignty be structured to insure that it would act as a good agent for the people? Hamilton signaled the weight of the issues in 1787 with his opening to *Federalist* Number 1, when he wrote the following:

> After an unequivocal experience of the inefficacy of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks of its own importance; comprehending its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.[291]

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289. Morgan writes:

> [T]he state assemblies [created by the Revolutionary period state constitutions], unchecked now by royal governors and their upper-class councils, acted in ways that alarmed many leaders of the Revolution. They passed laws in haste and repealed them in haste. They passed laws violating the treaty with Great Britain, delaying or scaling down the payment of public and private debts, issuing paper money as legal tender, refusing to pay their states' quota of national expenses, raising their own salaries and lowering those of other governing officers.

MORGAN, *supra* note 240, at 252-54.

290. *See* COLLIER & COLLIER, *supra* note 216, at 3-17. Gordon Wood argues that problems with the Articles were only half the reason the Philadelphia Convention was called. An equally important cause of dissatisfaction was the governments of the several states. WOOD, *supra* note 239, at 9-10; *see also* COLLIER & COLLIER, *supra* note 216, at 195-96 (discussing state laws that the framers found objectionable).

291. THE FEDERALIST No. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

As Hamilton's words suggest, the stakes were high in the summer of 1787 when the delegates to the Constitutional Convention met in Philadelphia. If the existing regime could not be fixed, perhaps popular sovereignty was useful as a rallying cry in revolution, but inadequate as a first principle of government. And if some better institutional scheme of governance could not be found, perhaps the people were forever condemned to be subjects of government, rather than its ultimate superiors.[292]

American constitution builders' response to the Revolutionary-era experiment with popular sovereignty was a melange of institutional devices including federalism, separation of powers, bicameralism, the enumeration of legislative, executive, and judicial powers, the executive veto, democratic electoral checks, and the amendment process. These first-order constitutional principles hold little intrinsic value. Instead their value derives from their ability to effectuate the ends of government rooted in popular sovereignty—a government both *by* the people and *for* the people. They are, in other words, part of an institutional scheme designed to minimize the agency costs inherent in the principal-agent relationship between a people and their constituted government. On this view, the electoral check, to provide an example, is not a device aimed at legitimizing government, but rather a way to ensure that government does not act illegitimately. The agent/government is not legitimized by periodic elections, but rather first by the constitutive act of the people, which transfers power and authority to an agent/government, and second by the agent/government's continuing good trusteeship of that power and authority. Electoral checks play a role in insuring that the agent/government acts as a good trustee of the principal/people's sovereign power, but they do not, at least in times of normal politics, legitimize the acts the agent/government takes.

Separation of powers serves a similar derivative purpose. The founders did not propose a national government of separate *but overlapping* powers for its own sake, but rather in an attempt to offer the people a government that would act in public-regarding ways, or at least do so with greater frequency than had the state governments created at the time of the Revolution. Separate but overlapping powers, American constitution builders had come to realize by the middle to late 1780s, are an important ingredient in the mix of

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292. *See* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 207, at 15-16.

institutional devices aimed at creating a government that will act as a good trustee of the people's sovereign power. The institutional device of separation of powers holds no intrinsic value. Rather, its value is derived from its ability to check the agent/government, and insure that the interests and rights of the principal/people remain intact. In other words, the "ultimate purpose [of the Constitution] was not democratic government—which at the time meant representative majoritarianism—but a government so structured that it would invariably promote the public interest."[293] In short, then, the answer to the question "why separation of powers?" is: "To effectuate popular sovereignty."[294]

2. The Shift in Separation of Powers Between the Revolution and the Founding

While at both the time of the Revolution and the time of the Founding separation of powers was considered an important institutional device for effectuating government rooted in popular sovereignty, the form that separation of powers took in the two eras differed substantially. The state constitutions of the Revolutionary period were characterized by a simple division of powers, with much of the power allocated to state legislatures and very little to executive and judicial branches. In reaction to the powerful royal governors the colonies experienced before the Declaration of Independence, state constitutions of the Revolutionary era embraced legislative supremacy.[295] By the time of the federal Constitutional Convention in Philadelphia eleven years later, however, thinking on separation of powers had shifted dramatically. The emphasis in 1787 was on separated but also overlapping powers. While real checks and balances had been scuttled in 1776, by 1787 they came to be seen as a necessary ingredient in good government.[296] Further, in contrast to the legislative supremacy of the Revolutionary period, by the time of the Founding separation of powers theory had been transformed to incorporate the idea that the three branches of government should operate as balanced coequals.[297] While the three branches of government were still seen as performing distinctly different functions, by the late 1780s they came to be seen as peers of equal status.

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293. EDELMAN, *supra* note 230, at 18.
294. *See* PAUL K. CONKIN, SELF-EVIDENT TRUTHS ix (1974).
295. *See supra* notes 235-37, *infra* notes 325-28, and accompanying text.
296. *See infra* notes 337-62 and accompanying text.
297. *See infra* notes 363-65 and accompanying text.

(a) Separation of Powers During the Revolutionary Period

In the period leading up to and immediately following the Declaration of Independence, separation of powers was axiomatic in American constitutional theory. All of the state constitutions written in the years immediately following the Declaration of Independence[298] employed separation of powers to one degree or another.[299] The Virginia Constitution of June 1776, for example, stated, "The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall the same person exercise the powers of more than one of them at the same time."[300] Professor Vile calls this "the clearest most precise statement of the doctrine [of separation of powers] which had at the time appeared anywhere, in the works of political theorists, or the pronouncements of statesmen."[301] Three other states—Georgia, Maryland, and North Carolina—explicitly mentioned separation of powers in their Revolutionary-period state constitutions.[302] Those state constitutions that did not explicitly mention separation of powers nonetheless invoked it.[303] Pennsylvania's constitution of 1776, for example, created an executive with a twelve member council, a legislature, and a judiciary.[304] Separation of powers was often cited during the Revolutionary period as vital to good government.[305] The instructions of the citizens of Boston to their representatives in 1776 read:

> It is essential to Liberty that the legislative, judicial, and executive Powers of government be, as nearly as possible,

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298. Eight states wrote constitutions in 1776. Those states were, in chronological order of their ratifications, New Hampshire, South Carolina, New Jersey, Virginia, Delaware, Pennsylvania, Maryland, and North Carolina. In 1777 three states, Georgia, New York, and Vermont, wrote new constitutions. Massachusetts did not ratify its post-Declaration of Independence constitution until 1780. Rather than write new constitutions, Connecticut and Rhode Island simply stripped their existing charters from 1662 and 1663, respectively, of references to the British Crown. For a complete discussion of the ratification of the post-Declaration of Independence state constitutions, see ADAMS, *supra* note 272, at 63-98, DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 96-110 (1988), and LUTZ, *supra* note 236, at 23-51.

299. *See* ADAMS, *supra* note 272, at 266-71.

300. M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 119 (1967).

301. *Id.* at 290.

302. WOOD, *supra* note 241, at 150.

303. *See* ADAMS, *supra* note 272, at 266-71.

304. *See id.* at 268.

305. *See, e.g.*, JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 213, at 108-09.

> independent and separate from each other, for where they are united in the same Persons, there will be wanting that natural Check, which is the principal Security against the enacting of arbitrary Laws, and wanton Exercise of Power in the Execution of them.[306]

Though separation of powers was incorporated into all of the state constitutions of the Revolutionary era, and universally cited by political thinkers of the day, some commentators have argued that the state governments in the period following the Revolution did not in fact practice the doctrine. Professor Corwin, for example, argued that even though "the majority of the Revolutionary constitutions recorded recognition of the principle of the separation of powers . . . the recognition was verbal merely."[307] Professor Wood echoed Corwin's thesis, writing, "what more than anything else makes the use of Montesquieu's maxim in 1776 perplexing is the great discrepancy between the affirmations of the need to separate the several government departments and the actual political practice the state governments followed."[308] Professor Vile, however, correctly counters that the separation of powers of the state constitutions immediately following the Declaration of Independence was real. Though differing in degree, the state constitutions of the Revolutionary period clearly separated government into distinct branches with distinct powers and responsibilities.[309] Vile locates the source of confusion among historians in the "failure to distinguish between the separation of powers on the one hand, and checks and balances on the other."[310]

While the state constitutions created in the period immediately following the Declaration of Independence incorporated separation

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306. *Id.* at 319.

307. Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514 (1924-25).

308. WOOD, *supra* note 241, at 153.

309. Professor Vile writes, "It is true . . . that in their practical operation the early State governments deviated considerably from the spirit of the doctrine [of separation of powers]; but in Virginia, and many other states, it was the separation of powers that formed the basis of *the institutional structure of the government.*" VILE, *supra* note 300, at 119 (emphasis added); *see also id.* at 134-36, 143 (discussing the institutional nature of separation of powers in the early state constitutions).

310. *Id.* at 136. As Professor Beitzinger points out, despite the presence of separation of powers in the early state constitutions, there were "no viable checks on legislative majorities." BEITZINGER, *supra* note 207, at 177; *see also id.* at 179-80 (describing the criticisms of Jefferson, Hamilton, and Madison of a lack of a check upon legislative power).

of powers, they actively avoided checks and balances.[311] The Pennsylvania Constitution of 1776, with its unicameral legislature and Supreme Executive Council, represents an "extreme rejection of checks and balances, allied with separation of powers."[312] Although it created three distinct branches, the Pennsylvania Constitution of 1776 provided few devices for one branch to have partial agency in another. As explained eight years after its ratification by a correspondent in the *Pennsylvania Gazette*, the government under the Pennsylvania Constitution of 1776 distributed authority to three distinct branches: the legislative, to which " 'belongs the right to make and alter the general rules of the society; that is to say the laws,' " the executive, which is " 'entrusted the execution of these general rules,' " and the judicial, which is charged with " 'the interpretation and application of the laws to controverted cases.' "[313] Along with Pennsylvania, the Vermont Constitution of 1777 also represents an extreme example of the simultaneous embrace of separation of powers and rejection of checks and balances.[314] Though less extreme than Pennsylvania and Vermont, the other American states exhibited "strong assertions of the doctrine of the separation of powers and an antipathy toward checks and balances."[315] In short, by 1776, separation of powers was "the only coherent principle of constitutional government upon which to build a constitution," but "the American system of checks and balances had yet to be formulated."[316]

Why did American constitution builders of the Revolutionary period reject checks and balances? In 1776 checks and balances seemed too similar to the theory of mixed or balanced government employed in England. Under the ancient theory of mixed or balanced government, the different "estates" of society—royals, aristocrats, and commons—and their parallel forms of government—monarchy, aristocracy, and democracy—were instilled in different parts of

311. Professor Vile writes, "In many respects [the state constitutions] differed considerably . . . but they all adhered to the doctrine of separation of powers, and they all rejected, to a greater or lesser degree, the concept of checks and balances." VILE, *supra* note 300, at 133.

312. *Id.* at 138.

313. *Id.* at 139 (quoting PA. GAZETTE, Apr. 28, 1784). One should note that under the Pennsylvania Constitution of 1776 the judiciary was in fact a branch of the executive. *Id.* at 138-39.

314. *Id.* at 140.

315. *Id.* at 141.

316. *Id.*

government.[317] Royals were represented by the Monarch, aristocrats by the House of Lords, and commoners in the House of Commons.[318] A government of pure monarchy, aristocracy, or democracy was thought to be unstable, with monarchy degenerating into tyranny, democracy degenerating into anarchy, and aristocracy degenerating into oligarchy.[319] A government that properly mixed or balanced the three, however, would remain stable and maintain the positive attributes of each.[320] The American Revolution, however, embraced a populist form of popular sovereignty—the idea that all political power flows directly from the principal/people to their constituted agent/government, *and that highly representative elected legislative bodies are the sole legitimate agents of the people in government.* As such, popular sovereignty in the Revolutionary period was "deeply opposed to the ideas of the balanced constitution, in which important elements were independent of popular power."[321] Thus, the anonymously penned pamphlet from 1776 entitled *The People the Best Governors* argued

> The just power of a free people respects first the making and the executing of laws. The liberties of a people are chiefly, I may say entirely guarded, by having the controul of these branches in their own hands.
>
> . . . .
>
> But it seems there is another objection started by some: That the common people are not under so good advantages to choose judges, sheriffs, and other executive officers as their representatives are. This is a mere delusion . . . . For they say, that the people have wisdom and knowledge enough to appoint proper persons through a state to make laws, but not to execute them. . . . [T]he objection falls: *The more simple, and the more immediately dependent (caeteris paribus) the authority is upon the people the better, because it must be granted that they themselves are the best guardians of their own liberties.*[322]

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317. *See* WOOD, *supra* note 241, at 197-98.
318. *Id.*
319. *Id.*
320. *Id.*
321. VILE, *supra* note 300, at 137.
322. *The People the Best Governors: Or a Plan of Government Founded on the Just Principles of Natural Freedom* (1776) [hereinafter *The People the Best Governors*], *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 237, at 390, 391-93 (emphasis added).

For the anonymous pamphleteer, the more government power directly connected to the people the better. Such an absolute view leaves little room for the incorporation of different social orders into a "balanced" governmental structure. In a similar vein, Samuel Williams, describing the underlying principle of the Vermont Constitution of 1777, wrote that "the security of the people is derived not from the nice ideal application of checks, ballances, and mechanical powers, among the different parts of the government . . . but from responsibility of each part of the government, upon the people."[323] In short, the rejection of checks and balances in the period immediately following the Declaration of Independence went part and parcel with the Revolutionary-era form of popular sovereignty, which rejected monarchy and aristocracy and the theory of mixed or balanced government that accompanied them.[324]

The popular sovereignty theory of the Revolutionary period also had implications for the distribution of powers under the state constitutions written in the period immediately following the Declaration of Independence. The colonial governors, who "had used their power to influence and control the other parts of the constitution, particularly the representatives of the people in the legislature,"[325] had been problematic for the colonists. Colonial governors appointed by the crown wielded substantial governing powers, including the power to prorogue and dissolve legislative bodies. And where official executive powers ended, colonial governors "frequently resorted to guile, corrupting influential legislators by offering them judgeships, government contracts, and other forms of patronage."[326] Often they manipulated colonial legislative assemblies by "attempt[ing] to establish electoral districts and apportion representation, . . . by appointing [legislators] to executive or judicial posts, or by offering them opportunities for profits through the dispensing of government contracts and public money."[327] In a reaction against their negative experience with powerful executives under the British colonial system, American

323. SAMUEL WILLIAMS, THE NATURAL HISTORY OF VERMONT 343 (1794), *quoted in* VILE, *supra* note 300, at 140-41.

324. Gordon S. Wood, *Democracy and the American Revolution, in* DEMOCRACY: THE UNFINISHED JOURNEY 508 BC TO AD 1993, at 94-95 (John Dunn ed., 1992); *see also* SHALHOPE, *supra* note 206, at 46 (arguing that in the Revolutionary period the rejection of aristocracy and monarchy by Americans was universal).

325. WOOD, *supra* note 241, at 156-57.

326. COLLIER & COLLIER, *supra* note 216, at 206.

327. WOOD, *supra* note 241, at 157.

constitution builders of 1776 and 1777 located the bulk of power in legislative bodies, at the expense of both courts and executives.[328] As Gordon Wood writes, "When Americans in 1776 spoke of keeping the several parts of the government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation."[329] Wood summarizes the Revolutionary-era state constitutions as follows:

> The state constitutions of 1776 explicitly granted the legislatures . . . functions that in the English constitutional tradition could in no way be justified as anything but executive, such as the proroguing and adjourning of the assembly, the declaring of war and peace, the conduct of foreign relations, and in several cases the exclusive right of pardon. In the judicial area the constitutions . . . [led] to a heightened involvement of the legislatures in controlling the courts and in deciding the personal affairs of their constituents in private law judgments.[330]

Eight of the state constitutions written immediately following the Declaration of Independence provided that the legislature would

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328. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 207, at 3; COLLIER & COLLIER, *supra* note 216, at 207-08. According to Shalhope, "in practice Americans employed the concept [of separation of powers] only to protect the legislative and judicial branches from incursions by the executive. More precisely, they lodged almost all power—executive, legislative and judicial—in the legislature, the true embodiment of the people in the government." SHALHOPE, *supra* note 206, at 88. The new Revolutionary-period assemblies, observes Morgan,

> drafted constitutions that provided for an executive, for they grudgingly recognized that they needed an executive of some kind. But they took care to make him their own creature, giving him no veto power or any other powers that might inhibit their own. The new governments would be run by representatives . . . who knew their places as agents of the people who chose them.

MORGAN, *supra* note 240, at 245. Wood agrees: "[T]o the Americans in 1776 their legislatures represented more than the supreme lawmaking authority in their new states. They were as well the heirs to most of the prerogative powers taken away from the governors by the Revolution." WOOD, *supra* note 241, at 162-63.

329. WOOD, *supra* note 241, at 157.

330. *Id.* at 155-56. Along similar lines Professor Shalhope writes:

> The first essential step to protect the people was to remove all prerogative powers from their governors. Pennsylvania went so far as to eliminate the position altogether, and every other state stripped the governor's position of all aspects of an independent magistracy. Most instituted annual elections for their executive and limited the number of years one man could serve. No governors were allowed to share in the lawmaking authority, and none had the exclusive power of appointing judicial and executive positions. American governors came to be viewed solely as repositories of the executive functions of government.

SHALHOPE, *supra* note 206, at 87-88.

choose the executive.[331] Many of the constitutions afforded executives only a one-year term.[332] Pennsylvania went so far as to eliminate the unitary executive altogether, and instead created an executive counsel of twelve members chosen by popular election.[333] In Virginia and many other states judges were selected by the legislature, and served at their pleasure.[334] Further, once the state constitutions of 1776 and 1777 were in place, "the State legislatures soon meddled in every type of government business, including that normally reserved to the judiciary."[335]

While the embrace of legislative supremacy in the state constitutions of 1776 and 1777 was a reaction against powerful colonial executives, it was also a function of the era's widely held assumptions regarding legislative assemblies. At the time of the Revolution, Americans viewed legislatures that mirrored the people as the very definition of good government. According to Wood,

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331. *See* DEL. CONST. of 1776, art. VII, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 273, 274; GA. CONST. of 1777, art. II, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 377, 378; MD. CONST. of 1776, art. XXV, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 817, 824; N.J. CONST. of 1776, art. VII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1310, 1312; N.C. CONST. of 1776, art. XV, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1409, 1412; PA. CONST. of 1776, § 19, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1540, 1544-45; S.C. CONST. of 1776, art. III, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1615, 1617; VA. CONST. of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1910, 1910; *see also* CONSTITUTIONS, *supra* note 214 (reprinting the above constitutions); SOURCES, *supra* note 214 (same).

332. *See* GA. CONST. of 1777, art. II, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 377, 378; MASS. CONST. of 1780, pt. 2, ch. II, § I, art. II, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 956, 964; N.H. CONST. of 1784, pt. II, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1280, 1283, 1287; N.J. CONST. of 1776, art. VII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1310, 1312; N.C. CONST. of 1776, art. XV, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1409, 1412; PA. CONST. of 1776, § 19, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1540, 1544-45; VT. CONST. of 1777, ch. II, § XVII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1857, 1860, 1862; VA. CONST. of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1910, 1910; BEITZINGER, *supra* note 207, at 176; *see also* CONSTITUTIONS, *supra* note 214 (reprinting the above constitutions); SOURCES, *supra* note 214 (same).

333. *See* PA. CONST. of 1776, § 19, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1540, 1544; CONKIN, *supra* note 294, at 1544; Matthew J. Herrington, *Popular Sovereignty in Pennsylvania*, 67 TEMPLE L. REV. 575, 588 (1994).

334. *See, e.g.*, VA. CONST. of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1910, 1911; *see also* CONKIN, *supra* note 294, at 1911 (discussing the subject).

335. VILE, *supra* note 300, at 143 (citing Corwin, *supra* note 307, at 514-15).

> In 1776 the Revolutionaries had placed great confidence in the ability of the state legislatures to promote the public good and protect the people's liberties. In their Revolutionary state constitutions written in 1776-77 Americans had greatly increased the size of the state legislatures, had made them more representative of the people than the colonial assemblies had been, and had granted enormous power to them.[336]

(b) Separation of Powers at the Time of the Founding

The state constitutions of 1776 and 1777 reflected two main, widely held, Revolutionary-era themes. First, while they embraced separation of powers, they avoided checks and balances.[337] Second, and related to the populist form of popular sovereignty in vogue at the time, the Revolutionary-era state constitutions reflected the belief that legislative supremacy was necessary for good government. Within eleven years, however, the thinking of Americans had radically changed. Rather than rejecting checks and balances, Americans came to see overlapping powers as *central* to controlling their agent/government; rather than embracing legislative supremacy, they came to believe that governmental power ought to be evenly dispersed between three coequal or peer branches. By the latter half of the 1780s James Winthrop's view that "[i]t is now generally understood, that it is for the security of the people, that the powers of the government should be lodged in different branches" was most common.[338] Likewise, in contrast to the thinking of 1776, Madison argued in 1788 that "it is evident that each department should have a will of its own."[339]

The shift in separation of powers theory between the Revolution and the Founding was a direct result of the problems that Americans experienced with powerful, unchecked, populist legislatures created by the Revolutionary-era state constitutions.[340] Having embraced

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336. WOOD, *supra* note 239, at 14-15.

337. *See supra* notes 311-24 and accompanying text.

338. *"Agrippa" [James Winthrop] XVII, Amend the Articles of Confederation or Amend the Constitution? Fourteen Conditions for Accepting the Constitution*, MASS. GAZETTE, Feb. 5, 1788, *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra* note 228, pt. 2, at 155, 156.

339. THE FEDERALIST No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961); *see also* Simeon Baldwin, Oration at New Haven (1788), *reprinted in* THE DEBATE ON THE CONSTITUTION, *supra* note 228, pt. 2, at 514, 521-22 (explaining the logistics and the benefits of separation of powers).

340. *See supra* notes 239-54 and accompanying text.

legislative supremacy and a separation of powers theory "almost unalloyed with any checks or balances,"[341] Americans soon came to see that powerful legislatures could be as problematic as the powerful executives had been in the colonial days. Wood writes, "In the years after 1776 the state legislatures did not live up to the Revolutionaries' initial expectations. . . . [F]actional interests were now demanding and getting protection and satisfaction from state legislatures that were elected annually . . . by the broadest electorates in the world."[342] Legislatures once revered as the people's agents and as the protectors of public welfare were increasingly viewed as the problem rather than the solution. In 1784, for example, James Iredell, then Attorney General of North Carolina, called the products of the state's legislature " 'the vilest collection of trash ever formed by a legislative body.' "[343] Henry Knox, in advising Rufus King, a delegate to the federal Constitutional Convention, wrote "The vile State governments are the sources of pollution, which will contaminate the American name for ages. . . . Smite them, smite them in the name of God and the people."[344] In both Vermont and Pennsylvania the Councils of Censors charged their respective state legislatures with encroachment upon the executive and judicial functions, including hearing private cases and overturning court judgments.[345] The Pennsylvania Council of Censors wrote, "The assumption of the judicial and executive, into the hands of the legislative branch, doth as certainly produce instances of bad government as any other unwarrantable accumulation of authority."[346] And Vermont's Council charged the state legislature with "becoming a court of chancery in all cases over £4000, interfering in causes between parties, reversing court judgments, staying executions after judgments, and even prohibiting court actions in matters pertaining to land titles or private contracts involving bonds or debts, consequently stopping nine-tenths of all causes in the state."[347] Against this backdrop, in arguing for the proposed Constitution in 1788, Hamilton rhetorically asked, "To what purpose separate the executive or the judiciary from the legislative, if both the

341. VILE, *supra* note 300, at 144.
342. WOOD, *supra* note 239, at 15.
343. WOOD, *supra* note 241, at 406.
344. WOOD, *supra* note 239, at 19.
345. WOOD, *supra* note 241, at 407-08.
346. *Id.* at 408.
347. *Id.* at 407.

executive and the judiciary are so constituted as to be at the absolute devotion of the legislative?"[348]

While in 1776 Americans reacted against powerful executives in the Colonial period, by the 1780s Americans began to react against powerful state legislatures created by the Revolutionary-era constitutions. Some argued that legislatures ought to be made even more populist and reflective of the people.[349] Even as late as the 1780s the idea lingered that American society possessed a fundamental unity of interests. The tide of the times, however, was against such sentiments. The more common theme was a recognition of factions in American society, which populist governments dominated by legislative bodies only magnified.[350]

The changing American attitudes towards powerful populist legislatures inevitably brought changes in constitutional theory. Indeed,

> the ink on the Revolutionary constitutions of 1776 was scarcely dry before defects were appearing and reforms were being proposed. Within even a few months some of those states which had delayed their constitution-making were beginning to entertain doubts about the capacity of their people to maintain extremely popular governments.[351]

New York's constitution of 1777, which was less populist than the other state constitutions of the Revolutionary period, foreshadowed what would become the mainstream constitutional theory a decade later.[352] Less enamored with democratic radicalism than other states at the time of the Revolution, New York's constitution makers in 1777 were "[t]orn in two directions—between the inherited dread of magisterial despotism and a fear of popular disorder."[353] As a result, New York's 1777 constitution created a stronger senate than did other state constitutions, and a governor elected by the people for a three-year term, rather than by the legislature for a one-year term.

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348. THE FEDERALIST No. 71, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

349. WOOD, *supra* note 241, at 409-10.

350. *Id.*

351. *Id.* at 431.

352. Professor Lutz argues that the state constitutions came in two "waves." The first wave "took place within a year after the writing of the Declaration of Independence," while "[t]he first constitution in the second wave was the New York Constitution of 1777." LUTZ, *supra* note 236, at 44-45. The constitutions of the first wave exhibit the political and constitutional theory of the Revolution, while those at the beginning of the second wave tend toward the political and constitutional theory that would evolve in the 1780s.

353. WOOD, *supra* note 241, at 433.

Three years later, in 1780, Massachusetts passed its first constitution since the Revolution's beginning. Even more so than New York's, the new Massachusetts Constitution moved toward a more equal balance between the three branches of government than had been common in earlier state constitutions. The popularly elected executive under the Massachusetts document held the veto power, and thus was more powerful than executives of other states at the time.[354] The Massachusetts Constitution of 1780 represents a fundamental shift in American constitutional theory,[355] which later manifested itself in the rewriting of several state Revolutionary-era constitutions. In 1784, New Hampshire, for example, rewrote its Revolutionary constitution to enhance the power of its executive at the expense of the legislature.[356] The period between 1784 and 1792 saw a total of five other states—Delaware, Georgia, Pennsylvania, South Carolina, and Vermont—amend their constitutions along similar lines.[357]

In short, where legislative supremacy was a main theme of the 1776-77 state constitutions,[358] by the middle of the 1780s legislative supremacy was dead. So too was the "unalloyed" version of separation of powers.[359] Having experienced the operation of governments with few checks and balances, American constitution builders began to see the virtues of separate but overlapping powers. Whereas checks and balances previously had been seen as too close

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354. *Id.* at 434.

355. *See* SHALHOPE, *supra* note 206, at 98-99 (arguing that the Massachusetts Constitution of 1780 was a model for reforming the perceived problems with the legislature that dominated Revolutionary period state constitutions).

356. *See* N.H. CONST. of 1784, pt. II, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1280, 1283, 1287-96.

357. *See* DEL. CONST. of 1792, art. III, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 278, 281-83; GA. CONST. of 1789, art. II, §§ 5-10, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 384, 385-86; PA. CONST. of 1790, art. II, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1548, 1550-51; S.C. CONST. of 1790, art. II, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1628, 1631; VT. CONST. of 1786, ch. II, § XI, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1866, 1869, 1871; *see also* CONSTITUTIONS, *supra* note 214 (reprinting the above constitutions); SOURCES, *supra* note 214 (same).

358. Professor Vile argues that "[u]nrestrained legislative supremacy was clearly not intended" by those who framed Revolutionary constitutions. VILE, *supra* note 300, at 144. While this may be true, it is also true that legislative supremacy was considered important to good government. Certainly the state constitutions of the Revolutionary period did not create government solely by legislatures, but the centrality of legislative power to the early constitutions is unmistakable. *See supra* text accompanying notes 330-35. By 1787 this centrality would vanish. *See supra* text accompanying notes 337-57.

359. VILE, *supra* note 300, at 153-54.

to the mixed or balanced system employed in England, by the middle 1780s checks and balances was seen as vital to good government rooted in popular sovereignty. Again, the New York Constitution of 1777 foreshadowed the constitutional theory that would emerge full force in the 1780s. Along with increasing the power of the executive at the expense of the legislature, the New York Constitution "showed a definite movement away from the extreme position of the earlier State constitutions towards some recognition of the need for checks and balances."[360] The Massachusetts Constitution of 1780 again followed the lead of New York, and fully embraced "the new philosophy of a system of separated powers which *depends upon* checks and balances for its effective operation . . . ."[361]

By the time of the Philadelphia convention in the summer of 1787, then, separation of powers theory had clearly undergone extreme transformations. In 1776, citizens revered populist legislatures reflective of the electorate and saw legislative supremacy as vital to good government. Separation of powers meant protecting the legislature from executive encroachments, and the theory of checks and balances, in the popular view, robbed the people of their power. In contrast, by 1787 populist legislatures were feared, legislative supremacy was repudiated, the need to create a balance of power between the three branches was acknowledged, and the necessity of overlapping powers in any system with divided powers was recognized. By the time Madison penned his contributions to *The Federalist* in 1787 he could persuasively argue that the "oracle" Montesquieu's separation of powers theory "did not mean that these departments [legislative, executive, judicial] ought to have no *partial agency* in, or no *control* over, the acts of each other,"[362] and that

360. *Id.* at 148.

361. *Id.*

362. THE FEDERALIST No. 47, at 301-02 (James Madison) (Clinton Rossiter ed., 1961). In *Federalist* Number 47 Madison also cites the overlapping powers that operated in then existing state constitutions. The first three constitutions he discusses—those of New Hampshire, Massachusetts, and New York—embraced overlapping powers more than other state constitutions, and thus reflect the emerging constitutional theory of the 1780s. *See* MASS. CONST. of 1780, pt. 2, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 956, 960-69; N.H. CONST. of 1784, pt. II, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1280, 1283-90; N.Y. CONST. of 1777, arts. XVII-XXXIV, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1328, 1335-37; *see also* CONSTITUTIONS, *supra* note 214 (reprinting the above constitutions); SOURCES, *supra* note 214 (same). To the extent that the other state constitutions he discusses—those of New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia—employ overlapping powers, they do so by giving the legislative branch substantial control over executive and judicial branches. *See* DEL.

"unless these departments [legislative, executive, and judicial] be so far connected and blended as to give to each a constitutional control over the others . . . a free government, can never in practice be duly maintained."[363] Because mere "parchment barriers" had proved insufficient, under the separation of powers theory that emerged in the 1780s the powers of each branch ought to be "connected and blended as to give each a constitutional control over the others."[364] Professor Vile summarizes the shift in constitutional thinking on separation of powers and checks and balances as follows:

> [I]n revolutionary America there were those who adhered to the pure doctrine of the separation of powers, accepting no compromises with the old constitutional theory of checks and balances. . . . As the Revolution progressed, however, the extreme view of the pure separation of powers found fewer adherents, and by the time of the Federal Constitutional Convention in Philadelphia some form of a constitution of checks and balances was inevitable. . . . [T]he idea of checks and balances, rejected at the height of revolutionary fervour, was considered an essential constitutional weapon to keep all branches of government, and especially the legislature, within bounds. . . . The two doctrines, drawn from different sources, and as a result of the very conflict with each other, were now to become interdependent, combined into a single, essentially American doctrine, which still provides the framework of political life in the United States.[365]

CONST. of 1776, arts. 4-10, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 273, 274-75; GA. CONST. of 1777, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 377; MD. CONST. of 1776, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 817; N.J. CONST. of 1776, arts. I-XII, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1310, 1311-12; N.C. CONST. of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1409; PA. CONST. of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1540; S.C. CONST. of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1615; S.C. CONST. of 1778, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1620; VA. CONST. of 1776, *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 214, at 1910; *see also* CONSTITUTIONS, *supra* note 214 (reprinting the above constitutions); SOURCES, *supra* note 214 (same). Of this latter group of states, only South Carolina had amended its Revolutionary-era constitution before Madison penned *Federalist* Number 47. Thus, these documents primarily reflect the Revolutionary-era constitutional theory of legislative supremacy and a rejection of mixed or balanced government.

363. THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

364. *Id.*

365. VILE, *supra* note 300, at 153-54.

Changing ideas about separation of powers and checks and balances were connected to changing ideas on popular sovereignty and on the role of legislatures as agents of the people. As argued above, popular sovereignty theory evolved between 1776 and 1787.[366] During the Revolution citizens viewed legislative bodies, especially lower houses, as the sole agents and representatives of the people in government. By 1787, however, Americans realized that, in practice, powerful populist legislatures had proved poor agents of the people. They began to see all organs of their governments—executive, upper legislative senates, and judiciary, as well as the lower houses—as their agents. Since separation of powers was viewed as a means toward the end of popular sovereignty—a government both *by* and *for* the people—it should come as little surprise that it too was transformed.[367] In 1776 the separation of powers theory's primary use was to empower the legislative branches, and in particular lower houses, at the expense of executives.[368] The public viewed legislative supremacy as the correct formula for creating agent/governments that worked for the good of the principal/people. By 1787, however, citizens were using separation of powers theory to argue *against* legislative supremacy, and in favor of a system of balanced government where each branch would have "partial agency" in the others. In the words of Professor Shalhope, "Once all branches of the government—executive, judicial, and legislative—were considered as separate and equal servants of the people, it made perfect sense that no single one should wield more power than any other."[369]

3. The Changing Institutional Role of Courts Between 1776 and 1787

How did the transformation of separation of powers theory affect the institutional role of courts in the Revolutionary and Founding

366. *See supra* part III.A.2.

367. Wood writes:

> The assumption behind this remarkable elaboration and diffusion of the idea of separation of powers was that all governmental power, whether in the hands of governors, judges, senators, or representatives, was essentially indistinguishable; that is, power in the hands of the people's "immediate representatives" in the lower houses of the legislatures was basically no different, no less dangerous, than power in the hands of governors, senators, and judges.

WOOD, *supra* note 241, at 453.

368. *Id.* at 449.

369. SHALHOPE, *supra* note 206, at 99.

periods? Under the separation of powers theory prevalent in the Revolutionary era the courts were thought less central to government than we are accustomed to today. Jefferson's opinion in 1776, which captures the thinking of the day, was that the judge ought to be "a mere machine," mechanically implementing the legislative will.[370] Accordingly, the state constitutions of the Revolutionary era mainly rendered the courts subordinate to, and dependent upon, legislative bodies. Further, since the legislatures, but not the courts, were thought the agents of the people, state courts of the Revolutionary era were generally thought not to have the power of judicial review.[371] Some political tracts of the Revolutionary period even went so far as to argue that judges ought to be popularly elected.[372] On another front, many around the time of the Revolution pushed for legislatively enacted codifications of judicially fashioned common law. The aim was both to weed out what was perceived as unjust law, and to locate law-making authority in popularly elected legislatures, rather than unelected courts which could exercise substantial equitable discretion when adjudicating common law principles.[373] In the radically democratic Revolutionary period Americans were willing to trust their legislative bodies to weed out unjust laws when making codifications more than they were willing to trust unelected judges to adjudicate with equity.[374] Thus, in 1776 the anonymous writer of *The People The Best Governors* argued that when courts adhere not to the letter of the law, but instead "put such a construction on matters, as they think most agreeable to the spirit and reason of the law," judges "assume what is in fact the prerogative of the legislature, for those, that made the laws ought to give them a meaning, when they are doubtful."[375] As Professor Lutz writes:

> [T]he early state constitutions placed the courts under the only other power available—the legislature. With the exceptions of Maryland, which still permitted judges to be appointed by the governor with the advice of his council,

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370. WOOD, *supra* note 241, at 161.

371. ADAMS, *supra* note 272, at 269-70.

372. *See, e.g.*, *The People the Best Governors*, *supra* note 322, *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 237, at 398 ("7Thly, that the freemen vote annually, in their town meetings respectively, for the judges of the superior court, at large through the government.").

373. WOOD, *supra* note 241, at 301.

374. *Id.*

375. *The People the Best Governors*, *supra* note 322, *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 237, at 400. The anonymous author also suggested that appeal from trial courts be directly to popularly elected legislative bodies. *Id.*

> and Pennsylvania, which gave the executive a partial role, the first wave of constitutions sought to make the judiciary so dependent upon the legislature that judges would merely work out the details of applying legislative will. Judges were elected by the legislatures, dependent upon them for salary, subject to impeachment by them, and often limited in their tenure. American legislatures also had a habit of interfering with the process of adjudication by amending court decisions with statutory law. This was in keeping with their belief in legislative supremacy and reflected, as well, a distrust of judicial discretion.[376]

By and large, however, Americans in 1776 were less concerned with curtailing judicial power than with expanding legislative powers in their new state governments. As Professor Wood writes: "At the time of Independence, with the constitution makers absorbed in the problems of curtailing gubernatorial authority and establishing legislative supremacy the judiciary had been virtually ignored or considered to be but an adjunct of feared magisterial power."[377] Thus, the subordinate role of courts under the separation of powers theory of 1776 can be seen as more a function of the embrace of legislative supremacy than of any particular vices Americans had detected in their judicial institutions.

Experience with the legislative supremacy and the virtually unalloyed separation of powers that characterized their Revolutionary-era state constitutions brought about an evolution in thinking on the institutional role of courts. While in 1776 the courts were institutionally subordinated to legislatures, by 1787 their institutional role became central in a separation of powers theory that had evolved to incorporate courts as a coequal check on legislatures.[378] As citizens came to believe that all branches of government, and not merely the legislature, were agents of the people, and that separation of powers required a balanced system of overlapping powers, they pointed to the judiciary more often as a check on legislative excesses. In Wood's words,

> The growing mistrust of the legislative assemblies and the new ideas rising out of the conception of the sovereignty of the people were weakening legislative enactment as the basis for law. The legislatures seemed to many to be simply another kind of magistery, promulgating decrees to which

376. LUTZ, *supra* note 236, at 96.
377. WOOD, *supra* note 241, at 454.
378. *Id.*

> the collective people, standing outside the entire government, had never really given their full and unqualified assent. Thus, all the acts of the legislature, it could now be argued, were still "liable to examination by the Supreme Judiciary, their servants for this purpose . . . ."[379]

While at the time of the Revolution the call for codification was aimed at vesting law-creating authority in populist legislative bodies, within a decade it became clear that statutorification coupled with strict judicial construction led to arbitrary and unjust adjudications. Rather than seeking to enhance legislative power by restricting the equitable discretion of courts, by the 1780s Americans came to realize that discretion in the hands of judges was necessary for just adjudications.[380] Americans of the period were learning the lesson that no legislative body can foresee the novel circumstances to which a statute may be applied, or envision the evolving context in which it will operate. Given the reconsidered role of courts under an evolved separation of powers theory, by 1788 Hamilton could argue that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[381]

This short phrase of Hamilton's shows how much American thinking on the relationship of legislatures and courts to each other and towards the people had changed since 1776. Citizens at the time of the Revolution saw legislative bodies as an embodiment of the people, and the courts as agents of the legislatures. Hamilton, however, here portrays the legislative body as an entity distinct and apart from the people, and the courts as an agent of the people. When the courts came between the legislature and the people in 1776 they were seen as usurping the legislative function. By 1788, however, when they did the same they were viewed as keeping the legislature within its prescribed bounds. Hamilton was arguing for the idea that unelected federal courts could check a popularly elected Congress through judicial review and nullify statutes in violation of the Constitution. His arguments are a logical extension of both the popular sovereignty and separation of powers theories that had emerged by that date,[382] and were palatable enough to be put forth

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379. *Id.* at 456 (citing PROVIDENCE GAZETTE, May 12, 1787); *see* LUTZ, *supra* note 236, at 97-98 ("Despite the direct consent through elections, the judiciary nonetheless came to be viewed as embodying the will of the people.").

380. WOOD, *supra* note 241, at 303-04, 457.

381. *Id.* at 462.

382. *See supra* notes 270-72 and accompanying text.

in a widely circulated newspaper editorial aimed at demonstrating the virtues of the proposed federal Constitution to the American people. To be sure, arguments for judicial review stirred controversy even by 1788. But driven by fundamental shifts in popular sovereignty theory, such arguments were the logical conclusion of the transformed separation of powers theory of the late 1780s, and thus were all but compelled to acceptance. Indeed, Hamilton was not the first to publicly voice such arguments, for they had been made as early as 1784 by pamphleteer Tudor Tucker, and in 1786 by attorney James Iredell in a North Carolina newspaper.[383]

It was not only with an eye to protecting the people's foundational organic law, however, that courts were by 1788 seen as a check on legislative bodies. The judiciary under the proposed Constitution would also act as a check on Congress regarding *statutory* law. As Hamilton wrote in *Federalist* Number 78:

> [I]t is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice . . . to qualify their attempts.[384]

Hamilton's words from 1788 stand in sharp contrast to those of the anonymous author of *The People the Best Governors*, who in 1776

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383. Goldstein, *supra* note 237, at 64-66. By the 1790s, judicial review was no longer controversial. *Id.* at 66. Though the Supreme Court did not employ judicial review of congressional statutes until 1803 in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), one of the new government's first statutes, the Judiciary Act of 1789, explicitly recognized the federal courts' power of judicial review over state legislative bodies. Further, the comments of those at the federal Constitutional Convention in Philadelphia in 1787 imply that judicial review was by that date assumed to be within the purview of judicial power. Finally, there is evidence that circuit courts may have exercised judicial review implicitly prior to *Marbury*. *See, e.g.*, Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

384. THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

argued that a court that goes beyond strict adherence to the textual legislative command usurps the legislative function as the sole author of law.[385] Indeed, changing views on the role of courts moved beyond theory and into practice. Professor Shalhope argues that the practices of the courts between the 1760s and the last decades of the 1700s changed dramatically.[386] Around the time of the Revolution, judges rarely took a functional or purposive approach to interpreting legal principles. Instead they simply "discovered" existing legal principles and applied them to the case at hand. Over the last decades of the century, however, judges increasingly came to see the legal process as one of creating, rather than just discovering, legal principles. Judges, and not just legislatures, had become sources of change in the legal landscape. By the time of the Founding judges were becoming an independent force in the institutional structure of good government.

On the new, more independent role of courts under the proposed federal Constitution, James Wilson stated at the Pennsylvania ratifying convention, "personal liberty, and private property, depend essentially upon the able and upright determinations of independent judges."[387] At the Virginia ratifying convention Edmund Randolph stated that "If Congress wish to aggrandize themselves by oppressing the people, the judiciary must first be corrupted!"[388] At the same convention John Marshall, who would later pen *Marbury v. Madison*, asked "To what quarter will you look to the protection from an infringement on the Constitution, if you will not give the power to the judiciary?"[389] In sharp contrast to the circumstances of a decade earlier, by the time the state ratifying conventions rolled around Americans looked to the courts as protectors of their liberty and welfare against oppressive legislative bodies.

In sum, the role of courts under separation of powers theory shifted dramatically between 1776 and 1787. In 1776, the courts were seen as subordinate to and dependent upon populist legislatures, and even as an arm of the executive. By 1787, courts were viewed as independent agents of the people, on the same plane as legislatures, and indeed as necessary checks on legislative excesses. While in 1776 Jefferson could argue that the courts ought to act as "mere machines"

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385. *See supra* note 375 and accompanying text.
386. *See* SHALHOPE, *supra* note 206, at 121.
387. 2 ELLIOT, *supra* note 231, at 480-81.
388. 3 *id.* at 205.
389. 3 *Id.* at 554.

mechanically applying the people's will as reflected by legislative bodies, by 1787-89 Madison and Hamilton could argue for the independent judiciary as a coequal check on Congress in the proposed Constitution. Judicial review thus became a logical extension of the constitutional theory that had evolved, and Hamilton could emphasize that courts were a check in statutory cases as well as constitutional matters.

4. Separation of Powers and the Honest Agent Conception

As Professor Aleinikoff tells us, the idea of legislative supremacy is "deeply ingrained"; "the legislature did something back then, our intuition tells us, and until they act again is it not up to the courts (or any interpreter) to update the law. To update is to usurp the legislature's job, to violate important notions of legislative supremacy and separation of powers . . . ." Indeed, these intuitions encapsulate arguments marshalled by proponents of the honest agent conception. Professor Aleinikoff states their reasoning as follows: "The model is premised on legislative supremacy and separation of powers. In our system of government, the legislature is assigned the chief law-making responsibility; an interpreter's job is to be faithful to the legislative will—as expressed in authoritative utterances called statutes—lest the interpreter become law maker."[390] Thus, the honest agent conception is supported with the simple and intuitively acceptable idea that the Constitution commits power to make law to the legislative branch, to implement law to the executive branch, and to adjudicate law to the judicial branch. By subordinating the third branch to the first, and denying courts a legitimate role in the law creation process, the honest agent conception, and the rules of statutory interpretation that flow from it, operate to prevent the third branch from encroaching onto the constitutional territory of the first branch. This simple model of separation of powers is often buttressed with notions of Congress's democratic legitimacy. As Professor Sunstein states: "The agency view is usually defended by a claim of legitimacy. . . . In a democratic system, one with an electorally accountable legislature and separated powers, it is usually thought impermissible for courts to invoke considerations that cannot be traced to an authoritative textual instrument."[391] The idea, in other words, is that the Constitution commits law-making power to Congress *because* Congress has

390. Aleinikoff, *supra* note 165, at 22.
391. SUNSTEIN, *supra* note 136, at 113.

electoral legitimacy. To the extent the federal courts fail to conform to the honest agent conception they usurp what is committed to an elected branch and undermine democratic principles. Both the simple model of separation of powers and the idea that the Constitution grants exclusive statutory law-creating power to the democratically legitimate legislative branch should be familiar to even those who have never heard them, for they seem connected with popular myths about our system of government. The practicing lawyer, and indeed the sitting judge, are (perhaps unwittingly) socialized to incorporate these ideas into their background beliefs and assumptions about how our government institutions work. Perhaps this explains why most statutory interpretation theorists who explicitly or implicitly espouse the honest agent conception fail to deeply investigate whether these ideas comport with the ideas animating our federal constitutional scheme.

Once we do probe deeply in this area, once we do question the simple model of separation of powers, we find that the simple model proves *too* simple. The honest agent conception fails to recognize the animus of the separation of powers theory ratified onto the federal Constitution. The separation of powers theory that appears in Revolutionary-period state constitutions was typified by a simple division of government powers, with much power allocated to the legislative branch. Legislative supremacy over the other two branches of government was viewed as a necessary ingredient in the organizational design of government rooted in popular sovereignty as conceived in 1776. Checks and balances were rejected since partial agency of the executive and judicial branches in the legislative branch would divest governing authority from what was then viewed as the sole agent of the people in government. By the time of the Founding, however, separation of powers theory had shifted dramatically. The aims of the separation of powers theory ratified into the federal Constitution of 1787 were not only separate but also overlapping government powers, a balanced distribution of powers between three coequal or peer branches of government, and an explicit incorporation of checks and balances. The branch of government most empowered by this evolution in separation of powers theory was the judicial branch.[392]

The honest agent conception underlying textual and intentional statutory interpretation is difficult to square with the particular

392. WOOD, *supra* note 241, at 453-54.

separation of powers theory ratified into the federal Constitution in the late 1780s. The honest agent conception posits the federal courts as the subordinate agents of Congress which should simply carry out the legislative command. Separation of powers theory by the late 1780s, however, had explicitly rejected the idea that governments ought to be organized along the lines of legislative supremacy. Courts were no longer subordinate agents of legislatures; they were coequals or peers whose role, as Hamilton stated, should be "mitigating the severity and confining the operation" of legislatively enacted statutes.[393] Rather than thinking it wise to locate a monopoly of law-creating authority in legislative bodies, American constitution builders of the late 1780s came to believe that courts ought to be afforded discretion in shaping law, even statutory law.[394] Thus, rather than cohering with the separation of powers theory ratified into the federal Constitution, the honest agent conception coheres with the separation of powers theory ratified into the state constitutions of the Revolutionary period.[395]

The thinking of 1776, which is reflected in the state constitutions of that time, was expressed by the author of *The People The Best Governors*, who argued that when courts fail to adhere to the letter of the law, but rather "put such a construction on matters, as they think most agreeable to the spirit and reason of the law," they assume "the prerogative of the legislature, for those, that made the laws ought to give them a meaning, when they are doubtful."[396] This line of

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393. THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

394. *See id.*, at 465-70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

395. While the evolution in separation of powers theory between 1776 and 1787 was dramatic, the latter never came to be the mirror image of the former. In other words, while courts were viewed as agents of legislatures in 1776, in 1787 legislatures clearly were not considered the agents of courts. The reaction against the legislative supremacy of the state constitutions written in the Revolutionary period never swung so far as to embrace judicial supremacy. Thus, at the federal Constitutional Convention Madison argued that courts ought not be given the power to overrule law created by the legislative branch, for this "makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper." WOOD, *supra* note 241, at 304. That the courts were never intended to be the superiors of legislative bodies should not obscure the fact that by the late 1780s separation of powers theory had evolved to a point where the "mere machine" model of courts that Jefferson had advocated in 1776 was rejected in favor of a model in which courts exercise discretion as a coequal check on the legislative branch. Jefferson, however, continued to hold his normative conception of the role of courts well into the 1780s. *See id.* at 304 n.75.

396. *The People the Best Governors*, *supra* note 322, *reprinted in* 1 AMERICAN POLITICAL WRITING, *supra* note 237, at 400. The anonymous author also suggested that appeal from trial courts be directly to popularly elected legislative bodies. *Id.*

argument sounds very much like the sort of rhetoric employed by modern-day proponents of the honest agent conception. By the late 1780s, however, Americans had come to think of courts in a totally different way. Under the separation of powers theory of the Founding period, courts were considered checks on the legislature, which, as Hamilton argued, ought to possess both powers of judicial review, and equitable discretion when applying statutes.

C. *Interpreting the Practical Implications of the Constitution's Central Principles*

The American Constitution is much more than a set of disaggregated rules. It is a reflection of bedrock political principles that have a binding and limiting impact on the practices and institutional structures of today's federal government. How should we discover the meanings and implications of these bedrock political principles? To begin, we must come to understand the intellectual and historical developments which gave them life. Constitutional theory never springs forth out of thin air. Rather, constitutional theory has a lineage, a parentage, a genealogy from which it evolves, and like a child, its mature incarnation cannot be fully understood without first knowing something about its earlier developmental phases. This is especially true for the unique forms of popular sovereignty and separation of powers theories that emerged in the late 1780s, since the versions of those theories never would have come into being had Americans not first experienced government based on the very different forms of popular sovereignty and separation of powers theories employed in the Revolutionary period.[397] Indeed, the constitutional theory of the Founding period was a direct reaction to

397. As Professor Elazar has written:

> Over the years, considerable attention has been given to the political theory of the United States Constitution and its implications for American government and politics. Studies of the document itself, the Constitutional Convention of 1787, the *Federalist*, Supreme Court interpretations, and executive and legislative actions of constitutional import abound, as well they should. State constitutions, however, have been studied almost exclusively from a reformist perspective . . . . Relatively little attention has been given to the political theories and philosophic assumptions underlying the fifty state constitutions and their colonial predecessors. . . . This slighting of state constitutional theory is ironic because the framers of the federal Constitution were influenced by their experiences with their respective state constitutions and the preexisting conceptions of constitutional government in the original states.

ELAZAR, *supra* note 207, at 107-08.

perceived failings of the constitutional theory of the Revolutionary period.[398]

Often constitutional theorists who seek an original understanding of the Constitution focus exclusively on events and writings from 1787 to 1789, from the Philadelphia convention to the Constitution's final ratification.[399] Much is missed by looking only toward the tail end of the Founding period. The years from 1776 to 1789 witnessed drastic transformations in the ways American constitution builders conceived of both popular sovereignty and separation of powers theories, and ignorance of these transformations results in only a partial understanding of these foundational constitutional principles. Because there is a definite relationship between the constitutional theory of 1776-77 and the constitutional theory of 1787-89,[400] knowledge of Revolutionary-era popular sovereignty and separation of powers theories yields a fuller comprehension of the distinctly

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398. As Professor Shalhope points out, "[W]hen the Constitutional Convention gathered in Philadelphia in 1787, it represented the culmination of reform efforts to curb the democratic excesses of the state legislatures and to provide an institutional framework that could safely accommodate the dynamic changes taking place within American society." SHALHOPE, *supra* note 206, at 100.

399. Professor Amar rightly points out that in seeking the original understandings of the Constitution *The Federalist* is of paramount importance, as are the records of ratifying conventions, while the debates in Philadelphia are of lesser importance. The former sources more closely represent the thinking of the popular sovereign, while the latter represent the thinking of those behind closed doors in Philadelphia. Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 287-89 (1987).

400. In trying to understand American constitutional theory and political thought during the Revolutionary period it is vital to look to the state constitutions, rather than the Articles of Confederation. The states were where most of the political action, and indeed political power, resided in the Revolutionary period, and for some time thereafter. In Professor Shalhope's words:

> For most Americans struggling to break free from oppressive centralized authority, the creation of republican governments in the states became the whole object of the Revolution itself. The richest and most provocative discussions of constitutional principles and political theory—sovereignty, representation, equality, the separation of powers, . . . —took place in the states.

SHALHOPE, *supra* note 206, at 87.

> [The] first American constitutions have lost their primacy of place to the Constitution of 1787/1788. Bicentennial patriotic rhetoric has often fused the Declaration of Independence and the Constitution into one all-engulfing Revolutionary act. Yet the Constitution was not adopted in 1776. Before that happened twelve critical years later, its authors and supporters, as well as its critics, had often looked back on the diverse constitutions of the first hour . . . . An attempt to reconstruct the political and social thought of the founders . . . can hardly begin, therefore, with what we know of the proceedings of the Federal Convention in Philadelphia in 1787, or with the defense of its work in *The Federalist*.

ADAMS, *supra* note 272, at 4.

different Founding-era versions of those theories. Knowledge of the former, in other words, brings the latter into bas-relief, and the contrasts between them brings a sharper image of both into focus. Those who have looked only to the tail end of the eleven-year period leading up to the Founding have missed unique features and contours of the popular sovereignty and separation of powers theories of the federal Constitution, and therefore have mistakenly argued or assumed that the honest agent conception comports with constitutional principles. The contrast between the Founding- and Revolutionary-era versions of popular sovereignty theory reveals that in 1787 popular sovereignty meant more than simply a government created by the people and for the people, but also carried with it definite *normative ideas about the institutional structure of government.* Most important for our purposes, it meant that the federal courts were to be considered agents of the people, rather than subordinate agents of the legislative branch. Likewise, by ignoring the development of separation of powers theory in the eleven years following the Revolution, some have missed the fact that by 1787 Americans sought a balance of power between the three branches, an empowerment of the judiciary, and an institutional structure of government aimed at neutralizing excessive legislative prerogative in both statutory and constitutional realms. In short, by looking only at the tail end of the period leading up to the ratification of the Constitution, one risks missing the subtle theoretical distinctions that reveal the incompatibility of current practices and institutional structures with foundational constitutional principles.[401] To the limited extent that statutory interpretation theorists have tried to justify the honest agent conception with reference to constitutional principles, they have fallen into this easy trap.

Beyond looking at the development of the Constitution's fundamental principles, in discovering the meaning of popular sovereignty and separation of powers theories, or any other constitutional principle, one must look first to the sense of those who ratified the Constitution—the people—and only second to the

401. A related problem is that many confuse ideas from the Revolutionary period with those of the Founding period. As we have seen, the political science of these two periods was markedly different, even to the point of the Founding's representing a rejection of Revolutionary-period principles. Statutory interpretation theorists who have tried to justify the honest agent conception have usually not been careful in distinguishing ideas of 1776 and the ideas of 1787-89. It is clearly the latter set of ideas, however, which was ratified into the federal Constitution, and which therefore guides the structure and operation of today's political institutions.

thoughts and writings of those who attended the Philadelphia convention. The founders may have written and proposed the Constitution, but the people ratified it. Indeed, both Madison and Jefferson believed that the meaning of the Constitution should be sought in the *"plain understanding of the people at the time of its adoption."*[402] Sources such as *The Federalist*, which presented the proposed Constitution to a wide public audience, better illuminate the Constitution's basic principles than sources such as *James Madison's Convention Debates*, which merely catalogs arguments made behind closed doors by those who drafted and proposed the Constitution. On the other hand, the thinking of the various founders can be important to our understanding the Constitution, not because of the founders' status as the Constitution's drafters, but rather because many of the founders were political figures who both shaped and reflected latent popular opinions of the day. They were, in a manner of speaking, at the center of the storm between 1776 and 1789, and therefore were uniquely situated to comprehend and chronicle the shifting political theory of that tumultuous period. The founders are not a source, but rather a conduit. Current and future generations should look back to them not as deities whose words and thoughts convey the Constitution's original meaning, but rather as time capsules reporting on the precise nature of constitutional theory in the Founding period. James Madison's writings and opinions, for example, are important not because he was one of the Constitution's prime drafters, but rather because he both participated in and observed the changing political opinions and attitudes of Americans between the time of the Revolution and the Founding. His writings, and the writings of other important public figures of the time who happen to also be among the Constitution's drafters, both document and crystallize these shifting currents. As applied to statutory interpretation, we should, for example, place great weight on Hamilton's argument in *The Federalist* that courts possess the power to check congress at the statutory as well as constitutional level. Why? Not because the private musings of a New York lawyer bind us today, but rather because such musings were included in the most widely read arguments in favor of the federal Constitution and because they reflect the theory of government ratified by We the People.

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402. BERGER, *supra* note 238, at 120.

In looking to the sense of the ratifiers at the time of the Founding for an understanding of the Constitution, however, we ought not take a micro-level approach. The argument presented here is not that the ratifiers had some particular notion of, for example, what rules and norms of statutory interpretation ought to govern the federal courts. Whether or not Americans of 1787 contemplated such an issue is entirely irrelevant. The inner thoughts of those who gave us the Constitution, whether they be founders or ratifiers, regarding such particularized operational level issues do not bind current and future generations. What is enduring and binding in the Constitution are the principles that are embodied in the document. What counts, in other words, are not particular notions Americans of the day may or may not have had about the way courts should interpret statutes, but rather the then prevalent theories of what institutional forms make for good government rooted in popular sovereignty, or how power should be divided under separation of powers, and the *implications* that these ideas have on current judicial interpretive practices.

Like particularized ideas Americans may have held about operational level issues, the practices at the time surrounding or immediately following the Founding period are of little relevance in discerning the meaning of the Constitution's fundamental principles. The Constitution of 1789 was not an incrementalist document, but rather a document which radically reconfigured the institutional design of American government. The sweeping new institutional structures set forth in the Constitution of 1789 were at the time untested, and for the most part built without the benefit of a template or blueprint borrowed from other earlier experiments in self-governance. Given the breadth of change, and the fact that American constitution builders of the Founding period were sailing in uncharted waters, we can hardly expect that the full meaning and practical implications of the Constitution's foundational principles would have been immediately apparent. Indeed, we should expect that practices and structures inconsistent with the central ideas ratified into the Constitution of 1789 would have persisted immediately following, and even long after, its ratification. The Founding was the culmination of a revolution and a period of great ideological change. Change is usually not neat and orderly, but uneven, messy, and full of loose

ends.[403] It should not bother us, therefore, if the statutory interpretation practices of the federal courts following ratification of the Constitution did not differ significantly from those prior to ratification, or if the practices in the federal courts of the day were basically along the lines of the honest agent conception. Nor should it come as a surprise if the founders, political thinkers of the day, and the American people did not fully realize the implications that the novel institutional designs embedded in their updated constitutional theories would have on operational level issues such as statutory interpretation. It is the ideas embodied in the Constitution, and not the practices of Americans following ratification, which endure and continue to govern. Though uneven, there was a definite shift in American attitudes on the ideal institutional structure of their governments during this eleven-year period leading up to the Philadelphia convention. Popular sovereignty and separation of powers meant something very different in 1787-89 when the federal Constitution was ratified than in 1776 when the Revolutionary-era state constitutions were ratified. In trying to understand the meaning of the federal Constitution and its current operational level implications, it would be foolish to ignore these differences. We today are in the final analysis, governed by the principles ratified into the federal Constitution of 1789 and not by the principles of the Pennsylvania, Virginia, or Vermont constitutions of 1776-77. The popular sovereignty and separation of powers theories of the federal Constitution of 1789 are entirely different animals than the popular sovereignty and separation of powers theories of the state constitutions of 1776-77. Only after highlighting these differences can we clearly see the incompatibility between the honest agent conception and the latter incarnations of popular sovereignty and separation of powers theories.

IV. AFTER THE HONEST AGENT CONCEPTION

Part III demonstrated a fundamental incompatibility between the honest agent conception, and the popular sovereignty and separation of powers theories of the federal Constitution. The honest agent

403. In discussing changing attitudes toward whether or not legislatures ought to ratify constitutions, for example, Professor Lutz comments as follows: "Like many developments in America at that time the process was fitful, indirect, and often unconscious. There were so many competing ideas involving so many people that the development could hardly be viewed as being directed by some commonly held architectonic plan. Nevertheless, the end result was theoretically coherent." LUTZ, *supra* note 236, at 79.

conception misconceives both the relationship between the federal courts, Congress, and the people, and the institutional roles and divisions between the first and third branches. Rather than subordinate agents of Congress, the proper institutional role of the federal courts is that of agents of the people. Instead of supposing an impenetrable wall of separation between congressional and judicial roles, the federal courts must recognize a balanced but overlapping allocation of statutory law-shaping powers between the first and third branches, which allows for checks between two peer branches of government. Rather than asking "Which interpretation is the one that the enacting Congress commanded or intended?", as the honest agent conception counsels, when interpreting statutes federal courts should ask "Which plausible interpretation is most public-regarding?"

Section A of this Part examines the extent to which existing statutory interpretation theories, despite the fact that they are usually rooted in the honest agent conception, might be compatible with the idea that the federal courts should concern themselves with shaping statutes along public-regarding lines. Briefly, courts operating under any single textual, intentional, or dynamic interpretive approach are constrained in their ability to shape statutes. Only by dishonestly and/or strategically employing existing interpretive approaches can a court shape statutory law. When a court does resort to "subterfuge" in an effort to shape statutory law, however, existing textual, intentional, and dynamic theories either afford a court unconstrained discretion, or alternatively guide judicial statute-shaping discretion in ways not designed to result in a more public-regarding statutory scheme. Section B of this Part introduces a two-step approach to statutory interpretation aimed at both affording the federal courts the ability to shape statutory law, and insuring that courts shape statutes along public-regarding lines. Under the proposed two-step approach, when faced with ambiguous statutes courts would use traditional tools of statutory interpretation to determine the range of plausible interpretations, and then engage in constrained statute-shaping aimed at producing public-regarding statutory interpretations. The two-step approach represents a first tentative step towards an interpretive theory that is compatible with the proper institutional role of the federal courts imbedded in the popular sovereignty and separation of powers theories of the federal Constitution. The two-step approach, in other words, is not intended to be a fully developed theory of statutory interpretation, but instead is merely a preview of how an interpretive approach consistent with our fundamental constitutional principles might appear.

A. *Interpretation Theory Redux*

Courts operating within the framework of honest agent interpretive approaches can, in many cases, shape statutory law along public-regarding lines. They can do so because when interpreting statutes courts may employ a multitude of legitimate interpretive methods and rules, each of which can lead to a unique interpretation of the same open-textured statute.[404] As will become clear, however, a court using only a single interpretive approach rooted in the honest agent conception is very limited in its ability to shape statutory law in public-regarding ways. A court that strategically

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404. Smith v. United States, 113 S. Ct. 2050 (1993), is but one example of this phenomenon. Another excellent example is found in United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453, *cert. denied*, 501 U.S. 1205 (1991). In *Marshall* the defendants were convicted of distributing and selling certain amounts of the illicit drug LSD. *Id.* at 1314-15. A federal statute set minimum and maximum terms of imprisonment for selling illicit drugs based upon the *weight* of drugs sold. *Id.* at 1315 (citing 21 U.S.C. § 841(b)(1)(A)(v), (B)(v) (1988)). For most drugs the weight includes not only the weight of the drug in its pure form, but also the weight of any carrier medium with which the drug is cut. *Id.* at 1317. Unlike most illicit drugs, however, LSD in its pure form weighs next to nothing. *Id.* at 1331 (Posner, J., dissenting) (stating that an average dose of LSD without its carrier weighs less than two millionths of an ounce). The issue before the Seventh Circuit was whether the weight of blotter paper, gelatin cubes, or sugar cubes—common LSD carriers—should be factored into the minimum sentence calculation under the statute. *Id.* at 1315. If so, given that LSD alone weighs almost nothing, the weight of the carrier medium alone would determine the weight of the drug sold, and therefore determine the length and severity of the sentence under the applicable statute. *Id.* at 1333 (Posner, J., dissenting).

The Seventh Circuit majority opinion, written by Judge Easterbrook, used a four-corners textual approach and interpreted the sentencing statute to require that the weight of LSD and its carrier medium be counted when calculating minimum and maximum sentences. *See id.* at 1314-20. Judge Easterbrook relied on the words of the statute, their conventional meaning, and the statute's structure in reaching his conclusion. *Id.* at 1317. Thus he concluded, "It is not possible to construe the words of § 841 to make the penalty turn on the net weight of the drug rather than the gross weight of carrier and drug." *Id.* at 1317.

The dissent, written by Judge Posner, employed an imaginative reconstruction approach in support of an interpretation that would have eliminated the weight of the carrier medium from the sentence calculation. *See id.* at 1331-38 (Posner, J., dissenting). The basic thrust of Judge Posner's argument is that Congress really did not understand how LSD is sold or how little it weighs. *See id.* (Posner, J., dissenting). Based upon mistaken assumptions regarding LSD, Congress treated it the same as other drugs, such as heroin and cocaine, covered by the sentencing statute. *See id.* at 1334 (Posner, J., dissenting). Congress, however, did not intend the odd applications that the majority's literal interpretation of the statute produces. *See id.* at 1337 (Posner, J., dissenting). Thus, Posner argued, "The literal interpretation adopted by the majority is not inevitable. All interpretation is contextual. The words of the statute . . . will bear an interpretation that distinguishes between the carrier vehicle of the illegal drug and the substance or mixture containing a detectable amount of the drug." *Id.* at 1337 (Posner, J., dissenting).

employs a variety of honest agent based interpretive approaches enjoys greater leeway in shaping statutory law. Even here, however, under certain conditions, statutory law is impervious to judicial shaping along public-regarding lines. Only where a court dishonestly applies interpretive approaches rooted in the honest agent conception do its statute-shaping powers approach those required by a court acting as a peer of Congress and an agent of the people. On the other hand, a court which dishonestly applies honest agent-based interpretive approaches is left relatively unconstrained in the way it chooses to shape statutory law. The dishonest application of honest agent-based interpretive approaches, in short, affords courts the ability to shape statutory law, but offers no guarantee that they will shape it in a public-regarding fashion. Dynamic theories limit and constrain the judicial statute-shaping powers in various ways, and therefore offer a partial solution to the problem of unchecked judicial statute-shaping power. Dynamic interpretive theories, however, constrain judicial statute-shaping in ways that tend to result in an updated and internally coherent body of statutory law, but not necessarily a more public-regarding statutory law. The rules of dynamic interpretation, after all, are designed with present-mindedness and internal coherence, rather than public-regarding qualities, in mind. Of course, like their textual and intentional counterparts, dynamic interpretive theories do sometimes prevent ends-oriented courts from shaping statutes along public-regarding lines, even if applied strategically.

In order to explain the limitations of existing interpretive approaches we will examine a number of spatial game models, such as the one depicted below in Figure #1.[405] The game has two players, Congress and a federal court. Congress moves first by passing a statute, and the federal court moves second by interpreting the statute. The game ends at this point with an interpretive outcome.[406]

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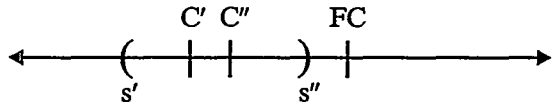
405. Professors Eskridge, Ferejohn, and Weingast have employed similar game models to explain court-legislature interaction previously. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 377-85 (1991); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 547-54 (1992); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 574-79 (1992).

406. In this model, and in models that follow, strategic aspects of the relationship *between* Congress and the federal courts are ignored. In the models presented here the factors contributing to statutory interpretation outcomes are the interpretive rules that apply, the statute Congress passed, and whether the court chooses to honestly, dishonestly, or strategically apply a given set of interpretation rules. The fact that Congress may react to the court's statutory interpretations is not considered. Briefly, a court that wishes to shape statutes in public-regarding ways might consider whether the interpretation it

FIGURE #1



The interval s′ to s″ in the model represents the range of plausible statutory interpretations of some ambiguous statute, given the use of traditional tools of statutory interpretation. When statutory terms are completely free of ambiguity, s′ = s″. Point C′ represents the most likely intent of the enacting Congress, while point C″ represents the most natural reading of statutory text. Point FC represents what the federal court interpreting the statute determines to be the most public-regarding way to structure the statutory scheme, to which we will refer as the public-regarding point. How the court goes about determining the public-regarding point will be addressed later. For now, suffice it to say that under the two-step approach advanced in section B of this Part, the public-regarding point does *not* correspond to the court's policy preference.

When faced with an ambiguous statute, the court must decide (1) which interpretive approach to employ, (2) whether to employ it honestly, and (3) whether to engage in strategic interpretation.[407]

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reaches would be overruled by Congress. Thus, even where the interpretive rules that apply allow a court to reach a statutory interpretation that the court finds public-regarding, recognizing that Congress could pass a statute overturning the interpretation, the court might opt for some interpretation that is less than public-regarding, but impervious to congressional override.

Such considerations, while important in other contexts, are not important here. The purpose of the spatial models here is simply to illustrate the limitations different interpretive theories place on judicial statute-shaping powers. For an empirical treatment of congressional overrides of Supreme Court statutory interpretations, see Eskridge, *supra* note 405. For game theoretical treatments of this phenomenon, see Eskridge & Ferejohn, *supra* note 405, at 547-51; Ferejohn & Weingast, *supra* note 405, at 574-82; John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 *passim* (1992).

407. A situation in which a court applies an interpretive approach in an *honest* fashion is one in which a court both closely adheres to the rules of the interpretive approach and makes a good faith effort to reach the interpretive outcomes that the interpretive approach is designed to produce. Thus, a court that applies the four-corners approach in an honest fashion uses the text, and only the text, of the statute in an effort to discover the legislative command.

A court that *dishonestly* applies an interpretive approach, in contrast, may use the language of the interpretive approach in the reasoning of an opinion justifying its interpretive outcome, but will view the rules of interpretation as obstacles to be overcome. Further, a court which dishonestly applies an interpretive approach makes no attempt to

The outcome of the game depends upon several factors, including the degree of statutory ambiguity, the interpretive approach the court adopts (textual, intentional, or dynamic), and the tactics employed by the federal court (honest, dishonest, or strategic). The models will help to clarify the effects that different interpretive approaches and different interpretive *strategies* have upon ultimate interpretive outcomes, and to reveal the conditions under which existing statutory interpretation theories are insufficient for courts acting as agents of the people, rather than subordinate agents of Congress.

1. The Constraints of Textual Interpretive Approaches

Let us begin with the four-corners textual approach. Under the four-corners approach the text and only the text is considered a legitimate guide to the meaning of the legislative command, and the role of the court is simply to effectuate that command.[408] In the spatial model in Figure #2 below, the interval s′ to s″ represents the range of plausible textual readings of an ambiguous statute given the use of a four-corners interpretive approach, while point C represents the most probable textual meaning. Points FC′ and FC″ represent two different hypothetical public-regarding points. Since four-corners textualism contains no rules to constrain the court in determining the location of FC along the policy continuum, the court exercises unconstrained policy discretion in determining the public-regarding point.[409]

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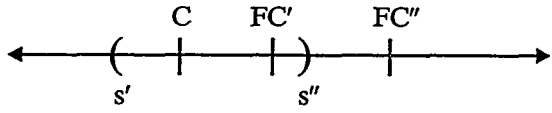
reach the interpretive outcomes that the interpretive approach is designed to produce.

A situation in which a court applies interpretive approaches *strategically* is one in which the court chooses between more than one legitimate interpretive approach in an effort to shape statutory meaning. A strategic court will employ a textual approach in one case, an intentional approach in another, and a dynamic approach in a third, all in an effort to shape statutory meanings. Different interpretive approaches result in different conceptions of what constitutes a plausible interpretation of a given statute, and also in different conceptions of what constitutes the most likely or most natural reading of statutory meaning. Stated in terms of the spatial game model, different interpretive approaches yield both different C points and different s points.

408. *See supra* part II.A.1.

409. There is, of course, no guarantee that a court exercising unconstrained policy discretion will locate FC at a point that actually corresponds with a public-regarding way to structure the statutory scheme. For the purposes of this hypothetical, and the hypotheticals to follow, however, the assumption is that the court sets point FC at a point along the policy continuum that represents the most public-regarding way to structure the statutory scheme in question. The purpose of this hypothetical, and of those that follow, is to demonstrate the limitations that textual, intentional, and dynamic interpretive approaches place upon the judicial shaping of statutory law along public-regarding lines. By assuming that point FC in the model represents the most public-regarding point along the policy continuum, we will be able to see the circumstances under which different

FIGURE #2



A court applying the four-corners approach in an honest fashion would reach an interpretation corresponding with point C, since point C represents the most probable textual meaning of the statute. Further, a court honestly employing the four-corners textual approach would be constrained from shaping the law to point FC', since point FC' is a plausible (but strained) textual reading of the ambiguous statute. In contrast, if the court chose to apply the four-corners approach in a less than honest fashion, it could reach an interpretation corresponding with point FC'. A court that dishonestly applies the four-corners textual approach, however, could not reach an interpretation corresponding with point FC", since point FC" lies outside the range of plausible textual interpretations. On the other hand, such a court could reach an interpretation corresponding with point s", which is the interpretation closest to point FC" that is also within the range of plausible statutory interpretations, s' to s".

A basic pattern emerges from the model in Figure #2. First, when a court *honestly* applies an interpretive approach, it must reach an interpretation corresponding with point C (here the most natural reading of statutory meaning), and therefore can exercise no statute-shaping powers. Second, where a court *dishonestly* applies an interpretive approach it can reach any interpretation within the range of plausible interpretations (falling in the interval s' to s"), and therefore can exercise limited statute-shaping powers. Finally, even if the court applies an interpretive approach dishonestly, it cannot shape the statute beyond the range of plausible readings of the statute. Stated another way, dishonest application of a single textual interpretive approach allows room for the judicial shaping of statutes within the range of plausible textual interpretations.

While Figure #2 involves a four-corners textual interpretation approach, the results are similar when we apply a textual-intentional approach to the spatial game model. Under the textual-intentional approach, when faced with statutory ambiguity the court seeks to

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interpretive rules prevent a court from reaching a statutory interpretation which corresponds to point FC.

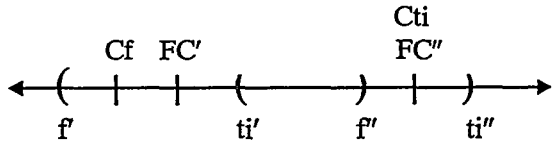
discover and apply the most probable congressional intent, but uses text alone or almost exclusively to determine intent.[410] Under such an approach, points s′ and s″ in Figure #2 above would correspond to the range of plausible congressional intentions given the use of statutory text as the indicator of intent, while point C would represent the most probable congressional intent as evidenced by statutory text. A court honestly applying the textual-intentional approach would reach an interpretation corresponding to the most probable congressional intent, point C, and therefore would be constrained from shaping the statute along public-regarding lines to point FC′. If the court chooses to apply textual-intentionalism dishonestly, however, it could shape the statute to the meaning corresponding with point FC′, but could not reach the interpretation corresponding with point FC″. The basic pattern observed in the application of four-corners textualism repeats itself in the application of textual-intentionalism. An important difference between four-corners textualism and textual intentionalism, however, is that in many cases the two will lead to different sets of plausible readings of statutory text, and to different versions of the most natural readings of statutory text. This was the case in *Smith v. United States*,[411] in which Justice O'Connor's four-corners approach led to one reading of the sentencing statute,[412] while Justice Scalia's textual-intentional approach led to a wholly different reading of the statute.[413]

The fact that different versions of textualism can lead to both different ranges of plausible statutory interpretations, and to different versions of the most natural textual reading of a statute, presents courts with the opportunity to deploy the two forms of textualism in a *strategic* fashion. In short, by vacillating between the four-corners and textual-intentional approaches a court can in many instances expand its ability to shape statutory law. In Figure #3 below, the interval f′ to f″ represents the range of plausible statutory interpretations given the use of the four-corners textual approach, with point Cf representing the best four-corners textual reading of the ambiguous statute. The interval ti′ to ti″ represents the range of plausible interpretations given the use of the textual-intentional approach, with point Cti representing the most likely legislative intent as evidenced by statutory text. As always, FC′ and FC″, the judicially

410. *See supra* part II.A.2.
411. 113 S. Ct. 2050 (1993).
412. *See id.* at 2053-59.
413. *See id.* at 2060-63 (Scalia, J., dissenting).

determined public-regarding points, represent hypothetical versions of what the court finds to be the most public-regarding way to structure the statutory scheme. Note that in this model Cti corresponds with FC″.

FIGURE #3



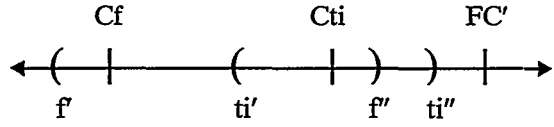
The intervals f′ to f″ and ti′ to ti″ partially overlap at the interval ti′ to f″. The disparity in the range of plausible interpretations resulting from the use of four-corners textualism and textual intentionalism is rooted in the difference between the discovery of what the statute says (four-corners textualism) on the one hand, versus the discovery of what the enacting Congress meant the statute to say (textual-intentionalism) on the other hand. Under the circumstances represented by the model, a court honestly applying the four-corners approach would interpret the statute at point Cf, while a court honestly applying a textual-intentional approach would interpret the statute at point Cti. Further, a court dishonestly applying the four-corners approach could choose to interpret the statute at point FC′, but not at point FC″, since the former lies within the range of plausible four-corners interpretations (i.e. interval f′ to f″), while the latter does not. The converse holds true for a court dishonestly applying the textual-intentional approach: It could adopt interpretation FC″, but not interpretation FC′. A court willing to deploy strategically four-corners and textual-intentional approaches, however, could choose to interpret the statute at either point Cf or at point Cti. If the court favors FC′ as the most public-regarding way to structure the statute, it would choose interpretation Cf, and would couch its opinion in four-corners terminology. In contrast, if the court favors point FC″ as the most public-regarding, it would choose point Cti, and its opinion would sound of the textual-intentional approach. Finally, a court which is both dishonest and strategic could reach interpretations that correspond with either point FC′ or FC″ or any other points in the f′ to ti′ interval.

In short, under the circumstances presented in the model in Figure #3 above, so long as a court is willing to engage in the strategic use of textual interpretation theories, it could, at least in theory, subvert the aims of the honest agent conception and shape statutory law along public-regarding lines. While in this particular case

interpretation theories rooted in the honest agent conception do not entirely foreclose a role for federal courts as shapers of statutory law along public-regarding lines, the strategic use of interpretation approaches is problematic for at least two reasons. First, it encourages the use of interpretation theories aimed at one end (effectuating the honest agent conception) in order to reach an entirely different end (the judicial shaping of statutes along public-regarding lines). While a public-regarding interpretation can be reached, it is reached in a fashion that is not publicly and explicitly stated in the court's reasoning. In such cases the interpretive method becomes a subterfuge for judicial statute-shaping. The problem is not with judicial statute-shaping per se, but rather with the use of an interpretation method as a deception. Second, and more importantly, even if one is not bothered by the use of interpretation methods as a subterfuge, the subterfuge works only under certain circumstances. If we change the configuration of the spatial game model only slightly, even courts willing to switch strategically between four-corners and textual-intentional approaches will be impotent to shape statutes along public-regarding lines.

The spatial game model in Figure #4 below illustrates the point. As with the model in Figure #3 above, the interval f′ to f″ represents the range of plausible statutory interpretations given the use of the four-corners approach, while the interval ti′ to ti″ represents the range of plausible statutory interpretations given the use of the textual-intentional approach. In this model, however, the court's understanding of the most public-regarding way to structure the statutory scheme lies *outside* the range of plausible interpretations given the use of both four-corners and textual-intentional interpretive approaches, or, in other words, FC′ lies outside the interval f′ to ti″.

FIGURE #4



Under these circumstances the best a court that strategically but honestly[414] applies the two textual interpretive approaches can do,

414. To say that a court strategically but honestly applies different approaches to statutory interpretation is to mean two things: First, the court chooses to apply the interpretive approach which affords it the greatest opportunity to shape the statute along the most public-regarding lines. Second, once the court has chosen the interpretive

as far as shaping the law in a public-regarding way is concerned, is to adopt a textual-intentional approach and interpret the statute at point Cti. Point Cti, which corresponds to the most likely congressional intent evidenced by statutory text, is closer to point FC', the public-regarding point, than is point Cf, the most natural four-corners textual reading of the statute.

Even in playing this limited statute shaping role the court is engaged in a subterfuge since its choice of interpretive approach is driven by the desire to reach a certain interpretive outcome. By using subterfuge the court is bending and distorting interpretive rules and practices in an effort to shape the statute in a public-regarding way. Though the outcome the court strives to reach in this hypothetical is consistent with the popular sovereignty and separation of powers theories of the federal Constitution, the use of subterfuge to achieve it is troubling. Ideally, courts would apply a single approach to statutory interpretation that would afford them a constrained and channeled discretion to shape statutes in public-regarding ways without a need to resort to strategic subterfuge.

2. The Constraints of Intentional Interpretive Approaches

Turning to intentional statutory interpretation theories, despite the fact that they are thought to offer courts greater discretion and less constraint than textual approaches, they too can, under certain circumstances, stunt the judicial shaping of statutory law along public-regarding lines. In cases where a court chooses to apply law as legislative intent,[415] imaginative reconstruction,[416] or the legal process method,[417] the analysis is essentially the same as when a court chooses to apply either a four-corners or a textual-intentional approach. In brief, where a court *honestly* applies any single intentional approach, it will interpret the statute at the point corresponding to the most probable version of legislative intent or statutory purpose. Where a court *dishonestly* applies any one of the three basic intentional approaches, it can bend statutory meaning, but only within the range of plausible versions of legislative intent or statutory purpose. In cases where the court's idea of the most public-regarding way to structure the statutory scheme lies beyond the range

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approach that affords it the greatest opportunity to shape the statute in a public-regarding fashion, the court applies that interpretive approach in an honest fashion.

415. *See supra* part II.B.1.

416. *See supra* part II.B.2.

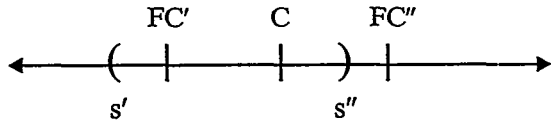
417. *See supra* part II.B.3.

of plausible versions of congressional intent or statutory purpose, the best a court can do is to adopt the plausible interpretation closest to the court's public-regarding ideal point. Finally, a court can expand its statute-shaping powers by *strategically* employing intentional methods of statutory interpretation. Even here, however, there will be limits on the court's statute-shaping powers. Beyond these generalities, subtle differences appear depending upon which of the three basic forms of intentionalism—law as legislative intent, imaginative reconstruction, or legal process purposivism—a court chooses to apply.

Under the law as legislative intent approach the law is the intent of the enacting Congress, while the statutory text is merely evidence of congressional intent counting no more than other evidence of intent, such as floor debates or legislative committee reports.[418] Of the three main intentional interpretive approaches, law as legislative intent offers courts the least interpretive discretion. Unlike imaginative reconstruction or legal process purposivism, under law as legislative intent the court is seeking something that at least in theory exists—the actual intent of the enacting Congress. In this way law as legislative intent parallels the four-corners textual approach. While the four-corners approach is aimed at discovering the actual legislative command, law as legislative intent is aimed at discovering the actual congressional will.

In the spatial game model displayed in Figure #5 below, the interval s′ to s″ represents the range of plausible interpretations of actual legislative intent regarding some ambiguous statute. Point C represents the most probable actual congressional intent. Points FC′ and FC″ represent hypothetical judicially determined public-regarding points.

FIGURE #5



A court honestly applying the law as legislative intent approach would adopt an interpretation corresponding with point C, the most probable version of legislative intent. A less than honest court could adopt an interpretation corresponding to point FC′, but not one

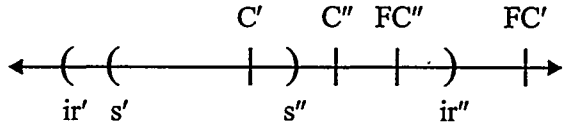
418. *See supra* part II.B.1.

corresponding to FC″. If the court's ideal public-regarding point corresponds to point FC″, then a court dishonestly applying law as legislative intent would reach an interpretation corresponding to point s″. Thus, where a court applies law as legislative intent dishonestly, the court could reach any interpretation it found public-regarding within the range of plausible versions of legislative intent (s′ to s″), or could adopt the plausible version of legislative intent closest to its ideal public-regarding point (s″).

Next consider the imaginative reconstruction approach, under which courts seek first to discover the actual intent of the enacting legislature, and second, where actual intents are ambiguous or missing, to construct a legislative intent consistent with the basic thrust of the elements of legislative intent that are clear.[419] Since under imaginative reconstruction a court seeks to discover both something that does not and never did exist (such as legislative intents regarding cases never contemplated by the enacting legislature), as well as actual legislative intents, courts utilizing this approach generally enjoy greater interpretive discretion than courts applying the law as legislative intent approach.

In the spatial game model in Figure #6 below, the interval s′ to s″ represents the range of plausible interpretations of actual legislative intent regarding some ambiguous statute. The intervals ir′ to s′ and s″ to ir″ represent imaginative reconstructions of legislative intent, or in other words the court's version of what the enacting Congress would have intended had it thought of the novel issue at hand, or had its actual intent been more clear. C′ corresponds to the most probable interpretation of actual legislative intents, while C″ corresponds to the most probable version of imaginatively reconstructed legislative intents.

FIGURE #6



A court applying imaginative reconstruction honestly would reach an interpretation corresponding to C″,[420] whereas a court honestly

419. *See supra* part II.B.2.

420. Why would the court not reach an interpretation corresponding to point C′? Because under the imaginative reconstruction approach a court applies the actual legislative intent, here C′, when actual legislative intent has addressed the issue before the

applying law as legislative intent would reach an interpretation corresponding to point C'. As always, when the court aims to apply imaginative reconstruction *honestly*, there is no possibility of judicial shaping of an ambiguous statute in public-regarding ways. When a court applies imaginative reconstruction *dishonestly*, however, because the range of plausible imaginatively reconstructed intents is a bit larger than the range of actual intents, the opportunity for bending statutory meanings is greater than under the law as legislative intent approach. Stated another way, when the court finds that the most public-regarding way to shape a statutory scheme lies within the range of plausible imaginatively reconstructed legislative intentions (ir' to ir"), but beyond the range of plausible actual intents (s' to s"), the court applying the imaginative reconstruction approach dishonestly could opt for an interpretation within the former range (ir' to ir"). A court applying law as legislative intent dishonestly, however, could at best opt for an interpretation at an extreme outer limit of the range of plausible actual intents (s"). In the spatial game model displayed in Figure #6 above, for example, where the court's ideal public-regarding point corresponds to point FC", which lies in the interval s" to ir", and the court applies imaginative reconstruction in a dishonest fashion, the court can opt for an interpretation corresponding to point FC". But, if under the same circumstances the court opts to apply dishonestly law as legislative intent, then a court with an ideal public-regarding point at FC" could at best reach an interpretation corresponding to point s", which represents the plausible actual intent closest to point FC". Though in this limited circumstance the dishonest application of imaginative reconstruction gives a court a greater opportunity to shape statutory law than does the dishonest application of law as legislative intent, there are certainly cases where the law-shaping abilities of courts applying imaginative reconstruction are proscribed. For example, when the court's ideal public-regarding point lies beyond the range of plausible imaginatively reconstructed legislative intentions—point FC' in Figure #6 above—the best the court can do is reach the interpretation at the extreme outer limit of plausible imaginatively reconstructed intents—point ir" in Figure #6 above.

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court, and actual legislative intent is unambiguous. An assumption of the model is that actual legislative intent is ambiguous. This assumption is incorporated in the model by the space in the interval s' to s". If legislative intent were completely clear, s', s" and C' would correspond to the same point in the model.

The analysis of the Hart and Sacks legal process purposive interpretation is essentially the same as under the textual and intentional approaches discussed above.[421] A court applying the purposive approach aims to interpret ambiguous statutory terms so as to effectuate the statute's underlying purpose, as opposed to the enacting legislature's intent.

In sum, when a court applies interpretive approaches rooted in the honest agent conception, in many situations it will be constrained from shaping statutes in public-regarding ways. First, when a court *honestly* applies only one interpretive approach rooted in the honest agent conception, no opportunity arises for judicial shaping of statutory law. The court simply opts for the interpretation that is the most probable legislative intent or the most natural reading of statutory text. Second, when a court *dishonestly* applies a single interpretive approach rooted in the honest agent conception, it is able to shape statutory law within the confines of the reasonable interpretations following from that interpretive approach. Finally, a court may *strategically* apply any one of the several interpretive approaches rooted in the honest agent conception. Following this tactic may greatly enhance a court's ability to shape statutory law. In other words, since interpretive outcomes often depend on interpretive processes, and courts can freely choose from several different interpretive processes, even when employing honest agent interpretive methods courts can reach a wide range of interpretive outcomes. A system in which courts strategically employ the variety of honest agent interpretive methods as a subterfuge aimed at shaping statutory law in public-regarding ways, however, is only a second best alternative. Courts adopting this tactic strive toward worthy ends, but they do so by questionable means. Much more importantly, however, the strategic use of interpretive methods rooted in the honest agent conception leaves the judicial statute-shaping function unconstrained and unchanneled. Courts strategically and dishonestly employing honest agent-style interpretive methods, in short, can set statutory meanings at almost any point along a broad continuum.

3. The Constraints of Dynamic Interpretive Approaches

Though it is certainly possible for courts employing dynamic interpretive approaches to bend private-regarding statutes toward public-regarding meanings, as with textual and intentional approaches

421. *See supra* part II.B.3.

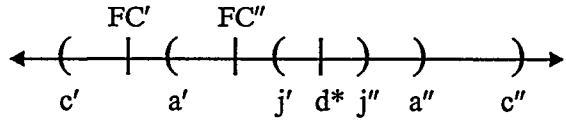
rooted in the honest agent conception, there are cases in which the use of any single dynamic method limits the ability of courts to shape statutes in public-regarding ways. Consider first Professor Dworkin's dynamic theory, under which Congress acts as the author of the initial chapter in a chain novel, and courts interpreting the statute act as authors of later chapters.[422] When authoring chapters in the chain novel, courts must strive to make the entire story a coherent whole, or in other words, must write the current chapter in the story of a statute along the trajectory set by earlier authors of the chain novel. By making courts authors of later chapters in the chain novel of statutory law, Dworkin's theory explicitly affords courts a role in the shaping of statutes. Since under Dworkin's theory courts interpreting statutes are constrained by the earlier chapters in the chain novel of statutory law, however, the more chapters that have been written the more constrained an interpreting court will be. Many interpretations will cohere with a freshly minted statute, fewer with a statute that has been interpreted by an administrative agency, and still fewer with a statute that has been interpreted by an agency and several federal district courts. As a statute grows older, and has been interpreted by more agencies and courts, the range of interpretations that will make a coherent whole out of earlier chapters in the statute's story shrinks. Dworkin's argument suggests that only one unique interpretation may cohere with a fully interpreted statute.[423] If this is correct, then at least for mature statutes, courts can have no role to play in shaping statutory meaning. Rather, the role of a court is simply to discover which single interpretation coheres with all of the previously authored chapters in a statute's story.

The spatial model in Figure #7 below illustrates the point. In the model, the interval c′ to c″ represents the range of interpretations that cohere with a freshly minted but ambiguous statute. The interval a′ to a″ represents the range of interpretations that cohere with the same statute after it has been interpreted by an agency. The interval j′ to j″ represents the range of interpretations that cohere with the same statute after it has been interpreted by an agency and then by a federal court. Finally, the point d* corresponds to the single interpretation that coheres with the same statute after it has been interpreted several times by federal courts. As always, FC′ and FC″

422. *See supra* part II.C.1.
423. *See* Dworkin, *supra* note 113, at 541 n.6.

correspond to hypothetical court-determined ideal public-regarding points.

FIGURE #7



Under the Dworkinian approach, a court faced with an ambiguous, freshly minted statute could find any point within the interval c′ to c″, such as FC′, to be an interpretation that coheres with the statute. After interpretation by an agency, however, a court seeking to shape the statute along public-regarding lines could not reach an interpretation corresponding with point FC′, but instead would be limited to at best reaching an interpretation corresponding to point a′. Finally, after the statute has been interpreted by a handful of federal courts, the court with an ideal public-regarding point at FC′ would be constrained to reaching an interpretation corresponding to point j′. In short, as the stature matures, and is interpreted by more and more actors, under the Dworkinian chain novel approach the ability of a court to shape the statute diminishes. In cases in which a statute is fully mature and has been interpreted several times over, its meaning can crystallize or harden, leaving no room for judicial shaping along public-regarding lines. Thus, under the chain novel approach to statutory interpretation, judicial statute-shaping powers depends upon how many times a statute has been interpreted by other relevant actors.

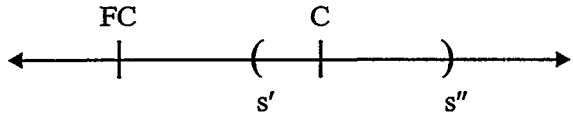
The Calabresian common law method operates in almost exactly the opposite fashion.[424] Under the Calabresian interpretive system, in cases in which a statute is freshly minted the statute-shaping powers of the federal courts are usually very limited, but as a statute grows older the statute-shaping powers of the federal courts tend to increase. More specifically, when a statute is obsolete, in the sense that it no longer fits the legal landscape and could no longer win majoritarian support in the legislature, under the Calabresian approach to statutory interpretation courts may treat the statute as it would treat common law. That is, a court can either reshape the statutory scheme, perhaps by altering or creating an exception to the obsolete statute, or in extreme cases a court can simply discard the

424. *See supra* part II.C.3.

statute altogether. Where statutes are not obsolete, however, a court employing the Calabresian method would engage in traditional honest agent-style statutory interpretation. Usually statutes will become obsolete, in the Calabresian sense, as they grow old.[425] Thus, under the Calabresian common law method judicial statute-shaping powers are positively correlated with the age of a statute, whereas under the Dworkinian approach judicial statute-shaping powers are negatively correlated with the age of a statute. The Calabresian interpretive approach, in other words, constrains judicial statutory construction powers precisely where the Dworkinian interpretive approach maximizes it, and vice versa.

The spatial game model in Figure #8 below shows how the Calabresian common law method constrains judicial discretion over young statutes, but expands judicial discretion as the statute grows older. The interval s′ to s″ represents the range of plausible statutory interpretation given the use of traditional honest agent-style interpretive methods. Point C represents the most likely intent of the enacting legislature. Point FC represents a hypothetical judicially determined public-regarding point.

FIGURE #8



If the statute is not obsolete, a court implementing the Calabresian common law method engages in traditional honest agent-style interpretation, and would therefore reach an interpretation corresponding to point C. In such cases there is no room for judicial shaping of the statute along public-regarding lines. Once the statute is deemed obsolete, however, the court can shape the statute's meaning to correspond with point s′, reconstruct the statutory scheme to correspond with point FC′, or even discard the statute altogether. In

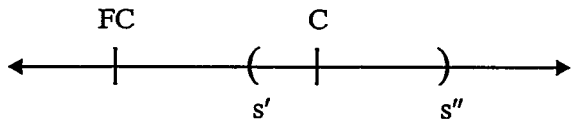
425. Since the majority coalitions that passed old statutes through Congress have long since dissolved, most old statutes probably could not gain majoritarian support in Congress today. Additionally, since the legal landscape may very well have changed considerably in the decades since their initial passage, old statutes are not very likely to fit the current legal landscape. Freshly minted statutes, on the other hand, are not very likely to be obsolete in the Calabresian sense. Since the coalitions that passed recent statutes are still intact, new statutes could probably again gain majoritarian support in Congress. Further, though some new statutes are explicitly designed to alter the legal landscape, those that are not have not been in place long enough for the legal landscape to change significantly.

short, when (and only when) the statute becomes obsolete, a court with ideal public-regarding point FC could shape the statute along public-regarding lines.

Like Judge Calabresi's common law approach, Professor Eskridge's dynamic theory of statutory interpretation affords courts the ability to update statutory law under certain limited circumstances.[426] Under Eskridge's theory the "evolutive" interpretive perspective controls judicial interpretation of statutes only when an applicable statute which does not specifically address the issue before a court is coupled with either a decisive shift in the policy context, or a decisive shift in public values. In all other cases—for example, when statutory text specifically addresses the issue before the court—the textual perspective, the historical perspective, or some combination of the two guides the interpretive process. In other words, when the text of a statute specifically addresses the issue before the court, the court acts as the traditional honest agent of the enacting Congress, and attempts to enforce either the legislative command or legislative intent. Only in those cases "when the statutory text is not clear and the original legislative expectations have been overtaken by subsequent changes in society and law" can a court engage in statute-shaping aimed at updating law, rather than furthering the enacting legislature's command or will.[427]

The limits Eskridge's approach places on judicial capabilities to shape statutory law are represented in the spatial game model depicted in Figure #9 below.

FIGURE #9



The interval s' to s" represents the range of plausible statutory interpretation given the use of traditional honest agent-style interpretive methods, with point C representing the most likely intent of the enacting legislature, and point FC representing a hypothetical

426. *See supra* part II.C.2.

427. Eskridge, *supra* note 34, at 1484. Eskridge's theory stands in contrast to the Posnerian imaginative reconstruction approach to statutory interpretation, under which a court faced with a statute that does not directly address the issue before the court tries to interpret the statute along the lines of the enacting legislature's basic intent, goals, or assumptions. *See supra* part II.B.2.

judicially determined public-regarding point. In cases when statutory text addresses the issue before a court, traditional honest agent-style interpretation leads to an interpretation corresponding to point C, and no room exists for judicial shaping of the statute along public-regarding lines. Only when the statute does not specifically address the issue before the court, and a decisive shift in the social or legal context has occurred, can a court shape statutory meaning.

It is important to note that even when shaping statutory meaning under Eskridge's theory, as under the Dworkinian and Calabresian approaches, the court may be limited in its ability to shape the statute along public-regarding lines. Why? Because under all three approaches the end goal of a court engaging in a statute-shaping function is not the development of public-regarding law, but rather the development of a coherent legal regime (under the Dworkinian approach),[428] the weeding out of obsolete statutes (under the Calabresian approach),[429] or the updating of statutory law so that it is consistent with current social and legal values (under the Eskridgian approach).[430] Thus, a court applying the evolutive perspective under Eskridge's interpretive theory could not reach an interpretation corresponding to point FC in the model (Figure #9) above if point FC is not consistent with current social and legal values. In short, the Eskridgian theory of statutory interpretation limits the ability of courts to shape statutory law along public-regarding lines in two ways: First, when statutes address the issues before a court, the court must employ honest agent interpretive methods. Second, even when a statute does not address the issues before a court, and the court can therefore apply the evolutive perspective, the court can only shape the statute along the lines of current social and legal values, rather than along the lines of public-regarding values, which may very well be different.

Turning finally to Professor Aleinikoff's synchronic coherence interpretive approach, we once again encounter limits on the judicial shaping of statutory law along public-regarding lines.[431] Under synchronic coherence courts interpreting statutes apply traditional honest agent methods of statutory interpretation with a twist. The twist is that courts use the probable intent, meanings, and background assumptions associated with the *current* legislature rather than those

428. *See supra* part II.C.1.
429. *See supra* part II.C.3.
430. *See supra* part II.C.2.
431. *See supra* part II.C.4.

of the enacting legislature in elucidating statutory meanings. The theory is dynamic in that it results in statutory meanings that evolve over time, rather than static meanings that solidify at the moment of legislative enactment. The theory, however, is very similar to honest agent interpretive approaches, with the main point of differentiation being who counts as the principal. Under traditional honest agent textual and intentional approaches to statutory interpretation, the enacting legislature is the principal, and courts are their agents. Under synchronic coherence, however, both the enacting legislature, which provides the statutory material to be interpreted, and even more so the current legislature, whose intentions and background assumptions act as a refracting lens of statutory meaning, are properly considered the principals. Though it results in evolving statutory meanings over time, Aleinikoff's synchronic coherence theory provides no room for the judicial shaping of statutory law along public-regarding lines. Indeed, under synchronic coherence any statute-shaping function of the courts involves merely the mechanical application of current legislative intents, assumptions, beliefs, and values to replace the intents, assumptions, beliefs, and values of the enacting legislature. A court is not an active player in shaping statutory meaning, but rather simply performs the task of infusing statutes with a legislative "present-mindedness." Stated another way, though Aleinikoff's approach results in evolving statutory meanings, evolution results from changes in the composition of successive legislatures, rather than a dialogue between the enacting Congress and the federal courts, or a sense that the federal courts are agents of the people rather than agents of the first branch.

Further, any evolution in statutory meanings resulting from a judicial implementation of synchronic coherence would not lead to a systematic conversion of private regarding statutes into public-regarding statutes. The same general factors that led to the initial passage of private-regarding statutory law are likely to remain in successive legislatures. This is not to say that the legislative coalition that formed to pass a particular statute will be durable over successive Congresses. To the contrary, given the difficulty of getting a bill over the series of hurdles that constitute the legislative process, each of which provides an opportunity for opponents to defeat it, such winning coalitions are even more difficult to maintain than they are to assemble. The point, however, is that the beliefs, assumptions, and values of a current Congress are no more likely to be public-regarding than those of a long retired enacting Congress. As with the Calabresian and Eskridgian interpretive theories, synchronic

coherence may very well lead to an updating of statutory law, but does not necessarily lead to public-regarding statutory law.

In sum, existing theories of statutory interpretation, whether textual, intentional, or dynamic, constrain the ability of courts to shape statutory law in public-regarding ways. Different interpretive approaches proscribe judicial statute-shaping under different structural circumstances. When applied honestly, textual and intentional theories afford no room for judicial statute-shaping along public-regarding lines. When courts apply these theories dishonestly and/or strategically, they can, in a broad range of structural circumstances, shape statutes along public-regarding lines.

Dishonest and strategic statutory interpretation, however, has at least two problems: First, it results in a hidden decision procedure, and leaves litigants uncertain of the true basis for judicial decisions. Second, and more important, it provides *no constraint on the way that courts shape statutes*. Stated simply, courts which dishonestly and/or strategically apply existing interpretive methods as subterfuge possess the power to shape statutes within a wide band of unconstrained discretion. There is nothing to ensure that such courts will shape statutes in public-regarding ways. Textual and intentional interpretive approaches rooted in the honest agent conception are aimed at constraining and guiding courts in the search for the legislative command or intent; they, however, contain no elements designed to constrain courts which opt to engage in judicial statute-shaping via subterfuge. Dynamic theories of statutory interpretation do constrain and guide, to one degree or another, the judicial statute-shaping function. But the constraints on judicial statute-shaping they put forth are aimed at ensuring that courts update statutory law, keep it in sync with the shifting legal landscape, or maintain its coherence with past decisions, rather than at ensuring that courts will shape statutes along public-regarding lines.

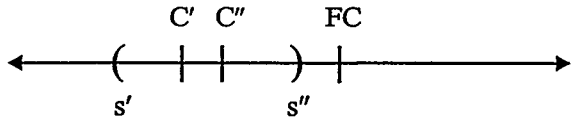
The two-step interpretive approach offered in section B below has two advantages over existing textual, intentional, and dynamic approaches. First, and most important, because the two-step approach offers courts a legitimate role in the shaping of statutes along public-regarding lines, it is fully consistent with the popular sovereignty and separation of powers theories of the federal Constitution. It, in other words, offers the federal courts an explicit and legitimate institutional role as an agent for the people, rather then as a subordinate agent for Congress. Second, the two-step approach is aimed at constraining courts in the shaping of statutes along public-regarding lines, whereas textual, intentional, and dynamic

approaches either offer little to constrain a court which chooses to shape statutes, or limit the judicial statute-shaping function to updating or coherence with the legal landscape.

B. Toward a Two-Step Theory of Statutory Interpretation

Under the honest agent conception the question foremost in the mind of a judge when interpreting a statute, is "What did the enacting Congress command or intend?"[432] If, however, the federal courts are to act as agents of the popular sovereign rather than as agents of Congress, the question that should be first in the mind of a judge is, "Which of the several plausible interpretations of this ambiguous statute is the most public-regarding?" The spatial game model in Figure #10 below illustrates the differing institutional roles for the federal courts under the two normative conceptions.

FIGURE #10



The interval s′ to s″ represents the range of plausible interpretations of some ambiguous statute, given the use of traditional tools of statutory interpretation. Point C′ represents the most likely intent of the enacting Congress, while point C″ represents the most natural reading of statutory text. Point FC represents the federal court's public-regarding point.

Assume that interpretive rules rooted in the honest agent conception, under which the court aims to discover and enforce the legislative command or intent,[433] are part of the game. Under this set of interpretive rules the federal court that honestly applies a given interpretive method will reach for a statutory interpretation corresponding with either point C′ or C″. The court will reach for an interpretation corresponding with point C′ if textual rules apply, and will opt for an interpretation corresponding with point C″ if inten-

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432. *See supra* notes 185-90 and accompanying text.

433. This is true so long as the court believes that intentional approaches to statutory interpretation are the best way to effectuate the honest agent conception. For the purposes of this hypothetical, assume that the court adheres to an intentionalist approach to statutory interpretation. The hypothetical is just as valid if it is assumed that the court adheres to a textual approach to statutory interpretation. On this assumption the interval s′ to s″ would represent the plausible textual readings of the statute, and point C would represent the most natural textual reading of the statute.

tional interpretive rules apply. Assume now that the court conceives of its institutional role as an agent for the people, rather than as an honest agent of Congress, and therefore views the shaping of ambiguous statutory law along public-regarding lines, rather than fidelity to the enacting Congress, as its fundamental goal. This shift in institutional roles alters the interpretive rules of the game. At one extreme a radical revisionary set of interpretive rules could apply to the federal court, under which the court would simply interpret ambiguous statutory provisions at point FC. Point FC, which in Figure #10 above lies outside of the range of plausible interpretations of the statute, represents what the court believes to be the most public-regarding formulation of the statutory scheme.[434]

Under a less dramatic set of interpretive rules, courts aiming to shape statutory law in a public-regarding fashion would be constrained to working within the bounds of plausible statutory interpretations, or in other words within the range s′ to s″ in Figure #10 above. Under this approach the federal court would reach an interpretation of the ambiguous statute corresponding to point s″, which is the point closest to FC that is within the set of plausible interpretation of the ambiguous statute. This second set of interpretive rules affords both the court and the enacting Congress a role in shaping the meaning of the statute. Congress moves first by passing a statute. In areas in which the statute is ambiguous, a range of "policy space"[435] opens. Within the policy space a federal court can shape the statute in the way closest to its own notions (as opposed to the enacting Congress's notions) of the most public-regarding way to structure the statutory scheme.[436]

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434. This approach, however, is just as much at odds with the popular sovereignty and separation of powers theories of the federal Constitution as are interpretive approaches rooted in the honest agent conception. The rejection of the honest agent conception as incompatible with popular sovereignty and separation of powers theory in the federal Constitution does not imply that the extreme opposite ought to be adopted. A radical revisionary role for the federal courts would, in effect, virtually obviate the role of Congress. When faced with a statutory case, a federal court operating under such a system could totally ignore the statute and decide the case on its own lights. Congress's role would be reduced to creating and replacing causes of action. The shape or form of those causes, however, would be entirely judicially determined. This clearly is not in line with constitutional principles.

435. Professors Schuck and Elliott coined the term policy space in reference to agency statutory interpretation under the *Chevron* standard. Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1024-25.

436. For now I leave to the side the issue of how a court should determine what the most public-regarding way to shape a statutory scheme. Note, however, that under the

Under this approach, statutory interpretation becomes a two-step process, which involves both interpretive judgment and policy discretion. In the first step the court uses traditional tools of statutory interpretation, such as text, legislative history, and canons and presumptions of construction, to determine the range of plausible meanings to ambiguous statutory clauses. Here the court exercises interpretive judgment, acting as an impartial observer attempting to discover the range of plausible interpretations of the congressional command and intent. In the second step of the interpretive process the court engages in a policy-oriented analysis of the several plausible interpretations of the statute. Here the court does not ask "what is the most likely congressional intent or most natural textual reading of the ambiguous statute?," as do courts operating under the institutional assumptions expressed by the honest agent conception; nor does the court simply reconfigure the statute without regard for congressional intent or textual meaning, as courts operating under the extreme radical revisionary approach outlined above might do. Instead, the court's reasoning and analysis centers upon which of the several plausible interpretations is the most public-regarding. If, as in Figure #10 above, the court's analysis concludes that the most public-regarding statutory scheme lies outside the range of plausible statutory interpretations, then the court chooses the plausible interpretation closest to what it finds to be the most public-regarding way to structure the statutory scheme.

In the first part of the two-step interpretive process the court engages in statutory *interpretation*, but in the second phase the court is actively engaged in statutory *construction*. The interpretation phase takes advantage of courts' specialized expertise in discerning the possible meanings of statutes, while the second phase offers the advantages of the judicial process to the shaping of statutory law. Unlike Congress, the federal courts are not beholden to electoral or special interest constituencies, which can warp statutes into interest-group-serving deals aimed at serving narrow constituencies carrying disproportionate voices at the expense of broader public concerns.[437]

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two-step interpretive approach offered here a court's conception of public regarding is not the same as its own policy preferences. Instead, interpretive rules, canons, and presumptions guide the judicial determination of what is and is not a public regarding statutory scheme.

437. Political scientists have come to understand that attentive interest groups and geographic interests influence the votes of members of Congress and the content of statutes to a much greater extent than more diffuse, dispersed, and unorganized interests. Rather than producing public-regarding legislation, these distortions in influence over the

congressional product often yield legislation in the service of narrow interests. Summarizing the current literature on Congress, Professor Elhauge writes:

> According to this literature, the government cannot be trusted to regulate in the public interest. Legislators are disproportionately influenced by organized interest groups and thus enact legislation enabling those groups to exact economic rents from others.
>
> . . . .
>
> The defining theme of the interest group theory of lawmaking is its rejection of the presumption that the government endeavors to further the public interest. . . . Legislators seek to maximize their chances of reelection. Voters and interest groups seek to maximize their own well-being at the expense of others. . . . Voters and interest groups demand the regulatory results that benefit them, and legislators . . . supply regulatory results to the highest bidder. The results need not further the public interest.

Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 32, 35 (1991). Professor Macey echoes Professor Elhauge's summary when he writes:

> According to the so-called interest group or economic theory of legislation, market forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups. The widespread acceptance of interest group theory has lead to suspicion about much of what Congress does . . . .

Jonathan R. Macey, *Promoting Public Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986). Similarly, Professors Ferejohn and Weingast write:

> The main claim of this modern literature is that members of Congress enjoy their life in Washington and the powers and perquisites that go with it and that they arrange their activities in order to ensure that they are able to retain their hold on office. Congressional institutions and practices . . . are, in this view, arranged to suit the reelection needs of the members rather than the requirements of rational and deliberate lawmaking.
>
> It is no longer possible to assume that Congress is simply a deliberative institution devoted wholly to determining the best course of public action and putting it into statutory commands. . . . Rather, we must recognize that the structure of the constitutional system confers significant incentives on legislators to shirk their policy-making responsibilities in favor of electoral pursuits.

Ferejohn & Weingast, *supra* note 405, at 565-66. Modern political science concurs with the view of legislatures widely held at the time of the Founding: legislatures very often fail to produce public-regarding statutes. As Professor Sunstein points out, "The problem of faction has been a central concern of constitutional law and theory since the time of the American Revolution." Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29 (1985). Sunstein is of course correct, but it is worth noting that the concern over factions has shifted since the time of the Founding. In the late 1780s Madison was concerned most with the problems of a majority faction tyrannizing a minority faction. *See* THE FEDERALIST Nos. 10, 48, and 51 (James Madison) (Clinton Rossiter ed., 1961); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 9 (1956). The modern learning on Congress, however, is more concerned with the undue influence of narrow interest groups on the legislative product, or what Madison would term minority tyranny. While Americans of the Founding period had practical experience with the limits of legislative bodies as good agents of the people, political scientists in the last 30 years have provided theoretical explanations of the mechanism that renders Congress an

By introducing an explicit role in shaping statutory law for the federal courts, the electorally independent third branch can shape statutes serving narrow interests in public-regarding ways. The judicial process is based on reasoned analysis, while the legislative process is better characterized by political force and bargaining. Under the two-step interpretive process, political bargaining determines the parameters of statutory policy, and in cases of ambiguity the reasoned analysis of the judicial process works along public-regarding lines. Further, affording courts a role in the shaping of statutes allows the incorporation of information the enacting Congress could not have accessed, such as how the statute functions in practice, changes in the legal landscape, and changes in underlying social values.

Apart from and much more important than these prudential concerns, the two-step approach to statutory interpretation, unlike statutory interpretation theories rooted in the honest agent conception, is fully compatible with the popular sovereignty and separation of powers theory of the federal Constitution. By affording courts an institutional role in shaping statutory law along public-regarding lines, the federal courts are transformed from agents of Congress into agents of the people. Yet the first step of the interpretive process, which constrains the range of the judicial policy discretion in the second step, insures that the institutional role of Congress is not emasculated or rendered superfluous. The two-step process, in short, affords both the first and third branches separate but overlapping roles in the making of statutory law. When authoring a statute Congress checks the courts by setting the parameters of judicial discretion; the courts check Congress by shaping ambiguous statutory law within those parameters. Finally, Congress may again check the courts by revising or clarifying statutes. Each branch plays a distinctly different institutional role but also operates as a peer or coequal player in the statutory law-creating game. The two-step approach to statutory interpretation represents a moderate option between the honest agent conception at one extreme and the radical revisionary approach at the other. While the honest agent conception renders the federal courts subordinate agents of Congress, and the radical revisionary interpretive approach renders the acts of Congress impotent, the two-step approach to statutory interpretation allows

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institution unlikely to produce public-regarding statutes.

both Congress and the federal courts to act as agents of the people, with neither subordinate to the other.

The two-step approach offered here is but an outline of what one method of interpretation consistent with fundamental constitutional principles might look like. A fully developed two-step approach, however, would strictly channel and constrain judicial discretion at two levels. At the first level, the traditional tools of statutory interpretation serve as a governor on judicial discretion. Here the courts seek to determine the range of plausible statutory interpretations, and rules of statutory interpretation designed for replicating the command or will of the enacting Congress are best suited for this task. Though the traditional tools of statutory interpretation can lead to multiple plausible interpretations of an open-textured statute, they nevertheless place outer boundaries upon the range of plausible interpretations even in cases of extreme statutory ambiguity. While many plausible interpretations for a given ambiguous statute may be reached, so too will many implausible interpretations be ruled out. Further, Congress maintains the power to pass precise statutory language aimed at narrowing the range of plausible statutory interpretations, therefore limiting the ambit of judicial discretion in the second part of the two-step interpretive process. Of course Congress cannot foreclose judicial discretion entirely. In some cases statutory ambiguity, and therefore a range of plausible interpretation, are the result of legislative bargaining and an effort to build the minimum winning legislative coalition needed to pass a bill into law. Thus, throughout the course of the statute-creation process—approval by House and Senate committees, approval by both chambers, changes in conference committee, and chief executive signature—key players may demand compromise in the form of the insertion of ambiguous statutory language or undefined statutory standards.[438] Even in cases in which a bill is

438. For example, passage of a bill advanced by liberals in Congress, which both sets up a regulatory agency and sets forth statutory standards and requirements for the agency to enforce, might require compromise with moderate conservatives in Congress, and with a moderately conservative chief executive. Moderate conservatives in Congress might demand ambiguous statutory language or undefined statutory standards, which would afford the moderate conservative President leeway in interpreting and applying the regulatory scheme. Statutes with extremely precise and clear meaning entrench and crystallize an area of law. When an ambiguous bill fails to gain the requisite support at different stages of the legislative process, the intentional introduction of statutory ambiguity can work as a strategy for gaining the support of key players in the legislative game. This sort of process may have been at work in the passage of Title VII. As is clear from reading the Supreme Court opinions in United Steelworkers v. Weber, 443 U.S. 193

widely supported and can pass without much compromise, limits on the time Congress can devote to drafting, the often unavoidable imprecision of language, and the tendency of novel and unforeseen cases to render ambiguous that which might at first glance seem clear, mean that statutory ambiguity can never be fully eradicated. Finally, there are often cases in which Congress cannot avoid the use of imprecise statutory language or statutory standards. Some statutes by their very nature necessitate the use of words such as "reasonable," "probative," or "practicable." Despite the fact that at least some statutes will necessarily be ambiguous, however, the use of traditional tools of statutory interpretation does place outer parameters on judicial discretion in the first phase of the two-step statutory interpretation process.

In the second phase of the two-step interpretive process, the court *constructs* the ambiguous statute by deciding which of several plausible interpretations is the most public-regarding, or in the alternative by choosing the plausible interpretation closest to what the court finds most public-regarding. Here too the federal courts must be constrained. The two-step approach is incomplete without a set of specific interpretive rules, canons, presumptions, and practices designed to guide and constrain the judicial determination of what constitutes public-regarding statutory law. Indeed, such a set of rules, canons, and presumptions is *by far the most important element* of a workable two-step approach. Merely affording courts the *ability* to shape statutory law in public-regarding ways, as does the two-step interpretive approach, does little to ensure that courts will in fact utilize such power to shape statutes in public-regarding ways. To the contrary, affording courts the legitimate power to shape statutes without constraint and guidance would likely result in the very opposite of public-regarding statutory schemes.

For this reason, a fully developed two-step approach must not only give courts the ability to shape statutory law in public-regarding ways, but also incorporate rules, presumptions, and canons designed to constrain and guide the way courts define what constitutes public-regarding statutory law. Rather than affording a court free-ranging discretion to define an ideal public-regarding point, a fully developed two-step approach must limit judicial determination of pubic-regarding

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(1979), the legislative floor debates reveal considerable confusion over whether the statute allowed preferential hiring treatment of blacks at the expense of whites. *See id.* at 202-08; *id.* at 231-55 (Rehnquist, J., dissenting). Whether Title VII could have been passed into law had its meaning on this issue been crystal clear is an open question.

points. As an example, a canon that statutory law that is stable over time constitutes (all other things being equal) public-regarding statutory law, might be incorporated into the second part of the two-step approach. A court applying the two-step approach would, among other things, count the stability of a statutory scheme in locating its ideal public-regarding point. Such a canon would tend to work against changing a statutory regime. To provide another example, a presumption that distributive statutory law entails widely dispersed benefits, and narrowly concentrated costs, could be incorporated into the two-step approach. Thus, unless the court can identify factors that would override this presumption, a court would be required to locate a public-regarding point which corresponds to widely dispersed benefits and narrowly concentrated costs. To provide a third example, the rules, canons, and presumptions constraining judicial determination of public-regarding points might incorporate notions of similar treatment for similarly situated parties. Ambiguous statutes would be read, to the extent possible, as consistent in the application to similarly situated parties. Or alternatively, ambiguous statutes which could be read to apply only to particular classifications, would be presumed to apply to all other similarly situated classifications.

These examples are simply meant to illustrate the methods that could be employed in constraining judicial policy or statute-shaping discretion in the second phase of the two-step approach. Such constraints are absent from traditional textual and intentional interpretive approaches rooted in the honest agent conception. Courts strategically employing different textual and intentional interpretive methods can, under the guise of honest agent-based statutory interpretation, exercise broad but doctrinally illegitimate and relatively unconstrained statute-shaping power. A fully developed two-step approach to statutory interpretation, in contrast, would not only explicitly afford courts a legitimate role in shaping statutory law along public-regarding lines, but also channel or guide courts when they seek to shape statutes. Consistent with the popular sovereignty and separation of powers theories of the federal Constitution, the two-step approach is based on a recognition that the federal courts ought to play a role in the shaping of statutory law. That role, however, is not one of unconstrained policy discretion, but rather of channelled application of generally applicable rules, canons, and presumptions aimed at infusing statutory law with a public-regarding character. The rules, canons, and presumptions of judicial statutory construction guiding courts in the second part of the two-step process, unlike the rules, canons, and presumptions incorporated in honest

agent approaches to statutory interpretation, must be designed with the shaping of statutory law along public-regarding lines as a first priority.

Of the three main approaches to statutory interpretation—textual, intentional, and dynamic—the two-step approach to statutory interpretation fits most comfortably in the family of dynamic interpretive theories. As with the two step approach, dynamic theories presuppose a dialogic statutory law-creating game involving Congress and the federal courts as active players. Further, while textual and intentional interpretive approaches generally view statutory law as static, or as a finished product upon passage by Congress and signature by the Chief Executive, dynamic theories, like the two-step approach, view statutes as mutable, fluid, unsettled, or protean law.

The two-step approach, however, differs from other dynamic theories in two important ways. First, dynamic theories are often sensitive to the pervasive acceptance of the honest agent conception, and therefore are presented as limited exceptions to honest agent interpretation.[439] The two-step approach, in contrast, is based upon an unqualified rejection of the honest agent conception, and upon the idea that judicial shaping of statutory law ought to be the legitimized norm rather than the surreptitious exception. The second, and more important, difference between the two-step approach and its dynamic siblings is that the two-step approach is ultimately aimed at shaping statutory law in public-regarding ways, while other dynamic theories are aimed at shaping statutory law to maximize consistency with the legal landscape, or at updating statutes to comport with changing background assumptions. Under the Calabresian common law method, for example, judicial shaping of statutory law takes place when a statute can no longer gain majoritarian support and is out of phase with the legal landscape,[440] but not necessarily when the statute is geared toward benefiting private interests at the expense of the public good. Likewise, under Professor Eskridge's dynamic theory, the evolutive perspective controls when statutory text and intent are unclear and background assumptions have changed,[441] but

439. Calabresi's common law method, for example, is to be employed only when a statute is both out of phase with the legal landscape and can no longer gain majoritarian support. *See supra* part II.C.3. Likewise, under Eskridge's quasi-dynamic approach, dynamic elements are to be used only when statutory text and intent are unclear and background assumptions have changed. *See supra* part II.C.2.

440. *See supra* notes 133-64 and accompanying text.

441. *See supra* notes 125-32 and accompanying text.

not necessarily when the statute is private-regarding. The rules, canons, and presumptions that guide judicial statute-shaping discretion in the second phase of the two-step approach, in contrast, must be specifically designed with shaping statutory law in public-regarding ways as the central aim of the interpretive enterprise.

Most of the statutory interpretation rules employed in the federal courts are based either explicitly or implicitly on the honest agent conception, and therefore are ultimately aimed at rendering the federal courts optimal agents of Congress. Theorists writing in the honest agent tradition are concerned with issues such as: Which interpretive rules are most likely to lead the federal courts to the discovery of the legislative command or will? Which interpretive rules will give the federal courts enough discretion that they can carry out the will of the enacting legislature in unforeseen situations? What is the optimal balance between the competing values of judicial constraint and judicial discretion? The two-step approach differs from these interpretive approaches in that it is built upon the idea that the federal courts are agents of the people, rather than agents of Congress. From this perspective, statutory interpretation theorists ought to focus on developing a regime of interpretive rules and practices that foster the shaping of statutory law in public-regarding ways. The research agenda of statutory interpretation theorists should focus on questions such as: What process should the federal courts employ when deciding which possible statutory constructions are public-regarding and which are not? How can judicial statute-shaping discretion be channeled and constrained in a way that tends to result in the shaping of statutory law along public-regarding lines? Could canons and presumptions of construction work to guide courts in their statutory law-shaping role? If so, what kinds of canons and presumptions would work best? Would a broad-brush rebuttable presumption that statutes are public-regarding work well, or should more detailed presumptions be developed, such as presumptions that certain classes of statutes are presumptively public-regarding? Could rules of judicial interpretive deference enhance the law-shaping role of courts? For example, though courts should generally be afforded a statutory law-shaping role, should courts sometimes forgo that role to improve the quality of statutory law? Should courts develop rules of deference in cases where courts lack expertise in a certain area, or where the nature of the judicial process is not amenable to addressing certain policy issues, or where a particular policy area is for prudential reasons best dealt with by other organs of government?

All of these questions are at bottom questions of the institutional design of government. The idea that statutory law is, and ought to be, made and shaped by the different parts of government, with each branch playing its own unique role, is consistent with institutional structure embedded in the popular sovereignty and separation of powers theory of the federal Constitution. The idea that Congress ought to enjoy a monopoly on statute creation with the federal courts as mere subordinate agents applying statutes in a mechanical fashion is not. The challenge to statutory interpretation theorists is to develop an approach to judicial statutory interpretation that (1) affords the federal courts the power to shape statutory law in public-regarding ways, (2) does not vitiate the important role of Congress as the initial author of statutes, and (3) channels and constrains the policy or law-shaping discretion of federal courts, again with an eye towards making the entire institutional process of statute creation and shaping one that produces a public-regarding output.

The general framework of the two-step approach offered here gives one tentative answer to the first two issues. The first step in the process maintains a key role for Congress as the initial author of statutes by affording Congress the power to tailor unambiguous and precisely specified statutes. The second step in the process explicitly gives the federal courts a power that they have often claimed by using honest agent interpretation approaches as "subterfuge"—the power to shape statutes in public-regarding ways within the boundaries of permissible statutory interpretations. The next step comes in developing rules of statutory construction which will constrain the statutory law-shaping powers of federal courts operating under the two-step approach. Here interpretation theorists must engage in the familiar balancing between judicial discretion and judicial constraint, but with an eye toward building an institutional structure that will produce public-regarding statutory law, rather than with an eye toward effectuating the honest agent conception. Interpretation theorists ought to be focused on developing rules, presumption, canons, and practices that will in some way systematize or routinize the exercise of judicial statute-shaping powers.

The two-step approach offered here is both tentative and incomplete. It is tentative because it is only one of many possible ways to structure the statutory interpretation process consistent with the popular sovereignty and separation of powers theories of the federal Constitution. Just as there are several very different basic approaches to effectuating the honest agent conception, so too will there be many possible ways to give both Congress and the federal

courts peer roles to play in the game of statute making and shaping. The two-step interpretive approach is incomplete because it does not yet include a set of rules of statutory construction aimed at constraining judicial determinations of what constitutes public-regarding statutory law. The two-step approach is in need of norms, conventions, practices, rules, patterns, systems, routines, presumptions, canons of construction—in short a rule-based institutional framework—to serve as both constraints and guidelines in the process of the judicial exercise of statute-shaping powers.

V. CONCLUSION

The main thrust of this Article has been to demonstrate that the honest agent conception—the normative institutional premise underlying textual and intentional statutory interpretation theory—is incompatible with the foundational constitutional theories of popular sovereignty and separation of powers. Popular sovereignty is the cornerstone of the federal Constitution, and separation of powers is one of the central theoretical pillars resting on that cornerstone. For too long statutory interpretation theory and practice have operated under the misguided assumption that foundational constitutional principles require the federal courts to act as subordinate honest agents of Congress. As we have seen, however, the idea that the proper institutional role of the federal courts is that of honest agents of the first branch sounds more of the constitutional theory ratified into the 1776-77 state constitutions than the entirely different constitutional theory ratified into the federal Constitution. We cannot ignore the meaning of the Founding, and the fact that American constitutional theory evolved dramatically in the eleven years leading up to the Philadelphia convention. In the Founding, the fountain of legitimate political authority, the people, spoke in a time of special constitutional transformation for purposes of altering the fundamental political rules by which we live and our agent governors must abide. No longer were our governments to be rooted in legislative supremacy, and no longer were popularly elected assemblies to be considered the sole agents of the people in government. Instead, we were to have a government of three peer or coequal branches, with overlapping powers, and ample checks. And we were to consider all three branches of government as legitimate agents of the people.

The honest agent conception, and the rules of statutory interpretation designed to effectuate it, fly in the face of these bedrock political principles. Our goal now must be to begin the process of building interpretive theories compatible with the popular

sovereignty and separation of powers theories of the federal Constitution. It is certainly true that the proper institutional role of Congress is to make the laws. But it is also true that the proper institutional role of the federal courts is to say what those laws mean. According to the popular sovereignty and separation of powers theories of our federal Constitution, the proper institutional role of the federal courts is that of an independent branch of government that operates as a check on Congress. Rather than a subordinate of Congress, the judicial branch is a coequal or peer player in the statute creation game. As a peer branch, the federal courts must take care not to encroach upon the institutional role of Congress—that of writing statutory law. As such, radically revisionary statutory interpretation methods under which the federal courts are unconstrained in reshaping and reconfiguring statutory law are ill-conceived. Just as ill-conceived, however, is the notion that rules of statutory interpretation ought to be designed with an eye towards submitting the federal courts to some slavish subservience to the command or intent of Congress. The federal courts are not the mouthpiece of long-retired Congresses, but rather an independent voice unto themselves who say what the law means. Rather than honest agents of Congress, the federal courts must begin to see themselves, and in fact conduct themselves, as the Constitution's fundamental principles demand—as agents for the people.

Of course, pointing the direction is one thing, and getting there is another. Our current set of commonly used interpretive theories, and the rules that flow from them, are designed to effectuate the honest agent conception, and therefore often inhibit judicial attempts to shape statutes along public-regarding lines. The federal courts are saddled with tools ill-suited for their proper institutional mission. They need new interpretive theories and rules consistent with our bedrock constitutional principles. They need a new theoretical statutory interpretation superstructure to operate as a road map, and they need new statutory interpretation rules to operate as a compass. The challenge to statutory interpretation scholars and to thoughtful judges is to provide that road map and compass.