STATUTORY INTERPRETATION AS CONTESTATORY DEMOCRACY

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ABSTRACT

This Article provides a novel solution to the countermajoritarian difficulty in statutory interpretation by applying recent insights from civic republican theory to the adjudication of statutory disputes in the modern regulatory state. From a republican perspective, freedom consists of the absence of the potential for arbitrary domination, and democracy should therefore include both electoral and contestatory dimensions. The Article argues that statutory interpretation in the modern regulatory state is best understood as a mechanism of contestatory democracy. It develops this conception of statutory interpretation by considering the distinct roles of legislatures, administrative agencies, and courts in making and implementing the law. The Article claims that this understanding of statutory interpretation is both descriptively accurate and normatively attractive, and it explores some of the most important implications of recharacterizing statutory interpretation in this fashion. Specifically, this understanding of statutory interpretation sheds new light on the most fundamental problems with textualism, and it provides reasons to give serious consideration to proposals for increased judicial candor in statutory interpretation and for judicial review of at least some types of legislation for due process of law making.

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INTRODUCTION

Constitutional theorists have devoted considerable attention to the question of what, if anything, justifies the power of judicial review in a democracy.[1] The "countermajoritarian difficulty" questions the legitimacy of an unelected judiciary's authority to invalidate the policy decisions of elected representatives of the people.[2] This problem is unlikely to go away any time soon, considering persistent charges of "judicial activism" against the Rehnquist[3] and Roberts Courts.[4]

Meanwhile, the democratic legitimacy of judicial law making in statutory interpretation has received far less attention. This disparity in treatment likely stems from the traditional view that courts do not engage in law making when they interpret statutes. Rather, courts are obligated to serve as faithful agents of the legislature, and thereby carry out the legislature's decisions.[5] The judiciary's authority to interpret statutes is easy to square with democracy from this perspective, because elected officials who are politically accountable to the people are making all of the important policy decisions.[6]

The traditional view has been difficult to sustain, however, for a variety of reasons. First, the legal realist movement and contemporary theories of interpretation have highlighted the inherent ambiguity of language and the severe limitations on legislative foresight.[7] It is therefore widely accepted that the legislature does not explicitly resolve every question that arises in statutory interpretation, and that courts have considerable interpretative

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1. *See* Barry Friedman, *The Birth of an Academic Obsession*: *The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

2. *Id.*

3. *See, e.g.*, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 203 (2004).

4. Editorial, *Activism and the Roberts Court*, N.Y. TIMES (Mar. 29, 2013), http://www.nytimes.com/2012/03/29/opinion/activism-and-the-roberts-court.html.

5. *See* John F. Manning, *Textualism and the Equity of the Statute,* 101 COLUM. L. REV. 1, 5 (2001).

6. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995).

7. *See id.* at 599, 602.

leeway. Second, the rise of the modern regulatory state has resulted in widespread delegations of broad discretionary authority from the legislature to other institutions, and a candid recognition that the resolution of ambiguities in federal regulatory statutes necessarily involves policy making.[8] Third, recent developments in political science have undermined the optimistic pluralistic conception of the legislative process that underlay the traditional model, and called into question the capacity of voters to hold elected officials accountable for their policy decisions.[9] These developments raise serious questions about the cogency of faithful agent theory, and suggest that the democratic legitimacy of statutory interpretation can no longer be taken for granted.

Partly in response to these developments, several prominent scholars have rejected faithful agent theory and suggested that courts should be understood as cooperative partners of the legislature in the process of statutory interpretation. These theorists recognize the inevitability of judicial discretion in statutory interpretation, and claim that courts can play a desirable role in (1) updating statutes to reflect changed circumstances;[10] (2) placing needed limits on government administration and ensuring stability and consistency in interpretation;[11] (3) promoting background norms that would improve the operation of government;[12] or (4) facilitating the integrity of the entire legal system.[13] Although some of these scholars have addressed the democratic legitimacy of a relatively ambitious judicial role in statutory interpretation,[14] it seems fair to

8. *Cf.* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

9. *See* Schacter, *supra* note 6, at 603-05.

10. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 227-28 (1982); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 42 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 591 (1988).

11. *See* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1246-47 (2002).

12. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

13. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).

14. *See* Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 380-83 (1989) (describing and critiquing the arguments of Calabresi and Eskridge); *infra* notes 81-85 and accompanying text.

say that those efforts have not been completely successful. Not only are cooperative partner theories widely viewed as undemocratic, but textualism—a more formal version of faithful agent theory than the traditional model[15]—has been tremendously influential in recent years precisely because it allegedly limits the judiciary's policy-making discretion.[16]

This Article contends that the solution to the countermajoritarian difficulty in statutory interpretation[17] can be found in recent literature on democratic theory, which returns to first principles and identifies the most fundamental limitation on governmental authority and the two essential dimensions of democracy. Specifically, Philip Pettit has set forth a republican conception of liberty as non-domination, whereby freedom consists of the absence of the possibility of arbitrary domination by others.[18] Though government promotes liberty under this view by protecting citizens from the possibility of arbitrary domination by private parties, the government can also be a potential source of arbitrary domination. It is therefore essential for any society that values liberty to provide structural safeguards to limit the possibility of arbitrary domination by the state. Pettit claims that a republican democracy with two essential dimensions is the form of government that is most conducive to this understanding of freedom.[19]

Because government acts nonarbitrarily when it is "forced to track the common, perceived interests of citizens,"[20] Pettit claims that "it is always better to have an arrangement under which the possibility of government's being indifferent to the common, perceived interests of ordinary people is reduced or removed."[21] This

15. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

16. *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 26, 48 (2006).

17. This Article does not address the countermajoritarian difficulty in constitutional theory, which raises some distinctive issues that stem, in part, from the difficulty of amending the Constitution to override judicial decisions.

18. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 66 (1997).

19. Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 164 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

20. *Id.* at 173.

21. *Id.* at 172.

is the function periodic elections perform in a republican democracy. Public officials are unlikely to win reelection if they are indifferent to the collective interests of the people. Pettit recognizes, however, that elections can provide only a limited protection against the possibility of arbitrary domination, because electoral democracy is not necessarily responsive to the interests and perspectives of minorities:

> Electoral democracy may mean that that government cannot be wholly indifferent to popular perceptions about common interests and that it cannot fail altogether to try and advance those interests. But it is quite consistent with electoral democracy that government should only track the perceived interests of a majority, absolute or relative, on any issue and that it should have a dominating aspect from the point of view of others.[22]

In other words, the tyranny of the majority precludes the possibility that electoral democracy is sufficient to ensure that government preserves freedom as non-domination.[23]

Pettit therefore argues that democracy must also contain mechanisms to ensure that the interests and perspectives of minorities are considered. He points out that the most promising solution to this concern is a procedure that would enable people to call public decisions into question, "and to trigger a review; in particular, to trigger a review in a forum that they and others can all endorse as an impartial court of appeal: as a forum in which relevant interests are taken equally into account and only impartially supported decisions are upheld."[24] The complaint in a contestatory regime of this nature is not that some people fared less well than others as a result of a decision, but rather that the decision was made in a manner that failed to take some interests or perspectives equally into account. "The assumption behind the complaint is that if those interests had been taken equally into account, then the ultimate decision would have been different."[25]

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22. *Id.* at 174.
23. *See id.* at 176.
24. *Id.* at 179.
25. *Id.* at 180.

Pettit claims that the electoral mode of democracy promotes legitimacy because it ensures that governmental decisions originate, "however indirectly, in the collective will of the people."[26] Significantly, however, the contestatory mode of democracy further improves the democratic legitimacy of those decisions to the extent that they can withstand challenges brought by individuals in appropriate institutional settings.[27] Whereas the electoral mode of democracy "gives the collective people an indirect power of authorship over the laws," the contestatory mode of democracy "would give the people, considered individually, a limited and, of course, indirect power of editorship over those laws."[28] Pettit demonstrates that the importance of contestatory democracy has been a prominent theme in democratic theory since at least the seventeenth century,[29] but he also recognizes that this idea "has consistently played a secondary role to the idea of putting government under popular, collective control and it has ceded to that other idea a semantic connection with the word 'democracy.'"[30] He argues that viewing as *undemocratic* proposals to constrain government by protecting individual rights or establishing mechanisms for individual challenge reflects "a serious conceptual loss,"[31] and that we should recognize that such restrictions on collective power are not solely pragmatic in character, but rather constitutive of the only understanding of democracy that is properly connected to the requirements of individual freedom.[32]

After discussing relevant aspects of Pettit's conception of democracy,[33] this Article argues that statutory interpretation in the modern regulatory state is best understood as a mechanism of contestatory democracy. I write against a contemporary backdrop in which most issues of statutory interpretation in federal court arise in the context of challenges to the validity of administrative action.[34] One party is claiming that the government has exceeded the scope

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 172.
30. *Id.* at 184.
31. *Id.*
32. *Id.* at 184-85.
33. *See infra* Part II.
34. *See infra* notes 125-39 and accompanying text.

of its lawful authority, whereas the government is alleging that the manner in which it has chosen to implement a statute is both legally permissible and reasonable as a policy matter. When a court decides such a case or controversy, it is resolving a "contest" over the permissible scope of governmental authority. In short, statutory interpretation in federal court is typically a species of judicial review of agency action—and a prototypical example of a mechanism for contestatory democracy.[35] Moreover, this conception of statutory interpretation also holds in most cases where an administrative agency is not involved, including litigation that contests the government's understanding of criminal statutes. As such, statutory interpretation is hardly a deviant institution in democracy; rather, its availability promotes freedom as non-domination and is therefore vital to the legitimacy of specific exercises of governmental authority in a post-New-Deal republican democracy.

The Article develops this conception of statutory interpretation as contestatory democracy by considering the distinct roles of legislatures, administrative agencies, and courts in the modern regulatory state.[36] The legislature is authorized by the Constitution to play the primary authorial role in the lawmaking process, and this is entirely legitimate because of the electoral dimension of democracy. Both the constitutional structure and principles of democratic legitimacy suggest that Congress should engage in reasoned deliberation on which courses of action will promote the public good, and that it should take the interests and perspectives of minorities into account during the legislative process. If Congress has explicitly resolved a particular issue pursuant to this process, the legislature's decision should ordinarily be respected by agencies and courts when the statute is implemented, and potential challenges to the validity of those decisions on statutory grounds will generally be unsuccessful. If, however, Congress has not explicitly resolved an issue during the legislative process or circumstances have materially changed, agencies will generally have more authority to play an authorial or robust editorial role when the statute is implemented.

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35. I will discuss the complexities of this claim *infra* in Part III.C., where I distinguish between (1) judicial review of agency law making; (2) statutory interpretation without agencies; and (3) statutory interpretation with agency guidance.

36. *See infra* Part III.

When an agency's interpretation of a statute is subsequently challenged in court under these circumstances, the judiciary performs an editorial role and examines whether the agency made a reasoned decision. If so, the agency's decision should be upheld; if not, it should be vacated and remanded for further consideration and potential revision. When there is no agency responsible for implementing a statute or the responsible agency has not engaged in reasoned deliberation on a matter, and Congress has not explicitly resolved the question, the judiciary will necessarily play a more robust editorial role if the proper understanding of the statute is contested. The people are thereby provided with a variety of different forums for potentially contesting legal or policy issues, and individuals cannot be adversely affected by governmental action unless a reasoned decision that considered their interests and perspectives was provided at some point during the process.

This Article proposes a different way of thinking about statutory interpretation, but it also provides a useful mechanism for understanding the existing empirical reality.[37] First, understanding statutory interpretation as contestatory democracy provides a congenial home for the increasingly influential role of administrative agencies, as well as a basis for properly understanding and evaluating the scope of judicial review of agency action and the doctrines by which courts defer to the executive branch's interpretation of statutes. Second, this understanding of statutory interpretation explains why federal courts have displayed a marked tendency to forego consistent application of any foundational theory in favor of an approach that resolves individual cases based on the application of practical reasoning. In the course of this positive discussion, the Article also provides some normative views on the proper level of judicial deference to agency decision making, and explains why the use of practical reasoning in statutory interpretation is both normatively attractive and affirmatively democratic.

Finally, the Article describes some of the most important implications of thinking about statutory interpretation as contestatory democracy, and identifies certain issues that deserve further consideration.[38] Specifically, the theory of statutory interpretation

37. *See infra* Part IV.
38. *See infra* Part V.

that is articulated in this Article undermines textualism because it suggests that *the law* is more than the text that was enacted by the legislature, and that the law includes decisions rendered over time by officials in several institutions.[39] Moreover, if we understand statutory interpretation by the judiciary as a mechanism of contestatory democracy, more factors will necessarily come into play in reaching decisions than *the meaning* of statutory language. On the other hand, contestatory democracy requires reasoned decision making on legal and policy issues by public officials. While agency decision making is typically reviewed by the judiciary for compliance with this standard, the vision of statutory interpretation set forth in this Article leaves more room for potential abuses of discretion by Congress or the judiciary. This suggests a need to reassess previous debates on the feasibility of judicial review of legislation for "due process of law making," as well as a potential need for greater candor in judicial decision making.[40] Although the judiciary's editorial role in statutory interpretation affirmatively promotes democratic legitimacy by providing meaningful opportunities for contestatory democracy, statutory interpretation best promotes freedom as non-domination when the judiciary gives reasoned explanations for its decisions that could reasonably be accepted by people with fundamentally competing interests and perspectives.

In their recent book, *Reading Law: The Interpretation of Legal Texts*, Justice Antonin Scalia and Bryan Garner emphatically declare that "[o]riginalism is the *only* approach to text that is compatible with democracy."[41] This Article provides an alternative understanding of statutory interpretation and its democratic legitimacy, which shows that the underlying premise of Scalia's and Garner's theory is false. This alternative vision is based upon fundamentally different understandings of freedom and democracy, which are ultimately more compelling, partly because they recognize that there is more to democracy than voting, and partly because they embrace the notion that democratic authority should not be exercised without listening and responding to the interests and perspectives of all the people.

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39. *See infra* Part V.A.

40. *See infra* Part V.B.

41. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 82 (2012).

I. THE COUNTERMAJORITARIAN DIFFICULTY IN STATUTORY INTERPRETATION

The traditional understanding of statutory interpretation is that the judiciary should serve as a faithful agent of the legislature.[42] As "honest agents of the political branches," courts "carry out decisions they do not make."[43] Because statutory interpretation implements previous decisions by an elected legislature, and does not involve creative law making by courts, the enterprise is consistent with, and, indeed, affirmatively facilitates majoritarian democracy. If Congress disagrees with a judicial decision or wants to change the law for other reasons, it is the legislature's responsibility to amend the statute pursuant to the constitutionally mandated lawmaking procedures. From this perspective, the democratic pedigree of statutory interpretation is impeccable because elected officials who are politically accountable to voters are making all of the important policy decisions.

The dominant understanding of the best interpretive strategy for a faithful agent of the legislature has gradually shifted over the years in response to prevailing understandings of law and the legislative process. The traditional view was that courts should resolve interpretive disputes by ascertaining the intent of the legislature with respect to the precise question at issue.[44] The legal realists, however, persuasively identified the difficulties associated with attributing a single coherent intent to a multi-member body, and the likelihood that many issues were not explicitly considered or resolved by a majority of elected representatives during the legislative process.[45] In short, the legal realists recognized that the notion of "legislative intent" is often a fiction and that courts necessarily exercise substantial policy-making discretion when they decide cases pursuant to traditional methods of statutory interpre-

42. *See supra* notes 5-6 and accompanying text.

43. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

44. *See* WILLIAM N. ESKRIDGE, JR., ET AL., LEGISLATION AND STATUTORY INTERPRETATION 221 (2d ed. 2006); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 89 (1991).

45. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

tation.[46] In the process, the legal realists identified a need for other mechanisms to guide or constrain the judiciary—or for a theory that could explain how the judiciary's exercise of such policy-making discretion is consistent with representative democracy.

To make a long story short, the alternative approaches or foundational theories have not been completely successful. One common technique that has been invoked by faithful agent theorists when Congress does not have a readily ascertainable intent is to engage in "imaginative reconstruction."[47] The idea is that the judiciary should decide a statutory question based on what the legislature would have intended if it had considered and resolved a particular problem.[48] This technique can potentially avoid absurd or patently unreasonable results that the legislature likely would not have intended,[49] but critics have persuasively argued that the technique is more "imaginative" than "reconstruction" in more difficult cases.[50] Accordingly, imaginative reconstruction necessarily confers a great deal of policy-making discretion on the unelected federal judiciary.

"Legal process theory," which provided the dominant theory of law and statutory interpretation after World War II and the establishment of the modern regulatory state pursuant to the New Deal, viewed such discretion as potentially beneficial and therefore moved away from faithful agent theory and toward an understanding of statutory interpretation as the "creative elaboration" of meaning by judges.[51] Henry Hart and Albert Sacks claimed in their famous legal process materials that the judiciary's role in statutory interpretation "is to decide what meaning ought to be given to the directions of the statute in the respects relevant to the case before

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46. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

47. *See* ESKRIDGE ET AL., *supra* note 44, at 226-28 (describing this approach); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985) (advocating imaginative reconstruction).

48. *See* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907).

49. *See* Manning, *supra* note 15, at 2399-2402 (describing the intentionalist justification for the absurdity doctrine).

50. *See* ESKRIDGE ET AL., *supra* note 44, at 227-28.

51. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1380 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *see also* Schacter, *supra* note 6, at 600-02 (discussing legal process theory).

it."[52] Courts should interpret statutes by deciding what purpose ought to be attributed to the legislation and then ascertaining which interpretation will best carry out that purpose, provided that the court does not give the words "a meaning they will not bear" or violate other well-established public policies.[53] When attributing purposes to a statute, courts should "assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[54] Hart and Sacks emphasized that "[w]hat is crucial here is the realization that law is being made, and that law is not supposed to be irrational."[55]

Legal process theory held sway during an era that was characterized by unusual societal consensus[56] and great optimism regarding government's capacity to solve social problems through the use of neutral expertise.[57] When this societal consensus collapsed and public policy was viewed as a battle between competing interest groups, it no longer made sense to assume that legislators were "reasonable persons pursuing reasonable purposes reasonably,"[58] or to entrust the unelected judiciary with significant policy-making discretion.[59] Because there was little doubt that purposivism provided the judiciary with at least as much policy-making discretion as intentionalism, this theory of statutory interpretation began to receive sharp criticism as undemocratic beginning in the late 1960s and 1970s.

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52. HART & SACKS, *supra* note 51, at 1374.

53. *Id.*

54. *Id.* at 1378.

55. *Id.* at 1379.

56. This is not to say unanimity. Indeed, the exclusion of certain social groups from public life during this period resulted in much of the social unrest of the following decades.

57. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1056-59 (1997); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 574-75 (1992).

58. HART & SACKS, *supra* note 51, at 1378.

59. *See* Lisa Schultz Bressman, *Beyond Accountability*: *Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 480 (2003) ("Post-Bickel, scholars began to distrust not only judicial use of individual rights to invalidate popularly enacted statutes, but *any* policy decision made by unelected officials."); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 2, 8-12 (2007) (identifying efforts to "minimize judicial intrusions into the political process" in different areas of public law in response to the "core problem" of justifying judicial authority in "a post-realist age ... when judging is understood to be an active, creative enterprise").

A group of judges, scholars, and other public officials on the political right responded to the perceived shortcomings of legal process theory and purposivism by returning to faithful agent theory with a vengeance. These theorists advocate what William Eskridge promptly dubbed "the new textualism"[60] as an alternative to an intentionalist methodology of statutory interpretation. The new textualism posits that the only legitimate goal of statutory interpretation is to ascertain the "plain meaning" of the text to an ordinary speaker of English when the statute was enacted.[61] The advocates of this approach have severely criticized the judiciary's use of legislative history to determine what Congress sought to achieve when it enacted a statute.[62] New textualists maintain that courts should rely instead on textual sources of meaning, including the ordinary understanding of relevant statutory provisions, related parts of the same act and the whole code, and long-standing canons of statutory interpretation, to determine what elected officials who participated in the lawmaking process formally agreed "to say."[63] A statute's underlying purpose and its policy consequences in a particular case may be considered under this approach only to resolve ambiguity, which exists only when a court is required to choose from among two or more linguistically permissible meanings that remain after a thorough examination of the statute's "semantic context."[64]

The "intent skepticism" that underlies the new textualism is based in part on the collective action problems facing an ongoing multimember institution that were recognized by the legal realists. New textualists have also relied, however, upon more recent lessons about the legislative process from political science to underscore the difficulties of attributing a meaningful intent to Congress beyond what is reflected by "the clear social meaning of the enacted text."[65]

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60. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623-24 (1990).

61. *See* Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 147-51 (describing the new textualism in statutory interpretation).

62. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997).

63. *See* ESKRIDGE ET AL., *supra* note 44, at 235-36 (describing the sources of guidance used by textualists).

64. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91-92 (2006).

65. *See* Manning, *supra* note 15, at 2408.

The upshot is that because "the precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknowable strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision," new textualists maintain that a faithful agent should enforce the precise terms of the deal enacted by Congress.[66] New textualists also claim that the judiciary's obligation to serve as a faithful agent of Congress and treat "the clear social meaning of the enacted text" as dispositive for purposes of statutory interpretation is compelled by the Constitution.[67] For example, they rely upon the requirements of bicameralism and presentment to point out that only the statutory text, which was formally approved by both chambers of Congress and the President, is authoritative.[68] Similarly, textualists rely upon judicial independence and the separation of legislative and judicial functions contemplated by the Constitution to challenge the legitimacy of exercises of judicial discretion that deviate from plain statutory meaning.[69]

The new textualism has been tremendously influential, but it has not solved the countermajoritarian difficulty in statutory interpre-tation. First, the theory is based on highly controversial understandings of the legislative process and the constitutional structure, and there are other well-developed ways of thinking about these matters that would have very different implications for statutory interpretation.[70] The adoption of a textualist methodology of statutory interpretation is therefore a discretionary policy choice of enormous magnitude. Second, textualism cannot eliminate the ambiguities in language and limitations on legislative foresight that necessitate the judiciary's exercise of policy-making discretion in statutory interpretation. In some cases, precluding courts from considering legislative history or policy consequences will, in fact, greatly exacerbate these problems.[71] To the extent that textualists

66. *See id.* at 2390.

67. *See id.* at 2408, 2431-45; Manning, *supra* note 5, at 56-78.

68. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 62, 68-69 (1994).

69. *See* Manning, *supra* note 5, at 56-70.

70. *See, e.g.*, Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006).

71. For empirical studies suggesting that the use of legislative history can ameliorate ideological decision making by the Justices, see James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History*: *Principle, Strategy, and the Scalia Effect*, 29

view the resolution of genuine statutory ambiguities as an inherent part of the judiciary's delegated authority to interpret statutes,[72] this justification for the exercise of the requisite judicial discretion is tautological.[73] One could just as easily understand the combination of Article III's judicial power and gaps in legislation as delegations of authority to courts to ascertain Congress's intent or determine how best to achieve a statute's underlying purposes in particular cases.[74] Because textualism is neither legally required nor capable of eliminating judicial discretion, courts tend to avoid the theory's more extreme and normatively unattractive consequences,[75] but the accompanying debates have merely highlighted the continued need to square the judiciary's authority over statutory interpretation with principles of democracy.

While judges and scholars on the right have responded to the shortcomings of intentionalism and purposivism by advocating the new textualism, their counterparts on the left have increasingly discarded faithful agent theories of statutory interpretation in favor of "cooperative partner" models. For example, Ronald Dworkin has argued that courts should promote the integrity of the entire legal system by resolving interpretive disputes in the manner that follows from "the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's

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BERKELEY J. EMP. & LAB. L. 117 (2008); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference*: *Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1093, 1135-36, 1194-95 (2008).

72. *See* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3, 6 (2004).

73. *See* CALABRESI, *supra* note 10, at 92.

74. Indeed, there is recent evidence to suggest that legislatures tend to prefer such understandings. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) (reporting the results of surveys of the attitudes of congressional staffers toward statutory interpretation); Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (reporting the results of a survey of the codified rules of statutory interpretation adopted by state legislatures).

75. *See* Molot, *supra* note 16, at 43 (claiming that a moderate version of textualism currently prevails in federal court and that "any effort to accentuate the differences between adherents and nonadherents of textualism will undermine its appeal"); *cf.* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation*: *Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1829-46 (2010) (describing a relatively moderate approach to textualism that currently prevails in several states).

legal practice."[76] Guido Calabresi has argued that courts should be willing to overrule statutes that no longer have contemporary majority support when circumstances have materially changed since the time of a law's enactment.[77] William Eskridge has argued that courts should place significant emphasis on "evolutive considerations" when they resolve statutory ambiguities and that contemporary legal and social developments will properly supplement and occasionally override originalist sources of statutory meaning.[78] Cass Sunstein has argued that courts should resolve ambiguities in regulatory statutes by adopting background norms, which reflect sound understandings of constitutional values and contemporary institutional arrangements and are designed to improve the operation of the modern administrative state.[79] These scholars are heirs to the legal process tradition with an increased sensitivity to the scope of interpretive indeterminacy and the policy discretion inherent in judicial decision making; the importance of changed circumstances and the difficulty of formally amending statutes; the pervasive flaws and potential inequities in the operation of pluralist democracy; and the potential significance of the establishment of the regulatory state. They recognize the limits of static inquiries into original statutory meaning, and they embrace the necessity and the potential desirability of a creative judicial role in statutory interpretation.

Precisely because these theories embrace a creative judicial role in statutory interpretation, they have been widely criticized on the grounds that they are countermajoritarian or undemocratic and that they exceed the scope of the judiciary's competence to resolve disputes over statutory meaning.[80] Of course, each of the foregoing scholars anticipated and responded to these concerns by providing alternative accounts of democratic legitimacy in statutory interpretation and discussing the judiciary's potential capacity to improve the operation of democracy. In short, these scholars rely on fundamental

76. DWORKIN, *supra* note 13, at 225 (quoted in Eskridge, *supra* note 10, at 1550).

77. CALABRESI, *supra* note 10, at 2.

78. Eskridge, *supra* note 10, at 1479, 1496.

79. Sunstein, *supra* note 12, at 411-12.

80. *See, e.g.*, SCALIA & GARNER, *supra* note 41, at 83 ("Allowing laws to be rewritten by judges is a radical departure from our democratic system."); Bressman, *supra* note 59, at 465-66; Molot, *supra* note 59, at 8-9.

notions of political morality,[81] analogies to the judiciary's authority to make common law decisions,[82] or countermajoritarian features of the constitutional structure[83] to argue that the judiciary's role in statutory interpretation is well designed to promote the rule of law and the goals of a representative, constitutional democracy.[84] Yet, neither their responses nor the subsequent efforts of like-minded scholars[85] have successfully overcome the stigma that such judicial policy making is undemocratic or provided a definitive solution to the countermajoritarian difficulty in statutory interpretation.

Professor Eskridge has persuasively argued that the "theoretical impasse" between advocates of faithful agent theory and cooperative partner models is a result of the inability of either approach to provide clear limits on judicial discretion based solely on the idea of legislative supremacy that underlies the traditional model and the related "inability of philosophical 'liberalism' to provide a satisfactory theory of judging."[86] He explains that liberal theory posits a collection of autonomous individuals with incommensurable interests who enter into a social contract to achieve collective goals that could not be reached solely through private action.[87] Those individuals like to preserve their autonomy, however, and they generally prefer to protect the private sphere from interference by the state.[88] The agreed-upon mechanism for making collective decisions on behalf of society is the legislature, which is politically accountable to the people through regular elections.[89] Because federal judges are not politically accountable, their exercise of policy-making discretion is in severe tension with liberal democratic theory.[90] Accordingly, liberal democratic theory seeks to limit the

81. *See* DWORKIN, *supra* note 13, at 387-92.

82. *See* CALABRESI, *supra* note 10, at 93-100; Eskridge, *supra* note 10, at 1499-1500.

83. *See* Eskridge, *supra* note 10, at 1498-1501, 1527-29; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 43-44, 47 (1985); *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 285-97 (1994).

84. *See* Zeppos, *supra* note 14, at 379-85 (summarizing and critiquing Calabresi's and Eskridge's theories of democratic legitimacy).

85. *See, e.g.*, Molot, *supra* note 11.

86. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 344-45 (1989).

87. *Id.* at 344.

88. *See id.*

89. *See id.* at 344-45.

90. *See id.* at 345.

policy-making discretion of judges by requiring them to justify their legal decisions as the product of the policy choices of elected officials.[91] Eskridge concludes that "it is doubtful that any theory will successfully allay liberalism's anxiety about permitting unelected judges to make policy choices that invade private interests," and recognizes that the potential responses to this dilemma include abandoning liberalism in favor of some version of republican theory or thinking about statutory interpretation in a significantly different way.[92]

The remainder of this Article seeks to break this theoretical impasse by providing a democratic defense of judicial discretion in statutory interpretation that simultaneously relies on recent advances in republican theory and proposes a significantly different way of thinking about statutory interpretation. The countermajoritarian difficulty in statutory interpretation is ripe for reconsideration at this time precisely because recent advances in democratic theory, which have not previously been explored in the literature, shed new light on this problem. Moreover, the rise of the modern regulatory state provides a crucial backdrop for fundamentally reconsidering the nature of statutory interpretation by the judiciary. These recent advances in democratic theory and the operation of the modern regulatory state work together to suggest that statutory interpretation is best understood as a mechanism of contestatory democracy. As such, the judiciary's role in this enterprise affirmatively promotes democracy by limiting the government's capacity to engage in arbitrary domination. The remainder of this Article describes the recent innovations in democratic theory, argues that statutory interpretation by the judiciary in the modern regulatory state is best understood as a form of contestatory democracy, relates this theory to current practice, and discusses the most important implications of thinking about statutory interpretation in this fashion.

91. *See id.*
92. *Id.*

II. LIBERTY AS NON-DOMINATION AND THE TWO DIMENSIONS OF DEMOCRACY

This Part lays the groundwork for my proposed solution to the countermajoritarian difficulty in statutory interpretation by describing recent literature on civic republican theory, which provides an alternative conception of liberty and identifies the two essential dimensions of democracy. I rely primarily on the work of Philip Pettit, which is set forth in his instant classic, *Republicanism: A Theory of Freedom and Government*, and a series of related publications.[93] It is noteworthy, however, that Pettit's work is part of a broader revival in civic republican theory over the past thirty years.[94] The "republican revival" is also closely related to the development of deliberative democratic theory, which has become "the 'most active' area of political theory" in recent years.[95] Nonetheless, Pettit's insights have never been used to explore the democratic legitimacy of the judiciary's role in statutory interpretation, despite their remarkable explanatory power. I begin by describing the idea of liberty as non-domination, and proceed to explain that a system of government can promote this vision of freedom only if it includes mechanisms of electoral democracy, as well as mechanisms of contestatory democratization.

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93. *See supra* notes 18-19; *see also* Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268 (2001); Philip Pettit, *Democracy, Electoral and Contestatory*, *in* DESIGNING DEMOCRATIC INSTITUTIONS 105 (Ian Shapiro & Stephen Macedo eds., 2000); Philip Pettit, *Depoliticizing Democracy*, 17 RATIO JURIS. 52 (2004).

94. *See, e.g.*, Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992); Sunstein, *supra* note 83.

95. Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 498 (2008) (quoting John S. Dryzek, *Theory, Evidence, and the Tasks of Deliberation*, *in* DELIBERATION, PARTICIPATION AND DEMOCRACY: CAN THE PEOPLE GOVERN? 237 (Shawn W. Rosenberg ed., 2007)). For some leading works, see Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17 (Alan Hamlin & Philip Pettit eds., 1989); DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998); JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND: LIBERALS, CRITICS, CONTESTATIONS (2000); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004); HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY: PUBLIC REASONING ABOUT THE ENDS OF POLICY (2002); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338 (1987).

One of the key questions animating Pettit's research is whether democracy promotes freedom. He explains that a standard rationale for government is that it reduces violations of freedom by private parties, but he recognizes that the government can also be a source of infringements upon liberty. Even if government were to promote the overall freedom of society by preventing more infringements of liberty than the state commits, Pettit wants to know "whether a democratized state, just in virtue of being democratized, will itself represent a lesser assault—or perhaps even no assault at all—on the liberty of its citizens."[96] He claims that the answer to this question depends on one's understanding of liberty, and he distinguishes between the modern liberal idea of freedom as non-interference and the classical republican understanding of freedom as non-domination.[97]

Under the liberal view of *freedom as non-interference*, an individual's liberty is constrained by any intentional form of obstruction or coercion.[98] This means that a benign dictator who voluntarily chooses not to interfere with the preferred actions of her subjects would not be infringing upon their liberty. Moreover, all coercive law or regulatory legislation infringes upon liberty as non-interference, irrespective of whether it promotes the common good or constitutes arbitrary governmental action. Accordingly, Pettit concludes that if we think of freedom as non-interference, then the adoption of a democratic form of government does nothing to reduce infringements upon liberty by the state. Rather, there remains an "essential enmity" between "coercive law or government, on the one hand, and individual freedom on the other."[99]

In contrast, the republican understanding of *freedom as non-domination* focuses on the absence of the capacity for arbitrary

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96. Pettit, *supra* note 19, at 163.

97. PETTIT, *supra* note 18, at 17-79; *see also* Evan J. Criddle, *When Delegation Begets Domination*: *Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 128 (2011) (recognizing the importance of Pettit's contribution to the literature and analyzing the nondelegation problem in administrative law from the perspective of freedom as nondomination); Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008) (applying Pettit's "antidomination model" to the problem of partisan gerrymandering).

98. Pettit, *supra* note 19, at 168-70.

99. *Id.* at 170.

interference by others.[100] Arbitrary interference occurs whenever power is exercised over someone's life "without regard to their perceived interests,"[101] and the capacity to exercise such power effectively creates a master-slave or master-subject relationship where one person is at the mercy of others.[102] Because a benign dictator has the capacity to interfere with her subjects on an arbitrary basis, the freedom of her subjects is necessarily compromised from this perspective, even if such power remains dormant: "the slave is a slave, and therefore someone unfree, no matter how gentle the yoke."[103] On the other hand, coercive law or regulatory legislation does not necessarily undermine freedom from this perspective, provided that public officials take the common perceived interests of their constituents into account when making decisions. "So far as law and government can be made non-arbitrary in character, to that extent they will not constitute a form of domination and will not represent a compromise of republican freedom."[104] Pettit therefore ultimately concludes that democracy will necessarily promote freedom "if it can increase the non-arbitrariness of legislation, adjudication, and administration."[105]

Pettit points out that limiting arbitrary governmental action requires mechanisms to prevent public officials from ignoring the interests and perspectives of ordinary people, and that this supports the electoral dimension of democracy.[106] Periodic elections bring government under the control of the people in the sense that voters are empowered to select candidates for public office based on their likelihood of promoting the collective interests of the people. The republican argument for elections is simply that they provide a sensible way to force the government to advance the common, perceived interests of citizens, and thereby provide a check against arbitrary domination by the state. Representatives are unlikely to be reelected if they ignore the collective interests of the people.[107]

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100. *Id.* at 170-72.
101. *Id.* at 165.
102. *Id.*
103. *Id.* at 167.
104. *Id.* at 171.
105. *Id.* at 170.
106. *See id.* at 173 ("The need for government to be forced to track the common, perceived interests of citizens argues for an electoral form of democratization.").
107. *See id.*

Pettit recognizes, however, that elections can provide only a limited protection against the possibility of arbitrary domination because electoral democracy is not necessarily responsive to the interests and perspectives of minorities.[108] Indeed, "it is quite consistent with electoral democracy that government should only track the perceived interests of a majority, absolute or relative, on any issue and that it should have a dominating aspect from the point of view of others."[109] For this reason, republican theorists have always been concerned about providing structural safeguards to prevent the tyranny of the majority.[110] "The elimination of domination would require, not just that the people considered collectively cannot be ignored by government, but also that people considered severally or distributively cannot be ignored either."[111]

Pettit therefore considers "whether there is any way of subjecting government to a mode of distributive or minority control in order to balance the electorally established mode of collective or majority control."[112] The most obvious solution[113] is a procedure that would enable minorities to question public decisions on the basis of their own perceived interests and to trigger a review in an impartial forum where all "relevant interests are taken equally into account and only impartially supported decisions are upheld."[114] A contestatory regime of this nature provides citizens with the power to challenge public decisions on the grounds that their interests or perspectives were not adequately taken into account during the decision-making process, and the resulting decisions were therefore arbitrary.[115] The underlying assumption is that the final decision would have been different if such interests were given equal consideration.

Pettit recognizes that functioning democracies already provide several familiar avenues of contestation, including judicial review,

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108. *Id.* at 173-78.

109. *Id.* at 174.

110. *See, e.g.*, Joseph M. Bessette, *Deliberative Democracy*: *The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980); Sunstein, *supra* note 83, at 39-45.

111. Pettit, *supra* note 19, at 178.

112. *Id.*

113. *Id.* at 179.

114. *Id.*

115. *See id.* at 180.

as well as the ability to challenge public decisions on various grounds within legislative or administrative bodies.[116] These mechanisms for democratic contestation tend to be specifically designed to ensure that the interests and perspectives of complainants are adequately considered, even if the public officials who made the challenged decision had the opportunity or incentive to ignore competing points of view. Contestatory proceedings of this nature frequently provide opportunities to invalidate arbitrary governmental action, but they also promote freedom as non-domination to the extent that the "losers" in such proceedings could reasonably be expected to accept the results of the process as legitimate because their interests and perspectives were given equal consideration.[117]

Pettit claims that the oppositional ideal of contestatory democracy has an impressive historical pedigree, and that it continues to be recognized as an essential feature of contemporary democracies.[118] Nonetheless, he acknowledges that the idea of contestatory democracy has been overshadowed by the idea of placing government under popular control, and that the latter idea has come to define the term *democracy* in popular parlance.[119] Pettit regards this as an unfortunate development, and he argues that since "[s]ensible political theorists all agree that popular, collective control needs to be restricted in various ways," they should also recognize that such limitations affirmatively promote democracy, "under the only interpretation that properly connects democracy with the requirements of individual freedom."[120]

At the end of the day, Pettit explains that electoral democracy promotes legitimacy because it ensures that governmental decisions can be traced indirectly to the "collective will of the people."[121] Contestatory democracy further enhances the democratic legitimacy

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116. *Id.* at 184-85.

117. There is empirical support for the proposition that fair procedures can enhance perceptions of legitimacy. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

118. Pettit, *supra* note 19, at 183-88.

119. *Id.* at 184-85.

120. *Id.*; *see also* Stephen Macedo, *Against Majoritarianism*: *Democratic Values and Institutional Design*, 90 B.U. L. REV. 1029, 1030 (2010) (claiming that "we should stop talking about 'majoritarianism' as a plausible characterization of a political system that we would recommend," and that "legitimate democracies are those that respect minority rights and promote fair and inclusive deliberation").

121. Pettit, *supra* note 19, at 180.

of those decisions to the extent they can withstand challenges brought by adversely affected individuals or groups "in forums and under procedures that are acceptable to all concerned."[122] Electoral democracy "gives the collective people an indirect power of authorship over the laws,"[123] whereas contestatory democracy gives "the people, considered individually, a limited and, of course, indirect power of editorship over those laws."[124] The remainder of this Article argues that statutory interpretation in the modern regulatory state is best understood as a form of contestatory democracy.

III. CONCEPTUALIZING STATUTORY INTERPRETATION AS CONTESTATORY DEMOCRACY

Consider the questions presented in some of the most well-known statutory interpretation cases of the past two decades. In *MCI Telecommunications Corp. v. AT&T*, the Supreme Court examined whether the Communications Act of 1934, which authorizes the Federal Communications Commission (FCC) to "modify any requirement" of the relevant section of the Act, permitted the agency to make the tariff-filing requirement of the Act optional for telephone companies lacking market power.[125] The lawsuit was initiated by AT&T, the only company still required to comply with the Act's tariff-filing requirement under the agency's interpretation.[126] The plaintiff alleged that the FCC's de-tariffing policy exceeded the scope of its statutory authority and was therefore unlawful. Though a majority of the Court resolved the case based on its understanding of the dictionary definition of the word "modify,"[127] the lawsuit ultimately provided AT&T with a successful opportunity to contest the validity of the FCC's de-tariffing policy under the Communications Act. Similarly, in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the Court considered the question of whether a regulation promulgated by the Secretary of the Interior, which defined the term "harm" under the Endan-

122. *Id.*
123. *Id.*
124. *Id.*
125. 512 U.S. 218 (1994); *see* Brief for Petitioner at 2, *MCI*, 512 U.S. 218 (No. 93-356).
126. *See MCI*, 512 U.S. at 231.
127. *Id.* at 234.

gered Species Act to include "significant habitat modification or degradation" that "actually kills or injures wildlife," exceeded the scope of the Secretary's statutory authority and was therefore invalid on its face.[128] The lawsuit was brought by small landowners, logging companies, and families who were dependent on the logging industry, which was allegedly being hampered by the agency's regulation.[129] More recently, in *FDA v. Brown & Williamson Tobacco Co.*, the Court decided whether tobacco products are subject to regulation as "drugs" or "devices" under the Food, Drug, and Cosmetic Act, which authorizes the Food and Drug Administration to regulate products that are "intended to affect the structure or any function of the body."[130] Several tobacco companies initiated the lawsuit to challenge the legality of FDA rules that regulated the marketing and sale of tobacco products to minors.[131]

These cases are not at all unusual. In a recent empirical investigation of the Supreme Court's application of its deference doctrine, William Eskridge and Lauren Baer identified 1014 cases decided between 1983 and 2005 in which a federal agency interpretation of a statute was at issue.[132] Many of these cases involved challenges to the legality of decisions by federal agencies.[133] These cases are almost certainly a drop in the bucket, considering that most challenges to the legality of agency action are litigated in lower courts, and the vast majority of those cases are not reviewed by the Supreme Court.[134] I am therefore writing against a contemporary backdrop in which most issues of statutory interpretation in federal courts arise in the context of challenges to the validity of administrative action. One party is asserting that an agency has exceeded the scope of its statutory authority, while the agency is claiming that the manner in which it has chosen to implement its statutory

128. 515 U.S. 687, 690 (1995); *see* Brief for Petitioner at 2, *Sweet Home*, 515 U.S. 687 (No. 94-859).

129. *See Sweet Home*, 515 U.S. at 692.

130. 529 U.S. 120, 126 (2000); *see* Brief for Petitioner at 2, *Brown & Williamson*, 529 U.S. 120 (No. 98-1152).

131. *See Brown & Williamson*, 529 U.S. at 129.

132. Eskridge & Baer, *supra* note 71, at 1094.

133. *See id.* at 1213 (coding decisions for whether they were decided in favor or against an agency's interpretation, or if the Court issued a "mixed decision").

134. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987).

authority is legally permissible and reasonable as a policy matter. The federal judiciary is resolving a "contest" over the permissible scope of governmental authority when it decides such a case or controversy. My contention is simply that statutory interpretation in the modern regulatory state is typically a species of judicial review of agency action and a prototypical example of a mechanism for contestatory democracy. Accordingly, statutory interpretation has the capacity to promote freedom as non-domination, and thereby affirmatively to improve the democratic legitimacy of particular exercises of governmental authority. And, contrary to the premises of the countermajoritarian difficulty, this is especially true when Congress has not explicitly resolved the precise question at issue, and administrators or judges must therefore exercise policy-making discretion.

Although my primary focus is the judiciary's interpretation of federal regulatory statutes that are implemented by administrative agencies, this conception of statutory interpretation could also be applied in other contexts.[135] For example, the judiciary's interpretation of criminal statutes is also best understood as a mechanism for contestatory democracy. Thus, in *Holy Trinity Church v. United States*, the Court resolved a contest over whether the government could impose a fine on a church for hiring a rector from England "to perform labor or service of any kind" in alleged violation of a federal statute.[136] The Court agreed with the plaintiff's contention that the statute was inapplicable to such "brain toilers," and famously observed that "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[137] This conception of statutory interpretation could even be applied to many civil cases between private parties in which the plaintiff is asserting a private right of action created by a federal statute. For example, in *United Steelworkers of America v. Weber*, the Court essentially

135. Even if this were not the case, Edward Rubin has pointed out that "it could readily be argued that courts in an administrative era should adopt, as their general standard for all cases, the approach to interpretation that fits administrative cases." Edward Rubin, *Dynamic Statutory Interpretation in the Administrative State*, ISSUES IN LEGAL SCHOLARSHIP, no. 2, 2002, at 10.

136. 143 U.S. 457, 458 (1892).

137. *Id.* at 459.

resolved a contest regarding whether private employers could be prohibited from adopting voluntary affirmative action plans under Title VII of the Civil Rights Act of 1964.[138] Indeed, most of the cases that I teach in my Legislation course are very good examples of statutory interpretation as contestatory democracy.[139]

It is one thing, of course, to recognize that statutory interpretation in the modern regulatory state is best understood as a mechanism of contestatory democracy.[140] It is another thing to understand

138. 443 U.S. 193, 194 (1979).

139. In addition to cases discussed elsewhere in this Article, challenges to federal agency action include *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81 (2007) (whether the Department of Education's method of calculating per-pupil expenditures violated the Impact Aid Act); *Rapanos v. United States*, 547 U.S. 715 (2006) (whether the Army Corps of Engineers could lawfully enforce the provisions of the Clean Water Act against the owners of certain wetlands); *United States v. Mead*, 553 U.S. 218 (2001) (whether day planners were "bound diaries" that could be subject to a duty by the Customs Service); *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989) (whether the open meeting requirements of the Federal Advisory Committee Act apply to the Standing Committee on the Judiciary of the American Bar Association); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (whether the NLRB could exercise jurisdiction over teachers in church-operated schools); *TVA v. Hill*, 437 U.S. 153 (1978) (whether a $100 million project of the Tennessee Valley Authority that was funded by Congress must be enjoined to protect the snail darter under the Endangered Species Act); and *Morton v. Mancari*, 417 U.S. 535 (1974) (whether an employment preference for qualified Indians in the Bureau of Indian Affairs violated the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972). The criminal cases include *Muscarello v. United States*, 524 U.S. 125 (1998) (whether a defendant who possesses a weapon in a locked glove compartment or trunk of a car "carries a firearm," and is thereby eligible for a mandatory five-year sentence enhancement); and *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff'd sub nom. Chapman v. United States*, 500 U.S. 453 (1991) (whether the weight of carriers should be counted for purposes of sentencing defendants convicted of selling LSD). For other good examples, see *Chisom v. Roemer*, 501 U.S. 380 (1991) (whether the protections against minority vote dilution that are provided by section 2 of the Voting Rights Act applied to judicial elections); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (whether appointed state judges are protected from age discrimination by state and local governments under the ADEA); *Kosak v. United States*, 465 U.S. 848 (1984) (whether plaintiff could bring suit against the Customs Service for the negligent destruction of his property under the Federal Torts Claim Act); *Cartledge v. Miller*, 457 F. Supp. 1146 (S.D.N.Y. 1978) (whether the anti-assignment or alienation provisions of ERISA preclude the execution of validly issued court orders enforcing family support rights); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (whether the cohabiting boyfriend or lesbian partner of a biological mother could lawfully adopt her child); and *State v. 1979 Pontiac Trans Am*, 487 A.2d 722 (N.J. 1985) (whether the state could permanently confiscate property that was used to commit a crime from innocent owners who could prove that they were uninvolved in and unaware of the wrongful activity, and that they had done all that reasonably could be expected to prevent the proscribed use of their property).

140. For a rare example of an article that recognizes that statutory interpretation can play a contestatory role, see Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory*

precisely what this means for Congress, agencies, and courts. Accordingly, the remainder of this Part outlines the respective roles of legislatures, agencies, and courts when statutory interpretation is understood as a form of contestatory democracy.

A. The Authorial Role of an Elected Legislature

Congress is authorized by the Constitution to play the primary authorial role in the lawmaking process,[141] and this is entirely legitimate because of the electoral dimension of democracy.[142] It follows that when Congress has explicitly resolved a policy question in a reasoned fashion, agencies and courts are obligated to respect the legislature's decision. Republican theory therefore embraces a sensible version of legislative supremacy that is consistent with the constitutional structure and the Bill of Rights, and it nowhere suggests that agencies or courts are authorized to make law in an unconstrained fashion. Nonetheless, if democracy also includes a contestatory dimension to protect the people from arbitrary domination, this aspect of democracy will have important implications for our understanding of the role of elected representatives in the lawmaking process. The resulting understanding of the legislative process will, in turn, have important implications for the proper roles of agencies and courts in statutory interpretation.

A fundamental prerequisite to the proper functioning of contestatory democracy is that rather than adhering to a pluralistic conception of the lawmaking process whereby legislation is understood to reflect the prepolitical preferences of the majority or the product of self-interested bargaining, the policy decisions of a republican legislature should be the product of reasoned deliberation.[143] This is partly the case because self-interested bargaining is unduly likely to favor the positions of the most powerful in society and could therefore potentially result in arbitrary domination. Moreover, legislation cannot truly be characterized as a collective

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Construction, 120 YALE L.J. ONLINE 47, 49-53 (2010).

141. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

142. *See supra* notes 19-22, 26, 106 and accompanying text.

143. *See* PETTIT, *supra* note 18, at 186-90, 202-05.

decision of the people if the interests and perspectives of minorities are not considered.[144] Contestatory democracy presumes that individuals or groups will be able to challenge public decisions on the grounds that their perceived interests were not taken into account during the lawmaking process, and that the final decision would have been different if their views were given equal consideration. The legislature must therefore engage in reasoned deliberation about the means and ends of its policy decisions to provide a basis for subsequent contestation. Such challenges would be incoherent if the legislative process were merely designed to aggregate the prepolitical preferences of elected representatives or their constituents. Accordingly, theories of contestatory democracy necessarily incorporate the basic tenets of deliberative democratic theory at the operational level.

Deliberative democratic theory maintains, in turn, that public officials are obligated to engage in reasoned deliberation on which courses of action will promote the public good.[145] They must consider all of the relevant information and views that are expressed during a decision making process, and they should give reasoned explanations for their decisions that could reasonably be accepted by free and equal citizens with fundamentally competing perspectives.[146] Public decisions that are rendered pursuant to these criteria are democratically legitimate because each interest and perspective is treated with equal respect and arbitrary decision making is prohibited.[147] Meanwhile, these requirements increase the odds of

144. *See, e.g.*, RICHARDSON, *supra* note 95, at 213; Cohen, *supra* note 95, at 22-23; Manin, *supra* note 95, at 359-60; *see also* Thompson, *supra* note 95, at 502-04 (discussing deliberative democracy's focus on "the need for a collective decision in a state of disagreement").

145. *See* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 857-58 (2012) (summarizing the basic tenets of deliberative democratic theory).

146. *See, e.g.*, GUTMANN & THOMPSON, DEMOCRACY AND DISAGREEMENT, *supra* note 95, at 52; Joshua Cohen, *Democracy and Liberty*, *in* DELIBERATIVE DEMOCRACY, *supra* note 95, at 193-94.

147. *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1291 (2009); *see id.* at 1282-84 (discussing the capacity of reason-giving to promote the legitimacy of governmental authority in a democracy); Thompson, *supra* note 95, at 502 ("[L]egitimacy ... prescribes the process by which ... collective decisions can be morally justified to those who are bound by them. It is the key defining element of deliberative democracy.") (internal punctuation omitted).

reaching the best decision on the merits in light of the available information and fundamental differences of opinion.[148]

The basic tenets of deliberative democratic theory are reflected in the American constitutional structure and relevant provisions of the Bill of Rights,[149] which is not surprising considering that the Framers were famously concerned about the problem of faction and the potential tyranny of the majority.[150] Thus, for example, the Framers rejected direct democracy at the federal level in favor of representative democracy, and they expected elected representatives to engage in a process of reasoned deliberation from which the common good would emerge.[151] They also adopted the requirements of bicameralism and presentment, which ensure that a bill cannot become a law unless there is either majority support for the measure in both chambers of Congress and executive approval or an unusually high level of congressional demand for the proposed legislation.[152] While this supermajority requirement facilitates bargaining and thereby prevents the domination of otherwise vulnerable minorities,[153] it also generates reasoned deliberation in a broader effort to reach agreements on how to promote the public good, which are responsive to their interests and perspectives.[154] The Supreme Court has recognized that the liberty protected by the Due Process Clause "includes a freedom from all substantial arbitrary impositions and purposeless restraints."[155] Similarly, the Equal Protection Clause has long been understood to raise concerns when statutory classifications impose burdens upon individuals or deprive them of benefits without advancing the purposes of the

148. *See* James D. Fearon, *Deliberation as Discussion*, *in* DELIBERATIVE DEMOCRACY, *supra* note 95, at 44-45 (describing "six major reasons or arguments for discussing a matter before reaching a decision on what to do"); Staszewski, *supra* note 145, at 887.

149. *See* Bessette, *supra* note 110, at 102-04; Sunstein, *supra* note 83, at 31; *see also* Staszewski, *supra* note 70, at 1018-22.

150. *See* THE FEDERALIST NO. 10 (James Madison).

151. *See, e.g.*, *id.*

152. *See* U.S. CONST. art. I, § 7, cl. 2.

153. *See* Manning, *supra* note 5, at 74-78.

154. *See* Staszewski, *supra* note 70, at 1021.

155. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). For a detailed discussion of this aspect of the Court's due process jurisprudence, see Peter J. Rubin, *Square Pegs and Round Holes*: *Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 844-47 (2003).

legislation.[156] These principles are reflected in the doctrinal requirement that ordinary legislation must be rationally related to a legitimate governmental purpose, which would be unintelligible under a pluralistic conception of the legislative process.[157]

While the rational basis test underenforces the relevant constitutional norms based on institutional concerns,[158] the structural safeguards that are provided by the Constitution to facilitate reasoned deliberation and prevent faction help to explain the strong presumption of constitutionality that the judiciary routinely ascribes to legislation.[159] If a law does not implicate any fundamental rights or suspect classifications, the judiciary presumes that elected representatives engaged in reasoned deliberation during the lawmaking process and that they had public-regarding justifications for their policy choices. This presumption holds if the judiciary is capable of hypothesizing permissible goals that could possibly be served by a statutory scheme, regardless of the contents of the legislative record.

Setting aside the adequacy of this approach to judicial review for the moment,[160] the Constitution's structural safeguards also provide the best explanation for the idea of legislative supremacy in statutory interpretation: when Congress has explicitly resolved a specific policy issue pursuant to a legislative process that requires elected representatives to engage in reasoned deliberation and consider the interests and perspectives of minorities, the legislature's decision should ordinarily be respected by agencies and courts when the statute is implemented.[161] In this situation, the issue was

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156. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 342-56 (1949).

157. *See* Sunstein, *supra* note 83, at 49; Tussman & tenBroek, *supra* note 156, at 350.

158. *See* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1216-18 (1978).

159. *See* Philip P. Frickey, *The Communion of Strangers*: *Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 444 (1998).

160. *See infra* Part V.B (returning to this question).

161. *Cf.* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Undoubtedly, ascertaining whether Congress has explicitly resolved a specific policy question in a reasoned fashion during the legislative process will sometimes be difficult. *See* Merrill, *supra* note 57, at 1091 (claiming that the line between clarity and ambiguity under *Chevron* "has a highly random aspect to it"); Molot, *supra* note 16, at 51 (same). If, however, we acknowledge that no methodology of statutory interpretation can eliminate the need for

already "contested" and legitimately resolved during the lawmaking process, and subsequent changes to the selected policy should ordinarily be adopted pursuant to a statutory amendment. If the government's efforts to implement the selected policy are contested in court on statutory grounds, this challenge should therefore be unsuccessful. By the same token, legal challenges to the government's departure from the selected policy should be significantly more viable.[162]

The corollary to this view of legislative supremacy, however, is that when Congress has not explicitly resolved a particular policy question in a reasoned fashion during the legislative process, then the best way to avoid the potential for arbitrary domination is for the public officials who implement the law to engage in reasoned decision making on the best course of action under the circumstances. In the modern regulatory state, the responsibility for resolving these statutory ambiguities will ordinarily fall, as an initial matter, on an administrative agency with delegated authority to carry out the purposes of the federal programs established by Congress.

B. The Intermediate Role of Agencies

Public officials who implement the law will necessarily have substantial policy-making discretion if statutes are deemed "ambigu-

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judgment in resolving hard cases, and we recognize that statutory interpretation should be understood as a mechanism of contestatory democracy, then this should be a central aspect of the inquiry even if the answer is sometimes debatable. From this perspective, moreover, the legislative record should convey useful information about whether elected representatives engaged in reasoned deliberation about a contested policy question, and whether the issue was resolved in a reasoned fashion during the legislative process. *See* Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1 (1999). Agencies and courts should also be capable of distinguishing between the known imprecision of statutory rules and identifiable bargains or compromises, which should ordinarily be respected when a law is implemented, and unanticipated or unresolved problems, which agencies and courts should have more flexibility to address in a reasoned fashion—even if those problems could, in theory, have been the subject of speculative backroom deals. *See* Staszewski, *supra* note 70, at 1025-27 (explaining the importance of these distinctions).

162. From this perspective, limitations on judicial review of agency inaction are problematic because they preclude individuals and groups from contesting an agency's failure to implement its statutory mandate. *See* Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 370-71 (2009).

ous" when Congress has not explicitly resolved an issue during the legislative process or unanticipated problems arise. This is highly problematic under the traditional model, which maintains that unelected administrators and judges should serve as the legislature's faithful agents and "carry out decisions they do not make."[163] The exercise of policy-making discretion by administrators and judges is significantly less troubling, however, if the role of democracy is to promote freedom as non-domination and there are structural safeguards in place to guard against the possibility of arbitrary domination by the state. The central function of administrative law is to provide such safeguards,[164] which include the opportunities for contestatory democracy that are provided by judicial review of agency action and statutory interpretation by federal courts in the modern regulatory state.

Before turning directly to those mechanisms of contestatory democracy, it is worth considering how administrative agencies go about implementing federal regulatory statutes in the first instance. After all, those statutes are just words on paper in the absence of administrative action, and final agency action is generally required for an interpretive dispute to be justiciable in federal court.[165] Jerry Mashaw has therefore pointed out that "agencies are, by necessity, the primary official interpreters of federal statutes."[166] Mashaw has suggested, moreover, that there are good reasons to think that agencies do not and should not perform this task in precisely the same manner as courts.[167] Professor Mashaw's seminal work on this topic has led to a lively debate on the question of whether it is accurate to think of agency decision making as "interpretation" in a conventional sense.[168] For example, Elizabeth Foote has argued

163. *See* Easterbrook, *supra* note 43, at 60.

164. *See* Bressman, *supra* note 59, at 472-73.

165. *See* 5 U.S.C. §§ 702, 704 (2006).

166. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502-03 (2005).

167. *See id.* at 521-24.

168. *See also* Glen Staszewski, *Introduction to Symposium on Administrative Statutory Interpretation*, 2009 MICH. ST. L. REV. 1, 1; Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read*: *Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 346-47 (1990). *Compare* Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889 (2007), *with* Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw*

that the primary role of agencies is not to *interpret* federal statutes, but rather to *implement* or *carry out* federal programs on an ongoing basis through a variety of policy-making vehicles.[169] Although this is an important and accurate observation, Mashaw has persuasively explained that the implementation of statutes routinely requires "interpretation" to ascertain the underlying purposes of the program and what the agency should be doing.[170]

I am skeptical that one can draw a clear or coherent line between the tasks of interpretation and implementation, but it seems clear that (1) agencies are the primary "implementers" of federal statutes in the modern regulatory state, (2) they do not make decisions in precisely the same manner as courts, and (3) they are obligated to carry out the ascertainable purposes of their programs in a reasoned fashion. As explained below, I also believe that agencies perform an "intermediate" lawmaking role that falls in between the authorial role of the legislature and the editorial role of the judiciary. Perhaps more accurately, I believe that agencies sometimes play an authorial role, and they sometimes play an editorial role, depending on the terms and specificity of their statutory mandates. Even when agencies play an authorial role, however, they are still bound by the underlying purposes of their statutory programs, and they should therefore be understood as *commissioned authors*, who have agreed to undertake a particular, instrumental project, subject only to the most general of instructions.

There are several recurring situations in which agencies play the role of a commissioned author. First, Congress frequently provides explicit delegations of lawmaking authority to regulatory agencies.[171] For example, Congress may charge the Environmental Protection Agency with responsibility for adopting limits on certain

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and Strauss, 59 ADMIN. L. REV. 197 (2007).

169. *See* Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 678-81 (2007).

170. *See* Mashaw, *supra* note 168, at 897-98; *Cf.* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1865 (2013) (claiming that when agency action is challenged as contrary to law, the question "is always whether the agency has gone beyond what Congress has permitted it to do," and therefore there is no basis for distinguishing between jurisdictional and nonjurisdictional interpretations of regulatory statutes).

171. *See* Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate*: *Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 364 (2010).

types of pollution. The agency will then be the author of any promulgated standards. Similarly, Congress often promulgates statutes that cannot be enforced until an administrative agency promulgates legislative rules of conduct.[172] These statutes do not directly regulate the public, but rather merely authorize regulatory agencies to promulgate rules of conduct in a particular area.[173] Agencies are therefore the authors of any applicable rules that are subsequently adopted. Congress has also been known to enact statutes that authorize agencies to promulgate rules or issue orders pursuant to a general obligation to "promote the public interest" in a particular field.[174] Once again, agencies will necessarily be the authors of policy decisions that are made in carrying out this authority. The same is true whenever Congress leaves gaping holes or patent ambiguity in the operative provisions of regulatory statutes that set forth rules of conduct that could be enforced by administrative agencies against the general public.[175]

There is nothing formally undemocratic about a regulatory agency playing the role of a commissioned author because such authority was by definition delegated from the elected legislature.[176] Moreover, elected officials in the executive and legislative branches have a variety of well-known means to influence how this delegated authority is exercised.[177] From a republican perspective, these mechanisms of political influence or control are best understood as the means by which *the electoral dimension of democracy* is applied

172. *See, e.g.*, Highway Safety Act of 1970, Pub. L. No. 91-606, 84 Stat. 1713, 1739 (1970) (codified as amended at scattered sections of 28 U.S.C. (2006)) (establishing the National Highway Traffic Safety Administration and requiring it to promulgate vehicle safety standards); Federal Food, Drug, and Cosmetics Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 29 U.S.C. §§ 301-99) (requiring the Food and Drug Administration to promulgate regulations regarding food safety).

173. *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 381-82 (1989) (describing the ubiquity of such statutes in the modern regulatory state).

174. *See, e.g.*, Amendments to the Communications Act, ch. 296, 52 Stat. 588, 588 (1938) (codified as amended at 47 U.S.C. § 201(b)) (adding a general grant of authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act").

175. *See, e.g.*, 15 U.S.C. § 45 (authorizing the Federal Trade Commission to prevent "unfair methods of competition" and "unfair or deceptive acts or practices").

176. *See* Rubin, *supra* note 135, at 6.

177. *See* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 45-49, 84-98, 524-38 (5th ed. 2009) (discussing means of legislative and executive control or oversight).

to agency action. Recall that avoiding the possibility of arbitrary domination by the state requires an arrangement that will prevent the government from ignoring the common, perceived interests of ordinary citizens. Although I am skeptical that presidential or congressional elections actually turn on the policy decisions of regulatory agencies,[178] it does seem plausible that the political influence of elected officials helps to ensure that agency decisions can be said to originate, "however indirectly, in the collective will of the people."[179] This is the case because the political influences on regulatory decision making encourage agency officials to consider the interests and perspectives of powerful members of the public or their representatives.

Like other mechanisms that promote the electoral dimension of democracy, however, administrative decision making might "only track the perceived interests of a majority, absolute or relative on any issue," and therefore "have a dominating aspect from the point of view of others."[180] It is not surprising then that administrative discretion has always been feared on the grounds that agencies might adopt "tunnel vision" and ignore the legitimate concerns of regulated entities,[181] or that they could be captured by regulated entities and ignore the interests and perspectives of the intended beneficiaries of statutory programs.[182] In truth, agencies routinely walk a fine line between the perils of majority and minority faction. Accordingly, it is vital for administrative law to provide mechanisms of contestatory democracy to ensure that everyone's views are given equal consideration. An agency's role as commissioned author is therefore most legitimately exercised pursuant to deliberative procedures, such as notice-and-comment rule making, and administrative policy decisions should ordinarily be subject to hard-look judicial review to ensure that the agency has engaged in reasoned decision making and thereby avoided the possibility of arbitrary domination.[183]

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178. *See* Staszewski, *supra* note 145, at 867-72; Staszewski, *supra* note 147, at 1271-76.

179. *See* Pettit, *supra* note 19, at 180.

180. *See id.* at 174.

181. *See* Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 600 (2002).

182. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712-13 (1975).

183. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43

The foregoing discussion involved situations in which Congress has delegated broad lawmaking authority to an agency pursuant to a relatively open-ended statutory mandate to regulate a field or solve a problem. It is, of course, frequently the case that Congress enacts more detailed statutes that explicitly resolve some matters, while leaving other policy questions for resolution by the agency. When an agency implements a federal program in this situation, it must initially determine whether Congress has explicitly resolved a particular question during the legislative process. If so, the agency should respect Congress's decision, unless the circumstances have changed sufficiently to generate the functional equivalent of fresh ambiguities. This is true for strategic reasons because an agency presumably does not want its decisions to be invalidated during the course of judicial review,[184] but agency officials are also obligated by their oaths of office to faithfully execute the law and therefore to honor the principle of legislative supremacy.[185] In this situation, administrators and judges are, indeed, obligated to serve as faithful agents of the legislature.

When an agency determines that a regulatory statute is ambiguous, however, either because Congress did not explicitly resolve the precise question at issue, or because the circumstances have materially changed, the agency will play an editorial role when it implements the statute. Accordingly, the agency will need to engage in reasoned deliberation to determine the best way of implementing the statute on the merits under the circumstances.

Regulatory agencies should generally approach statutes in a manner that differs in some ways from courts—based on institutional considerations—when they evaluate whether Congress explicitly resolved a policy question during the legislative process and consider whether or precisely how to edit the law.[186] First, agencies will frequently be in a better position than courts to ascertain whether the text of a statute should be understood in an

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(1983); *see also* Staszewski, *supra* note 145, at 892 ("[H]ard-look judicial review is perhaps the prime example of a well-established legal doctrine that has firmly embraced and squarely adopted the most fundamental principles of deliberative democratic theory.").

184. *See* Pierce, *supra* note 168, at 202-03.

185. *See* Mashaw, *supra* note 168, at 901.

186. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 914-15 (2003); *supra* note 167 and accompanying text.

ordinary or technical fashion because of their greater familiarity with the relevant area of law and actual involvement with the legislative process that produced the text.[187] Second, agencies will generally be more adept at using legislative history in a reliable fashion than courts based on the participation of agency officials in the legislative process, the ongoing interactions among agency officials and lawmakers, and the institutional memory of agency staff regarding the history of the programs they are responsible for carrying out.[188] Third, an agency's deep understanding of its organic statutes and substantive areas of law will provide it with advantages over courts in utilizing interpretive methods that pay special attention to substantive background principles of law and understand the meaning of statutes in light of such background principles.[189] Fourth, agencies should be more adept at interpreting regulatory statutes in a purposive fashion than courts because they will have a better understanding of the underlying purposes of the programs they are responsible for carrying out, and they should be better able to assess how far the enacting Congress intended to go to achieve those ends.[190] An agency's technical expertise will also provide distinct advantages over courts in determining how effectively a particular interpretation will carry out the statute's underlying purposes.[191] If the enacting Congress failed to resolve these issues in a sufficiently clear or detailed fashion, agencies will, of course, also have a better sense of how far the current President and Congress want the agency to press any particular policy objective.[192] Fifth, the technical expertise and political milieu of administrative agencies virtually ensure that they will interpret

187. *See* Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 104 (discussing the advantages provided by an agency's involvement with the legislative process).

188. *See* Strauss, *supra* note 168, at 346-48.

189. *See* Jonathan R. Siegel, *Guardians of the Background Principles*, 2009 MICH. ST. L. REV. 123, 124. For a general discussion of this method of statutory interpretation, see Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1066-67 (1998).

190. *See* Herz, *supra* note 187, at 98, 103-05 (claiming that agencies have advantages over the judiciary in identifying statutory purposes, but noting that agencies may also have greater incentives to "overshoot[] the mark").

191. *See id.* at 99-101.

192. *See* Rubin, *supra* note 135, at 6 ("[A]gencies, unlike courts, are under the supervision of elected officials who can discipline their interpretive efforts.").

statutes in a relatively dynamic fashion that places heavy emphasis on contemporary considerations. Indeed, Edward Rubin has argued that at least when agencies engage in legislative rule making and enforcement, it is highly unlikely that they could employ any approach other than dynamic statutory interpretation: "[t]he whole point of granting an agency rule making authority is to enable it to enact supplementary provisions that are applicable to the present societal, political and legal context."[193] This insight, of course, strongly suggests that Congress expects agencies to interpret statutes dynamically, and that this is presumably what Congress intends when it authorizes agencies to promulgate rules to carry out the provisions of federal programs. Agencies should therefore have a reasonable amount of flexibility to give ambiguous statutes different meanings over time as circumstances change.[194] Finally, agencies should be more adept than courts at interpreting regulatory statutes in an equitable fashion that deviates from the plain meaning of statutory language to avoid absurd results or other highly problematic consequences. As Cass Sunstein has observed, "[A]gencies are in a good position to know whether a particular outcome is, in fact, absurd," and they are "far better" situated than courts to assess whether deviating from the statutory text to reach sensible results in particular cases would pose significant problems for administration of a program.[195]

When the advantages of agencies are considered as a group, it becomes apparent that they are better situated than courts to ascertain whether Congress explicitly resolved an issue during the legislative process, and to perform the editorial function that is needed to implement the law in a reasoned fashion when statutes are ambiguous or would otherwise lead to unanticipated problems. It is therefore generally a good thing that agencies are "the primary

193. *Id.* at 3 (internal quotation marks omitted).

194. *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1279 (2008) (claiming that there was already doctrinal support for the two steps of the *Chevron* framework, but the decision "did spark a genuine revolution—by challenging the reigning principles of certainty and finality in statutory interpretation"); Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998) ("[Administrative] agencies have become modern America's common law courts ... [with the] power to adapt statutory language to changing understandings and circumstances.").

195. Cass R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law*, 32 ENVTL. L. REP. 11,126, 11,131 (2002).

official interpreters of federal statutes"[196] in the modern regulatory state from the standpoint of avoiding arbitrary domination.

Despite their advantages, it is undoubtedly true that administrative agencies can abuse their discretion and potentially engage in arbitrary domination when they perform their editorial function. These dangers can, of course, be minimized if agencies perform their editorial role through deliberative procedures that take advantage of administrative expertise and allow interested members of the public to provide relevant information and express their views on the legality and desirability of an agency's proposed course of action. In other words, the potential for arbitrary domination can be reduced if an agency's decision-making process is "contestatory" in nature.[197] The notice-and-comment rule making procedures of the Administrative Procedure Act (APA) are widely considered an exemplar of deliberative procedures of this nature.[198] Partly for this reason, Kenneth Culp Davis famously referred to legislative rule making under the APA as "one of the greatest inventions of modern government."[199] Nonetheless, agencies do not always use notice-and-comment rule making to interpret statutes, and other administrative procedures comport to widely varying degrees with this model. In addition to using sufficiently deliberative procedures, it is also vital to ensure that agencies actually consider the relevant information and competing views that are presented during the decision-making process, and that agencies provide reasoned explanations for their decisions that could reasonably be accepted by citizens with fundamentally competing perspectives. An agency's interpretive decisions should therefore generally be subject to meaningful judicial review, as explained in the following Section.

196. Mashaw, *supra* note 166, at 502-03.

197. *See* PETTIT, *supra* note 18, at 296 (explaining that "procedural and consultative measures" during a decision-making process are "two of the three sides to a contestatory democracy," and that the third side is the opportunity for ex post review by an impartial appellate body).

198. *See* Seidenfeld, *supra* note 94, at 1560; Sunstein, *supra* note 83, at 61-62.

199. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (Supp. 1970).

C. The Editorial Role of the Judiciary

The preceding Sections explained that there are structural safeguards in the legislative and administrative processes that facilitate reasoned deliberation and encourage lawmakers to consider the interests and perspectives of minorities. Nonetheless, statutes and administrative action are both products of the electoral dimension of democracy and could therefore easily result in majority tyranny or minority faction. In either case, individuals or groups would potentially be subject to arbitrary domination. It is therefore important to provide other mechanisms of contestatory democracy that could minimize this possibility by helping to ensure that relevant interests are taken equally into account. As Philip Pettit has explained, the most promising solution is a procedure that would enable individuals or groups to call governmental decisions into question, and to trigger a review in an impartial court of appeal.[200] The availability of such a procedure improves the democratic legitimacy of decisions that are *not* challenged, because the *possibility* of subsequent review encourages public officials to engage in reasoned decision making in the first place.[201] When public decisions are formally challenged, however, the contestatory mode of democracy gives "the people, considered individually, a limited and, of course, indirect power of editorship over those laws."[202] In considering how the judiciary should perform this editorial role on behalf of the people, it is useful to distinguish between cases or controversies in which the judiciary is (1) reviewing the legality of agency law making, (2) interpreting a statute without a responsible agency, and (3) interpreting a statute with guidance from a regulatory agency. In each of these contexts, the judiciary is typically resolving a contest over the permissible

200. *See supra* notes 24, 114 and accompanying text.

201. *See* Pettit, *supra* note 19, at 180; *see also* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1194-95 (1993) (recognizing that the availability of judicial review influences agency decision making); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 656, 666-67 (1985) (same).

202. *See* Pettit, *supra* note 19, at 180.

scope of governmental authority, and thereby promoting freedom as nondomination.

1. Judicial Review of Agency Law Making

As explained above, administrative agencies are "the primary official interpreters of federal statutes" in the modern regulatory state.[203] Moreover, when agencies are delegated lawmaking authority, and they interpret statutes pursuant to deliberative lawmaking procedures, they are performing a commissioned authorial role and are therefore the authoritative decision makers. Nonetheless, federal courts are typically authorized to review the validity of such agency decisions, and it is in this context that my claim—that statutory interpretation by the judiciary is best understood as a mechanism of contestatory democracy—is most obvious.

I have also explained that Congress's explicit resolution of a policy question should ordinarily be respected by agencies and courts when a statute is implemented because the legislature is charged with the primary authorial role in the lawmaking process.[204] Challenges to the legality of agency action on statutory grounds will therefore potentially turn on a judicial determination that Congress has unambiguously resolved the precise question at issue. Such judicial challenges will almost invariably be unsuccessful if the agency's decision comports with Congress's resolution of the question. Conversely, an agency's decision will be invalidated as contrary to law if it is incompatible with Congress's resolution of the matter. Although the foregoing propositions are true under any conventional standard of judicial review, substantial disagreement exists regarding the methods of statutory interpretation that courts should use when they assess whether Congress has unambiguously resolved a particular policy question.[205] When statutory interpretation is understood as a mechanism of contestatory democracy, the legislative history of a statute should play a prominent role in this analysis because one should expect legislators to engage in reasoned

203. *See* Mashaw, *supra* note 166, at 502-03.

204. *See supra* notes 141-42 and accompanying text.

205. *See* Eskridge & Baer, *supra* note 71, at 1122-23 ("The clearest effect of *Chevron* ... is that it has created an increasingly complicated set of doctrinal debates about when [*Chevron*] deference [is applicable].").

deliberation during the lawmaking process.[206] I have also pointed out that agencies have significant institutional advantages over courts that could help them better assess whether Congress has explicitly resolved a policy question during the legislative process.[207] The institutional advantages of agencies suggest that courts should treat agency judgments regarding the unambiguous meaning of statutes with respect during the process of judicial review.[208]

At the same time, the fact that a statute has a straightforward semantic meaning should not necessarily compel the conclusion that Congress unambiguously resolved the precise question at issue. On the contrary, if the literal application of statutory language would lead to unintended absurdities, administrative agencies should be allowed to deviate from the statute's ordinary meaning to reach sensible results,[209] thereby limiting the potential for arbitrary domination by the state. For example, in *American Water Works Ass'n v. EPA*, the D.C. Circuit upheld the agency's decision to implement the Safe Drinking Water Act by establishing a treatment technique, rather than a maximum contaminant level, for regulating lead.[210] The Act anticipated that the Environmental Protection Agency (EPA) would typically establish "maximum contaminant levels" for regulating chemicals, but expressly authorized the use of "treatment techniques" when the agency determined that it was not "economically or technologically feasible" to measure the level of a particular contaminant.[211] The EPA concluded that it was not

206. *See supra* Part III.A; *see also* Bell, *supra* note 161; Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 247 (1998).

207. *See supra* notes 186-95 and accompanying text.

208. I therefore tend to agree with Michael Herz's suggestion that the judiciary should give *Skidmore* deference to an agency's resolution of questions of law under the first step of *Chevron*. *See* Michael Herz, *Judicial Review of Statutory Issues Outside of the* Chevron *Doctrine*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 125, 142-43 (John F. Duffy & Michael Herz eds., 2005). I am also sympathetic to Mark Seidenfeld's recent argument that "judges should liberally construe statutes as amenable to multiple interpretations" under the first step of *Chevron*, albeit for somewhat different reasons. *See* Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 303-05, 311 (2011) (challenging the notion that *Chevron* deference is justified by Congress's intent and claiming that it "is better viewed as a doctrine of judicial self-restraint under the courts' Article III responsibilities").

209. *See* Sunstein, *supra* note 195, at 11,126.

210. 40 F.3d 1266, 1269-71 (D.C. Cir. 1994).

211. *See* 42 U.S.C. § 300f(1)(C) (2006); § 300g-1(b)(7)(A); *Am. Water Works*, 40 F.3d at 1268-69.

"feasible" to adopt a maximum contaminant level for lead even though it was undisputed that the substance was physically capable of being measured at a reasonable cost.[212] The agency explained that most lead enters public water systems through corrosion from service lines and plumbing facilities that are beyond its regulatory authority, and that aggressive use of corrosion control techniques necessary to comply with a maximum contaminant level for lead would undermine the statutory purpose by introducing more harmful chemicals into the water supply.[213] The D.C. Circuit agreed with the agency's position that "because the Congress apparently did not anticipate a situation in which monitoring for one contaminant, although possible, is not conducive to overall water quality, it impliedly delegated to the agency the discretion to specify a treatment technique instead of" a maximum contaminant level for lead.[214] The court therefore held that the statutory term "feasible" did not have a plain meaning under the circumstances.[215] Rather, the court explained that "where a literal reading of a statutory term would lead to absurd results, the term simply 'has no plain meaning ... and is the proper subject of construction by the EPA and the courts.'"[216] The court noted that this canon would be implicated if the plaintiff's proposed interpretation of the statute was accepted because "it could lead to a result squarely at odds with the purpose of the Safe Drinking Water Act."[217] After concluding that the relevant statutory language was ambiguous, the court upheld the agency's interpretation of the term "feasible" on the grounds that a decision to forego a single national standard in favor of a treatment technique that required public water systems to adopt custom corrosion control plans for lead was reasonable in light of the overall statutory purpose of promoting safe drinking water.[218] The plaintiff's challenge to the agency's interpretation of the statute was therefore rejected.

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212. *See Am. Water Works*, 40 F.3d at 1270.

213. *See id.* at 1270-71.

214. *Id.*

215. *See id.* at 1271.

216. *Id.* (quoting Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc., 470 U.S. 116, 126 (1985)).

217. *Id.*

218. *See id.*

In much the same fashion, changed circumstances can create legal ambiguity (and, thus, space for policy innovations by agencies) that did not exist when a statute was enacted, or perhaps even change the meaning of a regulatory statute altogether. For example, in *Bob Jones University v. United States*, plaintiffs challenged the validity of the Internal Revenue Service's newly established position that private schools that discriminate on the basis of race do not qualify as tax-exempt organizations under the Internal Revenue Code.[219] Although plaintiffs appeared to satisfy the statutory requirements for tax-exempt status solely by virtue of being organized for "educational purposes,"[220] and it was undisputed that the Congresses that enacted tax exemptions for charitable organizations would not have regarded racially segregated educational institutions as against public policy,[221] the Supreme Court agreed with the IRS that the relevant provisions of the Tax Code incorporated certain common law principles of charitable trusts.[222] As a result, institutions seeking tax-exempt status must serve a public purpose and not violate established public policy.[223] Because there was no longer any room for doubt that "racial discrimination in education violates deeply and widely accepted views of elementary justice"[224] by the time the IRS adopted the challenged policy, the Court concluded that the agency's revised interpretation of the statute was unquestionably correct.[225] In reaching this conclusion, the Court explicitly recognized that Congress has always "seen fit to vest in those administering the tax laws very broad authority to interpret those laws," for "[i]n an area as complex as the tax system, the agency Congress vests with administrative responsibility must

219. 461 U.S. 574, 577-78 (1983). Prior to 1970, the IRS granted tax-exempt status to private schools without regard to their admissions policies. *See id.* The IRS formalized the new policy at issue in a revenue ruling that was promulgated in 1971. *See id.* (citing Rev. Rul. 71-447, 1971-2 C. B. 230).

220. *See* 26 U.S.C. § 501(c)(3) (2006); *Bob Jones*, 461 U.S. at 613 (Rehnquist, J., dissenting) (identifying the statutory requirements for tax-exempt status, and claiming that there is no "additional, undefined public policy requirement").

221. *Bob Jones*, 461 U.S. at 593 n.20 (acknowledging this reality, but claiming that "contemporary standards must be considered in determining whether given activities provide a public benefit and are entitled to the charitable tax exemption").

222. *See id.* at 586-92.

223. *See id.* at 591.

224. *Id.* at 592.

225. *Id.* at 595.

be able to exercise its authority to meet changing conditions and new problems."[226]

Thus far, this Section has focused on an agency's obligation to respect Congress's policy choices, as well as the flexibility that agencies can and should exercise to avoid unintended absurdities and interpret statutes dynamically when they implement or carry out federal programs. Because agencies operate within the electoral dimension of democracy and may act arbitrarily when they make such determinations, however, the judiciary should review these aspects of agency decision making. As previously explained, courts should give an agency's judgment about whether Congress unambiguously resolved a particular question an appropriate amount of respect, but the judiciary must ultimately reach its own conclusions about whether an agency's decision was foreclosed by the statute. If the court determines that Congress neither compelled nor foreclosed the agency's chosen option, and the agency's decision was therefore permissible under the statute, then the court must proceed to determine whether the agency's policy decision was reasonable under the circumstances.[227] The court should therefore engage in hard-look judicial review and determine whether the agency engaged in reasoned deliberation when it made the contested policy decision.[228]

This proposed analytical framework responds to the serious concern that if courts fail to provide meaningful judicial review of

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226. *Id.* at 596.

227. The *Chevron* framework can and should be understood in a similar fashion. *See* M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council*, in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, *supra* note 208, at 93.

228. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co., 463 U.S. 29, 43 (1982) (stating that in reviewing agency action, courts must consider "whether the [agency's] decision was based on consideration of the relevant factors") (quoting Bowman Transp. Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974)). This proposed analytical framework comports with the position of commentators who argue that *Chevron* step two should be understood as the functional equivalent of arbitrary and capricious review. *See* Magill, *supra* note 227, at 93-102 (providing examples of courts taking this approach, and arguing in its favor); *see also* Ronald Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254-55 (1997); Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83 (1994); Seidenfeld, *supra* note 208, at 307-11. This form of judicial review should apply to an agency's decision to interpret a statute contrary to its plain meaning to avoid unintended absurdities or to interpret a statute dynamically, *see supra* notes 209-26 and accompanying text, as well as to an agency's resolution of more standard ambiguities.

the resolution of statutory ambiguities by regulatory agencies, the executive branch will acquire too much unrestrained lawmaking power, and agencies could therefore arbitrarily dominate the people.[229] Indeed, several commentators have previously recognized that APA procedures and hard-look judicial review are specifically designed to promote the principles of deliberative democracy, and therefore to guard against these possibilities.[230]

2. Statutory Interpretation Without Agencies

Although many interpretive problems in the modern regulatory state involve challenges to the validity of agency action, courts sometimes interpret statutes without meaningful input from regulatory agencies with authority over a matter. These cases, which have been the focus of most traditional theories of statutory interpretation, should also be understood as mechanisms for contestatory democracy. Generally speaking, the question is whether a federal statute should be understood to allow a particular type of adverse action against a party to litigation. Can the defendant be convicted of a crime for engaging in certain behavior? Can a private person or entity be enjoined from engaging in certain behavior or held civilly liable for any resulting damages? The individuals or groups who seek negative answers to the foregoing questions are contesting the potential exercise of governmental authority pursuant to the statute. Courts should therefore be expected to give equal consideration to the competing views and to provide good reasons for rejecting such challenges and reaching affirmative answers. The judiciary should, however, sustain those challenges when it concludes that a statute should not be understood to authorize the coercive action at issue.

In assessing such challenges, courts should utilize the traditional tools of statutory interpretation to evaluate whether Congress has

229. *See* Criddle, *supra* note 97, at 180-81; Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 525-26 (1989); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 105-07 (2000); *see also* Foote, *supra* note 169, at 708-11.

230. *See* Seidenfeld, *supra* note 94, at 1512; Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 443-46 (2003); Sunstein, *supra* note 83, at 56-58; *supra* note 164 and accompanying text.

explicitly resolved the precise question at issue. If so, the court should generally respect the legislature's decision because Congress has the primary authorial role in the lawmaking process,[231] and the constitutional structure provides significant protections against arbitrary domination. If, however, the court concludes that Congress has not clearly resolved the precise question at issue, then *the court* should engage in reasoned deliberation about the best way of implementing the statute on the merits in light of all of the relevant considerations. The judiciary's resolution of statutory ambiguities and assessment of how to apply a statute to unanticipated problems will admittedly involve *policy making*, but it is difficult to see how this could possibly be avoided when neither Congress nor an administrative agency has made a reasoned decision about the proper application of the statute under the circumstances. Moreover, the point of contestatory democracy is to enable people to challenge public decisions in an impartial forum on the grounds that their perceived interests were not taken into account during the lawmaking process, and that taking their views equally into account compels a decision in their favor. The judiciary is limiting the government's capacity to engage in arbitrary domination and thereby promoting freedom and democracy when it carries out this role.

There are a couple of important methodological implications of understanding statutory interpretation as contestatory democracy. First, courts should make judicious use of certain substantive canons of statutory interpretation under this theory. These canons, which include the rule of lenity (interpret ambiguous criminal statutes in favor of the defendant)[232] and the avoidance canon (avoid serious constitutional difficulties if another plausible interpretation of the statute is available),[233] have proven difficult to justify under faithful agent theories. After all, their invocation tends to deviate from the meaning the judiciary would otherwise attribute to the statutory text based on policy considerations. In addition, there is little reason to believe that Congress intended those particular results (and even less basis accurately to predict how the legislature

231. *See supra* Part III.A.
232. *See* ESKRIDGE ET AL., *supra* note 44, at 375-82.
233. *See id.* at 360-67.

would have resolved a problem that it never anticipated), and the application of these canons tends to undermine the underlying statutory purposes. Yet, substantive canons are based on the notion that Congress cannot outlaw private behavior or push the constitutional envelope without engaging in reasoned deliberation on the relevant issues.[234] By interpreting ambiguous statutes in favor of criminal defendants and against constitutional doubts, the judiciary promotes constitutional norms and remands legal or policy questions to the legislature for more focused deliberation.[235] In so doing, the judiciary ordinarily resolves contests over the use of governmental authority in favor of individuals or groups who claim that their perceived interests were not given adequate consideration, or any consideration at all, during the legislative process.[236]

For example, in *United States v. Witkovich*, the defendant was indicted for refusing to answer questions under a statute that authorized the Attorney General to require a deportable alien "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper."[237] Witkovich moved to dismiss the indictment on the grounds that it failed to state an offense within the meaning of the statute, and that, in the alternative, the statute was unconstitutional.[238] The Supreme Court held that the statute did not authorize the Attorney General to question a deportable alien about his political and social activities or associations, and instead limited the statute's scope "to authorizing all questions reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue."[239] The Court explained that the underlying

234. *See* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 446 (2005).

235. *See id.*

236. For the foregoing reasons, the rule of lenity and the avoidance canon should also potentially trump an agency's preferred understanding of a statute in appropriate cases. *See* Eskridge & Baer, *supra* note 71, at 1166-67.

237. 353 U.S. 194, 194-95 (1957) (citing Immigration and Nationality Act, Pub. L. No. 82-414, 68 Stat. 1232 (codified at 8 U.S.C. 1252(d) (Supp. II) (2006))).

238. *Id.* at 195.

239. *Id.* at 202.

purpose of the statute was to facilitate an alien's availability for deportation, the Senate Judiciary Committee expressed a reluctance to push the constitutional envelope,[240] and accepting the interpretation proposed by the government would raise serious constitutional questions.[241] In dismissing the indictment, the Court essentially concluded that if Congress wanted to give the Attorney General such expansive authority, it should amend the statute and make this decision more explicit.[242] In the process, Congress would presumably be required to give more careful consideration to the avowable interests of deportable aliens as well as the relevant constitutional norms. In the absence of solid evidence of reasoned deliberation on this issue by the legislature, however, the Court signaled that it would construe the statute in a manner that avoided the arbitrary domination of Witkovich and other deportable aliens.[243]

More generally, when statutory interpretation is understood as a mechanism of contestatory democracy, courts should eschew dogmatic reliance on any of the "foundational" theories of statutory interpretation that are suggested by faithful agent theory, and should instead engage in a process of "practical reasoning."[244] William Eskridge and Philip Frickey have succinctly described the three defining elements of this pragmatic approach to statutory interpretation. First, practical reasoning candidly recognizes that "statutory interpretation involves creative policymaking by judges and is not just the Court's figuring out the answer that was put 'in' the statute by the enacting legislature."[245] Second, "because this creation of statutory meaning is not a mechanical operation, it often involves the interpreter's choice among several competing answers."[246] Third, "when statutory interpreters make these choices, they are normally not driven by any single value," but rather they are typically influenced by a number of potentially competing

240. *See id.* at 201.
241. *See id.*
242. *See id.* at 200.
243. *See id.* at 199-201.
244. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990).
245. *Id.* at 345.
246. *Id.* at 347.

values,[247] including modern circumstances and norms.[248] Nonetheless, Eskridge and Frickey endorse a hierarchy of sources, which places the greatest weight on textual considerations; followed by the original expectations of the enacting Congress; and, finally, the purposes attributed to the statute over time and contemporary public values reflected in related statutes, evolving constitutional norms, and prevailing ideas of fairness.[249] They also rely on the metaphor of the "hermeneutical circle," which posits that "[a] part can only be understood in the context of the whole, and the whole cannot be understood without analyzing its various parts."[250] Interpreters must engage in a "to and fro movement" among all of the relevant considerations, which in turn influences how each relevant consideration is understood.[251] Eskridge and Frickey emphasize that judges should adopt the "hermeneutical attitude" when engaging in this analysis, and that "a true dialogue with the text requires the interpreter to reconsider her preunderstandings as she considers the specific evidence in the case, and then to formulate a new understanding, which in turn is subject to reconsideration."[252] After all, "the whole purpose of practical reasoning" is to understand opposing evidence and attempt "to derive a practical solution in the specific case at hand."[253] This purpose can be achieved only when the interpreter embraces an approach "in which all useful and relevant evidence is considered, and disagreement is embraced rather than suppressed."[254]

The use of practical reasoning in statutory interpretation is remarkably similar to the type of reasoned deliberation that is central to deliberative democratic theory,[255] and this method of statutory interpretation is therefore most conducive to avoiding arbitrary domination by the state. In this regard, practical reasoning and reasoned deliberation both take all of the relevant considerations and values into account in an effort to reach the best decision

247. *Id.* at 348.
248. *See id.* at 351-52 (describing the "dynamic element" of this approach).
249. *See id.* at 359.
250. *Id.* at 351.
251. *See id.* at 352.
252. *Id.*
253. *Id.* at 365.
254. *Id.*
255. *See supra* notes 145-54 and accompanying text.

under the circumstances in each particular case. Moreover, practical reasoning and reasoned deliberation are both dialectical and dialogic approaches to decision making, which require public officials to give serious consideration to the arguments presented by the participating parties. Both approaches require decision makers to remain open-minded and be willing to change or modify their views or positions in response to new information or arguments. Both approaches affirmatively embrace complexity and disagreement and seek to use the best available information and competing arguments to help decision makers reach the most justifiable solutions to concrete problems. Because decision makers are fallible and new information or arguments could subsequently be developed that would improve our understanding of the best approach to a problem, both approaches recognize that public officials should make modest decisions that preserve flexibility for the future. In short, legal and policy decisions should be minimalistic, incremental, dynamic, and above all, provisional. Practical reasoning and reasoned deliberation therefore contrast sharply with faithful agent theories of statutory interpretation, which are designed to convey the impression that the legislature finally decided everything when the statute was originally enacted.[256]

Although practical reasoning and deliberative democratic theory both trust public officials with substantial discretionary authority, they also provide meaningful constraints that protect citizens from arbitrary domination by the state. Deliberative democracy precludes participants in the lawmaking process from justifying their positions based solely on "naked preferences," and requires them instead to give "public-regarding" reasons for their preferred courses of action.[257] Factual or empirical claims should be based on reliable methods of inquiry and consistent with the best available information.[258] Similarly, practical reasoning in statutory interpretation is constrained by the historical text and the interpreter's moral

256. *Cf.* GUTMANN & THOMPSON, WHY DELIBERATIVE DEMOCRACY?, *supra* note 95, at 19 ("Deliberative democracy's provisionality checks the excesses of conventional democracy's finality.").

257. *See* Staszewski, *supra* note 147, at 1279-84 (discussing the value of reason-giving); *see also* Thompson, *supra* note 95, at 498 (explaining that a reason-giving requirement is "[a]t the core of all theories of deliberative democracy").

258. *See* GUTMANN & THOMPSON, DEMOCRACY AND DISAGREEMENT, *supra* note 95, at 15, 56.

obligations "to learn from the text, respond to the text, and reach common ground with the text" in resolving specific problems.[259] In addition, "the interpreter's perspective itself is conditioned by tradition—the evolution of the historical text as it has been interpreted, the values of society, and current circumstances."[260] Eskridge and Frickey contend that "[w]hile these constraints certainly do not dictate a result, the interpreter cannot disregard the force of that which envelops and situates her in present society."[261] Indeed, the historical text and tradition that constrain the permissible results in statutory interpretation are almost certainly more restrictive in most cases than the basic obligations of deliberative democratic theory. This disparity makes perfect sense, however, when one considers that legislators and administrators are frequently playing the primary authorial role in the lawmaking process. The judiciary, on the other hand, is merely playing an editorial role that is designed to implement the statute in as justifiable a manner as possible in particular cases—and thereby limit the government's capacity to engage in arbitrary domination of the people.

Perhaps most important for present purposes, the dialectical and dialogic aspects of deliberative democracy and practical reasoning, and the duties they impose upon public officials to provide reasoned explanations for their decisions, improve the democratic legitimacy of legal and policy decisions by the state. Deliberative democratic theory recognizes that reasoned deliberation provides decision makers with the information and competing arguments necessary to ascertain their own views.[262] Because the accompanying discussion can lead to an agreement, or at least an informed vote, on the best course of action on the merits under the circumstances, the resulting decision should be viewed as legitimate from the perspective of the prevailing majority.[263] The products of deliberative democracy are also legitimate from the standpoint of the minority, however, "if the minority's interests and perspectives were ade-

259. Eskridge & Frickey, *supra* note 244, at 382.

260. *Id.*

261. *Id.*

262. *See* Staszewski, *supra* note 147, at 1282.

263. *See id.* at 1282-83; *see also* Manin, *supra* note 95, at 341-44 (outlining Abbé Sieyès's argument that majority will is a necessary source of legitimacy).

quately considered during the decision-making process and the prevailing outcome is one that 'could be the object of a free and reasoned agreement among equals.'"[264] The related obligation of public officials to give reasoned explanations for their decisions that satisfy this standard helps to ensure that they make legitimate choices based on the best available information and that losing parties are not subject to arbitrary domination by the state.[265]

Similarly, the process of practical reasoning allows a court to reach a decision about the best resolution of a particular case, but this occurs only after a judge has considered a broad range of evidence and tested her preliminary views of the statute against other possible interpretations.[266] This approach requires an interpreter to evaluate statutory problems from a variety of different perspectives, and to carefully consider the competing positions of the parties and the arguments that point most strongly in each side's favor.[267] It also requires the court to provide a justification for its decision that responds in a reasoned fashion to the relevant considerations.[268] Eskridge and Frickey have persuasively argued that "[i]f performed candidly and with empathetic appreciation for the point of view of others (the classic assumptions of hermeneutics), the to and fro movement among the considerations suggested by our practical reasoning model is a more legitimate approach to statutory interpretation than the supposedly 'objective' foundationalist approaches."[269] They therefore conclude that "[t]he Court ought to acknowledge that, standing alone, textualist and archeological approaches to statutory interpretation are overly simplistic techniques that provide only a chimera of the legitimacy the Court seeks."[270] In contrast, "practical reasoning legitimates statutory interpretation through deliberation and candor" by encouraging judges to consider all of the relevant information and views to reach practical solutions to the concrete problems presented by difficult cases.[271] In other words, when statutory interpretation is understood

264. Staszewski, *supra* note 147, at 1283 (quoting Cohen, *supra* note 95, at 22).
265. *See id.*
266. Eskridge & Frickey, *supra* note 244, at 352.
267. *Id.*
268. *Id.*
269. *Id.* at 364.
270. *Id.* at 383.
271. *Id.*

as a mechanism of contestatory democracy, the creative elaboration of statutory meaning by the judiciary pursuant to a dialectical process of practical reasoning is significantly more democratic than the invocation of a pretense that the legislature provided a single correct answer to the precise question at issue,[272] which could be divined solely through the application of textualist, intentionalist, or purposive methods. Contrary to the conventional wisdom, cooperative partner theories of statutory interpretation are potentially *more democratic* than faithful agent models.

3. Statutory Interpretation with Agency Guidance

The judiciary frequently interprets statutes in the modern regulatory state with guidance from administrative agencies. This group of cases is formally distinct from judicial review of agency law making because the relevant agency did not interpret the statute pursuant to delegated lawmaking authority—either because the agency did not possess such authority or because the agency did not follow the requisite lawmaking procedures. Nonetheless, such cases are often functionally indistinguishable from judicial review of agency law making because the plaintiff is challenging the validity of agency action as arbitrary and capricious or contrary to law.[273] On the other hand, the cases in this category cover a broad range in terms of the procedural formality of the agency's decision and the extent to which the agency is involved in the litigation. Even where the agency's guidance is relatively informal and the agency is not a party to the lawsuit, however, the court must generally decide whether it agrees with an agency's preferred interpretation and whether, or how, the statute should be interpreted to regulate a private citizen's conduct. Accordingly, these cases will generally involve challenges to the validity of particular exercises of governmental authority under the statute, and they should therefore also be understood as providing a mechanism for contestatory democracy.

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272. *See supra* notes 70-79 and accompanying text.

273. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 222-26 (2001) (challenging the legality of a ruling letter issued by the Customs Service that resulted in the imposition of a tariff on the importation of plaintiff's day planners).

The judiciary is formally responsible for interpreting statutes in this category of cases, and it will accordingly play an editorial role when Congress has not explicitly resolved the precise question at issue, much like in cases where courts interpret statutes without agencies. Courts should therefore make judicious use of substantive canons and engage in practical reasoning when they perform this role.[274] Unlike statutory interpretation without agencies, however, courts have the benefit of interpretive guidance from agencies in this context, and agencies have numerous institutional advantages when it comes to identifying Congress's explicit policy choices and ascertaining the best way of implementing a statute under the circumstances.[275] Accordingly, the judiciary should treat an agency's interpretation of a statute with an appropriate degree of respect in cases of this nature.[276]

The degree of respect that is warranted will vary, however, based on the extent to which the agency engaged in reasoned deliberation in reaching its decision. If the agency reached its decision pursuant to a deliberative process that carefully considered competing interests and perspectives, and the agency provided a reasoned explanation for its decision that could be the object of a free and reasoned agreement among equals, then courts should generally defer to the agency's decision. If, however, the agency reached a conclusion without consulting the general public, the judiciary should uphold the agency's decision only if the court is independently persuaded that the agency has chosen the most justifiable option under the circumstances. In any event, courts should reject agency interpretations that they find unpersuasive in this particular context. In short, the weight of the agency's "judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[277]

When statutory interpretation is understood as a mechanism of contestatory democracy, judicial decisions about the most justifiable way of interpreting ambiguous statutes should be considered

274. *See supra* Part III.C.2.
275. *See supra* notes 186-95 and accompanying text.
276. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
277. *Id.*

provisional in this category of cases.[278] The judiciary should therefore be willing to reconsider its interpretive decisions when agencies subsequently engage in reasoned deliberation on a particular question and reach a persuasive decision that differs from the previous conclusion of a court. This is particularly true when the agency's subsequent decision is a product of especially deliberative procedures, such as notice-and-comment rule making,[279] and where the agency was delegated formal lawmaking authority on the matter or the relevant circumstances have materially changed since the time of the judiciary's earlier decision.[280] This understanding of statutory interpretation makes sense of the Court's occasional practice of invalidating an agency's interpretation of a statute, while simultaneously inviting the agency to reconsider the underlying policy question by promulgating a regulation pursuant to notice-and-comment rule making.[281]

IV. RECOGNIZING STATUTORY INTERPRETATION AS CONTESTATORY DEMOCRACY

This Article claims that statutory interpretation in the modern regulatory state should be understood as a mechanism of contestatory democracy, and it sketches the basic roles of Congress, administrative agencies, and the judiciary from this perspective. Although this theory provides a different way of thinking about statutory interpretation and its democratic legitimacy, it would not lead to radical changes in legal doctrine or dramatically alter the judiciary's approach to statutory problems. On the contrary, the proposed theory is largely consistent with existing legal doctrine, and recent empirical literature on statutory interpretation suggests that it is also largely compatible with how statutory interpretation

278. *See* Kenneth A. Bamberger, *Provisional Precedent*: *Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1276 (2002) (arguing that after *Mead*, "reasonable [judicial] construction of regulatory statutes" should be given "stare decisis effect only until [the responsible] agency sets forth its own permissible [and binding] interpretation").

279. *See supra* notes 197-99 and accompanying text.

280. *See* Bamberger, *supra* note 278, at 1311.

281. *See* Eskridge & Baer, *supra* note 71, at 1192 & nn.344-45 (describing several cases in which the Court has followed this approach, and claiming that this practice should be encouraged).

currently operates in practice.[282] Nonetheless, if statutory interpretation were reconceptualized as a mechanism of contestatory democracy, we would gain a better understanding of certain cases and be able to see why other decisions went wrong, in addition to having a better way of thinking about future problems.

In recent years, there has been a wave of interdisciplinary legal scholarship that has examined how courts interpret statutes from an empirical perspective. Without getting into all of the nuances of the findings, it seems fair to say that there is substantial empirical support for the notion that statutory interpretation in the modern regulatory state functions as a mechanism of contestatory democracy, and this Article's most significant normative prescriptions are consistent with the judiciary's existing practices.[283] Thus, for starters, scholars have recognized since the dawn of the *Chevron* era that "it is a defining characteristic of the administrative state that most statutes are not direct commands to the public enforced exclusively by courts, but are delegations to administrative agencies to issue and enforce such commands."[284] It is therefore not surprising that many statutory problems in the modern regulatory state involve challenges to the legality of agency action.[285] Moreover, it is generally accepted that federal courts are not obligated to give stare decisis effect to their interpretive methodologies in statutory cases,[286] which means that the judiciary can use different approaches to deciding different cases. Although the Court has suggested that its doctrines for deferring to agency interpretations of statutes should be treated as binding precedent, the Court has declined to follow its own doctrinal pronouncements on any consistent basis.[287] A number of studies have found that the Court

282. *See infra* notes 284-90 and accompanying text.

283. *See* studies cited *infra* notes 288-89.

284. Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 551 (1985); *see also* Rubin, *supra* note 173, at 369.

285. *See supra* notes 125-34 and accompanying text.

286. *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008) (asserting that the status quo should change to give statutory interpretation methodology stare decisis effect); Abbe R. Gluck, *Intersystemic Statutory Interpretation*: *Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1901-02 (2011).

287. *See* Eskridge & Baer, *supra* note 71, at 1086-91; Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1730-35 (2010).

relies on a variety of different considerations in deciding statutory cases, including legislative history, and that it frequently pays significant attention to legal precedent and a broad range of pragmatic considerations.[288] In other words, these studies suggest that *the Court engages in practical reasoning when it interprets statutes*.[289] The Eskridge and Baer study reached similar conclusions about the Court's methodology in cases in which an agency interpretation of a statute was at issue.[290] Although the Supreme Court has applied its own deference doctrine in a wildly inconsistent fashion, there is also clear doctrinal support for the following propositions: (1) agencies and courts are both legally obligated to follow the legislature's decision when Congress has explicitly resolved the precise question at issue;[291] (2) agency interpretations are formally entitled to greater deference when they are made pursuant to an explicit delegation of lawmaking authority from Congress;[292] (3) agencies are permitted to deviate from the plain meaning of statutory language to avoid unintended absurdities;[293] (4) an agency's resolution of statutory ambiguity pursuant to an explicit delegation of lawmaking authority is subject to judicial review for

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288. *See, e.g.*, Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 223-26 (2010); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992).

289. While most empirical studies of statutory interpretation have focused on the Supreme Court's methodology, Frank Cross has made similar findings in a study of the lower federal courts. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 199 (2009) ("It is clear from the findings that pluralism rules the day in judicial statutory interpretation.").

290. *See* Eskridge & Baer, *supra* note 71, at 1117-18.

291. *See, e.g.*, Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) ("[W]e neither defer nor settle on any degree of deference because the Commission is clearly wrong."); Herz, *supra* note 208, at 144 ("Where the statute is clear enough to allow the court to resolve the case in step one of *Chevron*, then the court would uphold or set aside the agency view, as the case may be, under either *Skidmore* or *Chevron*." (emphasis omitted)).

292. *See* United States v. Mead Corp., 533 U.S. 218, 227 (2001). *But cf.* Eskridge & Baer, *supra* note 71, at 1124-29 (discussing the influence of delegated lawmaking authority on the Court's deference to agency interpretations and finding that "congressional delegation is not a solid predictor of when the Court will invoke *Chevron*, but it is correlated with, and may influence, the agency's chances of prevailing once *Chevron* has been invoked").

293. *See supra* notes 209-18 and accompanying text.

reasoned decision making;[294] (5) agencies can change their interpretations of ambiguous statutory provisions pursuant to deliberate processes if they provide reasoned explanations for doing so;[295] (6) agency interpretations are entitled to greater respect when the agency has followed a participatory and deliberative procedure;[296] and (7) agency interpretations are entitled to greater respect when the agency has reached a reasoned decision on a particular question.[297] Accordingly, there is nothing to preclude agencies or courts from assuming the roles that are suggested by this Article's proposed understanding of statutory interpretation, and the judiciary already follows the broad outlines of this approach in many cases.

While understanding statutory interpretation as a mechanism of contestatory democracy is therefore consistent with the existing legal doctrine and empirical reality, it also provides the best explanation for many judicial decisions. For one recent example, consider *Dada v. Mukasey*.[298] Mr. Dada was a citizen and native of Nigeria, who came to the United States in the late 1990s on a temporary nonimmigrant visa. In 2004, the Department of Homeland Security charged Dada with being removable under the Immigration and Nationality Act for overstaying his visa.[299] An immigration judge found Dada to be removable and granted his request for "voluntary departure," which was affirmed without opinion by the

294. *See supra* note 228 and accompanying text.

295. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005); *see also supra* note 194 and accompanying text.

296. *See* Skidmore v. Swift & Co., 323 U.S. 140 (1944). Eskridge and Baer found little evidence to support this proposition in the Court's practice, but they argue that the Court should give greater deference to agency decisions that are made pursuant to notice-and-comment rule making, partly because of "the legitimacy-conferring features of [open] deliberation." *See* Eskridge & Baer, *supra* note 71, at 1147-48, 1171, 1177-80.

297. *See Skidmore*, 323 U.S. at 140; *see also* Eskridge & Baer, *supra* note 71, at 1180-81 (reporting that "the most significant variable" in determining whether the Court deferred to an agency's interpretation of a statute was whether the agency was "applying special expertise to a technical issue" and "applying its understanding of the facts to carry out congressional purposes," and claiming that the Court should be most deferential under these circumstances); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235 (2007) (describing the application of the "*Skidmore* factors" by the lower federal courts).

298. 554 U.S. 1 (2008).

299. *Id.* at 6.

Board of Immigration Appeals (BIA).[300] Dada was therefore ordered to leave the country within thirty days or suffer statutory penalties, including a significant fine and ineligibility for various forms of relief for a period of ten years.[301] Shortly before this thirty-day period expired, however, Dada moved to withdraw his request for voluntary departure.[302] He simultaneously filed a motion to reopen his proceedings based on new and material facts that allegedly demonstrated a basis for a change in his legal status.[303] Several months later, the BIA denied Dada's motion to reopen his proceedings on the grounds that he had overstayed his voluntary departure period. The BIA did not rule on his motion to withdraw his request for voluntary departure or consider the merits of his motion to reopen his removal proceedings.[304]

The issue for the Supreme Court was "whether an alien who has requested and been granted voluntary departure from the United States ... must adhere to that election and depart within the time prescribed, even if doing so causes the alien to forgo a ruling on a pending, unresolved motion to reopen the removal proceedings."[305] The applicable statute provides that if an alien's request for voluntary departure is granted after she is found removable, the alien must leave the country within sixty days.[306] The grant of a petition for voluntary departure benefits both the alien and the government.[307] From the government's perspective, an alien's agreement to leave voluntarily speeds the departure process and avoids the expenses of deportation, in addition to reducing the need for subsequent litigation.[308] In return, the alien avoids the possibility of extended detention within the United States, receives greater flexibility in deciding when to depart, and can select the country of destination. Perhaps most important, by agreeing to depart voluntarily, the alien avoids some of the penalties that result from

300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* at 6-7.
304. *Id.* at 7.
305. *Id.* at 4.
306. *See* 8 U.S.C. § 1229c(b)(2) (2006).
307. *See Dada*, 554 U.S. at 11-12.
308. *See id.* at 11.

deportation and thereby improves her chances for readmission.[309] The applicable statute, however, also provides that every alien ordered removed from the United States has a right to file one motion to reopen her removal proceedings based on newly discovered evidence or a change in circumstances since the hearing.[310] Pursuant to Department of Justice regulations, an alien's departure from the country has the effect of withdrawing her motion to reopen her removal proceedings.[311] Accordingly, the Court recognized that the statute and regulations appeared to place aliens in Dada's situation in a Catch-22, because they were required to choose between abiding by the terms of their voluntary departure agreements or pursuing motions to reopen their immigration proceedings.[312]

The Court was therefore required to determine whether the statutory right to reopen removal proceedings is qualified by the voluntary departure process.[313] Before addressing the parties' arguments, the Court pointed out that neither the statutory text nor the legislative history addressed this specific question, and it was therefore not explicitly resolved by Congress.[314] Dada argued that filing a motion to reopen should be understood to toll the voluntary departure period pending the motion's resolution.[315] The Court rejected this position, however, because it would reconfigure the voluntary departure scheme in a manner that would be inconsistent with the statutory design.[316] Specifically, while an alien would continue to receive "the full benefits of voluntary departure," the advantages of this disposition to the government—namely, a prompt and costless departure—would be lost.[317] This approach would also "invite abuse by aliens who wish to stay in the country but whose cases are not likely to be reopened by immigration authorities."[318]

309. *Id.* at 11-12.
310. *See* 8 U.S.C. § 1229a(c)(7)(A).
311. *See* 8 C.F.R. § 1003.2(d) (2012).
312. *See Dada*, 554 U.S. at 5.
313. *Id.*
314. *See id.* at 14-15.
315. *See id.* at 19.
316. *See id.*
317. *See id.* at 19-20.
318. *Id.* at 20.

The government argued, in contrast, that an alien's decision to seek and accept a voluntary departure order should be understood to result in the waiver of her statutory right to reopen her immigration proceedings.[319] The Court was not persuaded by the government's position either, however, because it would nullify the statutory right to seek reopening in most cases of voluntary departure.[320] Because "[t]he purpose of the motion to reopen is to ensure a proper and lawful disposition," the Court concluded that it "must be reluctant to assume that the voluntary departure statute was designed to remove this important safeguard for the distinct class of deportable aliens most favored by the same law."[321] This was especially true when aliens were not given prior notice that accepting voluntary departure would result in the loss of their statutory right to reopen their proceedings,[322] and "when the plain text of the statute reveals no such limitation."[323]

Having rejected the preferred positions of both parties, the Court concluded that it was necessary to adopt a compromise that would simultaneously "preserve the alien's right to pursue reopening while respecting the Government's interest in the *quid pro quo* of the voluntary departure arrangement."[324] The Court held that "to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request before expiration of the departure period, without regard to the underlying merits of the motion to reopen."[325] The alien therefore "has the option either to abide by the terms, and receive the agreed-upon benefits, of voluntary departure; or, alternatively, to forgo those benefits and remain in the United States to pursue an administrative motion."[326] The Court explained that while "this interpretation still confronts the alien with a hard choice, it avoids both the quixotic results of the Government's proposal and the elimination of benefits to the

319. *See id.* at 15.
320. *See id.* at 15-18.
321. *Id.* at 18.
322. *See id.* at 15-16.
323. *Id.*
324. *Id.* at 19.
325. *Id.* at 21.
326. *Id.*

Government that would follow from petitioner's tolling rule."[327] Because Dada requested the withdrawal of his motion for voluntary departure prior to the expiration of his statutory departure period, the Court concluded that the BIA should have granted his request and allowed him to pursue his motion to reopen his removal proceedings.[328] Dada therefore prevailed in his challenge to the legality of the agency's decision under the statute.

Dada v. Mukasey provides a vivid example of how statutory interpretation functions as a mechanism of contestatory democracy for several reasons. First, the case provided the petitioner with an opportunity to contest the government's refusal to consider his motion to reopen his removal proceedings on the merits on the grounds that the government's view of the statute was contrary to law. Second, although the Court considered the statutory language, the legislative history, and the underlying purposes of the relevant provisions in evaluating the parties' positions, the Court openly acknowledged that Congress did not explicitly resolve the precise question at issue or have an ascertainable intent.[329] Third, the Court gave equal consideration to the interests and perspectives of both parties, and ultimately adopted a reasoned decision that was responsive to their concerns and cognizant of the practical consequences of different courses of action. Nonetheless, the Court ultimately rejected the positions of both parties and adopted a deliberative compromise that would better promote the underlying purposes of the statute than the proposed alternatives.[330] Fourth, the Court explicitly recognized that its decision was provisional, and that the Justice Department, which has the authority to promulgate rules to carry out this program, could potentially adopt another solution to this problem after engaging in reasoned deliberation.[331] Indeed, the Court pointed out that a proposed rule by the Justice Department, which would have resolved the problem in a manner similar to the solution adopted by the Court, was entitled to the

327. *Id.*

328. *See id.* at 22.

329. *See id.* at 15-18.

330. *See id.*

331. *Id.* at 20 ("Although a statute or regulation might be adopted to resolve the dilemma in a different manner, as matters now stand the appropriate way to reconcile the voluntary departure and motion to reopen provisions is to allow an alien to withdraw the request for voluntary departure before expiration of the departure period.").

Court's respect during the interpretive process.[332] Finally, and perhaps most fundamentally, there is no question that the Court was making a policy decision in resolving this case, and thereby editing the statute that was authored by Congress. Justice Scalia complained in his dissenting opinion that the Court was exceeding the scope of its authority by "blue-pencil[ing]" the statute in this fashion.[333] He also claimed that because the Justice Department was actively considering the adoption of new regulations on this issue, the Court's "interpretive gymnastics may have been performed, not for the enjoyment of innumerable aliens in the future, but for Mr. Dada alone."[334] If statutory interpretation is understood as a mechanism of contestatory democracy, however, it becomes apparent that the Court's decision limited the government's capacity to engage in the arbitrary domination of Mr. Dada, and that the Court's resolution of this problem was therefore affirmatively democratic.

There are, of course, other cases that would appear to have been wrongly decided if statutory interpretation is understood as a mechanism of contestatory democracy. *United States v. Locke* stands out as a particularly striking example of a case in which the Court is undoubtedly correct about *what the statute means*, but Justice Stevens' dissenting opinion provides a more persuasive account of *how the statute should be interpreted* if the judiciary's role is to provide individuals or groups with an opportunity to contest the arbitrary exercise of governmental authority.[335] The Federal Land Policy and Management Act of 1976 required property owners with mining claims on public lands to register their initial claims with the Bureau of Land Management (BLM) within three years of the statute's enactment, and to make annual filings with the agency "prior to December 31" of each subsequent year.[336] The Locke family, who had earned their livelihood since 1960 by producing millions of dollars worth of gravel and other building materials from ten mining claims on federal land in Nevada, submitted their initial

332. *See id.*
333. *Id.* at 27 (Scalia, J., dissenting).
334. *Id.* at 30.
335. 471 U.S. 84, 119-21 (1985) (Stevens, J., dissenting).
336. 43 U.S.C. § 1744(a) (2006).

registrations for those claims in a timely fashion.[337] They proceeded to send their daughter, who worked in the family's business office, to the BLM's regional office in Ely, Nevada, to ascertain how to comply with the statute's annual filing requirement.[338] It was undisputed that she was told by agency employees that the required documents should be filed at the Reno office "on or before December 31, 1980."[339] Pursuant to this advice, the Lockes travelled more than 700 miles to hand-deliver the documents to the BLM's Reno office for filing on December 31, 1980. Several months later, the Lockes were first notified by the BLM that their property rights were "abandoned and void," because they had filed their mining claims one day too late.[340] After an unsuccessful administrative appeal, the Lockes filed a lawsuit against the federal government claiming that the extinguishment of their property rights was unconstitutional under the circumstances.[341]

The Court explained that before addressing the merits of the constitutional issues, it should first consider whether the statute could fairly be construed in a manner that would avoid those questions.[342] The Lockes argued that the statutory requirement of a filing "prior to December 31 of each year" should be interpreted to require a filing "on or before December 31," and that the BLM had therefore acted unlawfully in voiding their claims.[343] The majority concluded, however, that this position was foreclosed by the plain language of the statute.[344] The Court emphasized that adhering to a literal interpretation of the statute was particularly appropriate in this context because the point of a deadline is to have a deadline, and the particular date that is chosen is inherently arbitrary.[345] The Court also pointed out that the plaintiffs could have ascertained the correct filing date by carefully reading the statute or the agency's regulations or by obtaining legal counsel, and that there was

337. *See Locke*, 471 U.S. at 89.
338. *Id.* at 114 (Powell, J., dissenting).
339. *See id.* at 89-90 n.7.
340. *Id.* at 90.
341. *Id.* at 91.
342. *See id.* at 92.
343. *See id.* at 93; *see also supra* note 233 and accompanying text (describing the avoidance canon).
344. *See Locke*, 471 U.S. at 93-96.
345. *See id.* at 93.

nothing in the legislative history to prove that the text contained a scrivener's error.[346] While the Court acknowledged that the statutory language may have been clumsy or confusing, the Court concluded that it was required to apply the "prior to December 31" language by its terms because the statute's meaning was clear.[347] The Court explained that "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."[348]

Justice Stevens issued a dissenting opinion in which he claimed that the majority's decision was contrary to the likely intent of Congress, unfairly created "a trap for unwary property owners," and unnecessarily engaged in constitutional adjudication.[349] Justice Stevens pointed out that the statute contained a number of drafting problems, and he therefore concluded that in the context of a statutory scheme that requires periodic filings on a calendar-year basis, the choice of the language "prior to December 31" was at least ambiguous and likely a scrivener's error.[350] This conclusion was bolstered by the fact that "no one has suggested any rational basis for omitting just one day from the period in which an annual filing may be made," and Justice Stevens "would not presume that Congress deliberately created a trap for the unwary by such an omission."[351] Indeed, the actions of the BLM merely highlighted the confusing nature of the statutory language. Besides erroneously telling the Lockes that they could file their mining claims by the end of the year, the agency had previously issued a question and answer pamphlet that mistakenly stated that annual filings had to be made "on or before December 31," and the agency's current regulations rephrased the statutory language in an apparent effort to make the annual filing deadline more clear.[352] In any event, Justice Stevens argued that accepting mining claims that were filed "on December 31" would not undermine the statutory purpose of notifying the BLM of the existence of alleged mining claims on public lands,

346. *See id.* at 95.
347. *Id.*
348. *Id.* (quotations and citation omitted).
349. *Id.* at 117 (Stevens, J., dissenting).
350. *Id.* at 117-19.
351. *Id.* at 123.
352. *Id.* at 89-90 n.7.

evinced by the fact that the agency was willing to accept claims submitted by mail, as long as they were postmarked by December 30 and received by the agency on or before January 19 of the following year, as well as by the fact that the Lockes were first told that their mining claims were abandoned several months after their claims were filed with the agency.[353] The BLM could therefore plainly exercise the authority to accept a mining claim that was received after the statutory deadline, and its refusal to do so under the circumstances meant that the Lockes "lost their entire livelihood for no practical reason, contrary to the intent of Congress, and because of the hypertechnical construction of a poorly drafted statute" by an agency that was interpreting the statute flexibly in some contexts and inflexibly in others.[354] Indeed, there was evidence in the record to suggest that the BLM was "using every technical construction of the statute to suck up active mining claims much as a vacuum cleaner, if not watched closely, will suck up jewelry or loose money."[355] Justice Stevens pointed out that according to the BLM's own calculations, "thousands of mining claims have been terminated because filings made on December 31 were considered untimely," and he suggested that this information "confirm[s] the picture painted by *amici* of a federal bureaucracy virtually running amok, and surely operating contrary to the intent of Congress, by terminating the valuable property rights of hardworking, productive citizens of our country."[356] Based on this information and the foregoing arguments, it seems readily apparent that deciding this case in favor of the Lockes would have promoted freedom as non-domination and thereby affirmatively promoted democracy, irrespective of the plain meaning of the statutory text.

Finally, in thinking about the practical impact of understanding statutory interpretation as a mechanism of contestatory democracy, it is worthwhile to consider the "Tailoring Rule" that was recently enacted by the Environmental Protection Agency (EPA) as part of

353. *See id.* at 121-23 & nn.9, 11 (Stevens, J., dissenting) ("The agency's adoption of the January 19 deadline illustrates that it does not need the information by December 30; that it is not bound by the language of the provision; and that substantial compliance does not interfere with the agency's statutory functions or with the intent of Congress.").

354. *Id.* at 125.

355. *Id.* at 124 n.12.

356. *Id.*

its effort to regulate greenhouse gas emissions.[357] In *Massachusetts v. EPA*, the Supreme Court held that greenhouse gases are "air pollutant[s]" that are subject to regulation under the Clean Air Act,[358] and concluded that the agency was legally obligated to determine "whether sufficient information exists to make an endangerment finding" for greenhouse gases.[359] Several years later, after President Obama's election, the EPA issued a series of regulations related to greenhouse gases.[360] First, the EPA issued an Endangerment Finding,[361] in which it determined that greenhouse gases "may reasonably be anticipated to endanger public health or welfare."[362] Second, the EPA issued the Tailpipe Rule, which set emission standards for cars and light trucks.[363] Finally, the EPA determined that the Clean Air Act requires major stationary sources of greenhouse gases to obtain construction and operating permits.[364] Because immediate regulation of all those sources would result in overwhelming burdens on permitting authorities and regulated entities, however, the agency issued the Timing and Tailoring Rules, in which it determined that only the largest stationary sources would initially be subject to permitting requirements.[365]

More specifically, when it promulgated the Tailoring Rule, the EPA explained that it was "relieving overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources."[366] Although the relevant sections of the Clean Air Act explicitly require permits for sources with the potential to emit 100 or 250 tons per year of "any air pollutant" (depending on the applicable program and source),[367] the agency pointed out that "immediate application of these thresholds to sources that emit greenhouse gases would cause permit applications

357. *See* 75 Fed. Reg. 31,514 (June 3, 2010).

358. 549 U.S. 497, 532 (2007).

359. *Id.* at 534.

360. *See* Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1332, slip op. at 19-20 (D.C. Cir. June 26, 2012) (describing this background).

361. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009).

362. 42 U.S.C. § 7521(a)(1) (2006).

363. 75 Fed. Reg. 25,324 (May 7, 2010).

364. U.S. EPA, EPA-457/B-11-001, PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES (2011).

365. *See Coal. for Responsible Regulation*, slip op. at 19-20 (describing these rules).

366. 75 Fed. Reg. 31,516 (June 3, 2010).

367. *See* 42 U.S.C. § 7479(1).

to jump from 280 per year to over 81,000 per year" in one program, and "from 14,700 per year to over 6.1 million per year" in the other program.[368] The EPA also explained that the vast majority of these applications would come from small commercial or residential sources, which would incur an average of either $23,175 or $60,000 in permitting expenses, depending on the program.[369] If the permitting authorities hired the 230,000 additional full-time employees that would likely be necessary to process these permit applications, "authorities would face over $21 billion in additional permitting costs each year due to [greenhouse gases], compared to the current program cost of $62 million each year."[370]

Thus, rather than immediately requiring permits for all sources that exceed the 100 or 250 tons per year emissions threshold, the EPA decided to implement these programs in several phases, beginning with the largest sources of greenhouse gas emissions.[371] The Tailoring Rule therefore established the first two steps in this phased-in process. During the first step, the sources that were already subject to permit obligations based on their emission of other regulated air pollutants were required to install the best available control technology for their greenhouse gas emissions.[372] During the second step, sources with the potential to emit more than 75,000 or 100,000 tons per year of greenhouse gases, depending, again, on the relevant program and source, would be obligated to obtain the requisite permit.[373] The Tailoring Rule also contains enforceable commitments by the EPA to engage in subsequent rule making that will be designed to lower the emissions thresholds for greenhouse gases, streamline the administration of the permitting programs, and address the permitting of remaining sources with the potential to emit more than 100 or 250 tons per year of greenhouse gases under the relevant programs.[374] While the EPA acknowledged

368. *Coal. for Responsible Regulation*, slip op. at 74 (citing 75 Fed. Reg. 31,554 (June 3, 2010)).

369. *Id.* (quoting 75 Fed. Reg. 31,556, 31,562 (June 10, 2010), 75 Fed. Reg. 31,562 (June 3, 2010)).

370. *Id.* at 74 (quoting 75 Fed. Reg. 31,563 (June 10, 2010)).

371. *See id.* at 74-75.

372. *Id.* at 145.

373. Those emissions would be measured on the basis of their carbon dioxide equivalence. *See id.* at 114-15.

374. *See* 75 Fed. Reg. 31,516, 31,522 n.11.

that the Tailoring Rule is difficult to square with a literal reading of the text of the Clean Air Act, the agency justified its phased-in approach based on several administrative law doctrines that give agencies a certain amount of equitable discretion.[375]

In *Coalition for Responsible Regulation v. EPA*, a number of industry groups and "red states" challenged the validity of the Tailoring Rule on the grounds that the EPA exceeded the scope of its lawful authority under the Clean Air Act.[376] The plaintiffs argued that none of the doctrines invoked by the EPA allowed the agency to "depart unilaterally from the [Clean Air Act's] permitting thresholds and replace them with numbers of its own choosing."[377] While acknowledging the "lamentable policy consequences of adhering to the unambiguous numerical thresholds in the Clean Air Act," the plaintiffs claimed that the EPA's attempts to alleviate those burdens "establish only that the EPA is acting as a benevolent dictator rather than a tyrant."[378] The D.C. Circuit declined to address the merits of this claim, however, and dismissed this aspect of the complaint on the grounds that the plaintiffs lacked standing because they had not alleged an injury in fact that could be redressed by the court.[379] On the contrary, the court observed that the Tailoring Rule "actually mitigate[s] [plaintiffs'] purported injuries."[380]

This example provides an excellent illustration of several of the primary claims of this Article. First, statutory interpretation in federal court should be understood as a mechanism of contestatory democracy. The plaintiffs in *Coalition for Responsible Regulation* brought a lawsuit to challenge the validity of the government's decision to adopt the Tailoring Rule, and that is the context in which issues of statutory interpretation typically arise in the modern regulatory state. While the court's decision to dismiss the complaint for lack of standing seems correct under the existing legal

375. *See Coal. for Responsible Regulation*, slip op. at 75-76 (describing the EPA's arguments); *see also* Kirti Datla, Note, *The Tailoring Rule*: *Mending the Conflict Between Plain Text and Agency Resource Constraints*, 86 N.Y.U. L. REV. 1989, 1989-92 (2011) (providing a detailed evaluation of the potential application of one of those doctrines).

376. *See Coal. for Responsible Regulation*, slip op. at 75-76.

377. *Id.*

378. *Id.* (internal quotations omitted).

379. *See id.* at 76-81.

380. *Id.* at 77.

doctrine, such limitations on justiciability impose potentially problematic barriers on the ability of citizens to challenge the legality of governmental action.[381] Second, if a federal court were to address the merits of this claim, the Tailoring Rule would be legally vulnerable *if* the EPA's decision is properly understood as *statutory interpretation*, *and* the judiciary feels compelled to follow *the plain meaning* of the statutory language. While the EPA went out of its way to explain why its interpretation of the Clean Air Act is legally permissible,[382] it seems doubtful that the EPA's decision to enact the Tailoring Rule is best characterized as "statutory interpretation." Rather, the EPA is "carrying out" its delegated authority to "implement" the Clean Air Act's permitting programs, and it has understandably chosen to do so through a multistep process. Accordingly, the Tailoring Rule provides a compelling example of Elizabeth Foote's concern that routinely treating agency action as "statutory interpretation" poses the twin risks of judicial aggrandizement (by increasing the likelihood that courts will engage in law making under *Chevron* step one, in this case by invalidating the Tailoring Rule as contrary to the statute's plain meaning), as well as judicial capitulation to the policy choices of agencies (if the court concludes that the statute is ambiguous, and fails to review the agency's "interpretation" for reasoned decision making).[383] Third, by adopting the Tailoring Rule, the agency was, in reality, *editing* the Clean Air Act in response to changed or unanticipated circumstances. It is significant, moreover, that the EPA adopted the rule pursuant to notice-and-comment rule making, and that its final rule was accompanied by a thorough explanation. The questions for the judiciary, therefore, are (1) whether the EPA's decision should be deemed foreclosed by an explicit decision by Congress, and (2) whether the agency has engaged in reasoned decision making. In my view, Congress did not unambiguously preclude the EPA's adoption of the Tailoring Rule. While Congress adopted numerical emissions limits when it enacted the Clean Air Act, those emissions limits were specifically designed to apply only to "big polluters" who

381. *See* sources cited *supra* notes 162, 201.

382. *See* 75 Fed. Reg. 31,527-66 (June 3, 2010) (describing "the legal and policy rationale for the final [Tailoring Rule] decision").

383. *See* Foote, *supra* note 169, at 702-10.

could afford the costs of being subject to the permitting process.[384] Congress never anticipated the problem of climate change, or that greenhouse gases would be emitted into the atmosphere at such high levels by so many smaller sources. The agency's approach to carrying out its programmatic responsibilities seems like a perfectly reasonable solution under the circumstances. Indeed, the agency has avoided what could otherwise be characterized as the arbitrary domination of the permitting authorities and owners of countless small businesses and residences. The agency has therefore acted in a democratic fashion, and its decision should withstand judicial review. Nonetheless, such opportunities for contestatory democracy are important because they effectively prevent the agency from truly acting as a dictator, benign or otherwise.[385]

One might respond to all of this by claiming that the Clean Air Act contains unambiguous, numerical emissions limitations, and that if they need to be tailored to accommodate the regulation of greenhouse gases, Congress should amend the statute to provide more appropriate permit thresholds. While this would, in fact, be the ideal solution because Congress undoubtedly has the primary authorial role in the lawmaking process, such a solution does not appear politically feasible at this time. When the legislative process is this dysfunctional,[386] there is nothing undemocratic about agencies implementing statutes in a reasoned fashion, and the judiciary reviewing and upholding those decisions. Administrators and judges might have an obligation to help elected officials take our society "to hell" if their role is merely to serve as faithful agents of the legislature,[387] but that is decidedly not the case if the point of

384. *See* 75 Fed. Reg. 31,549-51 (June 3, 2010) (describing the legislative history of the 1977 amendments to the Clean Air Act).

385. This is particularly true when the EPA could have reached the same result in a less transparent, accountable, or democratic fashion by maintaining the statutory emissions levels and refusing to enforce the permit requirements below the agency's chosen thresholds. Such a course of action would not necessarily have involved public deliberation, and it would presumptively have been precluded from judicial review. *See* Heckler v. Chaney, 470 U.S. 821, 837-38 (1985).

386. *Cf.* Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479 (2012) (discussing shortcomings in the legislature's treatment of climate change, and claiming that a certain amount of "judicial prodding" would be appropriate in this context).

387. *Cf.* Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 199 (Mark DeWolfe Howe ed., abridged ed. by Alger Hiss, 1963) ("I always say, as you

democracy is to protect the public from arbitrary domination by private parties or the state.

V. THE IMPLICATIONS OF STATUTORY INTERPRETATION AS CONTESTATORY DEMOCRACY

While viewing statutory interpretation as a mechanism of contestatory democracy is largely consistent with current judicial practice, it would have real practical consequences in some cases. Nonetheless, the more significant result of reconceptualizing statutory interpretation in this fashion would be theoretical. Not only does this understanding of statutory interpretation openly acknowledge the limits of legislative intent and purposive analysis as tools for providing a single correct answer to statutory problems, but it also sheds new light on the most fundamental problems with textualism. This theory additionally provides reasons to give serious consideration to proposals for increased judicial candor in statutory interpretation and for judicial review of at least some types of legislation for due process of law making.

A. Problems with Textualism

Textualism's most fundamental tenet is the formalist axiom that *the statutory text is the law*.[388] The role of the judiciary in statutory interpretation is therefore to ascertain the ordinary meaning of the law when the statute was enacted.[389] Textualists are fond of demonstrating the simple genius of this method by asking questions such as whether a prohibition on bringing "dogs" into a restaurant applies to "cats,"[390] or whether the legislative treatment of "sandwiches" applies to "burritos."[391] As a reasonable speaker of English,

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know, that if my fellow citizens want to go to Hell I will help them. It's my job.") (quoted in Michael Herz, *"Do Justice!" Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 114 (1996)).

388. *See* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120 (2009).

389. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

390. *Cf.* SCALIA & GARNER, *supra* note 41, at 72-73 (pointing out that roosters and goldfish are both "animals" under a dictionary definition); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 47-52 (1991) (providing examples involving the exclusion of certain animals from restaurants).

391. *Cf.* SCALIA & GARNER, *supra* note 41, at 54-55 (discussing White City Shopping Ctr.,

I would acknowledge that dogs are different from cats and that a sandwich is not a burrito, but the main point of this Article is that courts are not asked to answer these questions in the abstract. Rather, they are typically asked to answer these questions in the context of a challenge to the legality of governmental authority. Moreover, in the modern regulatory state, it would not be unusual for Congress to delegate authority to an agency to promulgate rules or orders to prohibit dogs from restaurants or to regulate sandwiches. The institutional context in which questions about the breadth of these categories arises therefore matters. For example, I would be predisposed to grant *a motion to dismiss a criminal indictment* for violating a prohibition on bringing a dog into a restaurant if the animal at issue was a house cat based on the plain meaning of the statute. I would, however, also be inclined to dismiss the indictment if the animal at issue was a guide dog, and the defendant who was contesting the law's application was blind. On the other hand, I would be inclined to deny a motion to dismiss the indictment if the animal at issue was a dog/tiger hybrid that was fifty-one percent "cat." I would be even more inclined to uphold these particular decisions if they were made by an administrative agency with delegated authority to implement the relevant statute after engaging in a process of reasoned deliberation which considered the views of interested members of the public.[392]

All of this is to say that the text of a statute is not *the law*, and that *the meaning* of statutory language is not always dispositive. If the text is not *the law*, then what is? The answer to this question cannot be the legislature's intent, nor can it be the underlying statutory purpose, because as legal realists and textualists have both persuasively explained, Congress frequently has no discernible intent on specific interpretive problems and it pursues its policy goals in only a limited fashion.[393] From the standpoint of contestatory democracy, the law is what authoritative decision makers say it is based on a reasoned assessment of the circum-

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LP v. PR Rests., LLC, No. 2006196313, 2006 WL 3292641 (Mass. Super. Ct. Oct. 31, 2006), which examined whether a lease that prohibited a shopping center from providing space to a restaurant that earned more than ten percent of its business from the sale of "sandwiches" precluded a lease agreement with a Mexican-style restaurant).

392. *See supra* notes 176-99, 277-81 and accompanying text.

393. *See supra* notes 45-59 and accompanying text.

stances presented in a particular case. While agencies and courts both have a duty to respect Congress's explicit policy choices when they make their decisions, unelected bureaucrats and judges will often be engaging in a "lawmaking" function when they interpret statutes in a nontextualist fashion. Setting aside the fact that textualist judges also engage in law making when they resolve statutory ambiguity, textualists believe that judicial law making is undemocratic.[394] If, however, the point of democracy is to limit the government's capacity to engage in arbitrary domination of the people, then it would be democratically illegitimate to follow the plain meaning of statutory text when its purposes would not be served or serious adverse consequences would result, unless such an outcome was fully anticipated and rationally endorsed by elected representatives of the people.[395] Indeed, using the plain meaning of statutory language to resolve unanticipated problems would typically lead to random and, hence, arbitrary results.[396] In contrast, by providing administrative agencies with the authority to use their expertise to implement statutory programs in a sensible fashion pursuant to deliberative processes, the government's capacity to engage in arbitrary domination of the people is restricted. This is particularly true when administrative decisions are subject to judicial review for compatibility with the statutory scheme and reasoned decision making. If neither Congress nor an agency has resolved the precise question at issue in a reasoned fashion, then this authority necessarily falls to the judiciary, which should make a reasoned decision on the merits in light of all of the relevant considerations when a particular exercise of governmental authority is contested. The people are thereby provided with a variety of different forums for potentially contesting legal or policy decisions, and individuals cannot be adversely affected by governmental action unless a reasoned decision that considered their interests and perspectives was provided at some point during the process.

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394. *See, e.g.*, SCALIA, *supra* note 62, at 9 (observing that judicial law making under the common law "would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy").

395. *See* Staszewski, *supra* note 70, at 1025-28 (explaining how the absurdity doctrine in statutory interpretation promotes republican democracy).

396. *See* Staszewski, *supra* note 147, at 1309-10.

The meaning of statutory language is obviously important and should generally be followed because Congress has the primary authorial role in the lawmaking process, and good editors do not ignore or casually revise the texts of the projects for which they are responsible, especially when there may be significant reliance interests at stake. Nonetheless, a variety of other factors will ordinarily be relevant when agencies and judges make their decisions, including the legislative history of the statute, its underlying purposes, applicable legal precedent, canons of construction, constitutional norms, related statutory provisions and common law principles, a potentially broad range of policy considerations, and how things have changed since the statute was enacted.[397] The important point for present purposes is that while traditional theories of statutory interpretation assume that the role of agencies and courts is to ascertain the meaning of the law,[398] and recent literature debates whether they should perform this task in the same fashion,[399] the reality is that neither agencies nor courts are "ascertaining the meaning of the law" when they interpret statutes in the modern regulatory state. Rather, administrative agencies are carrying out their delegated authority to implement statutory programs, while the judiciary is generally reviewing the legality of their decisions.[400] Agencies are making policy decisions within the constraints provided by Congress, and the judiciary is providing the people with opportunities to contest the validity of exercises of governmental authority. If courts were to follow the "plain meaning" of statutes regardless of the circumstances or the consequences, they would be failing to perform their central function in statutory interpretation.[401] Statutory interpretation in the modern regulatory

397. *See supra* notes 284-97 and accompanying text.

398. For thoughtful jurisprudential discussions of the complexities of this proposition, see, for example, SCHAUER, *supra* note 390, at 51; Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449 (1997). *See also* Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 43-46 (2003) (describing and criticizing this view of statutory interpretation).

399. *See supra* notes 166-70 and accompanying text.

400. *See* Herz, *supra* note 187, at 119 (recognizing that when agencies resolve statutory ambiguity, "the court and agency are doing different things," and explaining that "[n]either is trying to figure out what the statute means" because "[t]he agency is making policy, [and] the court is ensuring that the agency has not abused its discretion in doing so").

401. Pragmatic theories of textualism, which seek to simplify statutory interpretation to minimize "judicial mistakes," are therefore based on a fundamental misunderstanding of the

state may no longer be "all about words,"[402] but it does have the potential to improve the legitimacy of legislation, administration, and adjudication under the only understanding of democracy that is properly connected to the requirements of individual freedom.[403]

B. Reassessing Due Process of Law Making and Judicial Candor

Contestatory democracy requires reasoned decision making on legal and policy issues by public officials. This can legitimately occur when a statute is enacted by Congress or when a statute is implemented by an administrative agency. If a statutory problem is not resolved in a reasoned fashion by either Congress or an agency, this task necessarily falls to the judiciary. Because agency decision making is typically subject to judicial review for reasoned decision making,[404] it is more likely that Congress or the judiciary will retain the capacity to dominate the people arbitrarily. The safeguards of representation and bicameralism and presentment help limit arbitrary domination by Congress, and the judiciary must give reasoned explanations for its decisions, but one can still fairly question whether these protections are sufficient. We should therefore give serious consideration to reforms that could improve the quality of legislative and judicial deliberations and the justifications that elected officials and judges provide for their decisions. This means, for example, that we may want to reconsider the potential value of judicial review of legislation for due process of law making, and that we should almost certainly encourage courts to be more candid about their role in making interpretive decisions.[405]

"Due process of law making" is a term that was originally coined by Hans Linde to describe judicial review of the validity of legisla-

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judiciary's role in this enterprise. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006).

402. *See* William N. Eskridge, Jr., *All About Words*: *Early Understandings of the "Judicial Power" in Statutory Interpretation*, *1776-1806*, 101 COLUM. L. REV. 990 (2001).

403. *See supra* note 32 and accompanying text.

404. *See* 5 U.S.C. § 706(2) (2006); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 27, 43 (1983). Agencies can also arbitrarily dominate the people when judicial review is not available. For more extensive discussions of this problem, and some potential solutions, see, for example, Criddle, *supra* note 97, at 193-96, and Staszewski, *supra* note 162.

405. For an excellent treatment of judicial candor and sincerity, see Micah J. Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987 (2008).

tion that focuses on the adequacy of lawmaking procedures or the quality of legislative deliberations.[406] Despite occasional objections, it is widely accepted that it is appropriate for courts to review an administrative record to determine whether agency officials engaged in reasoned decision making during the legislative rulemaking process.[407] In contrast, the Supreme Court provoked a flood of scholarly criticism when it recently assessed the constitutionality of several federal statutes by closely examining the contents of the legislative records.[408] This reflects the conventional wisdom that it is inappropriate for courts to review a legislative record to assess the constitutional validity of ordinary legislation for several related reasons.[409] First, there is no constitutional requirement that the legislative branch compile a formal lawmaking record sufficient for courts to assess the rationale for a law's enactment. Second, the existing legislative records are unlikely to provide a fully transparent, coherent, or authoritative window into Congress's reasoning because the legislative process is so diffuse, competitive, and legitimately susceptible to a wide range of informal influences.[410]

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406. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 225 (1976); *see also* Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases*: *An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1709-18 (2002) (describing various models of due process of law making, including the model of due deliberation); Staszewski, *supra* note 230, at 465-76 (discussing the relevant literature and evaluating the potential applicability of this method of judicial review to successful ballot measures).

407. *See, e.g.*, William W. Buzbee & Robert A. Shapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 126 (2001).

408. *See* Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 934-35 (2012) (describing legislative record review and the resulting academic critique); Staszewski, *supra* note 230, at 465 & n.249 (collecting sources).

409. *See* Staszewski, *supra* note 230, at 466-68 (describing the most prevalent criticisms).

410. Critics of the Court's recent foray into judicial review for due process of law making correctly observed that the Court's practice was in severe tension with the textualist approach to statutory interpretation that is advocated by two members of the Court's majority. *See* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 136-41 (2001); Frickey & Smith, *supra* note 406, at 1750-52. One might therefore conclude that the criticisms of judicial review for due process of law making also apply to my earlier claims that agencies and courts are obligated to follow the explicit policy choices of the legislature, and that they should rely on legislative history to help make these determinations. I do not believe that this follows for at least two reasons. First, when agencies and courts use the legislative history to ascertain *what the legislature decided*, they are not required to evaluate the reasons for Congress's decisions or whether elected representatives adequately considered and responded to competing interests and perspectives, which would be important aspects of judicial review for due process of law making. Second, when agencies or courts determine that Congress did

Finally, the judicial invalidation of statutes based on perceived deficiencies in the legislative process raises serious separation of powers concerns because Congress is a coordinate branch of government that is authorized by the Constitution to make laws within the scope of its enumerated powers, and it is therefore troubling for courts to tell Congress how to do its job.

On the other hand, it is equally troubling for Congress to exercise lawmaking authority without engaging in reasoned deliberation or providing reasoned explanations for its policy decisions. Judicial review of the validity of legislation for due process of law making is potentially justified by an admirable desire to limit the arbitrary domination of the people by Congress. Meanwhile, however, this authority would increase the potential for arbitrary domination by courts, especially if Congress is routinely unable to produce a legislative record that satisfies the requirements of deliberative democratic theory.[411] My sense is that judicial review of ordinary legislation for due process of law making is therefore unduly strong medicine, particularly because the remedy would typically involve invalidating a statute on constitutional grounds, which would frequently cause more harm than good. The democratic shortcomings of the legislative process mirror the failings of the elective mode of democracy; they tend to operate at relatively high levels of abstraction and place heavy reliance on majoritarian concerns, while neglecting the substantive merits of detailed policy questions that will arise during the course of governance and the views of individuals or groups without political power.[412] The best solution for these shortcomings is to provide the people with opportunities for contestatory democracy, including notice-and-comment rule making by administrative agencies and statutory interpretation by courts, as well as substantive judicial review under the Constitution. The theory of statutory interpretation that is set forth in this

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not explicitly resolve the precise question at issue during the course of statutory interpretation, the result is greater discretion for agencies and courts to reach a reasoned decision on that issue. In contrast, Congress's failure to resolve an issue in a reasoned fashion could lead to the invalidation of the statute on constitutional grounds under judicial review for due process of law making. Accordingly, the stakes of the judiciary's decisions, and the consequences of any difficulties or mistakes, are much greater in the latter context.

411. *See* Frickey & Smith, *supra* note 406, at 1736-37 (claiming that Congress cannot satisfy a judicially enforceable requirement for due deliberation).

412. *See supra* notes 22-23 and accompanying text.

Article is therefore self-consciously designed to counteract the deliberative failures of the legislative process, without resorting to judicial review of legislation for due process of law making. There may, however, still be a need for some version of the latter form of recourse for certain types of statutes, such as omnibus legislation or successful ballot initiatives, where the deliberative failures of the lawmaking processes are particularly stark.[413]

If statutory interpretation is to provide the type of reasoned deliberation on specific legal and policy questions that is frequently absent from the legislative process, then the judiciary must continue to ensure that agencies do not exceed the explicit limits of their delegated authority and that they exercise their policy-making discretion in a reasoned fashion. When agencies are not involved or have not resolved the legal or policy questions at issue in a reasoned fashion, then the judiciary must either remand the matter to the agency or make a reasoned decision on its own. In the latter situation, which is the traditional domain of statutory interpretation, courts will sometimes be able to identify and follow an explicit directive from the legislature. In many cases, however, courts will need to make their own legal or policy choices, and there is no use pretending that they are acting as the faithful agents of Congress in doing so. This Article has argued that to the extent that courts are providing the people with meaningful opportunities to contest the validity of governmental action, there is no reason to disparage their work as undemocratic.

Statutory interpretation best promotes democratic legitimacy and freedom as nondomination when the judiciary gives reasoned explanations for its decisions that could reasonably be accepted by people with fundamentally competing interests and perspectives. The fact that courts appear to resolve most statutory disputes by engaging in a process of practical reasoning suggests that this is already taking place to some extent. Nonetheless, explicitly recognizing that statutory interpretation in the modern regulatory

413. *See* GLEN S. KRUTZ, HITCHING A RIDE: OMNIBUS LEGISLATING IN THE U.S. CONGRESS 1-7 (2001) (explaining that omnibus packages "typically contain a nucleus that has widespread support in Congress" and that controversial attachments can be "tucked away" in such measures because members "are seldom aware of the minutiae of omnibus packages"); Staszewski, *supra* note 230, at 465-76 (claiming that judicial review for due process of law-making is appropriate in the ballot initiative context).

state serves as a mechanism of contestatory democracy provides some guidelines for improving the judiciary's performance. First, courts should give equal consideration to competing views when they resolve statutory disputes, and judicial opinions should be responsive to the arguments of the parties. While these are standard elements of legitimate adjudication,[414] courts should also acknowledge the extent of their policy-making discretion and explain the rationale for their decisions. Several commentators have recognized that courts use faithful agent theory as a fiction to disclaim their own responsibility for making decisions in statutory interpretation because of widespread concerns about the democratic legitimacy of judicial law making in this context.[415] If statutory interpretation is properly viewed as a mechanism of contestatory democracy, this fiction should no longer be necessary. There is nothing undemocratic about a judicial decision that candidly explains, for example, that (1) Congress left a particular statutory problem open, (2) the responsible agency has not considered or resolved the matter in a reasoned fashion or the judiciary was delegated this authority, and (3) *here is what we think and why*. On the contrary, it is only when courts take responsibility for their own legal or policy choices and seek to justify their decisions in public-regarding terms that the judiciary can be held more fully accountable for the exercise of lawmaking discretion that is inevitable when they interpret statutes in the modern regulatory state.

CONCLUSION

The countermajoritarian difficulty in statutory interpretation can be resolved by applying recent insights from civic republican theory to the adjudication of statutory disputes in the regulatory state. From a republican perspective, freedom consists of the absence of the potential for arbitrary domination, and democracy should therefore include both electoral and contestatory dimensions. This Article has argued that statutory interpretation in the modern

414. *See* Chad M. Oldfather, *Defining Judicial Inactivism*: *Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 137-60 (2005) (discussing the classic model of adjudication, the public law model, and the relationship between the public law and classic models, as well as the significance of judicial candor).

415. *See, e.g.*, Eskridge & Frickey, *supra* note 244, at 363-64; Zeppos, *supra* note 14, at 386.

regulatory state is best understood as a mechanism of contestatory democracy. This theory suggests distinct roles for Congress, administrative agencies, and the judiciary in the making and implementation of statutes, which are both descriptively plausible and normatively attractive. It also undermines the fundamental tenets of textualist theory and has important implications for the merits of judicial review for due process of law making and the benefits of increased candor in judicial decision making.