

STATUTES AND DEMOCRATIC SELF-AUTHORSHIP

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ABSTRACT

In this Article, we argue that both sides of the usual debate over statutory interpretation—text versus purpose—rest on a common, but flawed, premise. Judges and scholars have assumed that legislative bodies are the authors of statutes. We disagree; instead, we argue that the people are the authors of statutes. Legislative bodies play an indispensable role in the process: they draft statutes. And courts play a similarly indispensable role: they interpret statutes. But ultimately, it is the polity—we, the people—that is responsible, as authors, for the content of the law.

This shift yields dramatic consequences. To date, no theory of statutory interpretation has been able to explain the actual labor of interpreting statutes—either with respect to “super” statutes or with respect to regular statutes. Canons of statutory construction, though familiar to any practitioner, are a source of puzzlement for theorists. Our theory attempts to answer the challenge. It both offers an explanation of existing interpretive practices and supplies a normatively compelling view of what statutory construction involves. In this effort, we reach back to the origins of modern political theory—to the work of Thomas Hobbes—to demonstrate that “self-authorship” has long been integral to the ideal of democracy.

Ultimately, the problem is very simple. Commentators have long been sympathetic to the notion of self-authorship as applied to

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“fundamental” law—especially constitutional law. But they have failed to notice that the exact same issues are at stake in the construction of “ordinary” laws. That is the connection we make here.

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INTRODUCTION

In a democracy, we ordinarily distinguish the making of law from its application. The former, we think of as a task for the legislature, whereas the latter is ultimately the responsibility of the judiciary.¹ This separation of powers approach to law is legion in American political theory, described first in *The Federalist Papers* and endlessly repeated since.² It mirrors the logic of “balanced forces” characteristic of Newtonian physics: each branch asserts a force on the others.³ The result is a harmonious political machine that runs itself.

Trying to do legal theory today with this model of institutional balance is like trying to do physics with the Newtonian system. Stand back at the right distance—not too far and not too close—and the distinction between making and applying law seems not only plausible, but highly intuitive. Legislators author laws; courts apply them. But closer inspection causes the Newtonian explanations to break down. Take a few steps forward and the boundary between creating and applying law begins to feather; a few more, and it vanishes entirely.

This is the lesson of our decades-long debate over the nature of interpretation—a debate that originated in constitutional theory but subsequently spread to statutory construction.⁴ Some argue that it

1. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 163-64 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

2. THE FEDERALIST NOS. 47-51, at 234-55 (James Madison) (Terence Ball ed., 2003) (arguing for the merits of separating branches of government, with reference to political theory and state constitutions, and explaining how the federal constitution embodies this approach); see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity”); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 643-83 (2000) (pitting various theories of power separation against one another—from within the Newtonian approach).

3. JASON ZIMBA, *FORCE AND MOTION*, at vii (2009).

4. For the classic exposition of this theme in the constitutional setting, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-3 (1971) (developing Wechsler’s concept of neutral principles through First Amendment jurisprudence); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9-10 (1959) (arguing that judicial decisions should rely on neutral principles that transcend the

is institutionally mandatory for judges to apply legal texts “as written.”⁵ Others respond that no text interprets itself; absent interpretation, there is nothing to apply.⁶ Debate has consolidated around how “dynamic” statutory interpretation should be.⁷ In our view, however, this debate has labored under common but deeply flawed assumptions about authorship. Anxious to avoid the accusation of judicial aggrandizement, scholars on both sides of the debate frame their theories as if the role of the courts is to be the “faithful agents” of the author of the law: Congress.⁸ We reject this model of legislative authorship root and branch. Legislators play an indispensable role in statutory production: they *draft* statutes. And courts, too, play an indispensable role in such production: they

case at hand). *But see* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983).

5. Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L. REV. 1, 2 (1939).

6. *See infra* Part I.

7. For an excellent summary of existing positions, see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761-64 (2010); see also Anthony D’Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911, 912 (1996) (arguing that dynamic statutory interpretation, by disrupting the predictability of law, unjustly subverts reliance interests); William J. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-81 (1987) (introducing and defending the notion of “dynamic” statutory interpretation).

8. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 63 (1994) (laying out the normative stakes of the “faithful agent” ideal); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001) (“In our constitutional system, it is widely assumed that federal judges must act as Congress’s faithful agents.”). Some have argued against the “faithful agency” ideal on the grounds that it cannot account for more holistic methods of interpretation. *See, e.g.*, Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1566-71 (2010) (distinguishing between “faithful agent” theories of interpretation and “integrative” theories of interpretation). Merrill argues that “sources of meaning for the integrative interpreter,” unlike sources of meaning for the faithful agent interpreter, “include not only the text itself ... but also previous judicial decisions construing the provision in question, previous administrative interpretations, other enactments containing similar provisions, and even substantive canons of interpretation.” *Id.* at 1569. The use of such sources, however, is completely compatible with the faithful agency theory of interpretation. It simply requires a more robust notion of agency. *See* Guido Calabresi, *Being Honest About Honest Agents*, 33 HARV. J.L. & PUB. POL’Y 907, 910 (2010) (arguing that the “agency” theory of statutory construction invites expansive interpretive practices); William J. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 323 (1989) (noting that “a static view of interpretation does not rigorously follow from [the premises]” of the faithful agent view); *see also infra* Part I.A.

interpret statutes. Neither drafting nor interpreting, however, is the same as authoring.

In a democracy, the people must see themselves as the authors of the law. We must believe the law to be something we do together, not something that is done to us. This is true not just of the Constitution, authored by “We the People,” but of statutes as well.⁹ We are not democrats *occasionally*, as if collective authorship is a phenomenon that occurs only in moments of political crisis. Rather, collective construction—democratic self-authorship—is the legitimating condition of all law. Instead of imagining judges as the “faithful agents” of legislators, the right model of statutory construction is one that understands *both* legislators and judges as faithful agents of the people.¹⁰

Virtually all participants in the debate over statutory interpretation assume that authorship precedes interpretation. This is backwards. Authoring is not the fact of drafting. It is a social practice of attribution and accountability. Authorship is the consequence of interpretation, not its precondition. In a democracy, the best interpretation of a statute is one that persuades us to hold ourselves accountable for the law as something that we the people have authored together. Captured by the Newtonian image of governmental forces, scholars have been quick to assume that Congress authors statutes. They fear that the only alternative to congressional authorship is judicial authorship—and that judicial authorship would be an unconstitutional usurpation.

It is time to abandon the Newtonian imagery. Democracy, not separation of powers, should be the lodestar of statutory construction. Congress does not rule us. We rule ourselves; we are the

9. U.S. CONST. pmb1.

10. Cf. William J. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 992 (2001) (“In my view, Article III judges interpreting statutes are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of ‘We the People.’”). In referring to judges as agents of the people, what Eskridge seems to have in mind is the judicial review function. *Id.* at 995 (“To prevent injustices by the most dangerous branch [Congress], the least dangerous one—no less an agent of ‘We the People’—was expected to strike down unconstitutional laws, trim back unjust and partial statutes, and make legislation more coherent with fundamental law.”). This is a familiar idea in constitutional theory. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-13 (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 5-7 (1998).

authors of our own law. This is neither a fact nor a mere metaphor. Rather, it is a necessary belief without which we are continually forced to choose between the rule of law and self-rule. In interpreting a statute, the proper judicial role is to enable us to *avoid* this choice, by sustaining belief in democratic self-authorship.

Our proposed relocation of authorship is directed less at practice than at theory. Much of what courts actually do is more easily explained by our theory of democratic self-authorship than by traditional accounts of legislative authorship. Judges already share an intuition of democratic legitimacy that our account theorizes. The scholarly debate is another matter. Scholars have conflated democracy with electoral politics. In the traditional view, democracy, as defined in electoral terms, must be saved from the courts. We turn this over, arguing that democracy depends upon judicial interpretation. The role of courts is to explain the law as advancing a public purpose that the people can imagine as their own. Absent such an explanation, even a just law can seem as alien to us as the law of another country.¹¹

Contemporary democratic theorists have not entirely ignored the idea of democratic self-authorship. But they have taken the idea in a procedural direction, focusing first on voting and then on legislative process.¹² Procedural constraints are certainly important. But they are important less as a matter of democratic legitimacy than as a matter of individual justice. Just as it is unjust to exclude anyone from voting or speaking to the issues, it is unjust to privilege certain interests in the legislative process. At the same time, merely satisfying the demands of procedure will not ensure that the law produced is seen as authored by the people. Even when legislative bodies are functional and responsive, we are always governed in substantial part by laws that we had no part in creating. Those laws, too, must meet the democratic need to see ourselves as the

11. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 59-74 (2011) (stating that the legitimacy of the American Constitution depends on it being accepted as “our law”); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 54-89 (2d ed. 2011) (noting that interpreting the Constitution such that it results in disjunction between constitutional and moral norms can lead to a crisis of faith in the Constitution); Jamal Greene, *Originalism’s Race Problem*, 88 *DENV. U. L. REV.* 517 (2011) (discussing the ways that previously enacted laws—including the Constitution—can come to feel as foreign as laws from other jurisdictions).

12. See *infra* Part IV.C.

authors of the law by which we are governed. Otherwise, we are governed by the dead hand of the past—hardly a democratic principle.¹³ Only the courts can address this problem upon which the legitimacy of the entire system rests. They must show us that the law—old and new, constitutional and statutory—is something for which we can hold ourselves accountable as authors.

Of course, democratic legitimacy cannot require that every citizen approve of every law. Democracies are practical projects of governance, not utopian societies of discourse. The law is not what any one of us would have done had we had sole responsibility. The law is what we have collectively done together. Popular authorship of law is not different in kind from other forms of collective enterprise. Imagine a faculty member who disagrees with the decision to hire a new colleague. He might express his view and vote against the proposal. But if he loses, he will still accept the decision as something the faculty—including him—has done together. He will tell others that this is “what we have done.” He will hold himself accountable for that decision and defend it.

In this example, the fact of voting goes only to the *mechanism* of the decision; it does not bear on the faculty member’s responsibility to hold himself accountable for the decision’s content. Of course, there are limits. If the faculty turns anti-Semitic or votes for the dean’s nephew out of fear of retaliation, the individual faculty member may refuse to accept authorship of the decision. In those cases, he will call the decision illegitimate. Crucially, he will say this *even if* he exercised a right to vote. Long after the votes have

13. Not surprisingly, a main effort of progressive constitutional theory has been to emphasize the identity of the drafters—the fact that all the Framers were white, landed men. This is supposed to operate as an argument against certain methods of reading the Constitution—most prominently, originalism—because, as a pluralistic polity, we cannot imagine ourselves into this role. See, e.g., Greene, *supra* note 11, at 518 (“Voting for delegates to the state conventions largely excluded women, Indians, blacks, and those who did not own property. The Constitution is as to those marginalized persons as the Zimbabwe Constitution is to the rest of us, and so its authority must follow not from its democratic pedigree but from some other, more inclusive account.”); Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 381-87 (1997); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1032 (2002); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1717-20 (2003). For a recent originalist response, see JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 100-15 (2013).

been cast, the faculty member must still account for the legitimacy of the results. The same is true of democratic self-authorship in the context of statutory construction. Legitimacy can be achieved only through a deliberate practice of interpretation. In our system, that responsibility falls to courts.

After surveying the state of the debates over statutory construction in Part I and drawing a schematic distinction between authors and drafters in Part II, we then turn to the substantive defense of our model. In Part III we look at the actual interpretive work of the courts, arguing that despite their rhetoric of legislative authorship, they are, for the most part, interpreting statutes in the way that they should—that is, as faithful agents of the people. In Part IV, we argue that self-authorship finds its normative roots in democratic theory, particularly in the work of Thomas Hobbes.

I. WHERE THE DEBATE STANDS

Questions of statutory interpretation have drawn a remarkable degree of scholarly attention over the last several decades. This is all the more remarkable given how little energy had been invested in the subject before—as if an entire generation of scholars suddenly realized that the ordinary practice of applying the law was questionable and controversial.¹⁴ Everyone knew, of course, that statutes are often less than clear. H.L.A. Hart famously wrote about how to parse the word “vehicles” in a law prohibiting their entry in the park.¹⁵ And courts grappled with the interpretive problem long before Hart picked up his pen. As a discipline, however, “legislation” is remarkably young.¹⁶

In the well-known case of *Church of the Holy Trinity v. United States*, the Supreme Court declared that Congress did not mean what it said when it prohibited entry of foreign laborers into the country: “It is a familiar rule, that a thing may be within the letter

14. See, e.g., Eskridge, *supra* note 7, at 1479-80 (outlining the “traditional doctrine” surrounding statutory interpretation, which made no conceptual space for anything besides the intentions of the enacting body).

15. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-11 (1958).

16. See Gluck, *supra* note 7, at 1761 (noting how the challenge issued by Hart and Sacks developed to full fruition in only the last twenty years).

of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”¹⁷ The advent of the statutory interpretation debates, however, gave the judicial practice a broader frame of reference, suggesting that the legitimacy of the entire constitutional order is at stake in how judges make sense of ordinary laws. Exclude bicycles from the set of proscribed vehicles, and judges become autocrats usurping the legislative role.¹⁸ Include them, and legal interpretation becomes cramped and wooden: unresponsive to real-world problems.¹⁹ Rhetoric became heated; battle-lines were drawn; politicians paid attention; and judges lived in fear that they would be accused of authoring, rather than applying, the law.²⁰

For all of their disagreement, nearly all participants in these debates begin from the assumption that legislative will should ground the interpretation of statutes.²¹ On this view, legislatures are to make the substantive policy choices, and courts are to implement those choices.²² The legislature is in control and the judge is merely the legislature’s agent.²³ Against this backdrop, the debate has become methodological.²⁴ The question that most theorists have sought to answer—and upon which they disagree—is how the judge can stay faithful to the legislative author of the statute.²⁵

A. *Text and Purpose*

The mainstream debate is divided in two factions, textualists and purposivists, with a whole gamut of views in between.²⁶ In fact, very

17. 143 U.S. 457, 459 (1892).

18. *See supra* note 8 and accompanying text.

19. *See supra* note 8 and accompanying text.

20. *See* Eskridge, *supra* note 8, at 319-23 (outlining the contours and stakes of the “legislation” debate from the early 1980s and onward).

21. *See supra* note 8 and accompanying text.

22. *See supra* note 8 and accompanying text.

23. *See supra* note 8 and accompanying text.

24. *See supra* note 8 and accompanying text.

25. *See supra* note 8 and accompanying text.

26. For a summary of the various positions in the “interpretive wars,” see Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 123-30 (2009). Some argue, for example, that legislative purpose may be referenced, and that materials such as legislative history may be consulted—but only when the “plain meaning” is ambiguous. *See*

few theorists reside at one extreme or the other.²⁷ But our goal is not to trace the full range of middle positions. Rather, it is to describe the poles, in order to show how both are captured by a common idea of legislative authorship in spite of their other differences.

On one side, the textualists argue that judges must stay within the terms of the statutory text.²⁸ They understand legislation to be

id. at 153-57; *see also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 88-92 (2010) (arguing that extra-textual inquiry is necessary in light of the general-particular problems that language always raises); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 404-13 (2005) [hereinafter Nelson, *Textualism?*] (arguing that self-styled textualists are often willing to engage in “imaginative reconstruction” when plain text interpretation falters). Others argue that inquiry into legislative purpose (and the corresponding use of materials such as legislative history) is permissible for certain types of interpretation. For example, when statutes are being reviewed for their constitutionality, many textualists are willing to broach purposive questions. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down a facially neutral felony disenfranchisement because its purpose was to subordinate blacks); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1785-86 (2008) [hereinafter Nelson, *Judicial Review*] (highlighting that courts willingly look behind statutory text in order to ferret out “hidden purposes”).

At the same time, some commentators argue that the textualism-purposivism debate is effectively over. Interestingly, however, they disagree about which way the debate has been resolved. *Compare* Gluck, *supra* note 7, at 1764-68 (arguing that textualism has fallen out of favor as a contending methodology on the statutory construction debates), *with* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006) (arguing that textualism has been “so successful” as to become the sole terrain in which serious debate now takes place). Gluck argues that textualism suffers from “interpretive indeterminacy.” Gluck, *supra* note 7, at 1764-68. Whereas purposivism is able to absorb all the virtues of textualism—because a purposivist judge is free to engage in “textualist” interpretation, under his own purposivism—textualists are forced to apply their method even when it makes little sense. *Id.* at 1765. On the other hand, Molot argues that all major differences between textualists and purposivists have effectively disappeared; textualism has subsumed opposing schools, resulting in a spectrum of middle positions that are conceptually continuous and practically flexible. Molot, *supra*, at 2-3; *see also* Frederick Liu, *Astrue v. Ratliff and the Death of Strong Purposivism*, 159 U. PA. L. REV. PENUMBRA 167, 167-68 (2011) (arguing that it is purposivism, not textualism, which is dead letter on the Court today); Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309, 309-10 (2013) (noting how porous, and also how inclusive, the category of “textualism” has become).

27. *See* Nelson, *Textualism?*, *supra* note 26, at 383-86 (discussing widely operable canons and practices of interpretation, and arguing that very few textualists are as strict in their commitments as their opponents make them out to be); *see also* William J. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (arguing against “foundationalist” approaches to statutory construction that reduce the practice to discrete methodologies); Gluck, *supra* note 7, at 1765 (noting that self-styled purposivists can, and often do, employ “textualist” methods of interpretation).

28. For illustrative defenses of the position, *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1126 (1998).

the result of multiple bargains among competing individuals.²⁹ On this view, to rely on anything apart from the text would be to intervene retroactively in the legislative process of bargaining. The risk, then, is that an unelected court will rewrite the bargain reached by elected representatives. Justice Kennedy, writing for the Court, captured the point: “Judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—[undue] power.”³⁰

Textualists understand statutes as akin to contracts subject to an “integration” clause: background considerations fall away, and all that remains is a bargain to be enforced.³¹ The text, in this view, is the composite product of many factions and interest groups. Despite the fact that legislators have voted for a single text, we have no reason to think they have agreed upon a common purpose. Kenneth Shepsle provides the most systematic defense of this position. In his well-known article, *Congress Is a “They,” Not an “It,”* Shepsle argues that the collective nature of statutory creation renders the notion of a unified “legislative intent” simply “oxymoronic.”³² In Shepsle’s view, this insight leads unequivocally to the conclusion that strict textualism—what he calls the “plain meaning” approach—is the only valid method of statutory construction.³³

An equivalent form of textualism can also stem from fear of judicial overreach. Justice Scalia is the contemporary figurehead of this position. His famously rigid brand of textualism is grounded in his belief that judges, if they are allowed to negotiate between the

29. See SCALIA, *supra* note 28, at 25; Easterbrook, *supra* note 28, at 1119.

30. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (holding that the supplemental jurisdiction statute will under certain circumstances permit a court to exercise diversity jurisdiction over additional plaintiffs even if they do not satisfy the minimum amount-in-controversy requirement).

31. See RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981); 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:23 (4th ed. 2012) (explaining the effect of integration clauses in written contracts).

32. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 239, 249 (1992). Judge Posner refers to this—colorfully—as the “autistic” theory of statutory meaning, because it “denies the possibility of meaningful interpersonal communication.” RICHARD POSNER, HOW JUDGES THINK 194 (2008).

33. Shepsle, *supra* note 32, at 253-54.

text and other evidence of legislative intent, will inevitably read their personal convictions into the law.³⁴ For him, “[t]he best evidence of [the purpose of a statute] is the statutory text adopted by both Houses of Congress and submitted to the President.”³⁵ The force of this position does not depend on the proposition that the statute’s plain text is literally all that we can know about what Congress intended. Rather, the text must reign, because the alternative is judicial authorship of the law—and that would violate the principle of separation of powers.³⁶

In the contemporary debate, the great opponents of textualism are those who pursue “dynamic” statutory construction—often called “purposivists.” Purposivists reject the view that the text alone should serve as the guide to statutory construction.³⁷ Just as some textualists think the idea of an identifiable legislative purpose is a fiction,³⁸ purposivists think the idea that a text conveys a single meaning is often a fiction.³⁹ If legislative texts are ambiguous, judges must decide among possible interpretations. That decision must be based on some idea of the purpose of the statute. The problem, accordingly, is to identify the non-textual sources to which

34. SCALIA, *supra* note 28, at 16-18.

35. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991) (holding that the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988, does not permit the shifting of fees for services rendered by experts).

36. *See id.*

37. Gluck, *supra* note 7, at 1764; *see* Liu, *supra* note 26, at 167.

38. Hence the familiar critique that drawing on legislative history—or any other interpretive guide defined by equivalent multiplicity—is like “looking out over a crowd and picking out your friends.” *See, e.g., Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005). Of course, the critique can also be lodged in reverse. *See, e.g.,* William J. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 533-34 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (“[B]ecause the regulatory terms that generate the most intense statutory debates—such as ‘discriminate’ in civil rights laws—have a variety of meanings, choosing one meaning of a word is ‘like entering a crowded cocktail party and looking over the heads of the guests for one’s friends.’”).

39. *See* RICHARD POSNER, *REFLECTIONS ON JUDGING* 200-08, 214-15 (2012); Richard Posner, *The Incoherence of Antonin Scalia*, *THE NEW REPUBLIC* (Aug. 24, 2012), www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism [<http://perma.cc/FDU8-MGSF>]; *see also* Gluck, *supra* note 7, at 1764.

a judge can appropriately turn when—dynamically—constructing the purpose of a statute.⁴⁰

In his pathbreaking work on dynamic interpretation, Bill Eskridge argued that statutory construction is a “process of understanding a text created in the past and applying it to a present problem”—a process necessarily responsive to “the ways in which the societal and legal environment of the statute has materially changed over time.”⁴¹ Stephen Breyer and Richard Posner, the most prominent advocates of dynamic interpretation among sitting judges today, advance similar claims. Both describe their theories as “pragmatic,”⁴² but the substantive similarity to dynamic interpretation is unmistakable. For both Breyer and Posner, pragmatic interpretation focuses on goals and outcomes.⁴³ In Breyer’s words, when interpreting statutes, a judge’s goal should be to consider the “likely consequences of a proposed interpretation” framed in terms of “the provision’s purposes.”⁴⁴ Breyer explicitly calls for judicial discretion in the vindication of statutory purpose. Courts should “help[] individual statutes work better for those whom Congress intended to help,”⁴⁵ even when—indeed, *especially* when—Congress did not consider all possible parties who might solicit such “help.”⁴⁶ Posner makes the same point in more biting language: legislators

40. One such source—and one corresponding view of dynamism—is how the meaning of a given statute has grown up over time. In other words, it is possible to imagine approaching statutory construction the same way that the common law approaches doctrine. *See, e.g.*, Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 233-35 (1999) (exploring what it would mean for statutory interpretation to abandon the notion of fixed meaning—at the time of passage—and take seriously the evolution of meaning over time). This is importantly different from our account, which is explicitly normative in nature. While there is certainly likely to be overlap between the way that statutory meaning has evolved, on the one hand, and the set of constructions that makes a statute normatively relatable, on the other, these are not necessarily the same set. Not least of all because a statute might be more normatively relatable in *more* ways than its meaning has grown up over time. *See infra* Part III.A. (outlining numerous, but equally relatable, meanings of Title VII).

41. Eskridge, *supra* note 7, at 1483.

42. Posner refers to his theory as “constrained pragmatism,” because the consequentialist metric of pragmatism refers not to the outcomes that judges want, but rather to judges’ projections of the outcomes that *legislators* would want. POSNER, *supra* note 32, at 193-94, 230-69.

43. *Id.* at 193-94.

44. BREYER, *supra* note 26, at 92.

45. *Id.* at 96.

46. *Id.*

“lack[] the gift of prevision,” which means they cannot be expected to “anticipate [every] quirky case,” as well as “every future change in society,” that might cause a statute’s letter and its spirit to become dissonant.⁴⁷

Purposivists begin from the common-sense belief that Congress enacts statutes in order to address concrete problems. From this premise, they infer that the interpretation of statutes should focus on advancing solutions to the problems that the legislature has addressed. In this vein, Eskridge analogizes the role of judges interpreting statutes to that of “diplomats” who must be willing to “update” their charges in response to “changing circumstances.”⁴⁸ Breyer echoes this sentiment, arguing that statutory construction, especially with respect to the “most complex statutes,” is best understood as a process of “drafters, legislators, and judges [working] together” to “carry[] out the legislators’ objectives.”⁴⁹ Although these formulations envision a broad role for judges, the purposivists, no less than the textualists, understand the judicial role to be that of carrying out the legislative will; it is, after all, the legislature’s purpose that is at issue.⁵⁰ The dynamic theorists expand the judicial role in statutory construction precisely to *vindicate* the legislative will, which attempts to govern a complex and ever-changing landscape.⁵¹

47. POSNER, *supra* note 32, at 198-99.

48. Eskridge, *supra* note 7, at 1482, 1554.

49. BREYER, *supra* note 26, at 97. Guido Calabresi has taken this position even further, arguing that judges should be able to overturn and substantially transform “obsolete” statutes—just as they would be able to do with common law rules. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES 2* (1982).

50. It bears note that this position—focusing on legislative purpose—is indeterminate as to one of the most important questions of statutory construction today: how to approach administrative rules. Breyer is deferential to agencies, see BREYER, *supra* note 26, at 110-13, whereas Posner, from an equally pragmatic vantage point, is suspicious of them, see POSNER, *supra* note 39, at 86, 123 (calling the notion that agencies have comparative expertise a “fiction”).

51. For example, one theme that laces Eskridge’s work is concern about changing circumstances, and the speed with which statutes become outdated with respect to the problems they address. See Eskridge, *supra* note 7, at 1481; Eskridge, *supra* note 8, at 327-28 (outlining the role that “changed circumstances” ought to play in statutory construction). The same sensibility is also at play in Breyer’s and Posner’s views. See BREYER, *supra* note 26, at 92-94; POSNER, *supra* note 32, at 13-15, 194-95, 201-02.

B. An Example: Ali v. Federal Bureau of Prisons

A recent case illustrates the range of the contemporary debate, while also making clear the common assumption that the judge is to be the faithful agent of the legislative author. *Ali v. Federal Bureau of Prisons* arose under the Federal Tort Claims Act (FTCA), a statute that operates as a blanket waiver of sovereign immunity and allows individuals to seek damages for the tortious acts of federal officials.⁵² The petitioner in *Ali* spent two years in federal prison in Georgia, at which point he was set to be transferred to a different prison in Kentucky.⁵³ Before the transfer, Mr. Ali inventoried two duffel bags worth of personal property to take with him to Kentucky; upon arrival, however, numerous items were missing from the bags, including “two copies of the Qur’an, a prayer rug, and religious magazines.”⁵⁴

Mr. Ali filed suit under § 1346(b) of the FTCA, which authorizes suits for “injury or loss of property” caused by government officials.⁵⁵ The difficulty arose from the fact that § 2680(c) carves out an exemption for claims arising from “the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.”⁵⁶ The question presented in *Ali* was whether the government officials, named in Mr. Ali’s complaint, qualified as “other law enforcement officer[s].”⁵⁷

The Court divided sharply as to both the correct answer and the proper method for addressing the question. Justice Thomas delivered the majority opinion, taking a firm textualist approach. “[R]ead naturally,” he argued, “the word ‘any’ has an expansive meaning”;⁵⁸ Congress could hardly “have chosen a more all-encompassing phrase than ‘any other law enforcement officer’ to express [its expansive]

52. 28 U.S.C. § 2674 (2012) (“The United States [is] liable ... in the same manner and to the same extent as a private individual under like circumstances, but [is not] liable for interest prior to judgment or for punitive damages.”); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218 (2008).

53. *Ali*, 552 U.S. at 216.

54. *Id.*

55. *Id.* at 218 (quoting 28 U.S.C. § 1346(b)(1)).

56. *Id.* (emphasis added) (quoting 28 U.S.C. § 2680(c)).

57. *Id.* (alteration in original).

58. *Id.* at 219 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).

intent.”⁵⁹ Nor is it relevant, Thomas noted, that a different construction of § 2680(c) might be “more desirable” from a policy vantage point: “We are not at liberty to rewrite [a] statute Instead, we must give effect to the text that Congress enacted.”⁶⁰ Thus, on the majority’s view, the FTCA barred Mr. Ali’s suit.⁶¹

Justice Kennedy dissented, staking out a middle position on the textualism-purposivism spectrum. Opening his opinion with the declaration that “[s]tatutory interpretation, from beginning to end, requires respect for the text,”⁶² Kennedy suggested that the majority failed to “[consider] the text [of § 2680(c)] within the whole context of the statute as a guide to determining a legislature’s intent.”⁶³ In particular, he argued that the majority should have applied widely accepted canons of construction, especially *ejusdem generis*, to reach a different result.⁶⁴ *Ejusdem generis* teaches that “where a seemingly broad clause constitutes a residual phrase, it must be controlled by ... the ‘enumerated categories ... which are recited just before it,’ so that the clause encompasses only objects similar in nature.”⁶⁵ Concretely, then, the clause “any other law enforcement officer” should be read in light of the enumerated categories that came before it—“officer[s] of custom or excise”—leading to the conclusion that Congress only meant the exemption to apply to “other law enforcement officers” that perform *customs or excise* functions.⁶⁶ Thus, on Kennedy’s view, Mr. Ali should have been allowed to proceed with his claim against the prison officials.⁶⁷

Although most of Justice Kennedy’s dissent crafted narrow textual arguments, toward the end, the analysis shaded into purposivism. For Kennedy, the majority’s broad construction of § 2680(c) effectively “defeat[ed] the central purpose” of the FTCA, which, according to a Senate Report, was precisely to “make the tort

59. *Id.* at 221 (quoting 28 U.S.C. § 2680(c)).

60. *Id.* at 228.

61. *Id.* at 227-28.

62. *Id.* at 228 (Kennedy, J., dissenting).

63. *Id.*

64. *Id.* at 231.

65. *Id.*

66. *Id.* at 231-32, 235.

67. *Id.* at 242-43. The majority opinion has a textualist counter to this position. It argues that *ejusdem generis* does not apply due to the syntactic structure of the sentence. *Id.* at 225-26 (majority opinion).

liability of the United States ‘the same as that of a private person under like circumstance[s].’⁶⁸ If, against the background of this general purpose, Congress had intended to deprive plaintiffs of all remedies against law enforcement officers for detention of property, “it would have done so in more express terms.”⁶⁹

Justice Breyer offered a more “dynamic” take on the question. Although he agreed with Justice Kennedy’s basic position, Breyer felt compelled to “write separately to emphasize ... that the relevant context extends well beyond Latin canons and other such purely textual devices.”⁷⁰ For Breyer, the question presented in *Ali* was “not the [dictionary] *meaning* of the words” in general, but rather “[t]o what circumstances did Congress intend the phrase, as used in *this* statutory provision, to apply?”⁷¹ Legislators, Breyer reasoned, “normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work.”⁷² And for this reason, he thought the case was controlled by “nontextual context[ual]” factors,⁷³ including (1) the bill’s drafting history,⁷⁴ (2) the fact that a narrow exception squared with the legislature’s remedial goal,⁷⁵ and (3) the practical consequences of the majority’s contrary construction, which would effectively immunize “tens of thousands of officers performing [disparate] tasks” from tort liability.⁷⁶ Breyer found it implausible that Congress, with one innocent phrase, would have intended to “multiply the number of officers to whom [the exception] applies by ... orders of magnitude.”⁷⁷

A desire to effectuate the authorial will of Congress unites all three approaches in *Ali*. Justice Thomas feared that by straying from the “any other law enforcement officer” clause, he would rewrite the statute. By contrast, Justice Kennedy thought that by

68. *Id.* at 238 (Kennedy, J., dissenting) (alteration in original) (quoting S. REP. NO. 79-1400, at 32 (1946)).

69. *Id.*

70. *Id.* at 243 (Breyer, J., dissenting).

71. *Id.*

72. *Id.*

73. *Id.* at 245.

74. *Id.* at 245-46.

75. *Id.* at 246.

76. *Id.* at 246-47.

77. *Id.* at 247.

giving such an inclusive construction to that phrase, the majority failed to carry out what Congress intended. Justice Breyer, too, was concerned with Congress's authorial will, which he thought was quite clear: to permit tort recovery against the federal government in the absence of other remedies. Diverse as these approaches were, none stopped to ask why the correct object of judicial construction was the legislature's intent. Rather, all three assumed this to be the case.

C. Dworkin's Dissent

Ronald Dworkin has taken a contrarian view: he argues that legislative intent should not be the ground or measure of statutory construction.⁷⁸ Instead, judges should interpret statutes in such a way as to advance the "integrity" of the legal order as a whole.⁷⁹ Integrity inheres in the consistent application of principles across contexts.⁸⁰ A legal order with integrity reaches outcomes that are both principled and consistent. Confronting a controversy, the Dworkinian judge surveys the law as a whole in order to determine when and how the present controversy fits into the whole understood as a moral order. He interprets all of the relevant law holistically, and in the best possible light—as the expression of a community of principle.⁸¹ To thread this point, Dworkin famously

78. RONALD DWORKIN, *LAW'S EMPIRE* 243 (1985).

79. *See id.* at 255-75 (introducing the notion of integrity); *id.* at 313-14 (applying integrity to statutory interpretation).

80. This is expressed colloquially in the axiom that "like cases should be treated alike." *See, e.g.,* JOHN RAWLS, *A THEORY OF JUSTICE* 208 (2d ed. 1999) ("The rule of law also implies the precept that similar cases be treated similarly."); Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1039-43 (1990) (explaining this principle as part of a deontological defense of precedent); *see also* *Morse v. Frederick*, 551 U.S. 393, 426 (2007) ("Legal principles must treat like instances alike."). *Compare* Hart, *supra* note 15, at 624 ("[O]ne essential element of the concept of justice is the principle of treating like cases alike."), with Kenneth I. Winston, *On Treating Like Cases Alike*, 62 *CALIF. L. REV.* 1, 4 (1974) (contending that Hart misunderstands the function of the principle of treating like cases alike).

81. *See* DWORKIN, *supra* note 78, at 195-202; *see also* William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 *S. CAL. L. REV.* 541, 587-89 (1988) (exploring how Dworkin's notion of community instructs a "collaborative" theory of statutory interpretation).

conjures the image of Hercules, the super-judge who has the skill and stamina to discern the “right answer” to every case.⁸²

Integrity is a normative claim respecting individual and political morality. It has no particular connection to democracy or to the democratic origins of a law. Nevertheless, at two points Dworkin connects integrity to our concerns with democratic authorship as the principle of political legitimacy. First, on occasion he links integrity explicitly to an ideal of self-authorship: “The ideal [of self-legislation] needs integrity ... for a citizen cannot treat himself as the author of a collection of laws that are inconsistent in principle.”⁸³ Second, Dworkin thinks that integrity is a necessary condition of a polity that can legitimately coerce compliance with its commands.⁸⁴

We agree with the underlying premise linking these two points: belief that we have authored the law for ourselves is necessary to ground obligations of citizenship. But for us, the connection between self-legislation and legitimacy is not about integrity among abstract principles. It is, instead, about attachment to particular narratives.⁸⁵ There is no reason to think that the whole of the legal order is, or should be, at stake in the interpretation of every statute. Nor is there reason to think that legitimacy turns on principled consistency across the board. Recall the example, from the Introduction, of a decision with which a faculty member disagrees. To regard the decision as legitimate, he does not demand that the same set of principles support every appointment.⁸⁶ If he demands too much “integrity,” he will put himself entirely outside a workable sense of responsibility for the faculty’s decisions. What matters is not the conceptual purity of the decision, but that he can articulate a good reason for what has been done in this instance—a reason he recognizes even as he disagrees. Law is no different. Real judges, not Hercules, never have to contend with the whole legal order.

82. See DWORKIN, *supra* note 78, at 239-40 (introducing the concept of Hercules, the super-judge); *id.* at 313-17 (discussing how Hercules approaches statutory interpretation).

83. *Id.* at 189.

84. See *id.* at 206-16.

85. See *infra* Part III.

86. Nor would the presence of such principles suffice to guarantee legitimate decisions. “Anti-Semitism” is a principle—but it is not a principle that can engender legitimacy, no matter how consistently it is applied.

They have to contend with particular cases. The integrity that counts is local and retail, not global and wholesale.

In the end, Dworkin is too principled. Politics is not carried by principles. It is carried by persuasion. Having the better argument does not entitle one to political success, for citizens must still be persuaded. Persuasion in a democracy depends upon a narrative of self-authorship. We must be persuaded to see the law as our own. In this respect, a persuasive opinion must draw not only on principles, but also on anecdotes, on history, on examples, on hypothetical speculation, and on common sense. The goal is not to satisfy Hercules, but to offer a convincing reading of a statute as an act of popular self-government.

Judging requires judgment, not philosophy. Judgment is a matter of character, of sensing the possibilities and speaking to the perceived necessities of the times. A compelling narrative cannot ignore our principles, but neither can those principles, standing alone, account for what makes a narrative compelling. There are always multiple principles that can be brought to bear in the particular case; and there are always grounds for exceptions and disagreements. The law does not necessarily fail when it exalts charity or accommodation over principle. To the contrary, at times these virtues are precisely what make legal persuasion successful.⁸⁷

Dworkin is unable to account for this normative complexity because—like the textualists—he sees judgment as a bounded act. In place of the text, however, Dworkin substitutes principles. Hercules is able to “read” the principles that script our community, and having read them, he is bound to them. The particular case makes no demands of its own. There is no place for the equitable exception, no place for empathy, and no place for the sympathetic imagination.⁸⁸ There is only the relentless, if high-minded, mandate of integrity. Instead of integrity, we need belief in self-authorship.

87. See generally Kiel Brennan-Marquez, *Judging Pain*, 31 QUINNIPIAC L. REV. 233 (2013); Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013).

88. See *infra* Part III.B.2.

II. THE ANATOMY OF AUTHORSHIP

About any speech act, we can ask both what is said and who is saying it. The author of a text is not necessarily its writer, and, conversely, the writer cannot always claim authorship. Sometimes, the distinction between writer and author points to the collective nature of a project: a committee authors a report even if it is drafted by one member. Sometimes, authors have assistants who help them with the writing of a text. To draft is not to author, because the drafter is not held accountable for the text.⁸⁹ Authorship points to accountability, and accountability to authority. For this reason, it is not acceptable for a professor to blame his research assistant when problems emerge with a published text that the assistant drafted. Similarly, a judge cannot blame her law clerk for what the opinion says. The clerk may have drafted the opinion, but she is not the author. The clerk is not the author even if she wrote every word of the opinion; no one wants to know what the clerk thought when she drafted this text.

Authorship is not the act of drafting, but a social practice of accountability. For that reason, an author need not be an actual person. Corporations, for example, can be authors when the drafters exercise the authority of the corporation.⁹⁰ And certain legal doctrines—for example, in copyright law—are designed precisely to attribute authorship to the corporations that have a business interest in a work, instead of the human who created it.⁹¹ Practices of authorship attribution vary across fields. In the sciences, articles

89. For example, lawyers' errors are customarily attributed to their clients. *See, e.g.*, *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (“[T]he attorney is the prisoner’s agent, and under ‘well-settled principles of agency law,’ the principal bears the risk of [his agent’s] negligent conduct.” (quoting *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1992))).

90. *See* 1 JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* § 1:2 (3d ed. 2011) (“The corporation ... enters into contracts, executes conveyances, and conducts litigation in a legal capacity separate and distinct from its shareholders.”).

91. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 5.03[A] (Matthew Bender ed., 2013) (“The Copyright Act accords special treatment to works made for hire: ‘[T]he employer or other person for whom the [for hire] work was prepared, is considered the author for [copyright] purposes.’”) (alteration in original) (quoting 17 U.S.C. § 201(b)); *see also* Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 *YALE J.L. & HUMAN.* 1 (2003) (discussing the historical development of corporate authorship in copyright law).

list as authors all members of the team, from highest to lowest; in the humanities, individuals doing the same kind of work as co-authors in the sciences appear only as assistants thanked in a footnote; in government, persons doing that same work, typically staff, make no appearance at all.

Counterintuitively, authorship is less about writing than about reading. Readers, drafters, and authors are all engaged in a common social practice. Readers ordinarily attribute authorship just as the text directs them. When we deny the text's attribution of authorship, we are often making an accusation of plagiarism.⁹² There has, in that case, been a violation of a norm within the social practices of authorship. No one accuses a judge of plagiarism because a clerk wrote the text of an opinion. Just the opposite: if a law clerk claims authorship, we think he is violating the norms of the practice.⁹³

Not only must we distinguish drafters from authors; we must also distinguish the authorial voice from the narrative voice. Every text constructs an idea of its own narrator. The narrator is not necessarily the author. This is readily apparent in fiction; it is true even if the fictional text speaks in the first person.⁹⁴ Some postmodern literary critics have observed this distinction of narrator from author and concluded that there is no need to think about authors whatsoever when studying texts.⁹⁵ To consider the author, they

92. Mario Biagioli, *Recycling Texts or Stealing Time?: Plagiarism, Authorship, and Credit in Science*, 19 INT'L J. OF CULTURAL PROP. 453, 455-60 (2012) (arguing that accusations of plagiarism say more about the perceived unfairness of a practice—the fact that it seems to clash with conventions of authorship—than about objective theories of what it means to plagiarize).

93. See *generally id.* (arguing that the norms of attribution and correspondingly, of plagiarism, are constructed from field to field).

94. See, e.g., MICHEL FOUCAULT, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, AND PRACTICE: SELECTED ESSAYS AND INTERVIEWS 113, 129 (Donald Bouchard ed., Donald Bouchard & Sherry Simon trans., 1977). Of course, Foucault was not the first to articulate this principle; the distinction between author and narrator was familiar even in ancient literature. See, e.g., Simon Goldhill, *Framing and Polyphony: Readings in Hellenistic Poetry*, 32 PROCEEDINGS OF THE CAMBRIDGE PHILOLOGICAL SOC'Y (NEW SERIES) 25 (1986) (providing several examples of narrators in Hellenistic poetry being ironically subverted by the content of the poems, and arguing that the poems are best understood by positing an awareness of the author/narrator distinction).

95. For the classic statement of this position, see ROLAND BARTHES, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142 (Stephen Heath trans., 1977). To some extent, literary theorists are now backing away from Barthes's extreme position. See, e.g., Wayne C. Booth,

argue, is to approach the text from the outside—appropriate perhaps if we are studying history or biography. One way in which legal texts differ from literary texts is that in legal texts authorship matters, for authorship is connected to a kind of ownership: the law that legitimately claims us must be ours.

At the same time, certain kinds of texts want us to make precisely this identification of author and narrator. The social practice of reading these texts may go so far as to deny any other possibility of authorship, asserting that there can be no access to the author outside of the text. Religious texts are important examples. If you believe the Bible to be literally the word of God, then you believe the third-person, omniscient narrator of the text to be God, the author. Of course, this does not mean that there was no human drafter. Mohammed wrote the Koran, but he is not its author.⁹⁶ He too was scripting the word of God.

When believers see the “word of God” in religious texts, it is not because they have independent means of verifying that God really was the author. Asserting divine authorship reflects a social practice of reading, not a fact independent of the text’s narrative. When a Christian reads the Koran, he sees the same words as the Muslim, but he is likely to attribute authorship to Mohammed, rather than to God. The nonbeliever will likely say that God is the narrator, but Mohammed is the author. Christians and Muslims do not share in the same practice of finding meaning in the text, for meaning is constituted in part by locating authorship. To deny God’s authorship does not otherwise leave the meaning of the text untouched.

What is true of religious texts is also true of legal texts: they cannot be understood apart from social practices of reading that include an attribution of authorship. In the legal and political practices of the United States, that author is the people. The practice of attributing authorship to the people is common across our legal texts because they all exhibit the same problem of

Resurrection of the Implied Author: Why Bother?, in *A COMPANION TO NARRATIVE THEORY* 75 (James Phelan & Peter J. Rabinowitz eds., 2005) (discussing recent scholarship for and against the significance of implied authors in literary analysis).

96. Mohammad Ayatollahi Tabaar, *Who Wrote the Koran?*, N.Y. TIMES (Dec. 7, 2008), <http://www.nytimes.com/2008/12/07/magazine/07wwln-essay-t.html> [http://perma.cc/MLS4-EF2P].

legitimacy: each must convey a sense of why it is law *for us*. The construction of the author is a practice of holding ourselves accountable.

Where founding texts are concerned, this point finds intuitive traction. But the point gets lost in the professional discourse of statutory construction. The idea of popular authorship has been displaced, we suspect, by a disproportionate regard for voting as the site of popular participation in the legislative process.⁹⁷ Voting is an important mechanism of accountability. But voting alone cannot bear the weight of democratic legitimacy, especially when we consider all those laws passed before any of us exercised our first vote. The need to see that law as our own must be met with resources other than the franchise. Those resources include the narrative of self-authorship that the judicial opinion can offer in interpreting a statute.

Consider first the Declaration of Independence.⁹⁸ We know as a matter of historical fact that Jefferson drafted much of the Declaration.⁹⁹ If we were writing a biography of Jefferson, we might attribute authorship to him. In doing so, we would hold him accountable for the text as a matter of character, learning, skill, and foresight. We would ask him where he got his ideas and what motivated him to write as he did.¹⁰⁰ We would be curious about when he compromised, for what reasons, and with whom. We would discuss the moral dilemma he faced as an owner of slaves. From the perspective of a political practice of reading, however, Jefferson is not the author of the Declaration. The political meaning of the text does not turn on anything that Jefferson may have thought in the

97. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). Bork espouses the principle that “where the Constitution does not speak, the majority morality prevails,” but views voting as the only legitimate means of deciding “differences about moral choices.” *Id.* at 259. Similarly, the representation-reinforcing approach to judicial review of John Hart Ely envisions voting as the primary means of popular political participation. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4-5 (1980); see also *id.* at 103 (“In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office.”).

98. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

99. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 99-154 (1997) (describing the drafting and editing process).

100. *Id.*

process of drafting. Politically, we do not hold him accountable for this text.

Is it the case, then, that all those who signed the text that Jefferson drafted are its authors? Is it simply a matter of collective authorship? This is not quite right either; the drafters were acting collectively, but they were not acting for themselves alone. Rather, they were acting as representatives of their communities. They could no more declare independence as a collection of individuals than each could do so independently. They describe themselves as “the Representatives of the united States of America, in General Congress, Assembled.”¹⁰¹ They act “in the Name, and by Authority of the good People of these Colonies.”¹⁰² And what they do is “solemnly publish and declare, that these United Colonies are, and of Right ought to be Free and Independent States.”¹⁰³ The authority they exercise, accordingly, is that of the people of these colonies. Only the people could declare themselves free. It is the people who are accountable for this act of authorship: they suffer the burdens and the injuries of the war. If the British had managed to hang every one of the signers for their act of treason, the colonies would be no less free.

Understanding the people as the author allows us to see an important inversion of the relationship we ordinarily imagine between the author and the text. We think the author precedes the text, that the author brings the text into being. We ask an author, “What are you working on?” But with the Declaration of Independence, the text preceded the author. The people who declare through their representatives are not subjects existing in the world prior to their act of collective authorship; they do not first decide and then author a text. They are not to be located on a map or a calendar. The text is successful when it is received as the work of the people. Declaring authorship in their name, this text calls the people into existence. That author exists only as long as belief in the agency of the people is maintained. In other words, self-authorship is a practice that depends on the belief that we have given the law to ourselves.

101. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

102. *Id.*

103. *Id.*

If we lose that belief in the people's authorial agency, we might come to see this type of text as authored by a privileged elite who deployed a populist rhetoric to advance their own interests. As long as the belief remains, however, I will not receive the text as a gift from a now-dead author. Rather, as I read the Declaration of Independence I acknowledge authorship. I hold myself accountable for the text. In part, accountability means that I adopt as my own this text's narrative of revolution and its aspirations for justice.¹⁰⁴ In part, it means that I am responsible for the continued presence of this text as part of a political practice. I celebrate and I teach this text. I take it as a shared element of our common history. It figures into the account I give of the meaning of our political project. The beliefs at issue here are not subjective states of mind. Rather, they are elements of a social practice. Authorship as a political practice is not an aggregate of individual states of mind. A private politics—including a politics of authorship—makes no more sense than a private language.¹⁰⁵ Self-authorship is one of the background beliefs by which the community understands its practices and holds itself accountable for its past and present.

This idea of authorial self-creation is inseparable from the text's continual reference to a narrator: "We"—as in "We hold these truths to be self-evident."¹⁰⁶ Who is it that holds that "life, liberty and the pursuit of happiness" are "unalienable rights"?¹⁰⁷ Surely this does not refer to the drafters, as if the text were telling us what a particular group of individuals in Philadelphia in the late eighteenth century happened to believe. The text is not recording their beliefs, but is pronouncing a kind of communal creed. The "We," then, is each of us as we read this text together. At that moment, we

104. Lincoln, for example, appealed frequently to the Declaration as the fundamental text of the American political project. MAIER, *supra* note 99, at 202-08; *see also* LEVINSON, *supra* note 11, at 95-96, 140-41.

105. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 243-71 (G.E.M. Anscombe et al. trans., 4th ed. 2009) (arguing for the impossibility of a language that cannot be learned or translated by anyone other than its creator, on the grounds that it would be incomprehensible even to its creator because he would not be able to establish meanings for the signs).

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

107. *Id.*

affirm our political identity as part of this “We” that narrates the text. *We say this*.¹⁰⁸

The step from the narrative “We” to the authorial “We the People” is blurred in the practice of reading.¹⁰⁹ The “we” that *holds* becomes the “we” that *declares*. The rhetorical accomplishment of the text is to lead the reader from holding to declaring: because I believe, I declare. Precisely, here we see that the justice of the claims set forth is not irrelevant to the issue of legitimacy. Rather, the arguments from injustice (the King’s abuses),¹¹⁰ as well as the aspirations for justice (self-evident truths),¹¹¹ contribute to the persuasive character of the text. Someone who believed its claims to be false would likely have remained a loyalist. Today, someone who reads this text and believes its claims to have been false is likely to give an historical explanation of its creation. He will attribute its authorship elsewhere than to the people. Of course, such a reader might find other grounds or other texts, through which to identify with the political project of We the People.

The same distinctions and conjunctions are at work in the Constitution. We distinguish between what the Constitution says—for example, “no state shall deny any person equal protection of the laws”¹¹²—and who it is that we hear when reading that text. About the text, we can and do ask whether the law it creates is just and fair. Similarly, we argue about whether the institutions it establishes are efficient and democratic. We could have similar arguments about the constitutions of other nations. We pursue projects of comparative constitutionalism with exactly these ambitions. Our political relationship to the Constitution is not constituted in the first instance by its justice or efficiency. Rather, that relationship arises out of beliefs about authorship.

Just like with the Declaration, when we ask who the author of the Constitution is, we are not asking who were its drafters. The drafters met in Philadelphia.¹¹³ They, however, had even less authority than did the signers of the Declaration; the text of the

108. BALKIN, *supra* note 11, at 59-74.

109. U.S. CONST. pmb1.

110. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

111. *Id.* para. 2.

112. U.S. CONST. amend. XIV, § 1.

113. See AKHIL REED AMAR, AMERICA’S CONSTITUTION 5 (2005).

Constitution still had to be approved by special assemblies in each of the states.¹¹⁴ Nor is it the case that reading the text today we imagine those assemblies of delegates as the authors. Drafters and delegates were causal agents in the emergence of this text. Were we to assign authorship to them, it would become very difficult to explain why we continue to be bound by their authorial act. How are they not simply the dead hand of the past? Even if we believe the law they authored to be just, how is it *ours*?

Like the Declaration, the text of the Constitution creates a narrator: “We the People ... do ordain and establish.”¹¹⁵ Prior to ratification, this narrator had no more claim to authorship than the narrator of any fictional text. Any one of us can draft a text that presents itself as if it were written by We the People. Suppose the draft had not been ratified, would anyone attribute authorship to this narrator, despite what the text said? Ratification begins a social practice under which we read the narrator as the author. Once again, the authority of the text is linked to a belief in our relationship to this collective, transgenerational agent that appears as narrator and author. Because we are authors of this text, it has authority over us. The legitimacy of the Constitution, but not its justice, is located in this practice of reading.

Justice is not irrelevant to this practice of holding ourselves accountable as authors. We will not be persuaded to see ourselves as authors if we believe the content of the constitutional text to be fundamentally unjust. We would not author such a text. When radical abolitionists denounced the Constitution as a “covenant with death, and an agreement with hell,” they were making just such a move of disavowing authorship—they could not imagine themselves authoring such an unjust text.¹¹⁶ There was a corresponding move

114. *See id.* at 5-8.

115. U.S. CONST. pmbl.

116. *Eleventh Annual Meeting: Of the Massachusetts Anti-Slavery Society*, 13 THE LIBERATOR (Boston), Feb. 3, 1843, at 19. A resolution was first proposed “[t]hat no abolitionist can consistently demand less than a dissolution of the union between northern freedom and southern slavery, as essential to the preservation of the one and the abolition of the other.” *Id.* William Lloyd Garrison suggested the resolution be amended: “That the compact which exists between the North and the South is ‘a covenant with death, and an agreement with hell’—involving both parties in atrocious criminality; and should be immediately annulled.” *Id.* For more contemporary exposition of this theme, see BALKIN, *supra* note 11, at 111-23; LEVINSON, *supra* note 11, at 65-68, 74-80; J.M. Balkin, *Agreements with Hell and Other*

in the secessionist states, when people could not imagine themselves authoring a text that would allow federal intervention against the institution of slavery.¹¹⁷

A court's role follows from this fundamental principle of self-authorship. When interpreting the Constitution, a court is not to discern what the drafters meant, but what the people authored. The courts must persuade the people to take the position of authorship; they must present the meaning of the text such that the people can hold themselves accountable for this text. If courts confuse drafters with authors, the Constitution becomes the dead hand of the past and the people can no longer understand how they govern themselves.¹¹⁸ They cannot understand because they do not govern.

The pattern of distinguishing drafters from authors continues with legislation. We know that in practice, legislators rarely draft the actual statutory text—but even if they did, they would not be the authors of the law. They are not the authors because they have authority only as representatives. Indeed, the nature of our federal lawmaking process guarantees that it is difficult to localize authorship in any institution. Congress acts, but then so does the President. Many of the legal rules that actually apply to us are drafted by administrative agencies. Are they the authors? If that is all we see, then we are likely to worry about an unconstitutional delegation of legislative authority.¹¹⁹ We must see through the

Objects of Our Faith, 65 *FORDHAM L. REV.* 1703 (1997) (all exploring some of these issues, with further historical and theoretical references).

117. For example, see the proslavery constitutional rhetoric of Congressman Toombs from Georgia in 1849. AVERY O. CRAVEN, *THE GROWTH OF SOUTHERN NATIONALISM 1848-1861*, at 68 (1953) (“In spite of ‘as much attachment to the Union ... under the Constitution of our fathers, as any freeman ought to have,’ he did not ‘hesitate to avow before this House and the country ... that if by your legislation you seek to drive us from the territories of California and New Mexico ... and to abolish slavery in this District, thereby attempting to fix a national degradation upon half the States of this Confederacy, *I am for disunion.*”).

118. *See supra* note 105.

119. Not surprisingly, deferential standards of administrative review are quick to evaporate in cases that involve fundamental values. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007) (refusing to defer to the agency's constrictive construction of the statute due to, among other things, the “pressing environmental challenge” that global warming presents); *Gonzales v. Oregon*, 546 U.S. 243, 274-75 (2006) (holding that the Attorney General was not entitled to deference when he construed the Controlled Substances Act to impose criminal penalties on doctors that assisted in euthanasia pursuant to Oregon law).

regulation to the statute and through the statute to its author—the people.

Particular individuals must take certain steps to make the law—including writing—but that does not make them the authors.¹²⁰ Legislators draft a law; the President signs it into effect; and administrative agencies promulgate regulations to give it force.¹²¹ Still, the law is in no sense *their* law, for the authority they exercise is not their own. They might indeed be held electorally accountable for their work, but whatever happens to them personally has no effect on our law. Long after they are gone, the law remains and with it the puzzle of its legitimacy. The point here is not simply that the meaning of a text may be beyond the control of its author, for example, the reader of a novel might understand it differently than its author does. Reading a legal text, we want to attribute meaning to its author. Without that attribution of authorship, the text would not be part of a project of self-government. This defines judicial responsibility over statutory construction: the court must interpret the statute as an expression of our common project of democratic self-government. If such an interpretation is not available, the law is illegitimate, even if it is not held unconstitutional.¹²²

III. SELF-AUTHORSHIP AND STATUTORY CONSTRUCTION

We argue that democratic self-authorship grounds the best normative theory of statutory construction—a claim explored

120. See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871 (1930) (“[I]n law, the specific individuals who make up the legislature are men to whom a specialized function has been temporarily assigned. That function is not to impose their will ... on their fellow citizens, but to ‘pass statutes,’ which is a fairly precise operation.”).

121. See *Administrative Law Guide*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/administrative.php> [<http://perma.cc/X8DT-UTQV>] (last updated Feb. 28, 2014) (describing how administrative agencies function, both through creating regulations and through enforcing existing law); *The Legislative Process*, UNITED STATES HOUSE OF REPRESENTATIVES, http://www.house.gov/content/learn/legislative_process/ [<http://perma.cc/ZT66-8YQK>] (last visited Sept. 11, 2014) (describing the process through which a law is drafted, voted on, and signed into effect).

122. Notably, the claim runs in only one direction. If the court holds a statute unconstitutional, that holding entails that the statute is unimaginable as our own; but if the court does *not* hold a statute unconstitutional, that holding does not necessarily entail that we *can* imagine it as our own.

philosophically in Part IV. But democratic self-authorship is more than a normative theory. We offer it as a theory of existing practices of statutory construction. To qualify as a theory of *our* practices, there must exist, in Dworkin's terms, "fit" between what the theory demands and what courts are actually doing.¹²³ Accordingly, before we elaborate the normative theory of democratic self-authorship, we take up the inquiry into fit. In this Part, we maintain that judges have been guided by an intuitive sense that the rule of law and the rule of the people are one and the same. Of course, the fit is not perfect, for judges have also labored under a fear that they will be accused of usurpation of the legislative role. The fit is, however, closer than one might have expected. Indeed, if the ambition of the judicial practice is really to discern the authorial intent of the legislature, democratic self-authorship can explain many aspects of statutory construction that appear puzzling.

A. "Super" Statutes

Recently, considerable scholarly attention has focused on what Bill Eskridge and John Ferejohn call "super-statutes": statutes so deeply "entrenched" in our legal order that they operate almost like constitutional provisions.¹²⁴ Examples include Title VII of the Civil Rights Act of 1964,¹²⁵ the Sherman Antitrust Act,¹²⁶ and the Endangered Species Act.¹²⁷ Not surprisingly, judicial construction

123. DWORKIN, *supra* note 78, at 228-58 (1986); *see id.* at 255 ("Convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all.")

124. WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (adopting the closed spelling, "superstatute"); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215, 1216 (2001) ("A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does 'stick' in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.") For a helpful exposition of Eskridge's and Ferejohn's positions, see Paul Frymer, *Statutes, Courts, and Democracy in America*, 47 *TULSA L. REV.* 229, 232-38 (2011) (book review).

125. Pub. L. No. 88-352, §§ 701-705, 78 Stat. 253, 253-59 (1964) (codified as amended in scattered sections of 42 U.S.C.); *see* Eskridge & Ferejohn, *supra* note 124, at 1237-42.

126. 15 U.S.C. §§ 1-2 (2012); *see* Eskridge & Ferejohn, *supra* note 124, at 1231-37.

127. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (2012)); *see* Eskridge & Ferejohn, *supra* note 124, at 1242-46.

of these statutes does not focus on locating legislative intent in the technical sense that we saw in *Ali v. Federal Bureau of Prisons*.¹²⁸ Instead, courts focus on broader public values. Courts are not answering the question of what a particular legislative body at a particular moment did. They are answering the question of what it is *we* are doing.

Consider *Ricci v. Destefano*, a recent Title VII case that considered whether employers may adopt race-conscious policies in order to ensure compliance with Title VII's antidiscrimination regime.¹²⁹ The City of New Haven, looking to make promotions within the fire department, administered a lieutenant's exam that yielded demographically skewed results. In the aggregate, white firefighters performed much better than black firefighters, and of the top fifteen candidates—the group slated for promotion—all but one was white.¹³⁰ Fearing that certification of the exam results would invite a Title VII disparate impact suit, the City Service Board of New Haven voted to administer a new exam.¹³¹ This brought a Title VII suit from white firefighters, who claimed that the decision not to certify the examination results amounted to an impermissible use of race in an employment decision.¹³² In other words, *Ricci* “sets at odds [the] core directives” of Title VII¹³³—subsection (k) requires employers to avoid employment policies that yield a “disparate impact” along racial lines, whereas sub-section (a) forbids employers from engaging in “disparate treatment” along racial lines.¹³⁴

Formally, *Ricci* raised an issue of statutory interpretation. Yet no member of the Court found the text of Title VII, the statute's legislative history, or even inquiry into Congress's larger “purpose,” to be of much help.¹³⁵ Indeed, however fierce their other disagreements, all nine Justices seemed to concur as to the meaning of the text and the purpose behind it: the aim of Title VII is to end racial

128. 552 U.S. 214 (2008); *see supra* Part I.B.

129. 557 U.S. 557, 557-63 (2009).

130. *Id.* at 561-63.

131. *Id.* at 562.

132. *Id.* at 562-63.

133. *Id.* at 624 (Ginsburg, J., dissenting).

134. *Id.* at 557 (majority opinion).

135. *See, e.g., id.* at 580-81.

discrimination in the workplace.¹³⁶ The question is how. It is the same question, as Kennedy noted, that has beset the Court's constitutional jurisprudence for many decades.¹³⁷ It is the question of whether our commitment to racial equality entails color-blindness or color-consciousness. To tackle this difficult question, the opinions in *Ricci* placed these competing principles within broader narratives both of a national problem, and of the national effort to address that problem.¹³⁸ Their disagreement was over which narrative offers the most persuasive account.

Writing for the Court, Justice Kennedy invoked a narrative of compromise: as a nation, we live by principles, but we also recognize the value of well-functioning institutions and the need to respect the expectations those institutions create.¹³⁹ To his mind, the petitioners' position—that Title VII proscribes all race-conscious employment decisions—and the respondents' position—that Title VII allows for race-conscious employment decisions as long as employers have a "good faith belief" that compliance requires them—were both too strong.¹⁴⁰ Instead, the right construction would assure "all groups ... a fair opportunity [to obtain] promotions," but also recognize the "legitimate expectation" that employees have "not to be judged on the basis of race," and to have the parameters of the

136. *E.g., id.* at 580 ("[O]ur decision must be consistent with the important purpose of Title VII—that the workplace be an environment free of discrimination, where race is not a barrier to opportunity."); *id.* at 628 (Ginsburg, J., dissenting) ("The very purpose of the provision is to ensure that individuals are hired and promoted based on qualifications manifestly necessary to successful performance of the job in question, qualifications that do not screen out members of any race.").

137. *See id.* at 582 (majority opinion).

138. This excludes Justice Scalia's concurrence, *id.* at 594-96 (Scalia, J., concurring), which simply makes an analytic point about the tension between Title VII's disparate impact provision and the Equal Protection Clause. *See id.* at 595-96 ("[T]he war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.").

139. *See id.* at 583 (majority opinion) ("Resolving the statutory conflict in this way allows the disparate-impact prohibition to work in a manner that is consistent with other provisions of Title VII.").

140. *Compare id.* at 580-81 ("The rule petitioners offer would run counter to what we have recognized as Congress' intent that 'voluntary compliance' be the 'preferred means of achieving the objectives of Title VII.'") (quoting *Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986)), *with id.* at 581-82 (noting that the City's request for broad latitude to comply with the disparate impact provision would also contravene Title VII). Therefore, Justice Kennedy concludes, "a more appropriate balance" is proper. *Id.* at 582.

established “selection criteria” respected.¹⁴¹ In other words, employers need latitude to ensure that minorities have the chance to rise up the ranks, but employees are also entitled to a stable promotional process. The national commitment is to fairness, which requires acknowledgement of both principles while working out retail solutions in particular circumstances.

In his concurrence, Justice Alito advanced a different narrative, individual merit. Alito focused on the firefighters passed over by the city’s decision.¹⁴² Emphasizing that all they sought was “a fair chance to move up the ranks in their chosen profession,” Alito lamented the “personal sacrifices” the plaintiffs made.¹⁴³ Two stories were especially poignant to Alito. Frank Ricci, who suffered from dyslexia, “studied an average of eight to thirteen hours a day ... even listening to audio tapes while driving his car.”¹⁴⁴ Benjamin Vargas, a Hispanic, had to “give up a part-time job, and his wife had to take leave from her own job in order to take care of their three young children while Vargas studied.”¹⁴⁵ By treating Ricci’s and Vargas’s plights as equivalent, Alito implicitly disclaimed the notion that his construction of Title VII is about helping whites succeed; it is, instead, about ensuring that *everyone*, no matter their race, enjoys “evenhanded enforcement of the law.”¹⁴⁶

Alito also dedicated significant energy to insinuating that New Haven’s stated reason for throwing out the exam—to avoid disparate impact liability—was “a pretext,” and that “the City’s real reason was [an] illegitimate ... desire to placate a politically important racial constituency.”¹⁴⁷ In Alito’s view, the record contains evidence from which “a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of ... influential leaders of New Haven’s African-American community.”¹⁴⁸ Whatever one might think of disparate

141. *Id.* at 585.

142. *See id.* at 607 (Alito, J., concurring).

143. *Id.*

144. *Id.* (internal quotation marks omitted).

145. *Id.* (internal quotation marks omitted).

146. *Id.* at 608.

147. *Id.* at 597.

148. *Id.* at 598 (internal quotation marks omitted).

impact tests generally, redistribution of public resources to a powerful, local interest group cannot fit within a narrative of the people's purpose in authoring the statute. That is not why we passed Title VII.¹⁴⁹

In her dissent, Justice Ginsburg offered still another narrative: undoing racial subordination.¹⁵⁰ She opened by observing that “[i]n assessing claims of race discrimination, context matters.”¹⁵¹ Although Ginsburg acknowledged that plaintiffs like Ricci and Vargas “understandably attract ... sympathy,” their individual plights cannot transform the institutional reality in New Haven.¹⁵² African Americans and Hispanics, who account for nearly 60 percent of the population, “[are being] served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions.”¹⁵³ New Haven should have an opportunity to rectify this situation. Whether, and how, Title VII should limit the *means* by which the city may do so is a question that must be framed in terms of the history of Title VII's reception. After Title VII went into effect, “[e]mployers responded to the law by eliminating rules and practices that explicitly barred racial minorities from ‘white’ jobs.”¹⁵⁴ Yet “removing overtly race-based job classifications did not usher in

149. See, e.g., Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 552-66 (2003) (discussing the group-oriented aspects of disparate impact law as compared to the more individual-oriented equal protection jurisprudence); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 59-64 (1985) (discussing as a fundamental concern of administrative law the desire to avoid favoring interest groups, and procedural safeguards that are meant to protect against this possibility). In certain cases, the “disparate impact doctrine does involve an element of differential group treatment by race.” Primus, *supra*, at 566. Therefore, “[i]f disparate impact doctrine were to become more visible ... many people would understand the doctrine as evincing some kind of government concern with the allocation of employment among racial groups.” *Id.* at 576.

150. The difference between the majority and dissent tracks the difference that has emerged in scholarship between the so-called “anticlassification” and the so-called “antisubordination” view. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470-78 (2004); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281-86 (2011) (discussing a third approach—antibalkanization—which focuses on racial cohesion).

151. *Ricci*, 557 U.S. at 608 (Ginsburg, J., dissenting) (internal quotation marks omitted).

152. *Id.*

153. *Id.* at 609.

154. *Id.* at 620.

genuinely equal opportunity.”¹⁵⁵ Rather, “[m]ore subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions.”¹⁵⁶

Ginsburg found the majority’s identification of “intra-statutory discord” baffling.¹⁵⁷ In her view, the disparate impact provision and the disparate treatment provision of Title VII both pursue the same goal: dismantling racial hierarchy. New Haven’s actions simply “do[] not present ... race-based discrimination” of the sort that Title VII targeted.¹⁵⁸ In contrast to Kennedy’s insistence on pragmatic balancing, and Alito’s defense of color-blindness, Ginsburg told a story of historical redemption. We have not yet recovered from the sordid legacy of slavery and Jim Crow racism. To interpret the disparate-treatment provision and disparate-impact provision as “discord[ant]”¹⁵⁹ rather than “complementary”¹⁶⁰ would be to frustrate the very goal codified by Title VII, and expounded in *Griggs*: the promise “that groups long denied equal opportunity would not be held back by [practices] fair in form, but discriminatory in operation.”¹⁶¹

The dispute among the Justices is not over the statute’s text. Nor is it over legislative intent. Rather, each opinion takes the judicial role to be that of persuading us to read the statute as a part of a larger national narrative. Each opinion offers a distinct account of what we are trying to do in addressing our history of racial injustice.

155. *Id.*

156. *Id.* Ginsburg connects this statement with her view of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For Ginsburg, *Griggs* stands for the proposition that there is no “conflict between an employer’s obligations under the statute’s disparate-treatment and disparate-impact provisions.” *Ricci*, 557 U.S. at 624 (Ginsburg, J., dissenting) (internal quotation marks omitted). Rather, these are “twin pillars of Title VII,” both working toward “ending workplace discrimination and promoting genuinely equal opportunity.” *Id.* This does not mean that employers may engage in disparate treatment—as New Haven did—with impunity. But it does mean that they should enjoy latitude when making difficult employment decisions, and that if employers have “good cause” to believe that the absence of disparate treatment would result in a disparate impact lawsuit, then, per *Griggs*, they should be immunized from liability. *See id.*

157. *Ricci*, 557 U.S. at 626 (Ginsburg, J., dissenting).

158. *Id.* at 644.

159. *Id.* at 626.

160. *Id.* at 625.

161. *Id.* at 644 (internal quotation marks omitted).

We are all able to recognize each account, even if we disagree with it.

None of the opinions approach Title VII as if it were the outcome of a conflict of interest among distinct groups, with some winning and some losing. Likewise, no account sees the statute as a bargain, negotiating a division of public benefits. Instead, all three construct narratives of self-government under law.¹⁶² A theory of interpretation cannot identify which account is correct. In some sense, all three are correct. All three offer plausible interpretations of our national commitment to end racial discrimination. Different observers will prioritize one account over the others; different circumstances might lead to different choices. But it becomes clear that the judge's role is to match narratives to circumstances, and then to persuade us to see ourselves in that account.

B. "Ordinary" Statutes

Although "super" statutes attract more attention, the interpretive question they present is not different in kind from that of ordinary statutes. All laws are subject to the same demand of legitimacy. We do not have to agree with them, or with every construction of them, but we must be able to understand them as our own. To see how ordinary statutes recapitulate basic concerns of legitimacy, one need look no further than to the canons of construction that courts often use to interpret them.

1. Harmony

A number of canons articulate a presumption of harmony among discrete legal materials. Take, for example, the longstanding canon of constitutional avoidance: ambiguous statutes are to be interpreted so as to avoid constitutional problems.¹⁶³ Under the self-authorship view, this canon makes perfect sense. It is not merely about prudence, but about constructing a field of legal meaning. The same collective agent, we the people, is the author of both constitu-

162. See *supra* notes 139-61 and accompanying text.

163. See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1550 (2000).

tional and statutory law. Marking one as constitutional, the people have indicated a normative priority; they have marked out a general purpose. The question for a court is whether we, as author of the constitutional provision, could imagine ourselves as simultaneously the author of the statute. Can we imagine affirming authorship of both at once?¹⁶⁴

Similarly, courts also take for granted that statutes should be interpreted consistently with previously enacted statutes. But why? New lawmakers often contravene the work of previous lawmakers; in fact, that is often precisely what new lawmakers are elected to do.¹⁶⁵ If legislative will is the ground of judicial construction, it is hard to see why the presumption should run one way rather than the other. The question would be precisely whether lawmakers intended harmonization. In context, the answer might be yes, but it would not be presumptively so.¹⁶⁶

Consider, for instance, *American Express Co. v. Italian Colors Restaurant*, the most recent in a long line of cases resolving a

164. Compare the practice in Germany, in which constitutional rights apply horizontally (they regulate conduct between individuals) as well as vertically (they regulate the conduct of state actors). See, e.g., Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 393-411 (2003) (discussing legal systems in which constitutional rights have a horizontal application, including Germany's); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 431-44 (2008) (comparing the American system, on the "vertical" end of the spectrum, with systems on the more "horizontal" end of the spectrum).

165. See Christopher Coats, *Obama Joins Tradition of Overturning Predecessor's Executive Orders*, FINDING DULCINEA (Nov. 10, 2008, 5:54 PM), <http://www.findingdulcinea.com/news/politics/2008/November/Obama-Joins-Tradition-of-Overturning-Predecessor-s-Executive-Orders.html> [<http://perma.cc/E9CN-L234>] (analogizing the President's efforts to contravene his predecessor's efforts to similar tactics employed by lawmakers).

166. Consider, for example, the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)). RFRA begins by noting its purpose is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases in which free exercise of religion is substantially burdened," after the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), had abrogated this standard. 42 U.S.C. § 2000bb(b)(1) (2012). Also consider the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, which responded to the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), and fundamentally altered the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. For a more comprehensive survey of "legislative overrides," see Matthew R. Christiansen & William Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014).

tension between the Federal Arbitration Act, which compels the enforcement of arbitration clauses in private contracts, and other federal laws whose efficacy has been dampened by the existence of compulsory arbitration clauses.¹⁶⁷ The plaintiff in *Italian Colors Restaurant*, a neighborhood restaurant, attempted to sue American Express for violating federal antitrust law, on the theory that American Express abused its market power by charging merchants fees 30 percent higher than other credit cards.¹⁶⁸ The contract between American Express and Italian Colors required individual arbitration of all disputes; so American Express moved to compel arbitration under the Federal Arbitration Act (FAA).¹⁶⁹ Italian Colors responded by arguing that individual arbitration would be prohibitively expensive because the maximum possible award would not even cover attorneys' fees.¹⁷⁰ Therefore, waiving the individual arbitration requirement was necessary to make the antitrust suit practically actionable.¹⁷¹

The Court held that the FAA requirement could not be waived—the arbitration clause was enforceable, notwithstanding concern about the economics of antitrust litigation.¹⁷² In response to the argument that this result would undermine the force of the federal antitrust laws, the majority reasoned that those laws “do not guarantee an affordable procedural path to the vindication of every claim.”¹⁷³ Simply put, nothing about the federal antitrust scheme “evinces an intention to preclude a waiver of class-action procedure.”¹⁷⁴ Nor, in the majority's view, was a “judge-made exception to the FAA” warranted in this case.¹⁷⁵ The only cases recognizing such an exception are those in which an arbitration clause operates to strip would-be plaintiffs of the “*right to pursue* statutory

167. 133 S. Ct. 2304 (2013). For the second most recent case in this line, see *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2008) (holding that employees were required, per their employment contract, to bring an age discrimination claim via arbitration).

168. *Italian Colors Rest.*, 113 S. Ct. at 2308.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 2312.

173. *Id.* at 2309.

174. *Id.* (internal quotation marks omitted) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

175. *Id.* at 2310.

remedies.”¹⁷⁶ Here, by contrast, the plaintiff’s remedial right was perfectly safe. Plaintiffs could only claim that arbitration would deprive them of the opportunity to recover a sizeable damages award.¹⁷⁷

In her dissent, Justice Kagan bristled at the majority’s formalism. In her view, the relevant principle was that “[a]n arbitration clause may not thwart federal law, irrespective of exactly how it does so”¹⁷⁸—whether it does so *formally*, or merely *functionally*. By neglecting this principle, the Court effectively permitted American Express to “insulate[] itself from antitrust liability—even if it has in fact violated the law.”¹⁷⁹

For our purposes, the important point is not to decide between the majority and dissent, but to note that both sides felt it necessary to consider the FAA alongside the federal antitrust laws at all. If legislative will is the lodestar, why should courts assume that legislative bodies intend harmony among statutes—especially, though perhaps not exclusively—when the statutes were drafted and enacted by different sets of individual lawmakers? Generally, legislators intend for the law they enact to be effective, which often requires that later laws take precedence over earlier laws. Harmony is irrelevant.

On the legislative authorship account, the appropriate principle of harmony among discrete statutes would be no principle at all. The statute in question would be construed according to the will of the legislature that passed it. This purpose might involve harmony, if the legislature intended harmony, but there would be no general *mandate* for harmony.

In practice, however, when two statutes intersect, courts read the legal materials together in order to discern a common purpose behind them. “Purpose,” in this setting, does not refer to the actual purpose of any particular legislator, or even of the legislative body as a whole—as though, for example, Congress, when it enacted the FAA, consciously sought to maintain space for private antitrust

176. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

177. *See id.* at 2308.

178. *Id.* at 2313 (Kagan, J., dissenting).

179. *Id.*

actions. Nor is “purpose” simply a reflection of judicial will. When Justice Kagan decries the cannibalizing effect of the FAA on anti-trust actions, she is not saying that *she* finds antitrust enforcement a more important policy; rather, she is saying that *we* do.¹⁸⁰ The formalism of the majority, Kagan says, cannot ground a coherent narrative of what we the people are doing.¹⁸¹ We decided to enact the FAA for many reasons. But none of them was to subvert the force of other important federal laws.¹⁸²

2. Equity

A second interpretive practice that fits poorly with the legislative will view, but that self-authorship principles easily reconstruct, is the use of equitable principles to arrive at interpretations that clash with plain statutory language. Equity allows judges to avoid miscarriages of justice. But ensuring just outcomes can come at the expense of “faithful agency” to legislative will.¹⁸³

Consider *McQuiggin v. Perkins*, a case about the flexibility of federal appeals under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).¹⁸⁴ AEDPA circumscribes federal jurisdiction over habeas claims originating from state prosecutions. Among other things, § 2244(d) of the Act imposes a one-year deadline—from the date of the final judgment—on federal habeas petitions.¹⁸⁵ A defendant who fails to meet this deadline has “procedurally defaulted.”¹⁸⁶ Ordinarily, to overcome a procedural

180. *See id.* at 2315.

181. *See id.* at 2318-19.

182. *See id.* at 2315.

183. *See* Manning, *supra* note 8, at 8 (noting that “[t]extualists must take [equitable powers] seriously,” for if such powers are ascribable to federal judges, it would “undercut” the ideal of “faithful agen[cy]”). *But see* Eskridge, *supra* note 10, at 998 (arguing for compatibility between equitable remedies and the faithful agent ideal: “words ... involve policies chosen by the legislature and enduring principles suggested by the common law, the law of nations, and the Constitution”). As much force as Eskridge’s position might have in general, it is not easily squared with a case like *McQuiggin v. Perkins*, in which legislative purpose and deeper justice are at loggerheads, no matter how “dynamically” the former is construed. 133 S. Ct. 1924 (2013).

184. Pub. L. No. 104-132, 110 Stat. 1214, 1217-26 (codified as amended in scattered sections of 28 U.S.C.); 133 S. Ct. 1924.

185. *See* 28 U.S.C. § 2244(d)(1)(A).

186. “Procedural default” is a doctrine developed by the Court “to limit the habeas practice

default, a defendant must show “cause”—for example, that he missed a filing deadline due to abandonment by counsel,¹⁸⁷ or that the state appellate process afforded him no opportunity to raise the relevant challenge.¹⁸⁸

McQuiggin considered whether a successful actual innocence claim can cure a procedural default under § 2244(d),¹⁸⁹ by adducing new evidence, procured since the conviction, that no reasonable juror could have convicted the defendant.¹⁹⁰ In plainer English, should a defendant be allowed to appeal his conviction, many years after the normal window for review has closed, if new evidence emerges to suggest that he did not commit the crime? A narrow majority of the Court said yes, drawing an “actual innocence” exception to the one-year filing deadline.¹⁹¹

Michigan had maintained that granting an equitable exception would “rende[r] superfluous [the] carefully scripted scheme” set out by Congress.¹⁹² The *McQuiggin* majority responded that the equitable exception was drawn *carefully*, alleviating any concern about rendering the text “superfluous.”¹⁹³ The state’s point, however, was not that an equitable exception for actual innocence claims would render § 2244(d) superfluous in *every* context; rather, only that it would render § 2244(d) superfluous in the specific context of actual innocence claims. As Justice Scalia asserted in his dissent, “By the Court’s logic, a statute banning littering could simply be deemed to contain an exception for cigarette butts; after all, the

that it had radically expanded in the early or mid-twentieth century to include review of the merits of conviction and not merely jurisdiction of the convicting court.” *McQuiggin*, 133 S. Ct. at 1937 (Scalia, J., dissenting). The doctrine “holds that a state prisoner’s default of his federal claims ‘in state court pursuant to an independent and adequate state procedural rule’ bars federal habeas review of those claims.” *Id.* (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

187. See *Maples v. Thomas*, 132 S. Ct. 912, 917 (2012); *Holland v. Florida*, 560 U.S. 631, 652 (2010). In *McQuiggin*, the majority opinion emphasizes the difference between equitable tolling (in *Holland* and *Maples*) and an equitable exception (in *McQuiggin*)—but obviously the two raise exactly the same issues. *McQuiggin*, 133 S. Ct. at 1931.

188. See *Trevino v. Thaler*, 133 S. Ct. 1911, 1914-15 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309, 1313, 1320 (2012).

189. *McQuiggin*, 133 S. Ct. at 1928.

190. *Id.*

191. *Id.*

192. *Id.* at 1933 (quoting Brief for Petitioner at 18).

193. *Id.*

statute as thus amended would still cover *something*. That is not how a court respectful of the separation of powers should interpret statutes.”¹⁹⁴ As he wryly remarked, “One would have thought it too obvious to mention that this Court is duty bound to enforce AEDPA, not amend it.”¹⁹⁵ If Congress had authored the AEDPA, Justice Scalia’s critique would be virtually irrefutable. The majority offered no evidence that Congress intended an equitable exception under these circumstances. In fact, Congress explicitly included innocence-based exceptions to other sections of AEDPA, implicitly suggesting that it intended no such exception here.¹⁹⁶

But this is ultimately beside the point. As difficult as it may be to reconcile the opinion with legislative authorship, *McQuiggin* comes back to a very basic point about justice. The narrative upon which Justice Ginsburg relies is immediately recognizable and normatively self-evident: the innocent will not be abandoned. The American people would not author a law that allows innocent people to sit in prison, much less on death row, because of legal technicalities. A law that fails to acknowledge this would be difficult to recognize as our own.¹⁹⁷

3. *Gymnastics*

A final practice that casts doubt on the legislative author view is the adoption of what one might call hermeneutical gymnastics. One example is *Church of the Holy Trinity v. United States*, the famous nineteenth-century case in which the Court held that recruiting a minister from abroad did not violate a statute prohibiting “the importation or migration, of any alien or aliens, any foreigner or foreigners ... under contract or agreement ... to perform labor or service of any kind.”¹⁹⁸ Despite the text, the Court concluded that “a

194. *Id.* at 1939-40 (Scalia, J., dissenting).

195. *Id.* at 1938.

196. *See id.* at 1939-41. The majority’s answer to this rejoinder is unconvincing. *Id.* at 1933-35 (majority opinion).

197. This is why the iconic first line of *Coleman v. Thompson* is so jarring—“This is a case about federalism.” 501 U.S. 722, 726 (1991). The federalism frame cannot keep at bay the deeper narrative of innocence and justice beneath. *Id.* at 745-50.

198. 143 U.S. 457, 458-59 (1892) (quoting Alien Contract Labor Act of 1885, ch. 164, § 1, 23 Stat. 332, 332 (repealed 1952)).

Christian nation” would not do such a thing.¹⁹⁹ Another case, *Welsh v. United States*, which also involved the exceptional status of religion in America, shows just how far these gymnastic maneuvers can go.²⁰⁰

The question presented in *Welsh* was whether a statute granting conscientious objector status on religious grounds also granted equivalent status to objectors who explicitly denied that their objections were based on religious belief.²⁰¹ The law in question, the Universal Military Training and Service Act, made registration for military service compulsory for men over the age of eighteen.²⁰² Section 6(j) of the Act carved out an exemption for certain types of conscientious objections: “Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”²⁰³ The Act went on, however, to clarify that “[r]eligious training and belief” refers to “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation,” and that it explicitly does *not* refer to “essentially political, sociological, or philosophical views or a merely personal moral code.”²⁰⁴

Welsh was convicted for refusing to submit to military service.²⁰⁵ On appeal, he argued that he was entitled to conscientious objector status under section 6(j), despite the fact that he was not opposed to war on religious grounds.²⁰⁶ In fact, Welsh made it very clear that he was vehemently opposed not only to war, but also to religiously-grounded *objections* to war.²⁰⁷ As he put it: “I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding ‘duty’

199. *Id.* at 471-72.

200. 398 U.S. 333 (1970).

201. *Id.* at 335-36.

202. See Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604, 605 (codified as amended at 50 U.S.C. app. § 453 (2012)).

203. *Welsh*, 398 U.S. at 336 (citing 62 Stat. 612 (codified as amended at 50 U.S.C. app. § 456(j) (2012))).

204. *Id.*

205. *Id.* at 335.

206. *Id.* at 335, 341.

207. *Id.* at 341.

to abstain from violence toward another person) is not ‘superior to those arising from any human relation.’”²⁰⁸

The last sentence of Welsh’s statement is cribbed verbatim from the statute—“duties superior to those arising from any human relation”²⁰⁹—but for just the opposite purpose than one might expect. Welsh cited the statute precisely to *deny* that he was conforming to the designation provided for by section 6(j). Welsh’s claim of conscientious objection was therefore an act of defiance against the terms of the very exemption he sought to invoke. Could Welsh seek refuge in a safe harbor whose basis he had explicitly repudiated?

The Court said yes, holding that objections that rest on “moral” or “ethical” principles, as long as they are “deeply held,”²¹⁰ *are* entitled to the section 6(j) exemption, despite the explicit exclusion of such objections in the last sentence of that section. Establishing this claim required some gymnastics. The Court was forced to argue that Welsh’s objection could not be categorized as an “essentially political, sociological, or philosophical view[],” nor as a “personal moral code,”²¹¹ and from there, to reason that Welsh’s objection must be religious in nature—on the theory that if his objection did not fit into one of the exceptional categories, it must hail from the main one. This inference is fair enough. The difficulty lies in deciding, at the threshold, that Welsh’s objection was not an “essentially political, sociological, or philosophical view[].”²¹² By its own lights, the objection seemed *precisely* that.

It is little surprise, then, that the dissenting Justices in *Welsh* argued that the majority’s view utterly failed to “enforce the will of Congress.”²¹³ The failure is almost self-evident: the majority opinion openly flouted the spirit of section 6(j), which aimed to cabin, not to extend, the availability of conscientious objector status. Yet it would be wrong to call *Welsh* a failed act of statutory construction. It created a compelling narrative of collective authorship—one that sounds in free expression and freedom of conscience. In this narrative,

208. *Id.* at 343.

209. *Id.* at 336 (citing 62 Stat. 612 (codified as amended at 50 U.S.C. app. § 456(j) (2012))).

210. *Id.* at 344.

211. *Id.* at 342.

212. *Id.* at 336 (citing 62 Stat. 612 (codified as amended at 50 U.S.C. app. § 456(j) (2012))).

213. *Id.* at 368 (White, J., dissenting).

citizenship does not come at the expense of forsaking private moral beliefs. Just as we cannot embrace a legal regime in which administrative convenience takes precedence over truth, we cannot embrace one that leaves no room for individual conscience.

In other words, much as the dissenters in *Welsh* were right to accuse the majority of failing to “enforce the will of Congress,” they were wrong to conclude that the majority had enforced the Court’s will.²¹⁴ Democratic self-authorship resists the elision from (1) the observation that legislative will has been disregarded to (2) the idea that a judge has simply substituted *his* will in its place. A successful act of statutory construction persuades us to see our collective will in and through the legislation. Of course, a judge can mishandle this task; he might fail to produce a compelling narrative of self-authorship, just as he might fail to persuade us of the nature of the legislative will. But that does not transform the nature of the interpretive task, which is to align democratic self-government and the rule of law.

IV. SELF-AUTHORSHIP AND DEMOCRATIC LEGITIMACY

That democratic practices do not satisfy the demands of democratic theory is not surprising. What is surprising is that the gap is insurmountable. Inevitably, we the people are bound by decisions in which we had no opportunity to participate. Jefferson saw the problem clearly, and responded that constitutions should last no more than nineteen years—the span of a generation.²¹⁵ Madison saw immediately that Jefferson’s answer was not just impractical, but also unresponsive.²¹⁶ Generations do not all appear at the same moment.

214. *Id.*

215. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THOMAS JEFFERSON: POLITICAL WRITINGS 593, 596 (Joyce Appleby & Terence Ball eds., 1999).

216. Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in THOMAS JEFFERSON: POLITICAL WRITINGS, *supra* note 215, at 606, 606. Madison presents several practical objections to Jefferson’s argument, as well as theoretical objections. *Id.* at 608. (“[The only solution lies] in the received doctrine that a tacit assent may be given to established Constitutions and laws, and that this assent may be inferred, where no positive dissent appears. It seems less impracticable to remedy, by wise plans of Government, the dangerous operations of this doctrine, than to find a remedy for the difficulties inseparable from [the doctrine proposed by Jefferson].”).

Even under a nineteen-year rule, we would continually be bound by commitments that we did not make or that we no longer support.

Jefferson's proposal, nevertheless, raises an important point. Democratic theory must provide an answer to the skeptic who encounters a previously enacted law and says, "this law is not mine." It is no response to vouch for the integrity of the democratic procedures that produced the law—the skeptic may view the past history of this nation as if it were a foreign community. If he is not bound by the laws of France merely because its procedures are democratic, why is he bound by old laws here? Nor will it do to point out that he can participate in the repeal of any law he does not like, for it is always harder to change the law than to leave it in place. We could try to answer the skeptic by claiming that democratically enacted laws are more likely to be just. But even if that doubtful proposition was true, it seeks to ground the law's claim on its justice rather than on its author.²¹⁷

Ultimately, the skeptic's challenge is even more severe than first appearances imply. For the challenge is not containable to previously enacted laws. It can also apply to contemporaneous laws, and even laws that the skeptic had a hand in creating. Recall the discussion of *McQuiggin* above.²¹⁸ Even if I elected the lawmakers who passed AEDPA, I can still reject, as alien and unacceptable, the idea that an innocent person might sit on death row because of procedural technicalities. Being reminded that I voted in an election will not palliate my concern that the legislature has acted in a way that I view as not just wrong, but illegitimate.²¹⁹ If anything, it further inflames that concern.

In short, we need a theory of democratic legitimacy that does not equate democracy with procedure. Democratic legitimacy certainly *does* require certain procedural constraints. But it also requires a means of receiving the law as our own. Our answer lies

217. Identification of the temporal quality of democratic constitutionalism has been a central theme of the "Yale School" of constitutional theory. *See, e.g.*, BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1992); PAUL W. KAHN, *LEGITIMACY AND HISTORY* (1992); JED RUBENFELD, *FREEDOM AND TIME* (2001).

218. *See supra* notes 184-96 and accompanying text.

219. *See supra* Introduction (providing an example of a faculty member voting in a faculty decision).

in self-authorship. To flesh this out, we return to the origins of modern democratic theory, in the work of Thomas Hobbes.

A. The Hobbesian Paradox: Natural Right and Sovereign Power

The modern era began with a problem of political transition: to move from monarchical rule to a democratic political order. England, the United States, and France all confronted revolutionary struggles and each worked out a different solution to this problem.²²⁰ Apart from the practical problems of revolutionary destruction of the old order and constitutional construction of the new, these transitions also presented a problem of fundamental theory. The political philosopher had to explain how the coercive application of law to a resisting citizen could be legitimate. And he had to do so without appealing to sectarian religious belief or to traditional status relationships.

The earliest answers went in several directions, but all adopted the same baseline: legal authority must be traced back to a moment of unanimity in which all agreed to be bound by law. Three different approaches to the unanimity problem emerged. Hobbes theorized a social contract to which all must have given consent.²²¹ Individuals would do so because it was in their self-interest, given the alternative of a state of nature in which life was inevitably “solitary, poor, nasty, brutish, and short.”²²² Kant theorized the content of a moral order that could be determined by reason alone and therefore had a practical claim on every rational agent.²²³ Rousseau, who rejected the legitimacy of representation, appealed to common moral

220. See generally JACK A. GOLDSTONE, *REVOLUTION AND REBELLION IN THE EARLY MODERN WORLD*, at xxii (1991).

221. See THOMAS HOBBS, *LEVIATHAN* (Edwin Curley ed., Hackett Publ'g Co. 1994) (1668).

222. *Id.* at 76.

223. See, e.g., IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Allen W. Wood ed. & trans., Yale Univ. Press 2002) (1785). For Kant, “[o]nly a rational being has the faculty to act *in accordance with ... a will*. Since for the derivation of actions from laws *reason* is required, the will is nothing other than practical reason.” *Id.* at 29. “[I]f the will is not *in itself* fully in accord with reason (as it actually is with human beings), then the actions which are objectively recognized as necessary are subjectively contingent.” *Id.*; see also IMMANUEL KANT, *Toward Perpetual Peace: A Philosophical Sketch*, in *TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY* 67, 67 (Pauline Kleingeld ed., David L. Colclausier trans., 2006) [hereinafter KANT, *Toward Perpetual Peace*] (proposing various rational means of promoting perpetual international peace).

intuitions. He argued that the problem was to design institutions that would allow for the expression of the general will, to which all of us had access under the right circumstances.²²⁴

All of these approaches remain vibrant in contemporary political theory. Hobbes is attractive to social choice theorists; Kant to social-contract theorists; and Rousseau to constitutional theorists who continue to propose institutional reforms adequate to capturing the general will (referenda, extraordinary conventions, and so forth). Hobbes is particularly useful, however, if we want to make sense of democratic self-authorship as the rule of law in American political life. Not because he gives us a more compelling account of unanimity, but because of the way he *fails* to solve the problem. For Hobbes, the problem is unsolvable, leaving an issue for political practice rather than a theoretical solution.²²⁵ This is no less true of our own democratic order; its foundations are a problem of practice, not of theory.

Hobbes used two ideas to try to solve the unanimity problem: a natural right of self-defense and the social covenant that creates the sovereign. These ideas create an unresolvable tension. Hobbes understood everyone to have, by nature, a fundamental and unalienable right of self-preservation: “[t]he right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature, that is to say, of his own life.”²²⁶ The unalienable character of this natural right is critical: a person can always defend himself against a threat to his life. This is a source of motivation that operates everywhere in nature. In man, it operates as a concept guiding his will. To say that a man has no right to defend himself is like saying that water has no right to run downhill. Indeed, Hobbes wrote that on this point necessity and liberty are indistinguishable.²²⁷

224. JEAN-JACQUES ROUSSEAU, *Of the Social Contract*, in THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 39 (Victor Gourevitch ed. & trans., Cambridge Univ. Press 1997) (1762); see, e.g., *id.* at 57 (“[T]he general will alone can direct the forces of the State according to the end of its institution, which is the common good.”).

225. HOBBS, *supra* note 221.

226. *Id.* at 79.

227. *Id.* at 137 (arguing that liberty and necessity are consistent).

The right of nature operates as the sole principle of behavior in the state of nature. Before there is a state, there are no borders restricting the operation of this right. This means that there is no property, for anyone can seize whatever he believes necessary to preserve his own life.²²⁸ Hobbes followed the limitless quality of this right to its most extreme point. Not even the body of another poses a limit on what we can do to preserve ourselves.²²⁹ Moreover, because the right operates as a concept for man, it operates with respect to perceived as well as actual threats. The subject in the state of nature responds to his fears of future threats, which are without bound, for any one can become an enemy.

Hobbes famously argued that we leave the state of nature through a mutual, reciprocal covenant of each with all.²³⁰ The point of this covenant is to create the sovereign.²³¹ The sovereign is given “the whole power” of prescribing civil law, of judging controversies under law, of making war and peace, of creating a government, and of rewarding and punishing subjects.²³² Although Hobbes used the term “sovereign” to refer to who is given the right to exercise these state powers,²³³ the important point is the moment of unanimity from which the delegation follows. The coming into being of the sovereign is the coming into being of the state with all the regulatory powers characteristic of modern life.

Hobbes seems clever to solve the unanimity problem by making the social contract an agreement among citizens, rather than between the citizens and the sovereign.²³⁴ The sovereign is a sort of third-party beneficiary of the underlying contract. I have agreed with everyone else to give the sovereign this power; I have not

228. *Id.* at 89 (“[W]here there is no *own*, that is, no propriety, there is no injustice; and where there is no coercive power erected, that is, where there is no commonwealth, there is no propriety, all men having right to all things.”) (“propriety” is an alternate spelling of “property”).

229. *Id.* at 80 (“[I]t followeth that in such a condition [the state of nature] every man has a right to everything, even to one another’s body.”).

230. *Id.* at 110.

231. *Id.* at 110-11.

232. *Id.* at 114 (“[It] is annexed to the sovereignty the whole power of prescribing the rules whereby every man may know what goods he may enjoy, and what actions he may do, without being molested by any of his fellow-subjects.”).

233. *Id.* at 174.

234. *Id.*

agreed with him. Thus, for me to resist the sovereign is to violate my contract with my fellow citizens. We see a parallel with the referee in a game. The players agree among themselves to give a third party, the referee, the power to make calls. They do not enter an agreement with the referee. As long as they are committed to the game, they have reason to respect the contract even if they disagree with the referee's particular calls. They have reason, because without the referee, there is no game at all.

Analogizing politics to a game, however, is only roughly appropriate, for the stakes of the game of politics are unlike any other. Indeed, the stakes are so high that the game is always in danger of falling into a paradox that arises from the juxtaposition of natural right and sovereign power. What are the subject's rights when his life is threatened by the exercise of sovereign power? The right of nature is unalienable; it cannot be disavowed or lost even with the formation of the state. Indeed, it is the very ground of the formation of the state, the whole point of which is to secure life from the endless threats of the state of nature.²³⁵ Accordingly, when the sovereign comes after the subject, the subject has a natural right to resist, even as the sovereign may have a right to punish.²³⁶ There is a word for this recourse to reciprocal violence: war.

The creation of the sovereign may not end the warlike state of nature at all; it may simply change the direction of the threat to life and security. Hobbes tells us that war is not just a state of actual conflict, but extends to any situation in which there is a fear of the possibility of conflict.²³⁷ As long as, and as far as, we imagine a threat from the other, we will take steps to assure our own defense. This was exactly the problem of the state of nature, which Hobbes characterized as a war of all against all. But this, it turns out, is also the problem of sovereign power. Having given all power to the sovereign, I have reason to fear that he may use it—against me. States, particularly in Hobbes's time, tended toward civil war.

235. *Id.* at 106-07.

236. See MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 3-24 (1970).

237. HOBBS, *supra* note 221, at 76 ("War consisteth not in battle only, or to the act of fighting, but in a tract of time wherein the will to contend by battle is sufficiently known.").

Here, then, is the paradox: created to provide security, the state itself can become the threat to security. We know this today as the danger of the “failed state.” Hobbes’s point was more radical, for even the successful state can appear to any particular subject as a renewed form of the state of nature. When the executioner shows up, it does not matter to the victim that he claims the warrant of sovereign authority. It is still the victim’s head that is on the block. Hobbes, who is often read as if he offers a theoretical defense of the absolute power of the sovereign,²³⁸ actually cannot resolve the fundamental problem of state violence. He observed that it is a law of nature that the prisoner will resist and, similarly, that the soldier might flee the battle.²³⁹ Nature is stronger than convention. I cannot bind myself to give up my own life under any conditions, for preserving my own life is the fundamental end that I pursue in all of my agreements.

This paradox is not just a practical problem of enforcement at the moment the state demands my life. Rather, there is a fundamental problem with the theoretical strategy of mutual reciprocal agreement, as long as self-preservation is the engine of agreement.²⁴⁰ This is the paradox that any interpretation of Hobbes must resolve. Its resolution lies in rhetoric and persuasion, rather than reason and logic. That resolution requires that we consider another important Hobbesian shift in conceptualizing law, the movement from a paradigm of property to one of authorship.

B. From Property to Authorship as the Foundation of Law

One of the puzzling facts about the American Revolution is how quickly the colonists adopted the language of slavery to describe

238. See, e.g., Eric S. Wilensky, Comment, *A Contractarian Critique of the Theory of Auto-Limitation: The Fundamental Law of International Relations*, 150 U. PA. L. REV. 2011, 2023-24 n.74 (2002).

239. HOBBS, *supra* note 221, at 142 (noting that for those commanded to serve in the military, “there is allowance to be made for natural timorousness, not only to women ... but also to men of feminine courage”); *id.* at 145 (“[I]f a man be held in prison or bonds, or is not trusted with the liberty of his body, he cannot be understood to be bound by covenant to subjection, and therefore may, if he can, make his escape by any means whatsoever.”).

240. Kant would eventually displace self-preservation with reason as the foundation of the moral order. See KANT, *Toward Perpetual Peace*, *supra* note 223, at 67.

their own political position.²⁴¹ Because many of the revolution's leaders owned slaves, we find this rhetorical turn hypocritical. They, however, did not, because they did not yet understand liberty in its modern form. They did not see a life as something to be made on the basis of the subject's own idea of the good. Role, status, religion, and community were all important in understanding the self; authenticity was not yet a generally available aspiration. Liberalism had not yet been invented. Indeed, it was more the result than the cause of the age of revolution.

Quentin Skinner's work on liberty before liberalism helps us understand the colonists' disconcerting appeal to the idea that Great Britain treated them as if they were slaves.²⁴² Liberty, he argues, was understood in contrast to dependence.²⁴³ To be dependent upon another was to lack liberty.²⁴⁴ To be liberated—as a child is at maturity—is to no longer be dependent.²⁴⁵ One extreme form of dependence was slavery. Alongside that we can put the familial dependence of children and wives. The household was a domain of dependence: all depended upon the head, who was a white, male property owner.²⁴⁶ In classical thought, the household was understood as a domain of necessity in contrast to that of political freedom.²⁴⁷ That idea of necessity had become an idea of dependence by the early modern period.

Skinner portrays a world in which liberty is a function of status, and status a function of property.²⁴⁸ Some people—slaves—were actually owned. Lesser relationships of dependence—master and servant, parent and child, husband and wife, and employer and worker—were analogous to property claims short of ownership in

241. See, e.g., THOMAS PAINE, *Rights of Man, Part II (1792)*, in POLITICAL WRITINGS 155, 198 (Bruce Kuklick ed., Cambridge Univ. Press rev. ed. 2000) (“[T]here is one general principle that distinguishes freedom from slavery, which is that all *hereditary government over a people is to them a species of slavery and representative government is freedom.*”).

242. QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 43-46 (1998).

243. *Id.*

244. *Id.* at 45-46.

245. *Id.*

246. See Theodore Hershberg, *Free Blacks in Antebellum Philadelphia: A Study of Ex-Slaves, Freeborn, and Socioeconomic Decline*, 5 J. SOC. HIST. 183, 193 (1971).

247. See HANNAH ARENDT, THE HUMAN CONDITION 22-78 (2d ed. 1998); ARISTOTLE, POLITICS 57-59 (H. Rackham trans., Harvard Univ. Press 1932).

248. See SKINNER, *supra* note 242, at 39-40.

fee simple. Dependence signified a relationship in which someone, a superior, had a legally cognizable interest that could support a demand.²⁴⁹ To be truly free meant to be free of all such demands, actual or potential, upon the self.²⁵⁰ Accordingly the only person wholly free was the sovereign, who stood at the top of the order of law.²⁵¹ His sovereignty was marked by a radical claim of ownership: a king's property was his kingdom. It was passed through inheritance or marriage. The post-Revolutionary remnant of this idea of freedom is found in the property requirements that were a condition of voting: only a person of independent means could exercise his judgment free of the fears and threats of dependence.²⁵²

If dependence is a mark of an absence of liberty, it is not enough for the sovereign to pass laws that permit freedom of action by subjects, for the sovereign can always change his mind. Liberty is undermined by the threat, not just the act. The citizen lacks freedom to the degree that he has to modulate his behavior in response to the future possibility of a demand. The example in mind is the family. No matter how kind the head of household, the wife and children must anticipate that he might change his behavior. They must, therefore, always act with an eye to keeping in his favor.

Curing the problem of dependence seems beyond the power of law, for whoever has the power to make law has the power to make bad laws. Individuals remain dependent on the goodwill of the sovereign authority. A monarchy can have only subjects—more or less happy—not citizens. Nor is the problem cured by simply expanding the ranks of who exercises sovereign power, even if we move all the way to a democracy. To give the people the power to make laws may create the worst sort of dependency: fear of falling out of favor with the mob. Neither does a property qualification for citizen participation in governance cure the problem, for property

249. *Id.* at 42-44.

250. *Id.* at 45-46.

251. *See id.* at 55-57.

252. *See* Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1509-10 (2002) (reviewing ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000)) ("Property supplied independence; those without property were presumed to be economically dependent on and subservient to others. As a result, they would be subject to political manipulation and control by their economic patrons and social betters.").

can always be lost. The economic order is as much one of dependence as the political order, particularly for those who must work.

The revolutionaries came as a matter of practice to the same position that Hobbes had reached as a matter of theory. The problem of dependence is solved only if in following the law I am following a command that I have given to myself. There must be no gap between self and sovereign. We are back to the unanimity requirement.

To solve the problem of unanimity, Hobbes revisited an idea of property, but shifted the point of emphasis from the thing (or person) owned to ownership.²⁵³ Ordinarily, when we think of ownership, we think of a right to dispose of property by sale, transfer, or even destruction.²⁵⁴ We might speak of an owner's authorization of certain activities on or with respect to his property. If we think about intellectual property, the distinction between ownership and authorization tends to disappear: to own this sort of property is just the right to authorize its use. The more we think of property from the perspective of authorization, the more we are likely to think of real property disposition as simply one example of authorization. We will end up saying things like "property is a bundle of rights" by which the law specifies exactly what it is that an owner can authorize.²⁵⁵

In contemporary jargon, we could say that Hobbes located the origin of the state in intellectual rather than real property. The critical passage in *Leviathan* is as follows:

For that which in speaking of goods and possessions is called an *owner* ... speaking of actions is called author. And as the right of possession is called dominion, so the right of doing any action is AUTHORITY. So that by authority is always understood a right of doing any act; and done by *authority*, done by commission of license from him whose right it is.²⁵⁶

253. See HOBBS, *supra* note 221, at 101-02.

254. See, e.g., Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 794-96 (2005) (discussing the right to destroy as part of the right of ownership).

255. See, e.g., *id.* at 794 ("That said, the relatively small number of right-to-destroy cases that have been litigated provide a rich opportunity to illuminate property law's first principles. The right to destroy property is, after all, often an extreme exercise of some of the more widely recognized sticks in the bundle of rights.").

256. HOBBS, *supra* note 221, at 101-02.

In essence, Hobbes asked: By whose authority does the sovereign act? The question arises once we abandon the premise that the sovereign stands in a legal relationship of ownership to the state and its citizens. Indeed, Hobbes has turned the question around by asking how it is that a citizen, who is in no sense to be the property of the sovereign, is nevertheless bound by the sovereign. His answer inverted what had been the property relationship. The citizen is bound because he has authorized the actions of the sovereign.²⁵⁷ The sovereign in effect is exercising the citizen's authority.²⁵⁸

This concept is readily accessible to the modern mind. Consider an agent, perhaps a lawyer, who acts on behalf of a principal. The principal has authorized the agent to make decisions or enter into agreements that bind the principal. It is as if the principal had done the act himself.²⁵⁹ Others are to see those acts as "done" by the principal, just as the principal holds himself accountable for them.²⁶⁰ A legal order allows us to create this relationship of representation through authorization for artificial persons as well.²⁶¹ Thus, corporate officers act as agents or representatives of the corporation.²⁶² Their acts, within the limits of their authorization, are not their own.²⁶³ Instead, their acts are the legal responsibility of the corporation.²⁶⁴ In this way, a fiction becomes capable of taking acts with real consequences in the world.²⁶⁵ This language may seem modern, but Hobbes uses precisely these terms of fiction, artificial persons, and representation.²⁶⁶

In an ongoing political community, most relationships of authorization will be heavily regulated by law. Hobbes told us that children, fools, and madmen cannot authorize actions, for they do not have the capacity to "judge the same reasonabl[y]."²⁶⁷ Hobbes

257. *See id.*

258. This idea, which is quite old, springs up in the recent "fiduciary" theories of public service. *See, e.g.,* Ethan J. Lieb et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699 (2013); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671 (2013).

259. *See* HOBBS, *supra* note 221, at 101-03.

260. *See id.*

261. *See id.* at 102-03.

262. *See id.*

263. *See id.* at 102.

264. *See id.* at 102-03.

265. *See id.*

266. *See id.* at 103.

267. *Id.*

noted that “[i]nanimate things (as a church, an hospital, a bridge) ... cannot be personated [(represented)] before there be some state of civil government,” for these relationships are fictions that require law if they are to be recognized and enforced.²⁶⁸ Yet a state seems to be just the sort of inanimate thing of which the representation depends upon a similar fiction. In this case, however, we do not have civil government to specify the terms of the fiction, for we are speaking of the origin of that government.

Hobbes linked authorization to representation.²⁶⁹ Just as a lawyer can represent many individuals, each of whom has authorized him, so the sovereign acts on the authority extended to him by every individual citizen.²⁷⁰ They will extend that authority as long as they see the sovereign as their representative.²⁷¹ Accordingly, the citizens remain the authors of the sovereign’s actions, including the production of law.²⁷² This is, of course, a fiction. There is never any moment at which persons actually authorize the sovereign to act on their behalf. There is no need to specify the conditions of an original position—either real or hypothetical—in which authorization is extended. The foundation of the state is not a problem of origins at all. It is rather a problem of persuasion. Citizens must be persuaded to see the sovereign as exercising their authority. If they do not, they remain in the state of nature, which means they are effectively in a state of war with whoever claims to be sovereign.²⁷³

Just as a principal can withdraw authorization extended to an agent, a citizen can withdraw his extension of authority to the sovereign. Politics becomes a project of persuasion, for the state must persuade the citizen that the sovereign represents him.²⁷⁴ In part, persuasion is a matter of procedure, as the citizen excluded from the vote will not see himself in the law. Hobbes also thought that if citizens see the sovereign as the executioner coming after them, they are unlikely to see themselves in that action.²⁷⁵ Sometimes the sovereign-executioner takes the form of enforcement of

268. *Id.* at 102-03.

269. *See id.* at 104.

270. *See id.*

271. *See id.*

272. *See id.*

273. *See supra* notes 225-35.

274. *See HOBBS, supra* note 221, at 92-93.

275. *See id.* at 104-05.

criminal law. More often, it appears as the figure of death on the battlefield. Hobbes failed to foresee the strength of modern nationalism, which has supported mass mobilization and mass violence. Hobbes's general point, however, is surely correct: identification with the sovereign depends upon substance as well as procedure.²⁷⁶ The citizen must be able to see the law as something that he has authored. He must be given an account that persuades him that this is indeed something he has done.

Unless citizens are persuaded to see the sovereign as a part of themselves, the state collapses into the state of nature.²⁷⁷ Accordingly, the government's first responsibility is to sustain the belief in self-authorship of the law. That the origins of the state lie in popular revolution, that the people created a constitution, that they have defended this constitution through acts of sacrifice, and that they now author the laws—all of these are elements of the modern social imagery.²⁷⁸ We often imagine a "causal" narrative of legitimacy that runs from citizen, to sovereign, to law. But this is an inversion of our actual practices, which *begin*, not end, in legal texts. With the help of judges, we move from these texts to a narrative of their authorship, at the end of which we are to see ourselves as authors. Democratic legitimacy depends on this movement from text to authorship. And it is precisely this movement that our practices of statutory authorship must put on display.

C. The Procedural Turn in Modern Democratic Theory

The Hobbesian idea of self-authorship has played an important role in theorizing modern, constitutional democracy. Although we agree with Hobbes that belief in self-authorship is a matter of substantive interpretation of laws, contemporary political theorists have moved in a procedural direction. They focus on discourse and the conditions under which the outcomes of public discourse can—or

276. *See id.*

277. *See supra* notes 225-35.

278. *See* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 49-50, 68-70, 74 (1999) (discussing the relation of law and revolution); *id.* at 10-14 (discussing the myth of popular will as the origin of law's rule); *id.* at 45-50 (discussing the community's perception that it is the source of law); *id.* at 95-97 (discussing the role of sacrifice in law). For a fuller treatment of these issues, see PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA 49-100 (1997).

should be—accepted by citizens as a product of their own authorship. This is the leading thought in the work of Jürgen Habermas on law; this idea appears in American First Amendment jurisprudence, particularly in the work of Robert Post.²⁷⁹

Habermas's work on law applies his more general theory of discourse ethics to politics.²⁸⁰ By discourse ethics, he refers to a set of regulative criteria that express the internal norms of validation of an argument.²⁸¹ As applied to politics, these norms refer to the conditions of participation in a public, discursive exchange.²⁸² Unless those conditions are met, the outcome of the exchange cannot have a valid claim on the whole community.

Most importantly, participants must be free to enter the conversation and free to express whatever they believe to be relevant.²⁸³ These are conditions of free speech and free access. Freedom in both dimensions requires that participants come to their positions on their own—they must be speaking for themselves. In the modern constitutional state, this means that there must be a significant domain of private freedom within which citizens can exercise their autonomy in forming themselves. Public freedom depends, in this sense, on private freedom.²⁸⁴ Accordingly, public life has a large investment in securing the conditions of private life. Of course, private life is no longer thought of as organized around property, the earlier idea of independence.²⁸⁵

Private freedom in the modern state is a matter of rights enforced through law. For the state to meet the conditions of discursive legitimacy, Habermas argues that the laws that articulate and give

279. See generally *infra* notes 286-92 and accompanying text.

280. See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 7 (William Rehg trans., 1996) (1992) [hereinafter HABERMAS, BETWEEN FACTS AND NORMS] (aiming to “reconstruct the normative content of the system of rights and of the idea of the rule of law from the perspective of discourse theory”). Habermas's work in law proceeds from his earlier magnum opus. See generally 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., 1984) (1981); 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM (Thomas McCarthy trans., 1987) (1981).

281. See HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 280, at 7.

282. See *id.* at 133-50.

283. *Id.* at 176-86 (discussing procedures that regulate discourse and bargaining).

284. See *id.* at 82-131 (elucidating this “paradoxical” and “puzzling connection between private liberties and civic autonomy”).

285. See Hershberg, *supra* note 246, at 193.

effect to these rights must themselves be viewed by citizens as the product of their own authorship.²⁸⁶ There is no pre-political moment of law—something like natural law or law received from outside the community. Rather, the law must be popularly legitimated all the way down. All law must satisfy the conditions of discursive validity.²⁸⁷

Whereas Hobbes spoke of the conditions under which the sovereign will be understood to exercise the citizens' agency, Habermas speaks of the formation of public opinion in a modern state.²⁸⁸ Public opinion is now doing the work of the moment of unanimity in the formation of the social contract. There must be equilibrium between public opinion and legislation if a body of law is to be seen as authored by the citizens. The point is obvious if expressed in the negative. Legislation that runs against public opinion cannot be viewed as authored by the citizens. It fails to express their beliefs. Thus, Habermas offers the following as a democratic principle of legitimacy: “[O]nly those statutes may claim legitimacy that can meet with the assent ... of all citizens in a discursive process of legislation that in turn has been legally constituted.”²⁸⁹ Legitimation, accordingly, is an ongoing project of a reciprocal relationship between statutory outcomes and citizen beliefs. It is not exhausted in the voting booth. Even elected representatives can produce legislation that in itself fails to speak to our status as authors.

Robert Post puts this same idea of self-authorship at the center of his theory of the meaning of the First Amendment.²⁹⁰ For Post,

286. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 280, at 126-31. Citizens “achieve autonomy only by both understanding themselves as, and acting as, authors of the rights they submit to as addressees.” *Id.* at 126-27 (“The idea of self-legislation must be realized in the medium of law itself. Hence the condition under which citizens can judge whether the law they make is legitimate ... must in turn be legally guaranteed. This end is served by the basic political rights to participate in processes that form the legislator’s opinion and will.”). “The citizens themselves become those who deliberate and, acting as a constitutional assembly, decide how they must fashion the rights that give the discourse principle legal shape as a principle of democracy.” *Id.* at 127.

287. *See id.* at 104-10, 121, 127-31.

288. *Id.* at 132-93 (discussing extensively the means by which administrative power bound to communicative power—itsself the product of certain specified conditions—serves to legitimize a political order and the exercise of political power).

289. *Id.* at 110.

290. *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment*

freedom of speech is the source of legitimacy for the legal productions of the state. He picks up on Habermas's idea of discourse ethics, asking what are the conditions under which citizens will believe themselves excluded from the formation of public opinion that leads to legislation.²⁹¹ His immediate answer is that a citizen who is excluded from the public debate, or from speaking freely in the public debate, cannot believe that his point of view has been considered.²⁹² Unable to put forth his views, he is denied the opportunity to try to persuade his fellow citizens. Public opinion is formed as if he were absent—or worse, as if he did not count.

Thus, for Post, just as for Habermas, the fundamental principle of the First Amendment is an anti-exclusion norm. Short of some extraordinary threat to the public safety, everyone must be allowed to enter the public forum and express whatever views seem important to them. Exclusion undermines the claim to legitimacy of whatever state behavior, including legislation, follows.²⁹³ The citizen excluded from participation in the formation of public opinion stands to his own state's law as does a foreigner. The law may make a just claim upon him, but it is not his own. He has no particular reason to defend it, for his identity is not at issue. Indeed, he has every reason to view the law through the prism of his own self-interest, asking how he can turn it to his advantage. In that case, the idea of a community of citizens engaged with each other in a mutual project of self-government has already failed. Merely enacting laws that pass some abstract idea of justice will not suffice to recover it.

Jurisprudence, 88 CALIF. L. REV. 2353, 2368 (2000) (“[T]he participatory approach views the function of the First Amendment to be the safeguarding of public discourse from regulations that are inconsistent with democratic legitimacy. State restrictions on public discourse can be inconsistent with democratic legitimacy in two distinct ways. To the extent that the state cuts off particular citizens from participation in public discourse, it *pro tanto* negates its claim to democratic legitimacy with respect to such citizens. To the extent that the state regulates public discourse so as to reflect the values and priorities of some vision of collective identity, it preempts the very democratic process by which collective identity is to be determined.”).

291. *Id.*

292. *Id.* at 2369-74.

293. Dworkin makes a similar point. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 184-210 (2000). *But see* JEREMY WALDRON, THE HARM IN HATE SPEECH 5-6 (2012) (arguing that hate speech should be disallowed on the grounds that it undermines “group” dignity).

Both Habermas and Post tie the idea of a liberal polity to the idea of self-authorship. Both are deeply inside the shift of legal paradigm from property to authorship. Property, if allowed to intrude upon the foundations of the state, can only take the form of coercion, violence, and threats of violence. To preserve individual freedom within the law, the laws themselves must be an expression of that freedom. They must be seen as freely given by the subject to himself. Thus, the subject must bind himself or herself. For Post and Habermas, this sets political theory on an inquiry into procedure: what are the conditions under which citizens will see their political participation as an expression of their free agency?

The answer to this procedural question no doubt constitutes a necessary criterion of democratic legitimacy, but it is not sufficient. Neither Habermas nor Post can deal with the intergenerational problem of the law, the constant reality of being bound by laws in whose production one had no chance to participate. How am I to see my own authorial agency in that law? A law does not become mine simply because I am reminded that the people of a prior generation produced the law. If anything, that reminder only reinforces my grievance. More deeply, procedure is no guarantee of substance. Why else would we have substantive constitutional norms?

In the end, the question is whether we take ownership of law as acts of collective self-authorship. This requires the management of substantive belief, not just a demonstration of fair procedures. Expanding the horizon of consideration from voting alone to the discursive formation of public opinion is a step in the right direction, but does not yet reach the goal. The next step is up to the courts, who must persuade us to see the law as our common project.

CONCLUSION

Academics have gotten into a bad habit of distinguishing democracy from law. Democracy is about politics, which necessarily involves passions, interests, and shifting coalitions. Against this backdrop, law seems to embody the virtues that politics lacks: objectivity, predictability, and stability. Courts are to bring the virtues of the rule of law to our otherwise unruly politics. Separating law from politics once seemed a way to secure the judicial role as the voice of principle that could rationally govern the democratic

agon. Yet this view of law—as a corrective to politics—led only to puzzles about the judicial role, from the countermajoritarian difficulty of constitutional law to the endless debates about “faithful agency” in statutory construction.

As it turns out, the diagnosis was misguided. Democratic politics is not bereft of principles; rather, principles are just what we argue about. Because the diagnosis was wrong, the remedy has been ineffective. Politics without courts is not lacking in reason. The risk runs the other way. Courts without politics lack legitimacy. If we cannot separate politics from principle, we cannot separate courts from politics. The question is not whether courts can be apolitical, but what kind of politics the courts must pursue.

In this Article, we answer that question by taking seriously the way courts facilitate, rather than subvert, the democratic enterprise of ordinary law. Our answer does not center on principles. It centers on narratives. A democracy depends on citizens’ beliefs that the rule of law and the rule of the people coincide. Courts are uniquely situated to take up that rhetorical task of persuasion. Their role is not different in kind from that demanded of other public figures and statesmen in a democracy. They too must persuade us that we are a people advancing a common project with a past that we recognize as our own and a future in which our responsibility is to continue the project.

Some will respond with considerable skepticism, if not fear, to the idea that there is no truth of the matter that is within reach of the courts; that opinions are a display of rhetoric not proof; that the only measure of law’s success is persuasion. There is nothing to fear in any of this. We have lived for a very long time under just these conditions. In fact this is all that we have ever known, notwithstanding claims of objectivity, truth, proof, and right answers. Law is not a science, but a practical project of managing beliefs. Central among those beliefs is the democratic authorship of the law.

Returning to Hobbes helps us see that authorship of law is a practice of social accountability, not a fact of draftsmanship. When we ascribe authorship to the people, we are following the fundamental myth of the democratic state. To call self-authorship a myth is neither to discount its importance nor to downplay its power. The myth supports belief in a collective agent—We the People—that wrote a constitution two hundred years ago, and that continues to

author its own destiny to this day. The courts' role is to continue the project by persuading us to see the law, the Constitution and statutes alike, as the site of our own freedom. If the courts can no longer persuade us of this, it is not just their project that will falter, but the entirety of the democratic project. Without the myth of democratic self-authorship, we may be governed justly, but we will not be governing ourselves.