

Articles

CONTINUITY, COHERENCE, AND THE CANONS

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INTRODUCTION

“[O]ur legal tradition assigns to courts a creative role in improving law, as well as a guardian’s role in preserving its continuity and predictabil-

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ity.”¹ The great challenge presented to courts in this tradition has been to balance these dual roles when construing statutory law. Judges consistently are called upon to accommodate new legislation within the greater statutory legal landscape, a task that often asks them to find meaning in ambiguous language and make sense of overlapping statutes seemingly pointing in different directions. For many scholars, the inherent challenges of the interpretive endeavor, as well as a broad vision of the judiciary’s role as engineer of legal reform, dictate that courts should draw upon their creative role when construing statutes. But within the realm of modern statutory interpretation—that is, the interpretation of statutes *not* intended to delegate a broad lawmaking function to the courts—any emphasis on the role of courts as engineers of legal reform poses troubling ramifications for the other half of the equation—namely, the judiciary’s role as guardian of the law’s continuity and predictability.

Nowhere does this guardian’s role take on greater importance than where courts are called upon to interpret ambiguous legislative mandates. Courts best carry out this role by constructing and adhering to interpretive norms that enable the accommodation of new legislation within what Hart and Sacks called “the general fabric of the law”²—that is, by building principled connections between interpretations over time.³ The guardian’s role is also a cautious role—courts ought not upset settled continuity norms where legislative signals are vague or fleeting, lest the courts take an ambiguous legislative directive and run with it.

By contrast, the chief proponents of an engineering vision of courts in the realm of statutory interpretation generally contend for an interpretive approach by which courts “update” the legislature’s work and absolve that body of the need to police judicial constructions that may no longer remain in keeping with prevailing political or social norms. The pathbreaking work of William Eskridge, for example, presents a dynamic theory of statutory interpretation pursuant to which courts should reference signals being sent by the current Congress as well as the broader social and legal context when addressing questions of statutory construction.⁴ Among other things, Eskridge posits that “[w]here they diverge from the Court’s preferences, the expectations of the current Congress and the President are more important

¹ ROBERT E. KEETON, *VENTURING TO DO JUSTICE* 11 (1969).

² HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1416 (tent. ed. 1958).

³ As Justice Cardozo once said: “We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful.” BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 129 (1921).

⁴ See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331, 334 (1991) [hereinafter Eskridge, *Overriding*] (arguing that the Supreme Court is, and should be, responsive to current congressional expectations and the social context: “The Court facilitates the operation of pluralism over time by updating statutes to reach new situations, to reflect new values, and to accommodate the current preferences of governing political forces.”).

to the Court than are the expectations of the enacting Congress.”⁵ Alexander Aleinikoff has advanced his own interpretive approach that invites the “updating” of statutory interpretations as norms and values evolve.⁶

These so-called “dynamic” theorists (if we may group them loosely together) have met with criticism for tying statutory meaning to changing social and political norms because, as critics have argued, such an approach is “inevitably indeterminate,”⁷ offers “few interpretive constraints” on the judge,⁸ and invites judges to take on a policymaking role not in keeping with the separation of powers.⁹ The recent work of Einer Elhauge, who tries to answer many of these criticisms while defending certain core aspects of dynamic theory, presents an occasion to revisit the viability of a broader dynamic approach to statutory interpretation.¹⁰

Elhauge’s scholarship is important because he seeks to build a more workable and disciplined dynamic framework, one that better constrains judges from imparting their own views about how the world should look, and instead ties statutory meaning exclusively to legislative source materials rather than broader social norms or other factors about which reasonable minds can be said to differ. Specifically, Elhauge argues that when faced with statutory indeterminacy, courts “should not exercise judicial judgment but rather should act as honest agents for the political branches.”¹¹ In fleshing out how he believes courts may achieve this goal, Elhauge proposes a default rule regime pursuant to which the judiciary, when construing statu-

⁵ *Id.* at 390.

⁶ See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 54, 62–63 (1988) (“The task is not to make current policy judgments or to ask how the current legislature would decide the issue today, but to make sense of a statute’s language and structure in light of the current social and legal context.”); see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982) (positing that judges be permitted to “update” statutory law and declare obsolete statutes invalid).

⁷ John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2221 (1995); accord Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 69 (1994) (“Laws are designed to bind, to perpetuate a solution devised by the enacting legislature, and do not change unless the legislature affirmatively enacts something new.”).

⁸ Nagle, *supra* note 7, at 2214; accord *id.* at 2221 (“The sources from which a dynamic statutory interpreter may seek evidence of statutory meaning are limited only by the interpreter’s imagination.”); see also Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 906 (2003) (“[U]pdating may cause harm if the new values, not yet able to receive clear democratic support, are questionable on normative grounds.”).

⁹ See Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 852–53 (1994).

¹⁰ See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) [hereinafter Elhauge, *Preference-Eliciting*]; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2029–30 (2002) [hereinafter Elhauge, *Preference-Estimating*].

¹¹ Elhauge, *Preference-Estimating*, *supra* note 10, at 2029–30. I question whether “honest agent” is the appropriate descriptor for Elhauge’s model; the “partnership” model, pursuant to which judges take up in some respects where Congress leaves off, may be more on point. See generally John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 16–27 (2001) (describing the diverging models).

tory ambiguity, should reference exclusively the current prevailing legislative preferences and implement the same.¹² In a companion piece, Elhauge extends his theory to claim that the judiciary, when faced with ambiguous statutory language and unable to determine prevailing legislative preferences, should adopt a construction aimed at eliciting a legislative reaction—that is, spurring the legislature to take up and resolve the otherwise indeterminate statutory question.¹³ Elhauge contends that adopting such an approach will constrain the judiciary from imparting its own views into the interpretive process, and thereby enable the judiciary better to fulfill its “faithful honest[] agent” role.¹⁴ Elhauge’s work sets forth a major new framework for statutory interpretation.

By the same token, in attempting to rein in dynamic theory in certain respects, Elhauge’s work reveals additional flaws in the dynamic approach that have not been explored previously in the literature. Among other things, the idea that the legislature would willingly cede its authority to “update” statutes runs against what tradition and experience have taught us: namely, that each branch generally will seek to aggrandize its own powers at the expense of its companion branches. Indeed, this phenomenon provided the impetus for the Founders to structure the separation of powers as they did. Further, insofar as relinquishing to the judiciary the authority to “update” statutes will inevitably insulate many judicial decisions from review even where legislative preferences are at odds with the decision (given how difficult it is to pass legislation in our structure), such a transfer of authority undoubtedly would have real bite.

More fundamentally, the idea that statutory meaning should turn on prevailing legislative preferences ignores the legislative deal that brokered the statutory language in question as well as any background norms against which the language came into being. Even assuming that the Supreme Court could successfully gauge controlling political preferences in the sitting legislature—a claim that is difficult to defend—the idea that statutory gap-filling should turn on such preferences usurps the legislature’s role as the impetus for statutory change and undermines continuity and predictability in statutory law.

Both aspects of Elhauge’s theory likewise erode core separation of powers principles. First, by placing the judiciary in the position of divining and reacting to current legislative preferences, the theory comes close to merging the functions of those bodies, insofar as it calls upon judges to insert themselves into the ebbs and flows of the legislative process and to pick up where the legislature leaves off in terms of marshaling pending legislation through to the status of enforceable law. Second, the idea that the Supreme Court should be in the business of actively and routinely eliciting

¹² See Elhauge, *Preference-Estimating*, *supra* note 10, at 2030, 2037.

¹³ See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2165.

¹⁴ See *id.*

legislative reactions to its decisions where it cannot ascertain these preferences has the Court shunning much of its interpretive responsibility, while at the same time attempting to displace the priorities of its coordinate branch.

More broadly, in promoting a regime that ties statutory construction to prevailing political winds or evolving social norms, the various iterations of dynamic theory sacrifice the guardian role of the courts and the important values of statutory continuity, coherence, and predictability in favor of modest short-term gains. This sacrifice flows not simply from the premise that dynamic theories invite statutory meanings that change with time, but also from the retroactive nature of judicial decisions. Although new legislation upsets reliance interests and threatens stability in the law, the dual protections of the prospective nature of legislation and the inherent difficulty of enacting new statutes temper those risks. The absence of these protections in the context of judicial decisionmaking means that the threat to stability in the law will be that much greater within a regime of interpretation that empowers judges to act like legislators and “update” statutes.

In this Article, I argue that when construing statutory ambiguity, the judiciary’s adherence to its guardian role must be paramount. Accordingly, courts should elevate norms of continuity, coherence, and predictability over current democratic preferences or what a court perceives to be prevailing social norms. This approach better accords with the constitutional separation of powers and protects the reliance interests of broader society as well as legislative and judicial actors who operate against the backdrop of prior law. Properly chosen principles of construction can both constrain the judiciary and aid it in cultivating a more coherent statutory landscape, and in so doing enhance the legislative-judicial relationship. Within such a regime, when Congress decides to take an issue through to enactment, it can predict how its language will be interpreted and applied to situations known and unknown. Such a framework leaves the decision whether to chart a course of change in statutory law to the most politically accountable body—the legislature.

This Article proceeds in three parts. Part I sets forth some of the most important elements of Elhauge’s recent work as it builds on that of prior dynamic theorists. Part II explores some of the limitations of Elhauge’s proposal as well as dynamic theory more generally, and revisits the question of how to construct norms governing the construction of statutory ambiguity. In contrast to the notion that statutory meaning can and should change with political preferences or changing social norms, this Article contends that the values of continuity, predictability, and coherence should underlie any interpretive regime and inform the judiciary’s statutory gap-filling. Elhauge’s secondary proposal that a statutory construction be chosen to elicit legislative reaction where prevailing political preferences are unknowable is rejected in favor of a regime that seeks to achieve predictable and cohesive principles of construction and stability in the law. I argue

that such stability will be undermined by the short-term costs associated with an interpretive approach that calls for the election of extreme interpretations where necessary to put an issue on Congress's radar screen, and the long-term costs associated with Congress's inconsistent attention to statutory decisions as well as its inability to expend the resources required to take up the judiciary's invitation in many such cases.

In Part III, the Article explores the construction of intersecting statutes, an example that will demonstrate the importance of judicial advancement of a coherent web of statutory meaning coupled with a healthy respect for *stare decisis*. A timely example forms the basis for this Part: the intersection of the longstanding general habeas corpus statute, 28 U.S.C. § 2241, with recently enacted amendments to the habeas and immigration laws purporting to curtail judicial review. The discussion explores a series of Rehnquist Court decisions interpreting these intersections, observing that in each the Court has held fast to continuity and coherence norms while building off of a model established during the Reconstruction period.¹⁵ The discussion in this Part highlights many of the problems inherent in dynamic theories of statutory interpretation that not only accept but welcome changing statutory constructions. In particular, default rules that place controlling weight on contemporary political preferences undervalue longstanding statutes that deserve special respect for their longevity and foundational role in the evolving statutory framework.¹⁶ The example of intersecting statutes underscores the importance of constructing a statutory regime capable of addressing iterative applications of the same statute and achieving coherence among such applications.

In the end, an interpretive framework constructed with a healthy regard for *stare decisis* and well chosen canons that further the values of continuity and predictability leads to a more stable and coherent statutory fabric, while enhancing the efficiency and harmony of the legislative-judicial relationship. Ultimately, the responsibility to construct a workable and coherent legal regime out of congressional directives falls to the judiciary, and the judiciary does its best work here when it acts as guardian of law's continuity and coherence. As Judge Friendly once observed: “[Courts] must consult not only what went before but what came after—the *statute must be read as part of a continuum*.”¹⁷

¹⁵ To be sure, in the Court's most recent decisions involving the War on Terror, we see a Court wavering somewhat in its commitment to continuity norms in the broader habeas context. Compare *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (reading a broad and rather vague authorization of war to trump specific prohibition on the detention of citizens absent express congressional authorization), with *Rasul v. Bush*, 542 U.S. 466 (2004) (broadly protecting the Court's jurisdiction under 28 U.S.C. § 2241 (2005)). These cases are discussed *infra* at Part III.D.

¹⁶ One might call the original habeas grant, now codified at 28 U.S.C. § 2241, a “super-statute.” See generally William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) (positing that certain longstanding and significant statutes rise to the status of “super-statute”).

¹⁷ Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 214

I. A NEW TAKE ON DYNAMIC THEORY

The crux of Elhauge's first-order argument is that when faced with statutory indeterminacy,¹⁸ courts should turn to a set of default rules constructed to gauge currently enactable legislative preferences. Such default rules are "designed to minimize" the contemporaneous "political dissatisfaction with statutory results"¹⁹ because they call for the adoption of a construction that best estimates the political preferences of the current government where they can be readily ascertained.²⁰ This approach, which I will call "estimating dynamic theory," enjoys greater legitimacy because, in Elhauge's view, it actually will cabin opportunities for "judicial judgment" to influence the construction of statutory ambiguity.²¹ Elhauge sets forth an important new framework for approaching the interpretive endeavor, though aspects of it are not new.²²

Much of Elhauge's work builds in particular on the prior work of William Eskridge and Alexander Aleinikoff. Eskridge, well known as the leading dynamic theorist, has argued that statutes "should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context."²³ Aleinikoff's work posits that judges should construe statutes by taking a "nautical approach," which views "interpreters as supplying important direction to the development of the law in a complex, changing society."²⁴ This charge requires the jurist to "make sense of a statute's language and structure in light of the current social and legal context"; it does not call upon judges "to make current policy judgments or to ask how the current legislature would decide the issue today."²⁵

(1967) (emphasis added).

¹⁸ Elhauge limits his proposal solely to the construction of statutory ambiguity.

¹⁹ Elhauge, *Preference-Estimating*, *supra* note 10, at 2030.

²⁰ *Id.* at 2037.

²¹ *Id.* at 2030–31. Elhauge further contends that courts ought to exercise their judgment to maximize political satisfaction regardless of whether they are faced with pure statutory interpretation or the exercise of interstitial common law power created by the relevant statute. *See id.* at 2032.

²² *See* Eskridge, *Overriding*, *supra* note 4, at 334, 390–91; *see also*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451 (1989) ("[I]nterpretive norms must be consistent with the constitutional structure and the fabric of modern public law; must improve rather than impair the performance of governmental institutions; and must reflect a conception of politics that is likely, if adopted, to help combat defects in regulatory practices.").

²³ William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) [hereinafter Eskridge, *Dynamic Statutory Interpretation*]. In some of his earlier work, Eskridge called for a Gadamerian fusion of horizons between original expectations and modern day realities. *See* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 613, 632–66 (1990). In this earlier work, Eskridge's vision of dynamic interpretation can be said to be more limited than Elhauge's, for it still recognizes the importance of the enacting legislature's expectations surrounding the law being interpreted.

²⁴ Aleinikoff, *supra* note 6, at 62–63.

²⁵ *Id.* at 54.

Elhauge builds on the underlying premises of these proposals, but seeks in his theory to construct various limiting principles as a means of cabining the potential for “judicial judgment” to infiltrate the interpretative process. Thus, estimating dynamic theory permits judges to “update” statutes, but only where statutory ambiguities may be defined in reference to changing political tides, or what Elhauge calls “enactable political preferences.” These he defines as “the political preferences of the polity that are shared among sufficient elected officials . . . [such that] that they could and would be enacted into law *if* the issue were on the legislative agenda.”²⁶ Courts faced with statutory indeterminacy should make their “best estimate” of how the sitting legislature would resolve the court’s predicament if faced with the question itself.²⁷ In adopting this more limited version of dynamic theory, Elhauge tries—much more than Eskridge in his work—to nod to the traditional separation of powers principles and construct a “faithful agent” model of statutory interpretation.²⁸

Estimating dynamic theory’s “faithful agent” approach openly eschews the traditional Legal Process focus on the enacting legislature’s purpose and the “mischief” that the statute was designed to address. Indeed, Elhauge concedes that his default rules “often do not track the most likely meaning or even preferences of the enacting legislature.”²⁹ Further, Elhauge freely acknowledges—indeed embraces—the fact that estimating theory, like other dynamic theory, will often lead to statutory constructions that “vary with changed circumstances” because the interpretations will track constantly changing, controlling legislative preferences.³⁰

Elhauge defends estimating dynamic theory on both descriptive and normative grounds. As a descriptive matter, Elhauge, like Eskridge and Aleinikoff before him, cites in support of his theory the examples of the Supreme Court’s evolving construction of Title VII³¹ and its resolution of the tax-exempt status of racially discriminatory schools in *Bob Jones University v. United States*.³² He also points to *Chevron* deference as representing a

²⁶ Elhauge, *Preference-Estimating*, *supra* note 10, at 2034 (emphasis added).

²⁷ *Id.* at 2049.

²⁸ Eskridge’s model is more that of a “relational agent.” WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 125, 127–28 (1994) [hereinafter ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION].

²⁹ Elhauge, *Preference-Estimating*, *supra* note 10, at 2030–31.

³⁰ *Id.* at 2038.

³¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000); *accord* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (interpreting Title VII to permit voluntary affirmative action programs).

³² 461 U.S. 574 (1983); *accord* Aleinikoff, *supra* note 6, at 63–65 (noting that *Bob Jones* “made clear that private discrimination in some contexts is wholly inconsistent with public policy”); Eskridge, *Dynamic Statutory Interpretation*, *supra* note 23, at 1546–48 (reading the case as “a classic case in which the Hart and Sacks approach is invoked by the Court as a substitute for careful analysis” and viewing as the better justification for the holding “the dynamic, deliberative one suggested by the concurring opinion of Justice Powell,” which embraces “the evolutive perspective” of policy norms). This

default rule that calls for an altered understanding of statutory ambiguity where the political winds have shifted.³³ As for the normative basis for the estimating dynamic theory, Elhaug contends that it better constrains judges from imparting their own views into the interpretive process than do such alternatives as the Legal Process school or a blanket devotion to interpretive canons.³⁴ Finally, Elhaug asserts that if given the choice, sitting legislators would rather wield influence over the range of statutory questions likely to come before the judiciary during the legislators' tenure in contrast to questions that will arise over time with respect to their enactments.³⁵ This latter assertion underlies Elhaug's entire default rule analysis and, he contends, legitimizes the approach because it operates as the best means of making the courts "faithful agents" of the legislature by honoring legislative preferences.³⁶

Where parsing enactable preferences does not yield a clear answer to the interpretive question at hand, Elhaug maintains that political satisfaction may be achieved only through purposeful elicitation of a legislative reaction by the chosen judicial interpretation.³⁷ Reduced to its core premise, the "eliciting" rule contemplates that where the legislature disagrees with a judicial statutory construction, the legislature will override it; when the legislature does not override, we may presume that it agrees with the judiciary's chosen construction.³⁸ Elhaug argues that an "eliciting" construction should be chosen where three conditions are met: "estimated enactable

decision is explored in greater detail *infra* at text accompanying notes 198–222.

³³ See Elhaug, *Preference-Estimating*, *supra* note 10, at 2126–56; *accord* *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (holding that where an agency-administered statute is ambiguous, courts should defer to an agency's "reasonable" construction of that statute). Aleinikoff views *Chevron* in a similar fashion. See Aleinikoff, *supra* note 6, at 42–46; see also Elhaug, *Preference-Estimating*, *supra* note 10, at 2036, 2134; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518 (noting that purpose of *Chevron* rule is to permit agency interpretations to shift with administration changes).

³⁴ Consequently, estimating dynamic theory relegates to secondary status (to the extent that it does not disregard entirely) the statutory canons traditionally employed by courts. See Elhaug, *Preference-Estimating*, *supra* note 10, at 2036, 2134.

³⁵ See *id.* at 2039.

³⁶ See *id.* at 2039–40.

³⁷ Elhaug posits:

[W]hen enactable preferences are unclear, often the best choice is instead a preference-eliciting default rule that is more likely to provoke a legislative reaction that resolves the statutory indeterminacy and thus creates an ultimate statutory result that reflects enactable political preferences more accurately than any judicial estimate possibly could.

Elhaug, *Preference-Eliciting*, *supra* note 10, at 2165. At one point, Elhaug posits that the elicitation approach will only be called for in a "limited" range of cases, Elhaug, *Preference-Estimating*, *supra* note 10, at 2037; later, he notes that it may in fact be called for in "many" cases, Elhaug, *Preference-Eliciting*, *supra* note 10, at 2172. Given my view that gauging political winds on a range of statutory questions will be often a fruitless enterprise, see *infra* text accompanying notes 89–95, I think that the circumstances calling for an eliciting-interpretation under his theory will be quite common.

³⁸ In many respects, this argument may be advanced in support of just about any approach to statutory interpretation—Congress may always override what it views as a faulty construction.

preferences are unclear, significant differential odds of legislative correction exist, and any interim costs inflicted by a rule with less expected political satisfaction are acceptable.³⁹ When these conditions exist, estimating dynamic theory nonetheless posits that courts should sometimes “choose a moderate interpretive option,” even where it is likely that a more extreme option matches existing legislative preferences.⁴⁰ Elhauge calls this a “cautionary axiom.”⁴¹ Thus, Elhauge’s deference to the preferences of the sitting legislature only goes so far.⁴²

Elhauge also posits that many of the more common canons of statutory interpretation are better understood as preference-eliciting rules intended to spur legislative reaction to court decisions. Estimating dynamic theory proposes a different lens through which to understand, among others, the rule of lenity, the avoidance canon, and the canons favoring the politically powerless.⁴³ Viewing the canons in this way, it is argued, thwarts much of the force in Llewellyn’s famous critique of the canons’ usefulness and demonstrates instead that certain canons are properly invoked where the requirements for application of a preference-eliciting default rule are met.⁴⁴ The following sections discuss key aspects of estimating dynamic theory.

A. Choosing Statutory Rules to Maximize Political Satisfaction

Elhauge’s view hinges on his assertion that “[a]s a general matter, political preferences for a given statutory result are likely to be stronger in the present because those who hold those preferences (and elect the government) are those who experience that result.”⁴⁵ He contends that sitting legislators will prefer holding sway over current judicial interpretations, which will in turn affect a broad range of legislative issues, rather than influencing, down the line, only the narrow range of issues taken up by the particu-

³⁹ See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2166.

⁴⁰ Elhauge, *Preference-Estimating*, *supra* note 10, at 2038, 2080–81. Specifically, Elhauge asserts that where no one interpretive possibility commands over fifty percent of likely legislative preferences, a moderate option should be selected. *Id.*

⁴¹ *Id.* at 2081.

⁴² It is hard to square this aspect of Elhauge’s proposal (his concern over the “runaway” legislature) with his criticism of canons advancing statutory continuity, for here he argues that in his version of the “hard case” courts should move cautiously and in small steps. Influencing courts to move cautiously is, after all, the very premise of many of the canons at which he levels his criticism. See, e.g., David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992).

⁴³ See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2193–2211.

⁴⁴ See *id.* at 2167, 2212–22; accord Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (setting forth the now-familiar critique that for every canon counseling in favor of one interpretation, a counter-canon may be cited favoring a contrary interpretation).

⁴⁵ Elhauge, *Preference-Estimating*, *supra* note 10, at 2039. “Only some of them,” if any, “will still be around when the future statutory result comes, and even if they are still around, many will have different political views or be affected differently by the statutory result because their life-situation has changed.” *Id.*

lar legislature.⁴⁶ Estimating dynamic theory accordingly purports to maximize the preferences of both the enacting and current legislatures. The theory likewise presumes that the general citizenry eagerly would join in this proposed social compact because they will hold the same preference that construction of statutory indeterminacy accurately reflect their currently-held preferences. Thus, estimating dynamic theory may or may not lead to an interpretation that best advances the enacting legislature's purpose.⁴⁷

Under this approach, courts are justified in "updating" an interpretation to comport with changed circumstances because doing so in fact "maximizes the political satisfaction of the enacting polity."⁴⁸ By drawing guidance from current legislative preferences, moreover, the estimating approach purports to constrain judges from imposing their own views when filling in statutory gray areas.⁴⁹ Elhauge posits that it is only where the legislature expressly delegates gap-filling to the courts (i.e., to undertake a common-lawmaking role) that judicial judgment should come into play because that is what Congress clearly intended.⁵⁰ As is discussed below, however, his theory permits considerably greater reliance on "judicial judgment" than he acknowledges.⁵¹

Elhauge presents this theory—tied as it is to legislative preferences—as a stronger legitimating defense of updating statutes than those previously advanced by other scholars such as Guido Calabresi.⁵² He also defends es-

⁴⁶ See *id.*

⁴⁷ See *id.* at 2078.

⁴⁸ *Id.* at 2074. Further, "[e]nacting governments may always opt out of this dynamic default rule, but unless they opt out, they should be understood to have accepted updating of the default rules used to resolve the ambiguities or gaps they left in statutory meaning." *Id.* at 2075. Means by which this opt-out may take place include presumably enacting more detailed statutes *ex ante* or enacting statutory default rules.

⁴⁹ See *id.* at 2040. Elhauge does not, however, assert that any constraint will be complete, nor could he, given his acknowledgement that his proposal reads more like general guidance than strict rules of practice. He suggests therefore that where judges do not follow rules akin to those he proposes, the legislature should contemplate enacting specific statutory default rules. See *id.* at 2041. This proposal is dealt with at greater length by another scholar. See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).

⁵⁰ He offers the classic example of the antitrust laws. See Elhauge, *Preference-Estimating*, *supra* note 10, at 2044. Of course, it may often be the case that identifying when Congress has intended to delegate statutory gap-filling to the judiciary will be anything but straightforward. See *infra* text accompanying notes 223–226.

⁵¹ To highlight one example on this score, at various points, Elhauge criticizes as "usurpation" of the legislative process any interpretative approach that advances goals such as favoring politically underrepresented groups. (Elhauge's critique on this point seems to be targeted at the writings of Cass Sunstein and others more than actual judicial practice.) At different points in constructing his theory, however, Elhauge defends the use of canons favoring politically weak groups (such as Native Americans) as typically emblematic of a preference-eliciting rule. See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2166.

⁵² Compare Elhauge, *Preference-Estimating*, *supra* note 10, at 2074, 2082, with CALABRESI, *supra* note 6, at 2, 73. Calabresi has advanced what may be viewed as another dynamic form of statutory interpretation—one that permits judges to disregard obsolete statutes appearing out of sync with current

timating theory as narrower in many respects than other dynamic theories. For example, he notes that unlike Calabresi's proposal that a judge be permitted to declare an antiquated statute (whether clear or not) officially dead, if the law has outlived its usefulness in the view of the judge, estimating theory only operates within the more limited realm of statutory ambiguity.⁵³ Further, Elhauge distances himself from scholars such as Eskridge, Sunstein, and Dworkin who have advocated referencing public opinions and social norms when reading statutes.⁵⁴ In Elhauge's view, these approaches permit too much leeway for "judicial judgment" to creep into the equation.

The legitimacy arguments underlying estimating dynamic theory ultimately rely upon two key premises: first, the contention that any room for judicial influence over statutory ambiguities should be minimized; and second, the assertion that the legislature would choose to influence the interpretation of the range of statutes that come before the courts during its existence as opposed to the future interpretation of its enactments.⁵⁵

B. *Displacing Other Values*

Estimating dynamic theory tackles head on what it rejects as the lesser values of statutory coherence, stability, or predictability underlying the work of textualists and those who advocate the use of statutory canons. These normative values should never, estimating theory tells us, trump political satisfaction in choosing how to interpret statutory indeterminacy. In

views. *See id.* at 2. As a judge, however, Calabresi has moved more cautiously. *See, e.g.,* *Quill v. Vacco*, 80 F.3d 716, 739, 742–43 (2d Cir. 1996) (Calabresi, J., concurring in the result) (speculating that New York ban on assisted suicide may only remain good law "inadvertently or as a result of inertia" and positing that rather than ruling on the law's constitutionality, the court should effect a "constitutional remand" to the legislature so that it may revisit the state's interests in maintaining the law, but ultimately reaching the constitutional questions and voting to strike down the law), *rev'd on other grounds*, 521 U.S. 793 (1997).

⁵³ Of course, the realm of statutory ambiguity can be viewed as limited or vast, depending on the judge and his or her desire to influence the interpretive outcome.

⁵⁴ Compare Elhauge, *Preference-Estimating*, *supra* note 10, at 2074, with RONALD DWORKIN, *LAW'S EMPIRE* 313–54 (1986) (positing that statutory interpretation should be influenced by the judiciary's determination of the "best" application in light of current circumstances); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1032–34 (1989) [hereinafter Eskridge, *Public Values*] (discussing how courts can interpret statutes to protect traditional "Carolene" groups); and Sunstein, *supra* note 22, at 483. As argued below, however, there is more to connect him with these theorists than he acknowledges.

⁵⁵ Elhauge defends his proposal as flowing from the same ideas that govern the interpretation of contractual ambiguities. *See* Elhauge, *Preference-Estimating*, *supra* note 10, at 2033–34. As he notes, in the contractual context, default rules are chosen with the aim of best discerning or eliciting the preferences of the original parties to the deal. It is unclear why such an approach does not pull Elhauge in a different direction—namely, one that asks how the enacting legislature would have answered the statutory question at bar. *See, e.g.,* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 9 (1994) ("If the analogy between legislation and contracts is extended to matters of legal interpretation, the role of the courts is to fill in the gaps in legislation by interpreting the intentions of the law's enacting coalition.").

all events, “the issue of statutory coherence must be subordinated to the general issue of what maximizes political satisfaction,” that is, what tracks current legislative preferences.⁵⁶ Whether the goal of continuity advances reliance and stability is important only insofar as it mirrors norms that maximize political satisfaction.⁵⁷

This premise leads Elhauge to criticize the work of David Shapiro and others who have contended for the use of interpretive norms as a means by which courts can advance coherence and predictability in statutory construction.⁵⁸ Elhauge does make room within his proposal for certain canons, however, including the rule of lenity, the avoidance canon, and the *Gregory v. Ashcroft* clear statement rule.⁵⁹ He views each as a preference-eliciting default rule.⁶⁰ He explains the linguistic canons, when invoked, as falling into this category as well.⁶¹

C. *The Role of Stare Decisis*

Estimating theory views statutory stare decisis as inappropriate where current legislative preferences or prevailing norms suggest abandonment of previously-adopted statutory constructions.⁶² Elhauge goes considerably

⁵⁶ Elhauge, *Preference-Estimating*, *supra* note 10, at 2046. This generalization does not apply, however, where we deal with a runaway legislature, in which case Elhauge promotes a cautionary maxim. See *supra* note 42 and accompanying text.

⁵⁷ See Elhauge, *Preference-Estimating*, *supra* note 10, at 2047.

⁵⁸ See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2263–65.

⁵⁹ See *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Elhauge calls this rule, and other canons such as that favoring the incorporation of state law in the face of federal statutory silence “supplemental preference-estimating default rules”—rules that he believes are properly applied when prevailing legislative preferences are unknown but should be presumed on balance to favor a state-protective outcome. Elhauge, *Preference-Eliciting*, *supra* note 10, at 2250–51. Elhauge’s inclusion of a presumption against state law preemption here does not work descriptively, for as Richard Fallon has explored, a major counter-trend in the Rehnquist Court has been to favor federal preemption of state law. See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 462–63 (2002).

⁶⁰ Elhauge justifies this classification of certain canons as preference-eliciting rules in part based on the observation that “knowledge that a preference-eliciting default rule exists can induce the legislature to enact more explicit language in the original statute to eliminate the ambiguity *ex ante*.” Elhauge, *Preference-Eliciting*, *supra* note 10, at 2173 (emphasis added). Elhauge’s general attack on the canons in his first piece cannot be squared with this later-espoused position, for earlier he argues that there is no evidence that enacting legislatures proceed aware of background rules or canons and that such a justification elicits the question of which default rules should be chosen by the courts. See Elhauge, *Preference-Estimating*, *supra* note 10, at 2051.

⁶¹ See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2213–18; see also *id.* at 2226. Elhauge explores the examples used by Llewellyn in that scholar’s well-known critique of the canons, and explains their inconsistent application as following from whether the conditions for applying a preference-eliciting default rule are met. See *id.* at 2213–18; accord Llewellyn, *supra* note 44, at 401–06.

⁶² See Elhauge, *Preference-Estimating*, *supra* note 10, at 2121. Where a preference-eliciting interpretation was intended to elicit a legislative response and failed to do so, Elhauge contends that this may justify overruling the interpretation “when combined with other factors indicating the initial court miscalculated the likelihood of legislative correction or level of interim costs.” Elhauge, *Preference-Eliciting*,

further than Eskridge in this respect, for the latter advocates that judges “break away” from settled practices only in the “exceptional” case.⁶³ As a descriptive matter, Elhauge contends that the courts often reject the application of stare decisis principles.⁶⁴

Elhauge cites a litany of justifications for such abandonment, including one with which I do not necessarily quarrel—the situation where Congress decisively has delegated the development of legal doctrine to the judiciary, as is now widely accepted to be the case in the antitrust context.⁶⁵ More broadly, estimating dynamic theory proposes that judges assign no significance to prior interpretations, even beyond the category of what Eskridge cabins in his work as the “exceptional” case.⁶⁶ Instead, estimating theory contends that, when faced with a revisitation of previously-plowed ground, courts should aim to give effect to currently-enactable legislative preferences, even where such preferences dictate a change in course.⁶⁷ Thus, the theory invites the result that specific statutory constructions can and should change over time. Such an approach runs counter to any vision of the judiciary as guardian of law’s continuity and coherence, a point to which we will return shortly.

supra note 10, at 2233–34.

⁶³ See ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 28, at 201; *see also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363–64 (1988) [hereinafter Eskridge, *Overruling*] (rejecting a “super strong” version of statutory stare decisis but accepting that stare decisis is often appropriate in statutory cases).

⁶⁴ See Elhauge, *Preference-Estimating*, *supra* note 10, at 2121–22. Elhauge cites among other things a survey showing that between 1967 and 1990, Congress failed to override any of the Supreme Court cases overruling precedents involving statutory interpretations. *See id.* at 2121 n.283 (citing Eskridge, *Overriding*, *supra* note 4, at 399).

⁶⁵ An example from the earliest days of the antitrust laws shows why we might value such a distinction. In *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1896), the Supreme Court concluded that the Sherman Act’s ban on restraints of trade meant precisely what it said—*all* such combinations violate the new law. Despite considerable pressure to do so, Congress did not amend the law to carve out “reasonable” restraints of trade, *see* ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 58–59 (1941) (citing legislative consideration of such a change), something that might give a judge pause before changing course. Nonetheless, in taking up the *Tobacco* and *Standard Oil* cases soon thereafter, the Court retreated from its prior position to adopt such a view, no longer able to avert its eyes from the wholly unworkable regime created by its prior interpretation. *See United States v. Am. Tobacco Co.*, 221 U.S. 106, 192 (1911); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 105 (1911). Given the premise, now largely unquestioned, that Congress intended to delegate much of the details in antitrust law to the judiciary, it seems perfectly reasonable for the judiciary to play a more creative role and change course where it is clear that its exercise of that delegation has failed. Concerns of continuity and predictability, however, are certainly not absent this context and merit careful consideration where a change in course is being contemplated.

⁶⁶ See Eskridge, *Overruling*, *supra* note 63, at 1363–64, 1386, 1392 (positing that a statutory precedent should carry a “strong presumption of validity” that may be rebutted by changed circumstances rendering the precedent inconsistent with original legislative expectations and counterproductive to current policy, so long as important reliance interests will not be undermined by a changed rule).

⁶⁷ See Elhauge, *Preference-Estimating*, *supra* note 10, at 2121–25.

D. Eliciting Legislative Reaction Where Estimation Fails

Finally, estimating dynamic theory posits that, where estimation of current preferences fails to produce reliable evidence, and certain other circumstances are satisfied, a court should choose an interpretation with the intent of prompting a legislative reaction.⁶⁸ In this way, the argument goes, judges will not have occasion to impart their own views of how the world should look into the interpretive process and will instead force the members of the legislature to face the issue and formally register their preferences.⁶⁹ As support for the practicality of the argument, Elhauge points to Eskridge's study demonstrating that Congress does monitor Supreme Court statutory interpretations and overrides six to eight percent of the Court's holdings in this area.⁷⁰

The theory also contemplates that where the circumstances for application of a preference-eliciting default rule are met, an interpretation should be adopted that disfavors a powerful special interest group, thereby leaving the onus on that group to convince Congress to override the interpretation.⁷¹ Building on this theme, Elhauge recasts the canon of avoidance (like other canons) as a preference-eliciting default rule that if properly invoked, can protect discrete and insular minority groups.⁷² Finally, where estimation and elicitation fail (where preferences are unknown and where reaction is unlikely), Elhauge permits a role for some substantive canons and judicial judgment in his proposal. He calls these rules "supplemental default rules" and views them as a means by which the Supreme Court can guide lower courts toward more uniform interpretations.⁷³

Elhauge's new contribution to the statutory interpretation literature is important because he seeks to build a more workable and disciplined dynamic framework. In so doing, Elhauge proposes an interpretive regime that better constrains judges from imparting their own views about how the world should look and instead ties the interpretation of ambiguous statutory meaning exclusively to currently-held legislative preferences, rather than

⁶⁸ Elhauge, *Preference-Eliciting*, *supra* note 10, at 2165.

⁶⁹ By definition, a preference-eliciting default rule dictates an interpretation that is not chosen to correspond with existing preferences. *See id.* at 2177.

⁷⁰ *See id.* at 2174 (citing Eskridge, *Overriding*, *supra* note 4, at 331, 334–36, 338–40, 344–45, 397). Elhauge observes that six to eight percent amounts to five or six decisions each Term. *See id.* at 2174 n.25.

⁷¹ *See id.* at 2208. This aspect of estimating theory starts to look a lot like the canons favoring the politically powerless championed by Sunstein and others that are subject to a great deal of criticism at other points in Elhauge's work.

⁷² *See id.* at 2211. Later, Elhauge argues that the avoidance canon is more of a default rule protecting "fundamental national principles." *Id.* at 2255. This assertion implicates some of the classic criticisms of the avoidance canon as creating a "penumbra" of extra-constitutional values. *See, e.g.,* RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285 (1985); *accord* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 96.

⁷³ *See* Elhauge, *Preference-Eliciting*, *supra* note 10, at 2254–55.

broader social norms or other factors about which reasonable minds can be said to differ. By attempting to rein in dynamic theory in certain respects, however, Elhauge's work reveals additional flaws in the dynamic approach that warrant close scrutiny. This Article now applies such scrutiny.

II. GUARDING THE LAW'S CONTINUITY AND COHERENCE

Learned Hand once said, "It seems a simple matter, especially when the law is written down in a book with care and detail, just to read it and say what is its meaning."⁷⁴ As any judge can attest, Hand was undoubtedly making light of the difficulty of the interpretive task.⁷⁵ No one can debate seriously the need for some default rules in statutory construction. Indeed, courts consistently are called upon to make sense of ambiguous statutory language and to plug statutory gaps. Congress does not and cannot necessarily contemplate every future application of a statute at the time of its drafting. The real question is what default rules we should have where the formal evidence of congressional purpose—i.e., statutory enactment—leaves us shorthanded. Elhauge and other dynamic theorists have offered their views on this important question; other scholars have offered a range of alternate views.⁷⁶

In pursuing the seemingly elusive goal of choosing a default rule regime that best comports with the constitutional framework for the separation of powers, one truth becomes quickly apparent: whatever one's school of thought—Legal Process, textualist, canonical, dynamic, some combination thereof, or otherwise—in the end, judicial judgment will always creep into the equation in some form. The text will sometimes (if not often) come

⁷⁴ Learned Hand, *Is a Judge Free in Rendering a Decision?*, in *THE SPIRIT OF LIBERTY* 105 (3d ed. 1977).

⁷⁵ Hand continues: "Besides, even if the law had a language of its own, it could not provide for all situations which might come up. Nobody is so gifted with foresight that he can divine all possible human events in advance and prescribe the proper rule for each." *Id.*

⁷⁶ See, e.g., HART & SACKS, *supra* note 2, at 1415 (positing that the judicial objective is to attribute a legislative purpose to the statute and follow suit, presuming all the while that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably"); *id.* at 1156 ("[E]very statute must be conclusively deemed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the idea of law . . ."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (proposing that "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process" and outside that limited domain, parties must turn to alternative sources of law for support); Eskridge, *Dynamic Statutory Interpretation*, *supra* note 23, at 1479 (contending that statutes should "be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context"); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983) (suggesting "that the task for the judge called upon to interpret a statute is best described as imaginative reconstruction" in which the judge "imagines how [the enacting legislators] would have wanted the statute applied to the case at bar"); Shapiro, *supra* note 42, at 925 ("[C]lose questions of construction should be resolved in favor of continuity and against change."); Sunstein, *supra* note 22, at 503 ("[T]he statutory text is the foundation for interpretation, but structure, purpose, intent, history, and 'reasonableness' all play legitimate roles.").

up short,⁷⁷ ascertaining the purpose behind a law may uncover as many questions as it answers,⁷⁸ and canons of construction are by their very nature judicially-created guidelines for reading statutes. Dynamic theory fares little better, for its very premise places the courts in the role of updating the legislature's work. Ultimately, Judge Keeton correctly highlighted the unavoidable tension that courts face when interpreting statutes: "[O]ur legal tradition assigns to courts a creative role in improving law, as well as a guardian's role in preserving its continuity and predictability."⁷⁹

In the realm of modern statutory interpretation (that is, where statutes do not clearly delegate a broader lawmaking function to the courts), it is in this guardian's role that the judiciary makes its greatest contribution to the partnership between the judicial and legislative branches by creating and fleshing out the meaning and proper application of statutory law. Dynamic theorists sacrifice this guardian's role in favor of an entirely different conception of the judiciary—namely, one that is charged with engineering legal reform by “updating” statutes to keep them attuned to prevailing political winds or social norms, and in Elhauge's case, where this fails, one that should aim to provoke legislative clarification. Elhauge believes that such a framework limits the judiciary's role to that of “honest agent”; likewise, Elhauge contends that his proposal will cabin judicial discretion.

It is not at all clear, however, that the agency—or for that matter democratic—ideal is best served by such an approach to statutory construction. Indeed, quite the opposite seems true: in gauging current political winds, Elhauge's proposal ignores the legislative deal that brokered the statutory language in question, as well as any background norms against which such language came into being, and usurps the sitting legislature's formal role as the impetus for statutory change.⁸⁰ The approach likewise denies the contribution that courts make in building a coherent and workable legal framework out of what are often incoherent legislative directives. The added notion that the courts ought to “punt” a substantial number of cases back to the legislature deprives the judiciary in these cases entirely of its ability to act in any meaningful role in fleshing out the meaning and

⁷⁷ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2409 (2003) (“[B]ecause all statutory language is at least somewhat open-textured, textualists acknowledge that ‘a certain degree of discretion’ is inevitable in ‘most’ judicial decisionmaking.”).

⁷⁸ See Hand, *supra* note 74, at 108 (“When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right.”).

⁷⁹ KEETON, *supra* note 1, at 11. Put another way, “[t]he judiciary is . . . on the one hand a guardian of the law's continuity, stability, evenhandedness, and predictability and on the other hand a participant in creative evolution that keeps law contemporary and viable.” *Id.* at 24.

⁸⁰ In this vein, Elhauge's proposal falls victim to many of the criticisms of Ronald Dworkin's work in this area, which posits that the judge should view himself as “a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began.” DWORKIN, *supra* note 54, at 313. For one critique of this approach, consult Sunstein, *supra* note 22, at 436, as well as Sunstein & Vermeule, *supra* note 8, at 902–04.

proper application of statutes or developing a coherent framework of statutory law.

This Article promotes as normatively superior the construction of an interpretive regime built on a strong rule of statutory *stare decisis* and consistent application of interpretive guides that advance continuity and coherence. This approach provides a more efficient means of achieving equilibrium and harmony in the legislative-judicial relationship and allows the courts to take up the guardian's role more effectively.⁸¹ By coherence, I refer to the construction of a principled connection between bodies of law. This vision of coherence is not derived so much from metaprinciples of "justice" and "fairness" such as those with which Dworkin's Judge Hercules is concerned when he construes statutes,⁸² but more so as shorthand for reconciling and harmonizing linguistic meaning among numerous interpretations over time. Continuity, in turn, embraces the ideal that interpretations should not deviate from the existing statutory baseline absent substantial legislative evidence of a desire for such change. This principle may be understood as viewing statutory change through the lens of incrementalism.

Operating within such a framework, courts build a principled connection between interpretations over time and, in doing so, create a coherent and predictable legal framework within which actors may proceed with some confidence as to the ramifications of their actions. Where Congress takes an issue to the level of enactment, it can predict how its language will be interpreted not only in the situations directly addressed, but also in circumstances unknown and unexpected at the time. Such a framework leaves the role of determining if and when change is appropriate to the most politically accountable body—the legislature.

A. *Estimating and Eliciting*

The estimation portion of Elhauge's take on dynamic theory rests on the presumption that the judiciary is in a position to assess "current enactable preferences" when construing statutory ambiguity. Other dynamic theorists call on the courts to gauge evolving social norms in addition to prevailing political shifts,⁸³ but Elhauge views legislative signals as the only

⁸¹ This efficiency will result from a number of things, but mainly from the fact that Congress will have a greater ability *ex ante* (when it has already invested considerable time and attention to the subject matter in play) to predict how its statute will be interpreted versus leaving Congress to police the continuing stream of judicial interpretations handed down over time.

⁸² I refer here to Dworkin's hypothetical judge who interprets statutory meaning in keeping with such metaprinciples. *See* DWORKIN, *supra* note 54, at 243 (positing that judges should "assume, so far as this is possible that the law is structured by a coherent set of principles about justice and fairness and procedural due process" and "enforce these in the fresh cases that come before them"); *id.* at 313 (noting that Judge Hercules "will use much the same techniques of interpretation to read statutes that he uses to decide common-law cases").

⁸³ *See, e.g.,* Aleinikoff, *supra* note 6, at 62–63; Eskridge, *Dynamic Statutory Interpretation, supra*

legitimate source of influence over judicial statutory interpretation.⁸⁴ Elhauge concedes that estimating current enactable preferences will not always be possible,⁸⁵ and therefore offers as a fallback his eliciting option along with what he calls supplemental default rules, such as the deference owed to administrative agencies under the *Chevron* doctrine and selective canons of interpretation.⁸⁶ But his chosen supplemental rules will not always be available, and any great reliance on the notion that the judiciary ought to send its hardest cases back to the legislature seems to be the equivalent of judicial punting. Elhauge's recognition of the uncertainty that may befall any effort to gauge currently-enactable preferences should give him far greater pause, as sources for ascertaining such preferences are limited and we deal by definition with an area in which the current legislature has *not* acted (at least in any formal way).⁸⁷ Predicting what may be enactable requires a sophisticated understanding of the legislative beast, including its structure, procedures, and external influences.⁸⁸ This is no small undertaking.

In a substantial number of Supreme Court cases involving statutory ambiguity, moreover, the sitting legislature will not have even considered the respective interpretive question. Surveying the range of statutory questions posed to the Supreme Court in a given Term usually will bear this out, for many will involve complicated applications of the tax code, ERISA,⁸⁹ the intersection of federal and state criminal laws, and the breadth of statutes like RICO.⁹⁰ In one recent Term, for example, the Court addressed

note 23, at 1479.

⁸⁴ See Elhauge, *Preference-Estimating*, *supra* note 10, at 2081–85.

⁸⁵ See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2171.

⁸⁶ For more detailed discussion of the *Chevron* doctrine and canons of interpretation, see *infra* notes 190–196.

⁸⁷ See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2171–72 (recognizing these limitations). Further, Elhauge limits his theory to where current enactable preferences may be ascertained from memorialized official action, such as committee reports. See Elhauge, *Preference-Estimating*, *supra* note 10, at 2107. But where legislative views on a statutory question are embodied, for example, in a committee report but not enacted into law, it is certainly arguable that a court should view the lack of legislative action to suggest that such views could not in fact carry the day.

⁸⁸ See generally McNollgast, *supra* note 55, at 3–5. Elhauge addresses, but does not account for, some of the problems inherent in his proposed search for legislative preferences and recognizes that the McNollgast model “seems to overstate the certainty with which courts could determine whose political preferences were enactable.” Elhauge, *Preference-Estimating*, *supra* note 10, at 2063–64; see *id.* (arguing nonetheless that “coupled with some common sense about bargaining dynamics, it does provide helpful guidance for at least making estimates about enactable preferences”). Addressing the myriad factors that skew the legislative process (for example, logrolling and interest group influences), Judge Easterbrook has observed: “[B]ecause control of the agenda and logrolling are accepted parts of the legislative process, a court has no justification for deciding cases as it thinks the legislature would in their absence.” Easterbrook, *supra* note 76, at 548. Indeed, such “predictions . . . are bound to be little more than wild guesses.” *Id.*

⁸⁹ Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001–1461 (2000).

⁹⁰ Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–1968 (2000).

whether the federal tax lien statute reached a taxpayer's disclaimed interest in his mother's estate,⁹¹ whether a health care provider participating in Medicare can be said to receive "benefits" and therefore come within the federal bribery statute,⁹² whether a person injured by an overt act in furtherance of a conspiracy may assert a civil RICO conspiracy claim even if the triggering overt act does not constitute "racketeering activity" under the statute,⁹³ and whether the federal arson statute encompasses arson of a residence.⁹⁴ In each case, it is highly doubtful that members of the sitting Congress had expended any time contemplating the relevant statutory question.⁹⁵

Furthermore, in cases where members of the sitting legislature purportedly hold views on the relevant statutory question, those views are necessarily shaped against the baseline of existing statutory law.⁹⁶ Accordingly, they often will be reactionary in nature or represent strategic positions, in which case the holder of such views is unlikely to desire any genuine change to the statutory baseline.⁹⁷ The courts need something more to draw upon when addressing these thorny questions of statutory ambiguity.

On a more general level, calling upon judges to divine current legislative preferences is problematic for a different reason. The notion that judges ought to be tracking current political maneuvering comes awfully close to merging the functions of the bodies, for it has judges inserting themselves into the ebbs and flows of the legislative process and picking up where the legislature leaves off in terms of marshaling pending legislative policy through to the status of enforceable law. In this respect, the judiciary's actions could well be received by the legislature as an unwarranted intrusion into its province. Either way, the proposal erodes a significant

⁹¹ See *Drye v. United States*, 528 U.S. 49 (1999) (holding disclaimed inheritance subject to tax lien).

⁹² See *Fischer v. United States*, 529 U.S. 667 (2000) (finding Medicare providers to be covered by bribery statute).

⁹³ See *Beck v. Prupis*, 529 U.S. 494 (2000) (finding no cause of action under RICO).

⁹⁴ See *Jones v. United States*, 529 U.S. 848 (2000) (reading federal arson statute narrowly to exclude traditional state law crime).

⁹⁵ Elhauge asserts that "any expressions of the current government's views are more easily interpretable because they are contemporaneous with the interpreter and thus not thrown into doubt by changes in factual circumstances or linguistic conventions." Elhauge, *Preference-Estimating*, *supra* note 10, at 2104. This assertion suffers from two flaws. First, the enacting legislature clearly has considered the context in which the question arises, for they have enacted a statute in the field and there may be additional, fruitful evidence of legislative purpose to be found in the legislative record. (Note that Elhauge is not anti-legislative history.). Second, as noted, in many—if not most—cases, the current legislature may not even have concerned itself with the issue or the larger context in question.

⁹⁶ Those views, moreover, are by definition preliminary and until legislation emerges out of the constitutionally-required lawmaking procedures, estimating what is "enactable" will involve a great deal of speculation. *Cf. INS v. Chadha*, 462 U.S. 919, 954–59 (1983).

⁹⁷ Further, to the extent that a court can ascertain a manifest desire for change, it may be far from able to ascertain the controlling legislative position with respect to *how* such change should be achieved.

portion of the core division of powers between the branches and arguably has the judiciary taking on a visibly legislative role. It should therefore be received with some skepticism.

Indeed, Elhauge fails to identify precisely what flaws in the political process lead to his conclusion that the original or historical purposes of legislation are no longer valid or worthy of recognition, particularly given that we deal by definition with statutory language that Congress has not seen fit to amend. The reader is left to guess as to the normative basis for the argument that courts should correct this alleged—but unidentified—flaw in the political process. Further, Elhauge does not wrestle sufficiently with the work of law and economics scholars, such as that of Landes and Posner, suggesting that legislators in fact would prefer that their bargains be enforced rather than dynamically interpreted, and that they will operate more efficiently in such circumstances.⁹⁸

Where the views of the sitting legislature may not be ascertained by judicial estimation—circumstances that are likely to be quite common—estimating dynamic theory tells us that the proper fallback is to adopt a “preference-eliciting interpretation” in the hope of triggering Congress to take up the issue. Here, Elhauge contends for a far more common invocation of Bickel and Wellington’s “remand function.”⁹⁹ There are numerous problems with the proposal in its most recent form, however. For one, notwithstanding Elhauge’s limitation that an eliciting interpretation be chosen only where interim costs will be minimal, one cannot understate the fact that any eliciting interpretation (which, by definition, will need to be somewhat extreme so as to “catch” the legislature’s attention) will govern until and unless the interpretation is either taken up by the legislature or revisited by the judiciary.

The proposal also fails to take into account the fact that Congress is simply not equipped to react in the normal course to most statutory interpretation decisions¹⁰⁰ and that Congress’s track record suggests that its atten-

⁹⁸ See William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 882 (1975) (observing that “the legislature has powerful incentives to devise methods of increasing the permanency of legislation”).

⁹⁹ See Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 30–39 (1957) (defending the Court’s use of what the authors call the “remand function” in extraordinary cases).

¹⁰⁰ If Elhauge were correct that the granting of certiorari in a statutory interpretation case is the equivalent of the Supreme Court certifying an issue to Congress, for example, then one would expect to see more cases dismissed as improvidently granted by the Court due to intervening legislative clarifications. But in practice this rarely happens. Indeed, even where a question divides both the circuits as well as the Supreme Court, Congress may decline to pursue formal revisitation of its directive, as it has with respect to the tricky debate over federal court supplemental jurisdiction. See, e.g., *Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000) (dividing four to four and therefore failing to resolve whether the 1990 enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367, overruled *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)). After the issue divided the Supreme Court, Congress declined to amend or clarify the statute, and instead awaited judicial pronouncement on the question, which finally

tion to statutory decisions is highly inconsistent. Although Elhauge does concede that the legislative costs of overriding judicial statutory interpretations can be substantial,¹⁰¹ he does not appear to give this point nearly enough weight. To be sure, Eskridge's work documents numerous instances in which Congress has acted to override Supreme Court decisions interpreting statutes,¹⁰² but even he recognizes that "legislative inertia means that only occasionally and adventitiously will Congress respond to judicial statutory interpretations at odds with original intent or purpose."¹⁰³ Along these same lines, Eskridge recognizes that "Congress will generally not override a Supreme Court decision without painstaking deliberation over whether the decision undermines its policies and whether alternative approaches are desirable."¹⁰⁴

Importantly, Eskridge's study suggests that it is only where the interests of highly organized and influential groups (such as labor or business) are implicated that congressional oversight, override, or both may follow. By contrast, where the interests of diffuse or politically unpopular groups (such as consumers or criminal defendants) are implicated, overrides are virtually nonexistent.¹⁰⁵ Increased judicial reliance on what appears to be a counter-democratic legislative practice hardly seems like the best medicine for statutory indeterminacy.

The notion that courts should choose a preference-eliciting interpretation, although intended to serve as a nod to legislative supremacy, is in its own right hard to square with the separation of powers. The practice will have the judiciary, by attempting to displace greater legislative priorities, in some manner trying to control the agenda of the legislature. This is, and should be, the exclusive prerogative of the legislature. In this respect, the eliciting function mirrors an extreme form of textualism—that is, it places an unrealistic burden on the legislature to use a heightened form of detail

came this past Term. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2625 (2005) (holding that 28 U.S.C. § 1367 did overrule *Zahn*).

¹⁰¹ *See* Elhauge, *Preference-Eliciting*, *supra* note 10, at 2179. Elhauge argues that these costs may be mitigated by, for example, the ability of a legislature to "attach specific ex post corrections to other bills." *Id.*

¹⁰² *See* Eskridge, *Overriding*, *supra* note 4, at 335–38 (noting that in the late 1970s and 1980s each Congress reversed an average of ten to twelve Supreme Court statutory decisions).

¹⁰³ *See* Eskridge, *Dynamic Statutory Interpretation*, *supra* note 23, at 1525 (positing that whether Title VII allows for affirmative action is one example of a context in which the legislature is unlikely to revisit the judicial determination, notwithstanding potential disagreement with it). In a similar vein, Hart and Sacks posited that a legislator desiring to overrule a court decision may nonetheless leave well enough alone out of a "[b]elief that other measures have a stronger claim on the limited time and energy of the body." HART & SACKS, *supra* note 2, at 1395.

¹⁰⁴ Eskridge, *Overriding*, *supra* note 4, at 359; *see also id.* at 339 (noting that congressional hearings are "a virtual prerequisite for an override").

¹⁰⁵ *See id.* at 352, 360–63. Eskridge also found that the Court's "most controversial statutory decisions are usually not overridden because there are strong interest group alignments on both sides of the issues." *Id.* at 377.

when drafting statutes in the first instance, something that Congress simply is ill-equipped to do.¹⁰⁶ The legitimacy of such a practice is hard to see.¹⁰⁷ The judiciary better contributes to the legislative-judicial relationship by constructing a regime of principles of statutory construction for all cases of statutory indeterminacy, which in turn fosters the continuity, coherence, and predictability of the statutory framework.¹⁰⁸

B. Legitimacy

Estimating dynamic theory is premised on the contention that the sitting legislature would prefer a default rule system that permits it to wield influence over immediate questions of statutory interpretation pending in the courts versus future interpretations of its legislative products. This assertion seems questionable (and is made without any supporting empirical evidence), certainly at least in the context of high-stakes legislation, if not even more broadly.¹⁰⁹ Basic political science teaches us that politicians are driven more often than not by a desire to be reelected, which leads elected officials in turn to promote legislative outcomes that will curry favor with the appropriate electoral base. Politicians can claim credit for the statutes that they enact; they will be hard-pressed, however, to claim credit for merely influencing a judicial interpretation. Likewise, as earlier noted, sitting legislators may not even hold views on many of the numerous intricate interpretative questions likely to come before the courts during a given period.

Thus, if one actually asked legislators their preference over how to design the background principles animating statutory interpretation, it is not at all clear that they would prefer Elhauge's regime to others promoted by dif-

¹⁰⁶ See, e.g., Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 331 (1987) (“The demands on Congress’ agenda far exceed its capacity to make collective decisions.”).

¹⁰⁷ Accord Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 388 (“[T]he . . . proposition that a court should view itself as a kind of disciplinarian, whose role it is to force Congress to act in certain ways, seems to me lacking in force as a normative prescription.”).

¹⁰⁸ Surprisingly, Elhauge advocates that the Supreme Court adhere to his estimating dynamic theory, while the lower courts adhere to principles of stare decisis and apply well-settled canons of construction. See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2262. Not only is the distinction largely left unexplained, the adoption of such a regime will only further undercut any predictability and coherence in statutory law.

¹⁰⁹ For example, one might ask whether the legislators behind the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8 U.S.C. and 28 U.S.C.), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, div. C, 110 Stat. 3009–546 (1996) (amending 8 U.S.C. § 1101), would be willing to accede to future congresses (removed from the events that drove the legislation) the role of influencing the interpretation of those laws. The USA Patriot Act would make for a strong example here as well, but for the fact that Congress provided that many of its most controversial provisions would sunset after four years. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (“USA Patriot Act”), Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (2001).

ferent scholars.¹¹⁰ Indeed, I suspect that legislators may well prefer a framework in which the ground rules (in the form of presumptions or canons) are known to them *ex ante*, which—at least where applied consistently by the courts—allow legislators to predict how their work will be later interpreted. Of course, it may be true that which default rules legislators would truly prefer can only be answered by empirical study, of which there has been very little to date.¹¹¹

Lessons on how Congress works do call Elhauge's assertion into question, though. The notion that members of Congress would yield control over the "updating" of their work is at odds with many of the assumptions that traditionally underlie separation of powers theory, not the least of which is the understanding that each branch consistently will pursue the aggrandizement of its own powers at the expense of the other branches.¹¹² The idea that the legislature willingly would cede some of its updating power to the courts runs distinctly counter to this tradition. It rests, moreover, on the assumption that the legislature will relinquish its control over the future interpretation of its enactments—control that the enacting legislature exercises not just through the chosen statutory language but also, for example, through the legislative history surrounding a law's creation—to the courts, empowering the latter to make judgments for it. Particularly when viewed in light of the difficulties that would inhere to any effort on the part of the legislature to reverse the judiciary's exercise of this judgment in particular cases—even where a majority of the legislative body might disagree with a judicial construction¹¹³—this transfer of authority would have real bite.

There is of course a more fundamental problem with the assertion that where a court is faced with assigning meaning to statutory indeterminacy,

¹¹⁰ For his part, Eskridge contends that "formalism" (defined by him as "only ha[ving] eyes for the principal's original intent or for the plain terms of the written directive") fails because "the principal would rather have the agent who follows the dynamic purpose of his directives, rather than their strict, literal meaning." Eskridge, *Overriding*, *supra* note 4, at 408. This assumes, however, that such directives are in fact intended by the principal to be dynamic. Absent some evidence to support such a conclusion in the particular context (e.g., inclusion in the statute of a directive that it be interpreted dynamically), this presumption has a questionable foundation.

¹¹¹ With that said, any such empirical work will meet with considerable difficulties in terms of framing the issues to be studied and in making sense normatively of what is learned. See William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999). A small case study does shed some light on these questions. See generally Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

¹¹² See, e.g., Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 271 (1990) ("Separation-of-powers principles guard against the tendency of government—and of each branch of government—to aggrandize itself at the expense of the people or the other branches."); cf. JAMES Q. WILSON, *BUREAUCRACY* 268 (1989) ("A willingness to surrender turf is as rare among members of Congress as it is among cabinet secretaries.")

¹¹³ For example, the existence of veto gates and other elements that render enacting new legislation difficult in the federal structure may well prevent Congress from overriding a judicial interpretation with which a majority of its members may disagree strongly.

there is greater legitimacy in referencing current political preferences (or imposing the court's view of current social norms) than those of the enacting legislature, or for that matter, turning to established principles of construction to aid the interpretive effort. It must be acknowledged that the claims of legitimacy in all cases will be strained, for the truly hard questions of statutory indeterminacy arise only with respect to questions that the legislature did not consider or chose not to answer.¹¹⁴ To claim otherwise is, at some level, to buy into a fiction.

As for the distinction between the current and enacting legislature, elevating the preferences of the former in the interpretive process stands on questionable—and antidemocratic—footing. It is not so much that the current legislature will often hold no view on the question posed, but more so that there will be in many cases a framework (both statutory and legislative) from which to draw some evidence of the enacting legislature's general purpose animating the statute under scrutiny.¹¹⁵ Although we are concerned here with statutory ambiguity, statutes are applied otherwise very much as the embodiment of the enacting legislature's purpose where statutory text is clear, and the two (ambiguous and clear text) must work in tandem within the greater statutory fabric. Estimating theory is solely concerned with implementing current legislative preferences in cases of statutory indeterminacy; thus, the theory would create a disconnect between the clear statutory text (embodying the enacting legislature's preferences) and ambiguous statutory text (embodying the sitting legislature's preferences). Finally, it is also not clear why there is greater legitimacy in gauging the current preferences of a legislature that has (so far) chosen *not* to take up the instant question in any formal way in contrast to a legislature that did in fact expend the resources to address at least the general background principles in play.¹¹⁶

¹¹⁴ At one point, Elhauge acknowledges that

the Constitution . . . leaves statutory interpretation to be resolved by the “judicial power” without specifying how that interpretation should be conducted, and to the extent we have evidence on the original understanding of this phrase, it appears to have conferred broad power on courts to go beyond the text in interpreting statutes when that helps courts advance legislative preferences.

Elhauge, *Preference-Estimating*, *supra* note 10, at 2070. On this debate, see generally Manning, *supra* note 11 (contending that the Framers intended the separation of powers to do away with the doctrine known as the equity of the statute, which viewed it as the judge's prerogative to engage in atextual, purposive interpretation, and to herald rule-of-law principles, including predictability, transparency, and constraint); and William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) [hereinafter Eskridge, *All About Words*] (responding to Manning). See *id.* at 1036 (observing that “[i]t is perilous to argue, from the sparse accounts we have, that there was any further specific consensus about the method federal judges were supposed to use in construing statutes”).

¹¹⁵ That is, there will be related statutory text as well as potentially helpful legislative history. See, e.g., McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 705–06, 736–37 (1992).

¹¹⁶ Thus, I do not find great force in Elhauge's criticism of Landes and Posner's theory that judges should focus on the legislative deals behind statutes when interpreting such statutes down the line. See Elhauge, *Preference-Estimating*, *supra* note 10, at 2093–94 (citing Landes & Posner, *supra* note 98, at

Indeed, formalism (i.e., formal enactment) *does* matter, and legislative inaction should not rule the day.

Judge Posner highlights an additional problem with the contention that the preferences of the current legislature should trump those of the enacting legislature:

A court should adhere to the enacting legislature's purposes (so far as those purposes can be discerned) even if it is certain that the current legislature has different purposes and will respond by amending the relevant legislation to reverse the court's interpretation. The court's adherence to the initial compromise will not be futile, for the amending legislation will probably be prospective . . . , but judicial interpretations of legislation are retrospective Thus if the court were to implement the preferences of the current legislature, it would in effect be repealing the statute earlier than the legislature itself would have repealed it.¹¹⁷

There is even more to this story. When a legislature revisits an issue, it is not concerned (at least in any formal way) with *stare decisis* principles.¹¹⁸ This phenomenon can and does undermine reliance interests (and in the same vein threaten continuity and predictability in the law more generally). However, two factors temper this threat significantly: (1) the generally prospective nature of legislation, and (2) the constitutional design that renders the passage of new legislation a costly and difficult endeavor. By contrast, under any "updating" model, the court acts like a legislature (in rejecting *stare decisis* and ignoring reliance interests), but without these two important checks. Judicial decisions are generally retrospective, so they have a greater capacity to disrupt settled interests than does new legislation, and the judiciary faces none of the typical hurdles that stand in the way of new legislation, including veto gates, presentment, and bicameralism. The threat posed to reliance interests and consistency and coherence in the law by an interpretive regime that permits judges to "update" the legislature's work is, therefore, far greater than that presented by the concededly ever-present likelihood of legislative amendment.

To honor the enacting legislature's purpose where it can be ascertained and to build and maintain a framework of cooperation with the legislature for future lawmaking, courts should, as they often do, turn to broader principles to guide and constrain their exercise of interpretive discretion. These principles have the capacity to unearth important signals from the enacting legislature¹¹⁹ and to advance the important objective of building and sustain-

877–79). He contends that any statutory gaps represent issues that did not carry sufficient importance with the parties to the underlying deal and therefore studying those interests is illegitimate. His argument proves too much, for this same attention to formalism counsels that the sitting legislature's preferences should be equally disregarded until they reach the status of formal enactment.

¹¹⁷ Posner, *supra* note 76, at 810.

¹¹⁸ Of course, it is well-known that legislation taking away rights previously granted is exceedingly difficult to pass.

¹¹⁹ See McNollgast, *supra* note 115, at 705–06, 736–37 (contending that consistently applied inter-

ing a larger coherent statutory fabric. Consistently applied principles chosen for their capacity to favor continuity and coherence can advance important procedural and substantive values.¹²⁰ Further, as Shapiro has argued, a canonical “tilt” in favor of continuity “is—or at least it can be—the highest form of cooperation with the legislative enterprise.”¹²¹ In this respect, such an approach arguably is democracy-enhancing. Specifically, by operating as what Eskridge and Frickey have called a “coordinating device,” the application of settled interpretive principles can facilitate the process by which laws are made.¹²²

C. *Statutory Stare Decisis*

Dynamic theory’s general lack of affinity for stare decisis in the statutory context results in a regrettable undercutting of stability and reliance norms. Stare decisis contributes significantly to the building of a stable and coherent statutory regime and should not be so easily cast aside. Elhauge contemplates that interpretation of statutory gray areas will shift with the political winds; that is, the same statutory words may very well be read to embody different meanings over time. Another advocate for this idea, albeit in a far more limited range of cases, is Eskridge; to his credit, however, he has at least acknowledged that this idea is in many senses “radical.”¹²³

Elhauge presents judicial “updating” of statutory interpretation decisions (to borrow again Aleinikoff’s term), and the rejection of previously-settled interpretations, as a highly desirable means of cabinining judicial discretion. In his view, the courts act humbly as the “agent” of the sitting legislature when they carry out its wishes. This is certainly subject to some debate.¹²⁴ As an initial matter, it rejects the idea altogether that the judiciary ought to concern itself with the purpose of legislation as enacted. More broadly, however, given the enormous potential created by estimating the-

pretive principles can and should honor the bargain struck by the enacting coalition by, among other things, referencing elements in the legislative history detailing actions of consequence and the preferences of those actors in a position to exercise a legitimate veto threat).

¹²⁰ For an excellent discussion and defense of this contention, consult Shapiro, *supra* note 42, at 941–60.

¹²¹ *Id.* at 950.

¹²² See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66–67 (1994) [hereinafter Eskridge & Frickey, *Law as Equilibrium*] (“An interpretive regime tells lower court judges, agencies, and citizens how strings of words in statutes will be read, what presumptions will be entertained as to statutes’s scope and meaning, and what auxiliary materials might be consulted to resolve ambiguities. Interpretive regimes serve both rule-of-law and coordination purposes.”).

¹²³ See Eskridge, *Overriding*, *supra* note 4, at 391; see also Eskridge & Frickey, *Law as Equilibrium*, *supra* note 122, at 78–79 (discussing role of stare decisis in statutory interpretation cases).

¹²⁴ Indeed, to work off of Elhauge’s paradigm, where legislative preferences are sufficiently strong against a prior interpretation and where those preferences are supposedly “enactable,” we should question whether it is not preferable to put the onus on Congress to communicate those preferences through its formal means of communicating with the courts: the enactment of new legislation.

ory for judges to misconstrue legislative signals and infuse their own political preferences into statutory construction, the judiciary may well fail to live up to the agency role that Elhauge envisions. Regardless, it is a more modest judiciary that confines itself to the structure and predictability that come with a healthy respect for statutory *stare decisis*. For courts to take up where the legislature has not acted formally to “update” that body’s prior work might even be called “meddling.” Thus, ordinarily, I find much in the argument that courts evince a healthier respect for the legislature when they communicate that it, and only it, may override the Court’s statutory decisions and “update” legislative enactments.¹²⁵ Adopting a contrary approach communicates to Congress that it may withdraw from active review of the Supreme Court’s statutory decisions as well as its legislative role—which all should agree is primary—in “updating” statutory law.¹²⁶

Stare decisis in statutory construction cases is important, moreover, because it promotes continuity in the legal regime by honoring settled expectations and respecting reliance on prior decisions. Justice Brandeis put it much more simply: “*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”¹²⁷ It is not so much the fact that the legislature has forsaken the chance to revisit the relevant statutory question (the so-called “acquiescence” argument)¹²⁸ that counsels in favor of a strong rule of

¹²⁵ See Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 183 (1989) (arguing that such an approach “is critical to reinvolve Congress as an active participant in this ongoing process of statutory lawmaking”). As Marshall notes, others have contended that any countermajoritarian concerns triggered by judicial nonconstitutional policymaking are alleviated by the potential for legislative override. See *id.* at 204 (citing MICHAEL PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 28 n.* (1982)). In addition to the problems highlighted above with such reliance in practical terms, there are many arguments as to why such reliance fails as a legitimating tool as well. See, e.g., *id.* at 204–05; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 23 (1985) (“The theoretical possibility of congressional override cannot disguise the fact that lawmaking by federal courts would in most cases give the last word to the federal courts rather than to Congress.”).

¹²⁶ This argument has been advanced in far greater detail by Edward Levi and Lawrence Marshall. See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 32 (1949); Marshall, *supra* note 125, at 208–15.

¹²⁷ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Adrian Vermeule cites Holmes as having taken a similar position: “[O]ne of the first things for a court to remember is that people care more to know that the rules of the game will be stuck to, than to have the best possible rules.” Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 128 (2000) (quoting Letter from Oliver Wendell Holmes, Jr., to Franklin Ford (Feb. 8, 1908), reprinted in OLIVER WENDELL HOLMES, JR., *THE ESSENTIAL HOLMES* 201 (Richard A. Posner ed., 1992)).

¹²⁸ The acquiescence argument—namely, that by its silence, Congress communicates its agreement with a precedent—is subject to criticism from a range of scholarly views. See, e.g., Eskridge, *Overruling*, *supra* note 63, at 1404 (rejecting the idea because Congress is often unaware of the Court’s statutory decisions); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 554–56 (1992) (arguing that “Congress’s failure to object” often “means virtually nothing”); Marshall, *supra* note 125, at 184–200 (setting forth a number of reasons to question the argument). After all, it is far easier to block passage of a law than to enact a law. See Frank H. Easterbrook, *Stability and Re-*

stare decisis in the statutory context, but the normative good that such a rule brings to the table. By honoring past interpretations and working to weave new ones into a cohesive fabric with what has come before, the courts construct a statutory backdrop against which Congress may legislate and upon which private parties may rely in choosing a course of action.¹²⁹ In this fashion, statutory stare decisis operates in much the same manner as consistently-applied principles of construction favoring continuity and coherence in the statutory regime. At its best, precedent embodies core rule-of-law principles and operates as a limiting force on judicial creativity “by subjecting each judge’s work to the test of congruence with the conclusions of those confronting the same problem.”¹³⁰

Although I would not go as far as those who advocate for an absolute rule of statutory stare decisis,¹³¹ the Court is surely correct to assign “special force” to such precedents, if not even greater respect.¹³² Heightened statutory stare decisis advances the important values of statutory continuity, stability, and coherence. As Judge Keeton has observed, “[r]estraint in exercising the judicial power to overrule precedents is essential to the stability of law.”¹³³ But where a precedent does not “fit” with the surrounding legal landscape, there will be strong countervailing reasons to revisit the original interpretation. Thus, the answer, as it often does, lies somewhere in the middle. Statutory precedents should be abandoned only where wholly out of sync with the legal fabric—where the precedent failed to ap-

liability in Judicial Decisions, 73 CORNELL L. REV. 422, 427 (1988). Elhauge necessarily rejects the acquiescence argument in that he rejects stare decisis entirely. This position, however, is at odds with his otherwise warm embrace of post-enactment legislative history. See Elhauge, *Preference-Estimating*, *supra* note 10, at 2059–60.

¹²⁹ Hart and Sacks make much the same point in their manuscript, noting that healthy stare decisis preserves the continuity that is necessary to a fair and orderly adjudicative regime and in guiding private conduct. See HART & SACKS, *supra* note 2, at 587–88.

¹³⁰ Easterbrook, *supra* note 128, at 423.

¹³¹ See, e.g., *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 257 (1970) (Black, J., dissenting) (“When the law has been settled by an earlier case[,] then any subsequent ‘reinterpretation’ of the statute is gratuitous and . . . no different from a judicial alteration of language that Congress itself placed in the statute.”); Marshall, *supra* note 125, at 183; Vermeule, *supra* note 127, at 143–45; see also William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 MICH. L. REV. 2450, 2453 (1990). Daniel Farber has argued for a rule of heightened statutory stare decisis and asserts that the enacting legislature would prefer such a rule. See Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2, 11–13 (1988).

¹³² *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (“Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”). Of course, *Patterson* constitutes the high-water mark of statutory stare decisis, reaffirming as it did *Runyon v. McCrary*, 427 U.S. 160 (1976) (extending 42 U.S.C. § 1981 to private parties), notwithstanding the view of several sitting Justices that *Runyon* was wrongly decided. See Marshall, *supra* note 125, at 178–79.

¹³³ KEETON, *supra* note 1, at 15. To be sure, Keeton continues, “Yet abstention from exercising this power defeats stability itself.” *Id.*

ply a consistently-employed canon, cannot be squared with precedents interpreting companion statutory provisions or similarly-worded statutes, or has generated only great confusion (as opposed to clarity) in the law.¹³⁴ Statutory precedents should therefore enjoy considerable respect during subsequent judicial scrutiny and should be abandoned rarely and only for good reason. Any other rule sacrifices coherence and predictability for questionable short-term results and larger statutory upheaval.

D. *Continuity, Coherence, and the Canons*

Dynamic theory is meant to render current law “more responsive to current democratic wishes and reduces the legislative time that must be devoted to updating statutes.”¹³⁵ This may be true, but it leads to the relatively unstable result that statutory terms may be read to mean different things over time. Indeed, for his part, Elhauge is quite clear that this is where his estimation default rules take us. Here one is reminded of the simplicity in Justice Scalia’s observation that “statutes do not change.”¹³⁶

Beyond the rejection of stare decisis in the statutory context, estimating dynamic theory also takes aim at those who defend the use of certain canons to aid the interpretive effort. Elhauge reasons that because reliance will only follow where the law tells a party to rely, the normative defense of the canons—that they aid legislative drafters and private parties in predicting legal developments and fashioning their conduct accordingly—falls short. The argument proves too much, for its natural conclusion is to promote a regime in which reliance and predictability are wholly subsumed to constant change and, correspondingly, an unstable legal framework. Such an outcome is hardly desirable.

Preferring a rule that tracks changing legislative preferences or societal norms will—to use economist speak—have considerable externalities. First, unlike in a stable regime of known interpretive rules, individuals potentially affected by statutory gray areas will have significant difficulty predicting whether and how a statute will be read to apply to them. Such

¹³⁴ See *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (Frankfurter, J.) (“[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.”); KEETON, *supra* note 1, at 14; Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 6 (1941) (expressing the view, building on Blackstone, that precedent should be overruled where it is “flatly” absurd or unjust in its results). To be sure, anything other than a bright-line rule opens the courts up to criticism for inconsistent application, but disregarding stare decisis principles altogether will inflict far greater havoc on the statutory regime over time.

¹³⁵ Elhauge, *Preference-Estimating*, *supra* note 10, at 2087.

¹³⁶ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (1997). Justice Scalia cites the fourth of Dwaris’s Maxims: “An act of Parliament cannot alter by reason of time; but the common law may” *Id.* (quoting FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES, WITH AMERICAN NOTES AND ADDITIONS BY PLATT POTTER 122 (Albany, N.Y. 1871)); see also Easterbrook, *supra* note 7, at 69 (“Meaning does not follow the election returns.”).

predictions, turning as they will on constantly changing political winds, necessarily will be short-lived. Second, even after a court has settled a question of statutory meaning, the Court's construction will be thrown immediately into doubt as political preferences turn over yet again. Reliance on judicial resolution therefore will be precarious. The end result—a statutory “limbo” of sorts—will cause anyone subject to good counsel necessarily to move cautiously.¹³⁷ Concomitantly, such a regime will leave legislators bereft of background norms against which to draft new legislation, not to mention a clear target—namely, the current state of the law—at which to take aim.¹³⁸ Predicting statutory scope and application is a far easier task within a regime that advances coherence and stability in statutory construction.¹³⁹ As the McNollgast professors remind us, it is important that statutory interpretation—for both positive and normative reasons—“take into account the effects of an interpretative method on the costs and stability of the legislative process.”¹⁴⁰ The same holds true with respect to the effects on regulated parties.

Many of the canons go a long way toward achieving predictability and continuity in the statutory regime, and for this reason they hold an important place in our legal tradition. As Eskridge has noted, for example, canons were the “lingua franca of statutory interpretation” at the time of the founding, and “[n]o one appreciated the canons’ ability to give a rule of law veneer to statutory cases more than John Marshall”¹⁴¹ To be sure, the often inconsistent application of canons undercuts this objective. Building on Llewellyn’s famous critique, Eskridge and others have shown that the canons continue to be employed erratically, and that there are few principles in place to deal with canons seemingly pointing in different directions.¹⁴² Perhaps worst of all, as Eskridge demonstrates, the Rehnquist Court has a fondness for creating new and quite powerful canons and applying them ret-

¹³⁷ Think of the effect as analogous to First Amendment “chilling.”

¹³⁸ See Marshall, *supra* note 125, at 216 (“Congress must . . . be able to determine the current state of the law with certainty and to ascertain a nonmoving target at which to take aim.”).

¹³⁹ As already noted, moreover, there is a substantial difference between accounting for the possibility that the legislature will invest the time and resources to revisit a legislative question for prospective clarification or alteration and accounting for the possibility that judicial interpretations will change over time by tracking current preferences and easing the burden on the legislature to revisit legislative issues.

¹⁴⁰ McNollgast, *supra* note 115, at 713.

¹⁴¹ Eskridge, *All About Words*, *supra* note 114, at 1100; see also Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 35 (2000) (observing that at the time of the founding, “[j]udicial interpretation was guided not only by prior cases, but also by canons of construction that demanded consistency in interpretation across different statutes or constitutional provisions and thus constrained judges even in cases of first impression”).

¹⁴² See ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 28, at 150, 280–83. See generally Llewellyn, *supra* note 44, at 395; Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561 (1992).

roactively.¹⁴³ This, however, is not a reason to throw up our hands, much less abandon use of the canons. It is instead a basis to call for more consistent application of those canons that bring normative good to the table and for engaging in a healthy debate over which ones fall into this category.

Adrian Vermeule is therefore on to something when he suggests that courts simply “pick” canons and stick to them.¹⁴⁴ Consistency has the potential, after all, to reap efficiency gains both for the drafters of legislation (who may predict how their creation will be interpreted, e.g., narrowly or expansively) as well as those actors who must adapt their behavior based upon a prediction of how the court will interpret certain statutory law (e.g., whether a new standard will be read strictly or permissively). Vermeule is right in many respects that “[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules”¹⁴⁵ Where interpretive principles are well known, they serve a valuable purpose for legislators in that they “reduce[] the uncertainty surrounding the policy consequences of a statute and, thereby, increase[] the ability of legislators to achieve their policy objectives.”¹⁴⁶ Concomitantly, they should decrease the cost of legislation and increase the range of issues over which legislative agreements may be achieved.¹⁴⁷

To be sure, a sizeable number of legislative actors are blissfully ignorant of many of the canons,¹⁴⁸ but there is little if any justification for building a theory of interpretation on such a foundation. It may go too far to

¹⁴³ Thus, for example, as Eskridge and Frickey show, the Court has applied its *Dellmuth* “super strong” clear statement rule to statutes passed long before any such rule exists, an outcome decidedly at odds with the premise that canons are intended to tip the Court’s hat to Congress ex ante as to how a particular statute is likely to be interpreted. See *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 638–40 (1992) [hereinafter Eskridge & Frickey, *Quasi-Constitutional Law*]. One answer to this dilemma (assuming that some new canons may be desirable) may be to limit new canons to prospective application.

¹⁴⁴ See Vermeule, *supra* note 127, at 140 (“It is more important that judges select one answer and apply it consistently over time than that they select the right answer. If the default rules are fixed, Congress can, over time, incorporate the content of the background rules into its anticipations of judicial behavior.”).

¹⁴⁵ *Id.* (quoting *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J.)).

¹⁴⁶ McNollgast, *supra* note 55, at 13. Professors McCubbins, Noll, and Weingast contend that interpretive principles necessarily form part of the coalitional agreement over the drafting of a statute—either explicitly or through implicit reliance on judicial interpretive trends. See McNollgast, *supra* note 115, at 715. The adoption and application of such principles is, in their view, a required element in any interpretive regime aimed at discerning the legislative purpose behind a law when construing statutory ambiguities. See *id.*

¹⁴⁷ See *id.* at 716.

¹⁴⁸ Cf. Nourse & Schacter, *supra* note 111, at 600–05 (finding in case study that legislative staffers “are well aware of the general principles of statutory interpretation and do have in mind generally how a court would interpret language they are writing,” but observing that “in the ordinary course of drafting [staffers] do not spend substantial time anticipating or attempting to research the judicial application of particular interpretive law to the bill being drafted”).

suggest that members of Congress take a course in statutory interpretation at the start of each legislative session, but it is not too much to expect that they will make themselves aware of the most commonly employed canons and react accordingly; indeed, it is very much in their interest to do so. Experience suggests, moreover, that Congress can and will do this when given the incentive.¹⁴⁹ In this way, Congress can stay ahead of statutory issues *ex ante*, as opposed to *ex post*, when the body may reject judicial interpretations only through the process of formal enactment. Beyond the cooperative efficiencies advanced by use of a known interpretive framework, there is also substantial value to be found in its transparency.

But a good defense of constructing an interpretive regime along these lines must go beyond simply resting on the efficiencies that it would introduce to the legislative-judicial relationship. Something more must inform a critical analysis of which canons are worth embracing. In my view, it is those background norms that advance statutory coherence and continuity that bring the greatest value to the interpretive enterprise, enabling the courts to tie a principled connection between interpretations over time. Such norms, properly chosen and consistently applied, have the potential to construct a regime of stable and harmonious statutory fabric while heightening interbranch cooperation. In short, drawing on these values, the judiciary can fulfill its role as guardian of law's continuity and coherence, a role that reaches its zenith where the courts are called upon to make sense of statutory directives.

Shapiro's work on this subject demonstrates how such norms can and do serve important procedural and substantive values. As he notes, for example, on the procedural side, the values of predictability and fair notice—values that peak in the criminal arena, though they are certainly relevant in the civil arena as well—are well served by these norms.¹⁵⁰ This idea is embodied in canons such as the presumption against retroactive application of statutory changes and the rule of lenity.¹⁵¹ The latter principle flows from the idea that “fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”¹⁵²

¹⁴⁹ For example, although it has taken some time, Congress has learned how to draft statutes clearly implicating state actors. *See also* Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 143, at 638–39 (noting that it took Congress three tries to bring states within Education of the Handicapped Act of 1975 (“EHA”). *Compare* *Dellmuth v. Muth*, 491 U.S. 223, 229–32 (1989) (finding, despite statutory text and legislative history indicating the contrary, that Congress did not intend to waive states’ Eleventh Amendment immunity in the EHA), *with* *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–78 (2000) (finding clear statement of congressional intent in Age Discrimination in Employment Act that the law apply to the states).

¹⁵⁰ *See* Shapiro, *supra* note 42, at 943.

¹⁵¹ *See id.* at 943–44.

¹⁵² *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.); *cf.* *United States v. Bass*, 404 U.S. 336, 348 (1971) (“[B]ecause of the seriousness of criminal penalties, and because criminal punish-

Beyond these process values (directed more at the governed than the governing body), Shapiro makes a strong case that broader democratic values are advanced by canons favoring continuity and modest, incremental change. He notes that by presuming Congress does not intend to effect significant departures from settled rights, customs, and obligations where it does not make such a desire manifest, properly chosen canons have the capacity to “increase the likelihood that a statute will not change existing arrangements and understandings unless the legislature—the politically accountable body—has [actually] faced the problem and decided that change is appropriate.”¹⁵³ To embrace the opposite presumption is to subvert the notion of “partnership” between the legislature and the courts by having the judiciary take flimsy evidence of a desire for significant change and run with it.¹⁵⁴ In this vein, one is reminded that the Framers constructed a legislative structure that emphasized, with its bicameralism and presentment elements, “caution and deliberation, rather than ease, in lawmaking.”¹⁵⁵ This same caution and deliberation should inform the judiciary’s construction of statutes.

Judicial decisionmaking can, in adherence to this broader maxim, also protect important structural values such as the balance of power between the branches as well as between the state and federal governments. The clear statement rules, for example, have the potential to operate as what Alexander Bickel called “buffering devices.” By erecting norms of construction intended to preserve carefully calibrated structural balances, unnecessary interbranch and intergovernmental friction may be avoided.¹⁵⁶ Taken too far, of course, such an approach may thwart legislative purpose—for all legislation is intended to effect *some* change.¹⁵⁷ A court must therefore never let a presumption supplant dispositive evidence of legislative purpose. Ultimately, the idea is simply that a court, faced with an ambiguous statutory mandate, should decline to alter “existing understandings any more than is needed to implement the [known] statutory objective.”¹⁵⁸ Cass Sunstein has embraced a similar idea in some respects, positing that “courts should require a clear statement by Congress before allowing a statute to create significant inconsistency in the law.”¹⁵⁹ Critics such as Elhauge view this conception as overly conservative. But—far from being a

ment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.”).

¹⁵³ Shapiro, *supra* note 42, at 944.

¹⁵⁴ *See id.*

¹⁵⁵ Manning, *supra* note 77, at 2439–40.

¹⁵⁶ *See generally* Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578 (1998).

¹⁵⁷ Shapiro notes, for example, that “super strong” clear statement rules may accomplish just this evil. *See* Shapiro, *supra* note 42, at 958–59.

¹⁵⁸ *Id.* at 925.

¹⁵⁹ Sunstein, *supra* note 22, at 479.

negative—the conservative nature of the approach should be celebrated, for reading statutory ambiguity to effect modest change within the broad and stable statutory fabric is both apolitical and reflective of a judiciary hesitant to overstep its bounds, lest it encroach on its partner’s terrain or unsettle the stability of the law.¹⁶⁰ Indeed, for this reason, this cautionary maxim has informed judicial decisionmaking in this context since the time of Chief Justice Marshall.¹⁶¹

Nonetheless, Elhauge finds much to criticize in Shapiro’s work, as well as that of Judge Easterbrook, who contends that courts should always read ambiguous statutory language to achieve as little change as possible. More specifically, Easterbrook posits that “unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process.”¹⁶² Elhauge views the work of these two scholars as premised on the chimera of a baseline against which change should be carefully constrained.¹⁶³ Of course, one cannot dispute that “[t]he difficulty, as always with burden allocation based on a presumption in favor of the status quo, is to identify what, exactly, the status quo is.”¹⁶⁴ But just because it is difficult does not make it fruitless. All statutory interpretation, after all, is undertaken against a backdrop of prior interpretations and settled statutory law. Although Easterbrook veers too far in one direction when he suggests that in the absence of absolute clarity statutes should be read to effect essentially no change (adopting an approach akin to “hyper-textualism” that places unrealistic demands on Congress to address the range of possible applications of a statutory scheme), Elhauge goes too far in the other direction in presuming that Congress potentially would be amenable to dramatic change without leaving a trail of evidence to suggest as much.

Elhauge also criticizes Shapiro’s preference for Holmesian interstitial lawmaking as too conservative and unable to respond to changed circum-

¹⁶⁰ Nor is the legislature powerless to direct that a particular statute be read more broadly. As Shapiro notes, the legislature may, for example, include a clause in the statute saying as much, define its intentions more clearly, invite the courts to create quasi-common-law associated with the statute in question, or delegate the fleshing-out of the statute to an administrative agency. See Shapiro, *supra* note 42, at 953–55.

¹⁶¹ See Eskridge, *All About Words*, *supra* note 114, at 1104 (noting Marshall’s articulation of the point: “‘Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.’” (citing *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 390 (1805))).

¹⁶² Easterbrook, *supra* note 76, at 544; see also *id.* at 544–51; Hand, *supra* note 74, at 109 (“[T]he judge must always remember that he should go not further than he is sure the government would have gone . . . [and i]f he is in doubt, he must stop”); Shapiro, *supra* note 42, at 925.

¹⁶³ Specifically, he argues that construing a statute “against change,” a value embraced by Shapiro, is indeterminate when the baseline is unknowable, as it often will be. See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2264.

¹⁶⁴ Vermeule, *supra* note 127, at 142.

stances. I suspect that Shapiro would not disagree with this conservative labeling of his approach; indeed, this is part of what he finds appealing in the use of canons that favor continuity and modest change in the statutory framework.¹⁶⁵ Elhauge derides this approach as being biased against change and permitting judges to impose their own policy views upon their construction of statutes. It must be remembered, however, that his proposal advocates in favor of reading statutes (sometimes passed long ago) to further current political preferences—even, he tells us, where there is “unlikely” to be a “legislative override” (formal legislative reaction) in the absence of such an interpretation.¹⁶⁶ Estimating theory therefore may provide the seed for taking questionable evidence of a legislative desire for change and running with it—and doing so where legislative oversight is unlikely. The potential for “judicial judgment” to creep into Elhauge’s interpretive regime (and the concomitant undermining of the “agency” model of judging) is therefore far greater than he allows. Approaching the interpretive endeavor with a so-called bias against change, by contrast, does not advance any particular political interest—the status quo, after all, can be either politically liberal or conservative¹⁶⁷—and better respects legislative supremacy.

For his part, Elhauge does make room for some canons in his theory, but views them not through the lens outlined above but as what he calls preference-eliciting rules.¹⁶⁸ Thus, for example, he recasts the canon of constitutional avoidance as serving an eliciting function. Elhauge goes on to depict the canon as doing its best work when it operates to protect the interests of discrete and insular minorities.¹⁶⁹ This vision of the avoidance canon, however, sounds a great deal like the various canons favoring the politically powerless championed by Sunstein, Eskridge and others—canons that at other points in Elhauge’s work are subject to considerable criticism.¹⁷⁰ In any event, the notion that the judiciary ought to put its pro-

¹⁶⁵ Thus, I highly doubt that Shapiro is concerned with the fact that his approach insulates the judiciary from current political tides. See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2265, 2269–70 (criticizing this aspect of Shapiro’s work).

¹⁶⁶ *Id.* at 2265.

¹⁶⁷ Take as one example the recent statutory changes to the habeas laws discussed more fully *infra* Part III.A–C. The Court has read the changes in some decisions quite narrowly, as in *Felker v. Turpin*, 518 U.S. 651 (1996) (discussed *infra* Part III.B), and in doing so, has preserved a far more politically liberal notion of the breadth of federal habeas review.

¹⁶⁸ See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2284 (“[O]ften the[] canons can be justified as preference-eliciting default rules that ultimately maximize the satisfaction of legislative preferences by procuring more explicit legislative action.”). The canons embraced by Elhauge include the rule of lenity, the presumptions against antitrust and tax exemptions, the adoption of state law standards where federal law is silent, the avoidance canon, the presumption against interpreting statutes to affect the rights of Native Americans, and the clear statement rules.

¹⁶⁹ See *id.* at 2255.

¹⁷⁰ See *id.* at 2257–58; see also Eskridge, *Public Values*, *supra* note 54, at 1032–34 (discussing how courts can interpret statutes to protect traditional “*Carolene*” groups); Sunstein, *supra* note 22, at 483

verbial thumb on the scale in this respect further embroils the third branch in the business of the legislature, and puts the onus on Congress to extend additional resources to enact legislation reaching such groups. This notion is the very embodiment of the judicial judgment that Elhauge criticizes and ostensibly seeks to avoid by construction of his theory.

The suggestion that courts should use the interpretive process to correct perceived failings in the political process is deeply troubling from a separation of powers perspective. Among other things, what one judge may deem a failing (namely, a policy decision affecting certain politically marginalized groups in a certain manner) may well be viewed by another judge as not merely sound policy, but democracy at work. Further, to the extent that the notion is built on the premise that Congress is poorly skilled at setting proper political ordering, surely the judiciary—purposefully set apart from the political process in our constitutional structure—is no better equipped in this regard. Most fundamentally, the claim that the judiciary should follow an interpretive approach that will make it harder for the legislature to reach so-called marginalized groups subverts basic democratic values by openly calling upon the judiciary to attempt to manipulate the legislative process. To be sure, where faced with ambiguity within a statute that could be read to take away existing rights held by such groups, the proper course is to adopt the more modest reading and therefore protect continuity in the law while leaving intact settled expectations.¹⁷¹ But this is a far cry from embracing a presumption that all statutes affecting a particular group always will be interpreted in that group's favor.

Elhauge also embraces the line of cases in the *Gregory v. Ashcroft*¹⁷² mold as representing an eliciting ideal. Although clear statement rules possess the capacity to advance important structural ideals, including the avoidance of unnecessary interbranch friction, there is more to be said here. I part company with Elhauge when it comes to the notion that such rules are actually intended to elicit additional legislative reaction. Particularly where clear statement rules are applied with special force, as the Rehnquist Court has done in the context of states' rights and more recently in decisions involving the protection of judicial review, let there be no doubt—application

(“In the face of ambiguity, courts should resolve interpretive doubts in favor of disadvantaged groups so as to ensure that regulatory statutes are not defeated in the implementation process.”).

¹⁷¹ Elhauge uses the example of *Morton v. Mancari*, 417 U.S. 535 (1974), to support the idea that specific statutes favoring the interests of politically weak groups should trump more general statutes. *See id.* at 549–51 (applying the canon against implied repeals and positing: “[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible” (citation omitted)); Elhauge, *Preference-Estimating*, *supra* note 10, at 2120–21. The case is better read, however, not as a decision elevating the interests of Native Americans per se, but instead as adopting a construction that gives effect to both applicable statutes. *See Mancari*, 417 U.S. at 549–51 (upholding the longstanding statute allocating an employment preference to Native Americans in the Bureau of Indian Affairs despite the later enactment of a broad antidiscrimination principle in federal government hiring); *see also* Shapiro, *supra* note 42, at 949 (discussing *Mancari*).

¹⁷² 501 U.S. 452 (1991).

of clear statement norms follows from an unmistakable judicial preference against change.¹⁷³

Ultimately, the selective inclusion of certain canons within estimating dynamic theory and the attempt to recast these canons as preference-eliciting default rules fails.¹⁷⁴ The canons are better viewed—and better chosen—as a means of tying new interpretations to old in a principled fashion and instructing the courts to move cautiously where legislative indicators are vague at best. The real debate, accordingly, should be over which canons best advance these values.¹⁷⁵ Interpretive norms along these lines include the principle of construing similarly-worded statutes similarly;¹⁷⁶ the principle that understands a specific statutory provision as fitting within a broader statutory context of which it is a part (the “whole act rule”);¹⁷⁷ the principle that reads one statute to harmonize with prior legislation, rather than repeal earlier statutes, in the absence of legislative evidence suggesting an intention to achieve such an end;¹⁷⁸ and the presumption that statutory changes are prospective in nature.¹⁷⁹ Additional examples include the understanding that new legislation should not be read loosely to impact long-

¹⁷³ Cf. Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 143, at 631 (observing that clear statement rules and interpretive presumptions have the capacity to “protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly,” though ultimately criticizing the strength and antimajoritarian nature of the current Court’s federalism-based clear statement rules).

¹⁷⁴ It bears noting here that Elhauge does value uniformity (and therefore one presumes predictability) in the sense that he proposes viewing various canons (e.g., the avoidance canon and the canon teaching that statutes should be interpreted consistent with the common law) as a means for the Supreme Court to constrain lower courts. See Elhauge, *Preference-Eliciting*, *supra* note 10, at 2254.

¹⁷⁵ Cf. Stephen F. Ross, *The Location and Limits of Dynamic Statutory Interpretation in Modern Judicial Reasoning*, in *ISSUES IN LEGAL SCHOLARSHIP*, Nov. 2002, at 34 (observing that “[g]reater transparency in general will hopefully provoke a more open and honest debate” over which interpretive canons judges should use), available at <http://www.bepress.com/ils/iss3/art6>.

¹⁷⁶ See, e.g., *Morrison-Knudsen Constr. Co. v. Dir., Office of Workers’ Comp. Programs*, 461 U.S. 624, 633–34 (1983).

¹⁷⁷ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) (Cardozo, J.) (“There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts.”). By the same token, however, the courts are not at liberty to impose through aggressive statutory construction a broad vision of statutory coherence where Congress clearly has not intended such coherence. See, e.g., *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1159 (D.C. Cir. 1988) (Mikva, J., dissenting). Judge Mikva criticized the majority opinion for interpreting price discrimination law in keeping with broader antitrust doctrine but in conflict with congressional expectations: “The majority today has opted for what it thinks is good free-market philosophy—at the expense of faithfully interpreting the law that Congress passed. That is not the role of a court interpreting policy made by others.” *Id.*

¹⁷⁸ See, e.g., *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868) (“Repeals by implication are . . . never [permitted] when the former act can stand together with the new act.”).

¹⁷⁹ After all, reliance interests peak here. See, e.g., *Martin v. Hadix*, 527 U.S. 343, 357–62 (1999) (holding that certain provisions of the Prison Litigation Reform Act would not be interpreted to operate retroactively in the absence of a clear congressional command to apply the Act’s terms retroactively).

settled divisions of power among the branches,¹⁸⁰ or conversely to expand the power of one branch at the expense of another.¹⁸¹ This same principle should inform the reading of statutes potentially affecting the federal-state balance.¹⁸² Each embodies the idea that Congress does not lightly disrupt the stability of existing law and embraces harmonization ideals. The latter group, moreover, protects important structural values against unintentional disruption and ensures that the political process is working properly; that is, it is focusing on the important issues implicated in separation of powers and federalism contexts.

Certain interpretive principles have the potential to serve these goals, but often run into trouble when they are emboldened to the point of evading clear legislative purpose. These include the much-criticized avoidance canon,¹⁸³ as well as the clear statement rules. As noted, the latter can serve as an interbranch and intergovernmental buffering device, permitting major change in the existing balance of powers only where Congress leaves a record of heightened evidence that such change is desired.¹⁸⁴ The avoidance

¹⁸⁰ Along these lines, the Court has presumed that Congress does not displace a court's inherent powers absent clear language intending such a result. *See, e.g., Roadway Express Inc. v. Piper*, 447 U.S. 752, 764–65 (1980) (observing that courts possess inherent powers, including the power to assess attorney's fees in extraordinary cases); *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) (holding that absent plain language, the Court would not presume Congress intended a “departure from traditional equity practice”). *But see Miller v. French*, 530 U.S. 327 (2000) (upholding an automatic stay provision triggered by the filing of a motion for reconsideration of an order of prospective relief where the language chosen by Congress made clear a desire to preclude courts from exercising their equitable power to enjoin the stay).

¹⁸¹ *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) (applying the presumption against “implying” a new cause of action into a federal statute).

¹⁸² *See, e.g., Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (applying the presumption against preemption of traditional areas of state law).

¹⁸³ This long-standing canon of statutory construction directs courts to read statutes to avoid constitutional difficulties where such a construction is possible. *See, e.g., Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465–66 (1989) (positing that “[i]t has long been an axiom of statutory interpretation that ‘where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress’” (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988))); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (arguing that passing on a constitutional question should only be done as a last resort). The critics and champions of this canon are far too numerous to list. One prominent critic includes Judge Easterbrook, who views the avoidance canon as “a roving commission to rewrite statutes to taste.” Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405 (2002). Note, however, that use of the avoidance canon—or something like it—dates as far back as the Marshall Court. *See Manning, supra* note 11, at 96–97 (noting that the Marshall Court interpreted statutes, where possible, to avoid conflict with the law of nations); Note, *supra* note 156, at 1585 (same). Even the Court's current “leading textualists enthusiastically embrace the canon of avoidance.” *Manning, supra* note 11, at 121.

¹⁸⁴ Of course, the use of the clear statement rule in the case of the Eleventh Amendment has invited tremendous criticism of the Court because the rule seems to become more robust with time, not unlike a fine Brunello. *See, e.g., Eskridge & Frickey, Quasi-Constitutional Law, supra* note 143, at 597, 638–39 (contending that clear statement rules in this area are really “quasi-constitutional law”).

canon similarly operates in this manner by preserving constitutional conflicts for only those cases in which Congress's desire to push the proverbial envelope is made clear.¹⁸⁵ But it is not the purpose here to explore in depth those canons that advance statutory coherence and stability.¹⁸⁶ Rather, my purpose is merely to defend the broader proposition that many of the canons play a valuable role within a greater interpretive framework that protects the stability of statutory law by elevating the values of continuity, coherence, and predictability and embracing the idea that only modest change to the statutory landscape should follow in the absence of evidence of congressional desire to effect greater change.

The secondary debate should then reach the question of ranking norms in the interpretive regime. It is inevitable that such norms will at times come into conflict. In short, Llewellyn was on to something. Where this occurs, statutory coherence must trump all other values; canons advancing harmonization ideals should eclipse others with which they come into conflict. Other scholars, most notably Sunstein,¹⁸⁷ disagree with the idea that coherence values should come first, but it would undercut much if not all of the benefits of a regime predicated on stability and predictability should the judiciary permit, as Sunstein would, norms favoring disadvantaged groups to defeat those that seek to bring a statute into harmony with its similarly-worded counterparts.¹⁸⁸

Judges are, at root, charged with accommodating new legislation within the greater statutory framework—a charge that asks them to make sense of ambiguous language and sometimes overlapping statutes seemingly pointing in different directions. Properly chosen canons can both constrain and aid the courts in building a coherent statutory web, and go a long way toward arming the judiciary with the tools required to fit a statute into “the general fabric of the law,”¹⁸⁹ a fabric that is ultimately sewn to-

¹⁸⁵ As Justice Jackson put it, the avoidance canon is not meant to be used to “avoid or postpone difficult decisions,” but instead animating its use is “[t]he predominant consideration . . . that [the court] should be sure that Congress has intentionally put its power in issue by the legislation in question before [the court] undertake[s] a pronouncement which may have far-reaching consequences” *United States v. Five Gambling Devices*, 346 U.S. 441, 448–49 (1953) (Jackson, J., plurality opinion).

¹⁸⁶ For a more detailed discussion on this point, consult generally Shapiro, *supra* note 42, at 921.

¹⁸⁷ Sunstein, *supra* note 22, at 498–502; cf. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 264–66 (1986) (positing that the canons may be ranked on the basis of which ones best allow the courts to serve as a check on legislative excess while not intruding on legislative supremacy).

¹⁸⁸ Indeed, canons favoring disadvantaged groups should be dropped from the canonical catalogue altogether. See *supra* text accompanying notes 168–171. In his ranking of canons, Sunstein includes certain canons in groups separate from his “harmonization” category, such as the canon against implied repeals, one that I would place firmly in the harmonization group of norms. See Sunstein, *supra* note 22, at 499.

¹⁸⁹ HART & SACKS, *supra* note 2, at 1416. The Hart and Sacks model asks both that the judiciary “attribute” a purpose to the legislation under scrutiny and draw on that purpose when interpreting the relevant statute. The model further instructs the judiciary to fit its construction into “the general fabric

gether by the courts. It is in this regard that the judiciary does its best work as guardian of law's continuity and coherence.

E. *The Lure of Dynamic Theory*

Any discussion of these topics would be incomplete without examining in greater detail some of the key examples relied upon by Elhauge and other dynamic theorists as support for their vision of courts as engineers of law reform. First, there is the *Chevron* doctrine. Elhauge contends that *Chevron* provides strong support for estimating dynamic theory because administrative agencies can “generally provide[] the best available estimate of where current enactable preferences lie” when interpreting statutory ambiguity implicating an agency's policies and area of responsibility.¹⁹⁰ Viewing *Chevron* through this lens has much to offer.¹⁹¹ *Chevron*'s effect is to leave the construction of ambiguous statutory language in the first instance to administrative agencies, which are presumably more politically plugged-in than the federal judiciary.¹⁹² Consequently, there is no question that *Chevron* is at some level about tracking political winds; even Justice Scalia views the doctrine as operating in this way.¹⁹³

But *Chevron* is also predicated on the assumption (whether realistic or not) of implicit delegation by Congress to administrative agencies. As the decision notes, “an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.”¹⁹⁴ Just as we understand the legislature to have delegated certain

of the law.” *Id.*

¹⁹⁰ Elhauge, *Preference-Estimating*, *supra* note 10, at 2128.

¹⁹¹ For an earlier discussion of *Chevron* along very similar lines, see Aleinikoff, *supra* note 6, at 42–46 (noting “whether by design or accident, *Chevron* provides a major route for the updating of statutes”).

¹⁹² As a descriptive matter, it bears noting that the Court has at times limited the ability of *Chevron* to track current political winds by questioning the practice of deferring to changed agency positions or interpretations. *See, e.g.*, *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (observing that “the consistency of an agency's position is a factor in assessing the weight that position is due” but deferring all the same to agency's new interpretation); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988) (declining to defer to agency interpretation where it was “contrary to the narrow view of that provision advocated in past cases”). In practice, however, the Court has wavered in this view of *Chevron*. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991) (holding that a revised agency interpretation deserves *Chevron* deference and sustaining agency action on this basis).

¹⁹³ According to Justice Scalia:

Under *Chevron*, [ambiguous statutory language] can mean a range of things, and it is up to the agency, in light of its advancing knowledge (and also, to be realistic about it, in light of the changing political pressures that it feels from Congress and its various constituencies) to specify the correct meaning. If Congress is to delegate broadly, as modern times are thought to demand, it seems to me desirable that the delegatee be able to suit its actions to the times, and that continuing political accountability be assured. . . .

Scalia, *supra* note 33, at 518.

¹⁹⁴ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); *see also* FDA

authority to make common law to the courts (e.g., in the antitrust context), *Chevron* is best viewed as built upon the premise that the legislature delegates policymaking responsibility to administrative agencies when it desires that the agencies play an important role in fleshing out those policies and that such policies remain in keeping with the times.¹⁹⁵ But for many of the reasons discussed already, in addition to the very different legislative-judicial dynamic, Elhauge's attempt to build a broader theory of statutory interpretation for the courts on his view of *Chevron* fails. Indeed, if anything, the manner in which *Chevron* arguably undermines continuity norms suggests that we ought to question—rather than celebrate—its breadth.¹⁹⁶

Second, dynamic theorists commonly point to certain Supreme Court decisions as strong support for the dynamic ideal. The principal examples employed to this end are *United Steelworkers v. Weber*¹⁹⁷ and *Bob Jones University v. United States*.¹⁹⁸ Taking up *Bob Jones* first, there the Court faced a question regarding the proper construction of § 501(c)(3) of the Internal Revenue Code, which grants tax-exempt status and permits tax-deductible contributions to qualifying institutions that are “organized and operated exclusively for religious, charitable, scientific . . . or educational purposes.”¹⁹⁹ Focusing on the word “charitable,” the Court upheld Internal Revenue Service (“IRS”) regulations that denied tax-exempt status to two nonprofit private schools that prescribed and enforced racially discriminatory admission standards on the basis of religious doctrine.²⁰⁰

Regarding *Bob Jones*, Elhauge emphasizes the majority's concession that “the 1894 legislature that enacted the statute probably would have re-

v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”).

¹⁹⁵ Although Elhauge challenges the view of *Chevron* that sees the doctrine as predicated upon legislative delegation, he does view the doctrine (like estimating theory generally) as emanating from the presumption that a given legislature would prioritize background norms that enable the legislature to wield influence over the set of interpretive questions arising during its tenure in office. See Elhauge, *Preference-Estimating*, *supra* note 10, at 2130–34. See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (discussing various theories of *Chevron* and subscribing to the view that the doctrine constitutes an implicit delegation by Congress to the agencies); Scalia, *supra* note 33, at 517 (adopting the delegation view).

¹⁹⁶ In light of the considerable tension between the *Chevron* doctrine and continuity norms in statutory interpretation, there may be some justification in, at a minimum, questioning *Chevron* deference to changed agency positions and agency positions that are difficult to reconcile with the broader governing statutory scheme. See Shapiro, *supra* note 42, at 956 (“[I]t does not follow that the agency itself should ignore the tilt toward continuity to the extent it bears on the agency's proper role.”). Where, moreover, congressional delegation of rulemaking authority is not readily apparent (e.g., the issue in question is one about which Congress cannot be said to have thought at all), *Chevron* deference should not follow. On the tension between *Chevron* and continuity norms, see Molot, *supra* note 141, at 10, 53–75.

¹⁹⁷ 443 U.S. 193 (1979).

¹⁹⁸ 461 U.S. 574 (1983).

¹⁹⁹ 26 U.S.C. § 501(c)(3) (2000).

²⁰⁰ *Bob Jones*, 461 U.S. at 585.

garded . . . racist admissions standards as unproblematic given the prevalence of racial segregation at the time” as demonstrating why an intentionalist approach cannot explain the decision.²⁰¹ “But by 1983,” Elhauge continues, “it was clear that, while the current Congress had not decided the precise question, granting such a charitable exemption fundamentally contradicted modern congressional race relations policy.”²⁰² Thus, in his view, the case is a straightforward application of estimating dynamic theory—the Court approved of the IRS interpretation of the statute because it “correctly estimated current legislative preferences.”²⁰³

Eskridge tackles *Bob Jones* from a slightly different angle. After critiquing elements in the majority opinion embracing a purposive analysis as difficult to reconcile with the accepted view that the § 501(c)(3) tax exemption’s main purpose was to encourage diversity in viewpoint expression,²⁰⁴ Eskridge commends the Court for what he calls its “evolutive perspective.”²⁰⁵ To the extent that the statute left room for discretion in defining its scope, he argues, the Court’s task of ascribing meaning to it properly referenced “current attitudes” shaped “by the public deliberation in which we have engaged since *Brown* and the various civil rights statutes.”²⁰⁶

The other case often cited by dynamic theorists as supporting the assertion that courts do act dynamically is *Weber*. There, the Supreme Court took up and answered affirmatively the question whether Title VII, the text of which bars employers from discriminating in the employment context against “any individual . . . because of such individual’s race, color, religion, sex, or national origin,”²⁰⁷ forbids voluntary affirmative action plans

²⁰¹ Elhauge, *Preference-Estimating*, *supra* note 10, at 2118.

²⁰² *Id.*

²⁰³ *Id.* Elhauge further asserts that *Bob Jones* represents a proper inference by the Court that a recent congressional enactment denying a similar tax exemption to racially discriminatory social clubs “did not mean Congress wanted a different rule for racially discriminatory schools, but most likely meant that, if enactment were necessary, then enactable political preferences favored denying tax exemptions to racially discriminatory entities.” *Id.* at 2120. As he puts it:

[T]he whole point of using preference-estimating default rules is to minimize political dissatisfaction for issues too minor to provoke legislative action, or in the interim before the legislature acts, and to free the political process from the needless burden of making enactments it would probably make if time and political energy were not scarce.

Id.

²⁰⁴ See *Bob Jones*, 461 U.S. at 608–10 (Powell, J., concurring in part and concurring in the judgment) (offering same critique).

²⁰⁵ Eskridge, *Dynamic Statutory Interpretation*, *supra* note 23, at 1547–48. Eskridge sees the best evidence of this approach in Justice Powell’s *Bob Jones* concurrence. See *id.*

²⁰⁶ *Id.* at 1548 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)); see also Aleinikoff, *supra* note 6, at 63–65 (noting that *Bob Jones* “made clear that private discrimination in some contexts is wholly inconsistent with public policy”).

²⁰⁷ Title VII of the Civil Rights Act of 1964, § 703(a), 78 Stat. 253, amended by 42 U.S.C. § 2000e-2(a) (2000); see also Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169, 1178–81 (2000) (suggesting that section 703(d), pertaining to training and apprenticeship programs, may be the applicable provision).

created “to eliminate manifest racial imbalances in traditionally segregated job categories.”²⁰⁸ With respect to *Weber*, Eskridge sees what the Court did there as tracking closely what it did in *Bob Jones*. In Eskridge’s view, because the two central purposes of Title VII—promoting a colorblind workplace and improving the plight of African-American workers in our country—sent conflicting signals as to how best to resolve the difficult statutory question presented in that case, the process of construing the statute’s prohibition of “discrimination” required looking to the changing legal and societal context surrounding Title VII since the law’s enactment.²⁰⁹ Eskridge further argues that “*Weber* suggests a lesson: when societal conditions change in ways not anticipated by Congress and, especially, when the legal and constitutional context of the statute decisively shifts as well, this current perspective should, and will, affect the statute’s interpretation, notwithstanding contrary inferences from the historical evidence.”²¹⁰

But these readings of *Bob Jones* and *Weber* do not tell the whole story. In *Weber*, if one starts with Justice Brennan’s majority opinion, there is no evidence to be found supporting a dynamic interpretation of Title VII. Brennan’s argument, by contrast, is purposive in nature—it is essentially that Title VII was designed to help certain minorities and concomitantly should not be read to harm them or, for that matter, to keep them from being helped.²¹¹ This surely explains why Eskridge relies predominantly upon Justice Blackmun’s concurrence when tying dynamic theory to *Weber*.²¹² Here as well, however, it takes a great deal of stretching to fit Blackmun’s opinion into the dynamic mold. Reduced to its core, Blackmun’s argument was that because the legislative drafters had failed to think through the difficult question of remedying past wrongs, Title VII left a gap that needed to be filled by the judiciary.²¹³ There is absolutely nothing in either the major-

²⁰⁸ *United Steelworkers v. Weber*, 443 U.S. 193, 198 (1979).

²⁰⁹ See Eskridge, *Dynamic Statutory Interpretation*, *supra* note 23, at 1491–94.

²¹⁰ *Id.* at 1494.

²¹¹ See *Weber*, 443 U.S. at 201–02 (“The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must . . . be read against the background of the legislative history of Title VII and the historical context from which the Act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would ‘bring about an end completely at variance with the purpose of the statute’ and must be rejected.” (citations omitted)); see also Frickey, *supra* note 207, at 1177–78 (observing that Justice Brennan’s opinion skipped over text to look at the law’s broader purpose).

²¹² See Eskridge, *Dynamic Statutory Interpretation*, *supra* note 23, at 1492; see also Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546, 1569 (1996) (observing that “the approach sketched in Justice Blackmun’s concurrence . . . seems to do the least total damage to the legal fabric” and “rests on the theory that the statute should not be construed to be self-defeating”).

²¹³ See *Weber*, 443 U.S. at 211 (Blackmun, J., concurring) (noting that the issue before the Court involved a “practical problem in the administration of Title VII not anticipated by Congress”); *id.* (observing that “Congress intended to encourage private efforts to come into compliance with Title VII”); *id.* (opining that narrow forms of voluntary affirmative action, established as “reasonable response[s] to . . . ‘arguable violation[s]’ of Title VII” derive “predictability from the outline of present law and closely effectuate[] the purpose of the Act”); see also Frickey, *supra* note 207, at 1191–95 (observing that Blackmun’s opinion borrowed heavily from Judge Wisdom’s dissent below in the Fifth

ity or the concurrence pointing to a dramatic shift in national attitudes about affirmative action since Title VII's enactment as a basis for construing the law to condone an employer's efforts to promote the advancement of African-American craftworkers at its plant.

As for *Bob Jones*, dynamic theory again does not provide the best account of the decision or, for that matter, the outcome. The majority opinion places considerable emphasis on the statute's use of the word "charitable" and engages in a lengthy discussion of how to understand the drafters' choice of the term.²¹⁴ In so doing, the majority purports to analyze the question in a purposive manner—that is, "within the framework of the Internal Revenue Code and against the background of the congressional purposes."²¹⁵ The opinion finds "underlying all relevant parts of the Code . . . the intent that entitlement to tax exemption depends on meeting certain common law standards of charity."²¹⁶ Drawing on those standards, the Court then essentially takes up where the legislature left off—in trying to assign meaning within the relevant context to the term "charitable."

To be sure, there are hints of dynamic tendencies in the majority opinion, and there is much reliance on an argument of "congressional acquiescence" to the IRS rule rejecting tax-exempt status for racially discriminatory schools.²¹⁷ One certainly can read *Bob Jones*, moreover, to suggest that the meaning of the word "charitable" can change over time. But this does not necessarily make the decision a model for dynamic interpretation. The case is better viewed as involving the not uncommon situation of Congress delegating to the judiciary the role of assigning meaning to a broad term (in this respect, "charitable" is akin to "moral turpitude" as that phrase has been used in the immigration laws²¹⁸) intentionally left undefined by the statute's drafters.²¹⁹ When a legislature uses terms such as these, it can fairly be thought (indeed, it can most plausibly be understood) to contemplate that the application of the term will change with the temper

Blackmun's opinion borrowed heavily from Judge Wisdom's dissent below in the Fifth Circuit).

²¹⁴ Curiously, the majority ignores entirely the arguably far more relevant word in the statute: "educational." See 26 U.S.C. § 501(c)(3) (2000).

²¹⁵ *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

²¹⁶ *Id.* at 587.

²¹⁷ See *id.* at 592 ("[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."); *id.* at 600 ("Non-action by Congress is not often a useful guide, but the non-action here is significant. During the past 12 years there have been no fewer than 13 bills introduced to overturn the IRS interpretation of § 501(c)(3)" and "[n]ot one of these bills has emerged from any committee."); see also *id.* at 610 (Powell, J., concurring in part and concurring in the judgment) (agreeing with the majority that Congress has adopted the IRS view of the statute).

²¹⁸ Cf. Aleinikoff, *supra* note 6, at 47–54 (using a similar example to contend that the judiciary should "update" the legislature's work).

²¹⁹ See *Bob Jones*, 461 U.S. at 607 (Powell, J., concurring in part and concurring in the judgment) ("The [relevant] statutory terms are not self-defining . . .").

of the times. The courts are then charged by the legislature with carrying out that mandate.

Thus, *Weber* is a difficult case in which the outcome strains to make the best sense of a question that the majority believed to have been left unresolved by the legislature (what may be called “deliberate ambiguity”²²⁰); it is by no means emblematic of a broader dynamic approach to statutory interpretation. Nor does *Bob Jones* provide strong support for dynamic theory. *Bob Jones* is better viewed as involving a statute in which Congress employed a broad and undefined term that on its face cries out for a contemporary reading.²²¹ With this said, Eskridge and Elhauge surely are right to argue that *Weber* and *Bob Jones* demonstrate why purely intentionalist interpretation cannot provide a complete answer to statutory construction because it cannot offer helpful guidance in cases such as these. Rather than gauging current political winds or social norms, however, the better practice for the courts is to move cautiously in keeping with principles of continuity and coherence in statutory interpretation and, where faced with ambiguity or charged with filling a gap in lawmaking, to look to surrounding law (legislative enactments, constitutional principles, and judicial decisions) and choose the construction of the undefined statutory term that best fits within the broader legal landscape.²²²

F. *Some Limits*

It is perhaps too much to suggest that one theory of interpretation can necessarily address all issues of statutory ambiguity. Accordingly, there are important limits to the model set forth above.

As an initial matter, there is the inherent difficulty when construing statutes to ascertain whether the statute delegates the lawmaking enterprise to the judiciary, implicates longstanding and important common law principles, or is purported to have a more limited reach. Drawing a distinction between lawmaking delegation—in many respects an invitation by the legislature to the courts to play a more robust interpretive role—and those statutes that should be interpreted cautiously in the face of ambiguous legislative signals often will present a considerable challenge.²²³ From a

²²⁰ Nourse & Schacter, *supra* note 111, at 594 (noting that legislation often includes such ambiguity). To be sure, here there exists considerable evidence (cited in Rehnquist’s dissent) to suggest that Congress did not leave open the question for judicial resolution, and the majority may be accused of filling a gap that did not exist. See *United Steelworkers v. Weber*, 443 U.S. 193, 226–253 (1979) (Rehnquist, J., dissenting).

²²¹ The situation may be viewed, in this way, as a form of legislative delegation of common law-making authority.

²²² To be sure, this approach may sometimes lead the judge to the same place as dynamic theory. But when construing terms like “moral turpitude,” judges better advance rule-of-law principles where they reference surrounding law in contrast to estimations about existing legislative preferences, social norms, or both.

²²³ See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 261 (1994) (“It is entirely possible—indeed,

more fundamental perspective, moreover, there is reason to question whether in certain contexts law is better made by the courts than controlled by statute. One might contend, for example, that procedural rules be left for development by the courts, which hold a comparative advantage of expertise in this realm. This reasoning appears to underlie the broad grant of authority given to the federal courts to develop the standards for certain evidentiary rules.²²⁴ Assigning such a role to the courts allows them to retain the freedom to experiment and correct wrong turns,²²⁵ and there may be a number of contexts in which we may prefer to have courts emphasize their role as engineers of law reform far more than they do now.²²⁶

Any approach to statutory construction that does not seek (as, for example, estimating theory would) to force an issue of ambiguous law onto the legislative radar screen, moreover, may run into the problem that those issues traditionally relegated to low status on the legislative agenda will evade much-needed attention from the legislative body.²²⁷ In this context, an argument could be made that courts should be permitted a more creative role to develop workable standards. Greater reliance on law revision commissions to aid the legislature in addressing these areas may be a better answer to the problem, though experience demonstrates that these bodies have met with varied success²²⁸ and have succeeded typically only with respect to issues on which special interests cannot be said to hold strong positions.²²⁹

highly probable—that, because it was unable to resolve the retroactivity issue . . . Congress viewed the matter as an open issue to be resolved by the courts.”). In a recent piece, Daniel Meltzer highlights an example in which the Supreme Court likely read Congress wrong on this front. See Meltzer, *supra* note 107, at 346–51 (discussing *Great-West Life and Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and criticizing the Court’s textualist focus as blinding it to the need for (and propriety of) consideration of “the tradition of creativity in the development of equity”).

²²⁴ For example, Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting “common law principles . . . in the light of reason and experience.” FED. R. EVID. 501.

²²⁵ See, e.g., David L. Shapiro, *Supplemental Jurisdiction: A Confession, an Avoidance, and a Proposal*, 74 IND. L.J. 211, 218 (1998) (addressing congressional tinkering with supplemental jurisdiction post-*Finley v. United States*, 490 U.S. 545 (1989), and suggesting that it would have been preferable for Congress “to enact a law establishing the principle of supplemental jurisdiction, and then . . . leave all or most of the details to be worked out by the courts”); see also Meltzer, *supra* note 107, at 403 (“How much better off we would have been had *Finley* never aspired to place responsibility for fine-tuning the contours of supplemental jurisdiction on the Congress and had Congress not therefore felt obliged to enact a comprehensive codification that proved to be full of pitfalls.”).

²²⁶ One could argue, for example, that courts should enjoy greater leeway in furthering congressional “purpose” where the federal statutory scheme is preemptive and therefore displaces state law from providing a background default rule. See Meltzer, *supra* note 107, at 386; see also David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574 (1985) (asserting that “courts are functionally better adapted to engage in the necessary fine tuning [of the scope of their own jurisdiction] than is the legislature”).

²²⁷ To be sure, this is one of the evils at which estimating theory is directed. Nonetheless, as discussed, the notion that the judiciary should aim to distort legislative priorities is deeply troubling from a separation of powers perspective.

²²⁸ See, e.g., Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in Califor-*

Further, any settled interpretive approach must be subject to some displacement where the legislature dictates a different approach. This would be the case, for example, if the legislature directed that a law be interpreted dynamically or where the legislature has included a statutory term that calls for a contemporary interpretation on its face, as I contend Congress did in the tax-exemption statute at issue in *Bob Jones*.²³⁰ Finally and importantly, interpretive guidelines must never substitute in the place of legislative purpose the judicial view of how the world should look. A guideline should remain just that—it should not dictate a course at odds with the enacting legislature’s clear will or dictate the result of interpretive analysis before the inquiry even begins.²³¹

nia and Pennsylvania, 8 WIDENER J. PUB. L. 229, 231 (1999) (quoting a member of the California Law Revision Commission commenting on how it “has produced a solid success and several ignominious failures”). *But see* Larry Kramer, “*The One-Eyed Are Kings*”: *Improving Congress’s Ability to Regulate the Use of Judicial Resources*, 54 LAW & CONTEMP. PROBS. 73, 92 (1991) (noting that “[e]xperience with state law revision commissions has generally been good, and several states, particularly New York and California, have had notable success”). Building on prior suggestions of Cardozo and Pound, Justice Ginsburg has called on Congress to “install a system of legislative review and revision under which it would take a second look at a law once a court opinion or two highlighted the measure’s infirmities.” *See* Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 996 (1987); *see also* Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114, 119 (1921) (proposing a “ministry of justice” that would “view [a] field in its entirety, and not, as judges view it, in isolated sections, who will watch the rule working in its working, and not, as judges watch it, in its making, and who viewing and watching and classifying and comparing, will be ready, under the responsibility of office, with warning and suggestion”); Roscoe Pound, *Anachronisms in Law*, 3 J. AM. JUD. SOC’Y 142, 146 (1919) (proposing a ministry of justice that would be a continuing body harmonizing the common law and legislation).

²²⁹ Further, drawing again on the example of Congress’s response to *Finley*, 28 U.S.C. § 1367 (2005), experience has shown that revision committees may not see the forest for the trees. The academic expert-drafters’ response to *Finley* “had quite a few unforeseen consequences,” Meltzer, *supra* note 107, at 399, including apparently (at least on the face of the statute) overturning *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), *see* 28 U.S.C. § 1367 (2000). Indeed, a recent Supreme Court decision explicitly held that § 1367 overruled *Zahn*. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2625 (2005).

²³⁰ *See* Nagle, *supra* note 7, at 2218 (noting that the legislature may use terms with “dynamic potential”). Consider another context in which this could arise—where the legislature chooses as a controlling term in a statute a word or phrase that implicates prevailing scientific or medical norms—which undoubtedly will evolve and change over time. *See, e.g.*, *Boutilier v. INS*, 387 U.S. 118 (1967).

²³¹ The difference can be highlighted by contrasting the example of the Court’s clear statement rule as applied to questions of Eleventh Amendment abrogation, which has arguably pushed continuity ideals to the breaking point, *see, e.g.*, Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 143, at 638–39 (noting that it took Congress three tries to communicate that states should come within a statute’s coverage), with other areas in which the Court has drawn on structural concerns to animate the interpretation of genuinely ambiguous language. Examples of the latter kind can be found in the criminal context, where, for example, the Court has generally presumed that Congress “traditionally [is] reluctant to define as a federal crime conduct readily denounced as criminal by the States,” *United States v. Bass*, 404 U.S. 336, 349 (1971), as well as in the civil arena, where the Court has presumed that Congress does not generally intend to “precipitate conflict between federal . . . and state authority,” *Bowen v. American Hosp. Ass’n*, 476 U.S. 610, 645 n.33 (1986) (quoting *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 152 (1944)). *Accord* *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940) (declining to sweep within

* * *

Each new piece of the law must find its place in the larger statutory continuum. Making sense of that continuum ultimately falls upon the judiciary:

As soon as a statute is enacted, it joins the rest of the law, and together with all the rest it speaks to the judge at the moment he decides the case. When it is enacted, to be sure, it was a command uttered at a certain time in certain circumstances, but it became more than that. It became a part of the law which is now telling the judge, with the case before him and a decision confronting him, what he should now do. And isn't this just what the legislature wanted? The legislature had fashioned the statute, not for any immediate occasion, but for an indefinite number of occasions to arise in an indefinite future, until it was repealed or amended.²³²

In the end, the quest for statutory meaning in the absence of formal legislative evidence reduces to a debate over the proper role that courts should play in construing statutes—engineer of legal reform versus guardian of law's continuity and coherence. I argue that any approach to statutory interpretation that promotes the engineering role and puts the courts in the position of tracking current legislative preferences or social norms will elevate questionable short-term gain over long-term statutory stability and coherence—an approach that will lead inevitably to a statutory regime that is both unstable and unworkable over time. Likewise, the notion that courts should choose interpretive positions with the goal of eliciting legislative reaction undercuts these important values and improperly embroils the courts in the legislature's agenda-setting.

In short, when undertaking traditional statutory interpretation, courts should elevate norms of continuity, coherence, and predictability over estimated current democratic preferences. Doing so better accords with the constitutional separation of powers and protects the reliance interests both of broader society as well as of legislative enactments and judicial decisions constructed out of the fabric of prior law. Application of properly chosen principles of construction along with a healthy regard for *stare decisis* will lead to a more stable and efficient legislative-judicial cooperative existence. And, as the following example highlights, such a framework better aids the

the Sherman Act conduct traditionally regulated by the states); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 540 (1947) (“The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation.”).

²³² Charles Curtis, *A Better Theory of Interpretation*, 3 VAND. L. REV. 407, 415 (1950), *quoted in* Aleinikoff, *supra* note 6, at 58; *see also* Curtis, *supra*, at 423 (“[T]he virtue on which the Law stakes its hopes of salvation is consistency.”).

court faced with iterative applications of the same statute and is particularly helpful where the judiciary construes statutes implicating important structural or constitutional norms. Reduced to its essence, statutory construction should, as Judge Friendly once instructed, “consult not only what went before but what came after—the statute must be read as part of a continuum.”²³³

III. INTERSECTING STATUTES: A CASE STUDY IN THE NEED FOR CONTINUITY

Nowhere is the necessity to read a statute as part of a continuum more imperative than where a court is called to make sense of two or more intersecting statutes. This is all the more true because when courts deal with “super-statutes” like the one explored here (the provision for original habeas corpus jurisdiction) that are both longstanding and remain an important and active part of the statutory landscape, the judiciary finds itself repeatedly interpreting and harmonizing the provisions with other pieces in the statutory fabric over time.²³⁴ In the absence of sound principles counseling in favor of building upon past decisions and seeking to fit new applications within the existing statutory framework, the result would be a collection of incoherent and irreconcilable applications of the same statute.

Estimating dynamic theory is largely unconcerned with the lessons of prior judicial forays in the interpretive enterprise because it accords no independent value to stare decisis or canons promoting continuity and coherence. The theory, as we have seen, instead builds off of prior dynamic models and asks judges to concern themselves with the current political state of affairs. But where a court is faced with making sense out of two intersecting statutes, one or more of which is of recent vintage while another is longstanding, this approach to statutory construction simply fails. The

²³³ Friendly, *supra* note 17, at 214 (emphasis added) (paraphrasing Justice Frankfurter’s approach to the interpretive endeavor). Of course, Judge Friendly used this point to justify the use of post-enactment legislative history, *see id.* at 214 n.103, and my point here is quite different. Justice Frankfurter, for his part, posited that the words making up statutes “must be read with the gloss of the experience of those who framed them.” *United States v. Rabinowitz*, 339 U.S. 56, 70 (1940) (Frankfurter, J., dissenting), *quoted in* Friendly, *supra* note 17, at 213. He also charged that judges must “retain the associations, hear the echoes, and capture the overtones” of each statute under scrutiny. Felix Frankfurter, *The Reading of Statutes*, in *OF LAW AND MEN* 52 (1965).

²³⁴ *See* Eskridge & Ferejohn, *supra* note 16, at 1216–17. By promoting the idea that “current enactable preferences” should inform how courts interpret statutory ambiguity, Elhauge indirectly contends for a regime in which statutes of more recent vintage will often trump those more longstanding, for in many cases the legislative interests animating the younger statute will remain well represented. One could argue by contrast that the longstanding should be preferred to the young—certainly, at least those longstanding statutes that have formed the foundation upon which later enactments have been built. This argument is fleshed out by Eskridge and Ferejohn in their discussion of what they call “super-statutes,” statutes that successfully establish a new normative or institutional framework and correspondingly have a broad effect on the law. *See id.* at 1216. The authors contend that such statutes should in fact trump those statutes that do not rise to the level of “super-statute.” *See id.*

approach almost always will accord greater weight to the newer statute (a statute that ultimately may enjoy a very short stint as formal law) and undervalue the statute with a greater historical pedigree that remains as relevant today as it did when enacted into law.²³⁵ In addition, estimating theory seriously minimizes the use of normative canons, because by definition these canons are seen as obstructing rather than advancing current legislative preferences.²³⁶ By studying one prominent example involving intersecting statutes new and old, we see how any dynamic approach that accords greater weight to more recent enactments and prevailing political trends and social norms is likely to tip the balance in favor of the younger statute to the point of improperly disregarding or undervaluing the older one.²³⁷

Any such approach to statutory interpretation, which is predicated essentially on a theory of congressional ignorance of the background statutory fabric, although possibly a correct assessment of modern legislative realities, disrespects the legislative branch and unsettles reliance interests just as much as would a judge rewriting a statute from scratch. Instead, a court faced with two intersecting statutes should give effect to both and presume that Congress acts with the knowledge that it never writes on a clean slate, but against the backdrop of that which has previously emerged from the formal lawmaking protocol.²³⁸ To disregard what has come before is, in many respects, to usurp the legislative prerogative of formal repeal.

When we study the Supreme Court's treatment of intersecting statutes in the habeas corpus and immigration contexts, we see a Court holding fast to these principles. Where Congress has acted to curtail the judiciary's habeas review of criminal convictions and review of deportation proceedings, the Court has responded in a recent line of cases by turning to how it re-

²³⁵ Even apart from the context of intersecting statutes, tying statutory meaning to the existing political fads may produce results at odds with the values to which some dynamic theorists subscribe. See Nagle, *supra* note 7, at 2211–12.

²³⁶ For example, normative justifications for clear statement rules, including those invoked by the Court in the habeas context, are inconsistent with a regime that seeks to “estimate” current legislative preferences.

²³⁷ Of course, I have limited my example to one in which the older statute remains exceedingly relevant, thereby taking it outside the reach of the Calabresian judge who may declare obsolete statutes dead. See CALABRESI, *supra* note 6, at 2, 73. Nonetheless, although obsolete statutes likely should not carry the same weight in the interpretive equation versus those that remain a vital part of the legal landscape, the same separation of powers problems arise in either case where the judge takes it upon herself to refashion the legislative books by declaring an obsolete statute no longer valid.

²³⁸ That is, as each layer of the complex web of the statutory fabric is added, the parts that make up the whole must each be accounted for in some manner. See *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (“[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”). There are those who challenge this notion, which essentially forms the predicate for the presumption against repeals by implication. See, e.g., Posner, *supra* note 76, at 812 (contending that the presumption “impl[ies] legislative omniscience in a particularly uncompromising and clearly unrealistic form”). My own view is that adopting a contrary approach results in a statutory repeal by the judiciary, a countermajoritarian usurpation of a core legislative power.

solved similar dilemmas in the past. Working off the model created in a line of Reconstruction cases, the Court has construed newly restrictive statutes as they intersect with the general habeas writ in a manner that preserves meaning in both and assigns, if anything, greater weight to the statute with the more authoritative historical pedigree. The Court has done so by invoking the canon against repeals by implication as well as, in many cases, a clear statement rule aimed at protecting structural harmony. By relying on these principles to inform its interpretative approach, the Court's decisions in this line highlight its devotion to continuity norms. Thus, these cases call into question, at least as a descriptive matter, the import of estimating dynamic theory, for the Court has adopted this approach despite increasingly stronger indications of a legislative desire to curtail the judiciary's role in reviewing criminal habeas and deportation cases. The decisions discussed below also demonstrate why, as a normative matter, continuity norms should play a central role in the construction of statutes. Beyond the fact that political signals are often fleeting and may misrepresent the controlling legislative position, tying statutory meaning to such indicators will leave much of the Court's interpretive work subject to revisitation on a regular basis and would thrust upon the Court a visibly legislative role.

I believe that the Court's approach in these cases should be celebrated and that critics who view these cases as representing judicial evasion of clear congressional signals are wrong. The statutory signals explored herein sent by the Reconstruction Congress and more recent Congresses respecting the scope of habeas review are at best hazy insofar as they say nothing of the continuing viability of the general habeas writ in the specific context addressed. Absent better evidence of a congressional purpose to effect dramatic change (namely, repeal) to this longstanding and active source of judicial review, the norms and canons promoting continuity and coherence properly dictate against such an outcome.

A. The Blueprint: Ex parte Yerger

Shortly after Congress broadly expanded the scope of federal habeas jurisdiction in the Act of 1867 to provide for the first time for federal court habeas review of state court convictions,²³⁹ Congress scaled back its new grant of power to the courts. Specifically, in 1868 Congress repealed the provision of the 1867 Act that authorized appeals from the denial of a habeas writ by lower courts.²⁴⁰ Congress did so in a directed effort to deprive

²³⁹ The 1867 law extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (repealed 1868).

²⁴⁰ The language of the Act of March 27, 1868 (the "1868 Act") was specific in referencing its target: "[S]o much of the act, approved February 5, 1867 . . . as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by

the Supreme Court of jurisdiction over *Ex parte McCardle*,²⁴¹ which was then pending before the Court and presented a substantial threat to the validity of the Reconstruction legislation.²⁴² With all three branches at war with one another and uncertainty as to the direction the Court might take, Congress passed the 1868 Act to prevent the Court from ruling in *McCardle* on the constitutionality of certain aspects of the Reconstruction effort.²⁴³ The impetus for the law was quite clear: take the Court out of the governing equation.

Despite clear language in the 1868 Act restricting the Court's authority to preside over an appeal from the denial of a writ, in *Ex parte Yerger*, which followed on the heels of *McCardle*, the Court determined that it possessed jurisdiction via the original habeas statute to review a circuit court's denial of the writ.²⁴⁴ The Court began its analysis where it ended: by pointing to the first habeas law enacted as part of the Judiciary Act of 1789, left untouched by the 1868 legislation.²⁴⁵ Section 14 of that Act broadly granted "every court of the United States" the "power to issue the writ."²⁴⁶ Later statutory additions, those of 1833, 1842, and 1867, the Court observed, were mere overlays upon the Act of 1789 and did nothing to chip away at its core. As the newer laws offered no evidence of a congressional purpose to divest the broad grant of authority in section 14 (the text of the 1868 Act spoke only to what the 1867 Act had added to the habeas mix²⁴⁷), the *Yerger*

said Supreme Court on appeals which have been or may hereafter be taken be, and the same hereby, repealed." Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44 (repealed 1885).

²⁴¹ 74 U.S. (7 Wall.) 506 (1868).

²⁴² See generally 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 224–27 (1998). McCardle, and Yerger after him, had been denied a jury trial and tried instead before a military commission pursuant to section 3 of the Reconstruction Act. See *id.* at 242.

²⁴³ See ACKERMAN, *supra* note 242, at 225; William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 236–39 (1973).

²⁴⁴ As noted, *Yerger* came on the heels of *Ex parte McCardle*, in which the Court dismissed McCardle's pending case in light of the congressional repeal in the 1868 Act of the habeas provisions pursuant to which the appeal had been brought. In its *McCardle* opinion, however, the Court hinted that it retained the power to review habeas petitions filed under the original habeas jurisdiction as established in section 14 of the Judiciary Act of 1789. See *McCardle*, 74 U.S. (7 Wall.) at 515 ("Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised."). It is this hint on which Yerger built his case. See MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 468 (1988).

²⁴⁵ The 1789 Act has been called "probably the most important and satisfactory act ever passed by Congress." Judge Henry B. Brown, *The New Federal Judicial Code*, 36 A.B.A. REP. 339, 343 (1913), quoted in Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 52 (1923).

²⁴⁶ *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 101 (1868); see Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (granting federal judges power to grant writs of habeas corpus).

²⁴⁷ See *Yerger*, 75 U.S. (8 Wall.) at 104 (noting that the 1867 Act "extend[ed] the original jurisdiction by *habeas corpus* . . . but did not repeal any previous act conferring jurisdiction by *habeas corpus*,

Court reasoned that the broad grant of authority in section 14 remained fully intact. Thus, in many respects, the Court's decision in *Yerger* can be read as nothing more than a routine application of the canon against repeals by implication.

Interestingly, however, language in the opinion swept far more broadly. In the Court's view, "[t]he great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction."²⁴⁸ The original extension of habeas to the federal courts embodied a collective "intent . . . that every citizen may be protected by judicial action from unlawful imprisonment."²⁴⁹ Although conceding that its appellate jurisdiction was "given subject to exception and regulation by Congress," the Court stated that the denial of appellate jurisdiction in this class of cases "must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction."²⁵⁰ Here we see a Court not simply applying a means of construction guided by the desire to make sense of two intersecting statutes, but openly entrenching itself as a major player in defining and protecting individual rights under the Constitution.²⁵¹ The breadth of the Court's language, although ultimately forgotten as a premise for *Yerger's* holding and unnecessary to the decision in my view, demonstrates just how unconcerned the Court was with current political tides in Congress as it struggled to make sense of the intersecting statutes before it.

Had the Court construed the statutory question before it more in keeping with estimating dynamic theory, it almost certainly would have resolved *Yerger* differently. The 1868 Congress considered the Court meddling and a serious threat to the validity of Reconstruction legislation. Congress passed the 1868 Act with the essential purpose of removing the Court from the role of resolving the scope of constitutional congressional authority as well as the rights of individuals subject to detention (the latter being more of a by-product of Congress's concern over the former).²⁵² The political

unless by implication"—an implication that the Court would not adopt lightly).

²⁴⁸ *Id.* at 101.

²⁴⁹ *Id.* The Court hinted, but did not seriously explore whether, Suspension Clause problems might follow from an interpretation of the 1868 Act as superseding portions of the Act of 1789.

²⁵⁰ *Id.* at 102–03.

²⁵¹ See UROFSKY, *supra* note 244, at 468 ("[Chief Justice] Chase's wording [in the *Yerger* opinion], especially compared to the restrained opinions in earlier cases, clearly indicated his desire to reassert the Court's independence and power and cannot be squared with characterizations of the Court as helpless during the Reconstruction era."). Barry Friedman suggests a more limited reading of the Court's motives behind *Yerger*, noting that the case "came to the Court largely after the storm [brewing between the branches of the federal government] had passed." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 37 (2002).

²⁵² See Friedman, *supra* note 251, at 25–31.

signals were clear and had the Court listened, it would have understood Congress's desire to have its jurisdiction-stripping language read as broadly as possible.²⁵³ But the Court did not read it this way because the actual language in the 1868 Act was far more limited in reach. In this respect, it is not surprising that in discussing congressional "intent," the *Yerger* Court did not look at—or even discuss—the intent behind the 1868 Act; instead, its sole focus was on that of the broadly worded 1789 Act.²⁵⁴ And, as things turned out, the general habeas provision protected in *Yerger*'s holding remains with us today. By contrast, the 1868 Act was itself repealed shortly thereafter, destined to become nothing more than a short-lived resident of the United States Code.²⁵⁵ Accordingly, *Yerger* provides an important lesson in the value of continuity and the perils of tying statutory meaning to shifting political winds.

Yerger has also become one of the leading precedents for the principle that Congress must be held to legislate against that which has come before and, in so doing, may not repeal its own precedents merely by implication. The decision has guided the Court most recently in a series of cases in which the Court found itself charged with making sense of the intersection of the general writ with modern statutory overlays. As we will see, the Court has yet to stray far from *Yerger*'s approach.

B. Congressional Overhaul of the Habeas Provisions: *Felker v. Turpin*

Fast-forward over one hundred years and once again—this time in response to an outcry that the courts were permitting criminal defendants to pursue endless appeals—Congress moved to restrict the scope of federal court habeas jurisdiction. The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")²⁵⁶ expanded upon prior judicially crafted limits on habeas corpus by setting time limits for filing petitions, severely curtailing the grounds on which relief may be granted, and limiting the opportunities to file successive petitions to a very narrow range of circumstances.²⁵⁷ In

²⁵³ Indeed, on the heels of the Court's decision in *Yerger*, Congress took up a bill to strip the Supreme Court of all appellate jurisdiction over habeas corpus. See ACKERMAN, *supra* note 242, at 243. In a later form, the bill would have barred the Court from calling into question the constitutional validity of the Reconstruction effort. See *id.* Because historical events led to *Yerger*'s transfer to state custody and ensured that no additional cases in the *McCardle-Yerger* line would arise, the post-*Yerger* legislation never became law. See *id.* at 243–44.

²⁵⁴ One might question whether this stacked the deck too much in favor of the 1789 Act. Indeed, the *Yerger* Court seemed entirely disinterested in current political tides. This may have been reactionary in light of the historical context and extraordinary interbranch tension at the time. In any event, as *Yerger* stands today, it is an important model for the proposition that a foundational statute must be accorded meaning and may not be discarded as a historical relic when still very much a part of the legal fabric.

²⁵⁵ See Act of March 3, 1885, ch. 353, 23 Stat. 437 (repealing the 1868 Act).

²⁵⁶ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8 U.S.C. and 28 U.S.C.).

²⁵⁷ See, e.g., 28 U.S.C. §§ 2244(d), 2263 (2000) (setting one-year time limit for filings by state and

the words of the Supreme Court, “AEDPA’s purpose [is] to further the principles of comity, finality, and federalism.”²⁵⁸

The Court heard the case of *Felker v. Turpin*²⁵⁹ soon after AEDPA’s passage and while political rhetoric on these issues remained strong and very much focused on curtailing access to the courts by criminal defendants and immigrant aliens. In *Felker*, the Court had to decide the constitutionality of AEDPA’s new limits on the ability of prisoners to file successive habeas petitions. The gatekeeping provision at issue, 28 U.S.C. § 2244(b), limits its application to second or successive applications brought “under section 2254,” the specific avenue for challenging state convictions. The provision requires that any such petition “shall be dismissed unless” it includes a claim presented for the first time in federal habeas *and* the claim satisfies one of two factors: it relies (i) on a new rule of constitutional law made retroactive to collateral cases by the Supreme Court²⁶⁰; or (2) on facts, previously undiscoverable, that render it exceedingly unlikely that a jury would convict if given the opportunity anew.²⁶¹ Further, AEDPA provides that the grant or denial of a request to file a successive petition, which must be presented to a Court of Appeals and obtained prior to proceeding with a successive petition, “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”²⁶² These changes superseded judicially crafted limits on habeas²⁶³ and underscored the tide of congressional preferences at the time of AEDPA’s enactment—Congress wanted to curtail severely, and arguably eliminate (but for the two enumerated extraordinary circumstances), successive habeas petitions from the federal court docket.

The Court studied these provisions as they interact with the general habeas writ, very much removed from the existing political context. In this

federal prisoners); *id.* § 2263 (establishing 180-day statute of limitations for habeas filings challenging capital sentences); *id.* § 2254(d) (strictly limiting circumstances in which petitions arising out of state convictions may be granted); *id.* §§ 2244, 2255 (setting forth limited circumstances in which state and federal prisoners properly may file successive petitions).

²⁵⁸ *Duncan v. Walker*, 533 U.S. 167, 178 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 436 (2000)); *see also* H.R. CONF. REP. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944 (One purpose of AEDPA is “to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.”).

²⁵⁹ 518 U.S. 651 (1996).

²⁶⁰ It is difficult, if not impossible, to imagine the context in which such an outcome would come to pass under AEDPA’s new provisions, and accordingly this exception may well be without substance. The Court would have no reason when establishing a new constitutional rule in a direct appeal to speak to the applicability of the new rule to collateral cases, and under the new habeas provisions (as well as judicially-crafted limitations on habeas preceding those rules), it will be the rare case indeed where the Court establishes a new rule of constitutional law in a collateral case. *See Tyler v. Cain*, 533 U.S. 656 (2001) (holding that the Supreme Court must expressly declare that a new rule is retroactive to collateral cases to trigger the § 2244(b)(2) exception).

²⁶¹ 28 U.S.C. § 2244(b).

²⁶² *Id.* § 2244(b)(3)(E).

²⁶³ *See, e.g., Teague v. Lane*, 489 U.S. 288 (1989).

regard, the *Felker* opinion drew substantially on the Court's prior decision in *Yerger* and reads much like this ancestor. Because § 2244 "makes no mention of [the Court's] authority to hear habeas petitions filed as original matters in this Court," the Court concluded that it simply should not be read as speaking to that authority.²⁶⁴ Just like *Yerger*, the *Felker* opinion is a tribute of sorts to the continuing vitality and importance of the general habeas provision,²⁶⁵ but is best read as another example of the Court reconciling two intersecting statutes by giving meaning to both and advancing continuity and coherence norms in the process.

In *Felker*, the Court quickly dismissed the myriad constitutional challenges launched against the gatekeeping provision, including those grounded in the Suspension Clause. Because AEDPA does not implicate the Court's jurisdiction to entertain original habeas petitions via the general writ embodied in 28 U.S.C. § 2241,²⁶⁶ the Court held that the newer law presented no problems of constitutional magnitude.²⁶⁷ This result followed, we are told, from the fact that the case stood virtually on all fours with *Yerger*.²⁶⁸ To be sure, the *Felker* Court did flirt with the avoidance canon in its opinion,²⁶⁹ but the notion that there were constitutional doubts underscoring a contrary interpretation was highly questionable. The Court was, after all, not faced with the wholesale divestiture of federal review of state criminal convictions (which still stands over every such conviction through certiorari review), nor was it faced with a statute purporting to strip it or the lower federal courts of all habeas review, which might arguably implicate the Suspension Clause.²⁷⁰ Instead, it dealt with *successive* federal court habeas review, and it is frankly hard to see any Suspension Clause avoidance issues influencing the interpretive question posed in the case.²⁷¹

²⁶⁴ See *Felker*, 518 U.S. at 661 ("As we declined to find a repeal of § 14 of the Judiciary Act of 1789 as applied to this Court by implication then [in *Yerger*], we decline to find a similar repeal of § 2241 of Title 28—its descendant . . . by implication now."). Justice Stevens added a concurring opinion setting forth additional means by which jurisdiction might be exercised in these cases. See *id.* at 666 (Stevens, J., concurring).

²⁶⁵ As noted, the general habeas writ stems from the first Judiciary Act. See *id.* at 659 n.1 ("Section 14 [of the Judiciary Act of 1789] is the direct ancestor of 28 U.S.C. § 2241, subsection (a).").

²⁶⁶ The existing version of the general habeas statute grants federal courts the authority to issue a writ to an individual detained "in violation of the . . . laws . . . of the United States." 28 U.S.C. § 2241(c)(3).

²⁶⁷ See *Felker*, 518 U.S. at 660–61.

²⁶⁸ *Id.*

²⁶⁹ See *id.* at 663–64. As the authors of the Hart & Wechsler text note, the Court did not expressly invoke the avoidance canon in *Felker*. See RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 341 (5th ed. 2003) [hereinafter HART & WECHSLER].

²⁷⁰ Indeed, *Felker* had already sought certiorari three times prior to the instant petition. See *Felker*, 518 U.S. at 655–56.

²⁷¹ Even those who read the Suspension Clause broadly acknowledge that it does not necessarily speak to successive habeas petitions. See, e.g., Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 917 (1994). Mark Tushnet and Larry Yackle have suggested, however, that precluding Supreme Court re-

In the end, *Felker* drew heavily on *Yerger*.²⁷² Accordingly, stare decisis and the canon against implied repeals drove the *Felker* decision.²⁷³ Just as in *Yerger*, the Court's seemingly routine application of the canon disfavoring repeals by implication also served the purpose of actively defending the Court's jurisdiction to address serious constitutional violations. Thus, what might be called a conservative reading of the statutes—that is, one that presumes Congress does not effect dramatic change to the existing legal landscape lightly—led to an arguably politically-liberal result. With that said, however, in following this interpretive approach and defending its role in the separation of powers, the Court really ceded little ground to the habeas applicant by making clear that it would only issue an original writ in a truly “exceptional” case.²⁷⁴

Had the Court in *Felker* analyzed the intersection of the general habeas writ and AEDPA's restrictions on successive petitions utilizing estimating dynamic theory, it likely would have come out in a very different place. It is clear, after all, that the overall aim of Congress in passing AEDPA was “to reduce what Congress and the President regarded as excessive delays in carrying out lawful executions” and finalizing convictions.²⁷⁵ The Court's decision in *Felker* undoubtedly undercut that purpose by upholding a back-door avenue for prisoners to file additional petitions to stave off their executions,²⁷⁶ an avenue that while not particularly promising, undoubtedly has been pursued by many prisoners. In opening that door, the Court plainly disregarded the “mood” animating AEDPA.²⁷⁷ But had the Court assigned

view of gatekeeping decisions rendered by the courts of appeals, as § 2244(b) might be read to do, would present constitutional problems “because it would impair the Supreme Court's ability to ensure the supremacy and uniformity of federal law.” Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 24–25 (1997).

²⁷² Note, however, that the more sweeping aspects of *Yerger* (namely, its staunch defense of the judicial role in the protection of individual rights) were nowhere present in the *Felker* Court's decision. The latter invoked *Yerger* solely for its reliance on the canon against implied repeals.

²⁷³ When dealing with jurisdictional statutes, of course, the canon against implied repeals not only preserves the continuing vitality of the older statute in the equation, but also protects the Court's jurisdiction and concomitant role in the balance of powers. In *Felker*, moreover, we see the seeds of a powerful clear statement rule that will play a far greater role in later decisions in this line.

²⁷⁴ *Felker*, 518 U.S. at 665 (Rehnquist, C.J.). Given the narrow circumstances in which the Court has indicated it will take up review of a successive petition, I believe that Tushnet's view of the *Felker* decision as having undercut “Congress's attempt to speed up executions” is misguided. Mark Tushnet, “*The King of France with Forty Thousand Men*”: *Felker v. Turpin and the Supreme Court's Deliberative Processes*, 1996 SUP. CT. REV. 163, 182.

²⁷⁵ Tushnet, *supra* note 274, at 165.

²⁷⁶ *See id.* at 183 (noting that the Court's opinion “guts the main purpose of limiting review” and “makes one wonder what exactly the [AEDPA] did”). Tushnet notes, however, that the Court's decision was not extraordinary by any stretch, given that “there was essentially unanimous agreement in the briefs that the statute did not bar the Court from hearing original habeas petitions.” *Id.* at 182.

²⁷⁷ *Cf.* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (Frankfurter, J.) (“It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for

greater significance to prevailing political tides, it would have done tremendous damage to the statutory fabric. Importantly, *Felker*'s reliance on broader principles of statutory continuity and harmonization preserved the vitality of § 2241 and connected the decision with *Yerger* and its progeny. In *Felker*, the Court determined § 2244's place in the statutory continuum and let *Yerger* point the way.²⁷⁸

C. *Congressional Restrictions on Review of Deportation Proceedings:*
INS v. St. Cyr, Zadvydas v. Davis, and DeMore v. Kim

With the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),²⁷⁹ Congress took aim at judicial review in a different context—the deportation of immigrant aliens.²⁸⁰ These changes, like those AEDPA enacted with respect to criminal habeas review, were directed at a politically weak group and were born of a congressional desire to streamline or curtail altogether judicial review of deportation and removal proceedings.²⁸¹ IIRIRA so dramatically altered the field of immigration law that it has been called "the toughest immigration legislation adopted in half a century."²⁸²

Prior to IIRIRA, the Immigration and Nationality Act ("INA")²⁸³ governed judicial review of deportation proceedings. INA section 1105a set forth that "the sole and exclusive procedure for . . . the judicial review of all final orders or deportation" shall be that provided in the Hobbs Act, which

judgment and not as a body of rigid rules assuring sameness of application."). Indeed, the Court's unanimous opinion in *Felker* came only months after AEDPA went into effect, and the prevailing political winds at the time were very much in favor of streamlining criminal habeas proceedings. *See, e.g.*, H.R. REP. NO. 104-518, at 111 (1996).

²⁷⁸ Notably, the Court had really committed itself to very little, for a defense of jurisdiction for jurisdiction's sake does not grant any rights or relief automatically to the affected litigants. *See* Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 842 (1991) (recognizing that "[e]ach implication of a remedy [versus simply jurisdiction] on a federal statute is simultaneously the creation of a right and the creation of federal question jurisdiction to adjudicate that right").

²⁷⁹ Pub. L. No. 104-208, div.C, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.).

²⁸⁰ These limitations superseded similar, though less powerful, provisions in AEDPA curtailing judicial review of deportation. *See* Note, *supra* note 156, at 1581 n.22.

²⁸¹ IIRIRA increased significantly the justifications for inadmissibility and deportation of aliens, restricted the circumstances in which waivers of deportation would be available, and expedited proceedings by purporting to eliminate judicial review. *See generally* Lenni Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).

²⁸² T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 368 (2002).

²⁸³ Pub. L. No. 414, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

in turn placed exclusive jurisdiction in the courts of appeals.²⁸⁴ In IIRIRA, Congress repealed section 1105a and moved to restrict, if not eliminate, the availability of judicial review of executive decisions in this realm.

As part of their changes to prior immigration law, AEDPA and IIRIRA targeted the Attorney General's authority to grant a discretionary waiver of deportation for aliens convicted of certain enumerated crimes.²⁸⁵ *INS v. St. Cyr*²⁸⁶ presented the question of whether IIRIRA had in fact withdrawn entirely the Attorney General's authority to waive deportation. Before even getting to that question, however, the Court had to overcome the seemingly broad language in both AEDPA and IIRIRA purporting to eliminate the Court's jurisdiction to review *St. Cyr*'s claims. The relevant statutory language included a section of AEDPA entitled "Elimination of Custody Review by Habeas Corpus"²⁸⁷ and a provision in IIRIRA setting out the following: "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [certain specified] criminal offense[s]."²⁸⁸

Although the unanimous Court that found § 2241 jurisdiction in *Felker* split five to four in *St. Cyr*, the Court concluded once again that § 2241 remained intact and provided a jurisdictional basis for the Court's review of the legal question posed.²⁸⁹ This conclusion followed, in the majority's view, from "the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction" and the strong presumption favoring judicial review of administrative actions.²⁹⁰ This clear statement principle, the majority noted, derived from *Yerger* and *Felker*; it functioned in *St. Cyr* essentially as the canon against implied repeals in different clothing. The *St. Cyr* Court piled on the avoidance canon as well for good

²⁸⁴ See 75 Stat. 651 (1961) (providing that the procedures set forth in the Hobbs Act would be the "sole and exclusive procedure" for judicial review of final orders of deportation). Section 1105a of the INA is now repealed. See 8 U.S.C. § 1105a(10) (repealed Sept. 30, 1996).

²⁸⁵ Compare INA section 212(c), which permitted such waivers, with the newly amended 8 U.S.C. § 1182(c) (1996), which set forth certain offenses rendering the alien ineligible for a waiver, and 8 U.S.C. § 1229b(a)(3) (2000), which replaced the repealed section 212(c) and provides that the Attorney General may cancel removal only with respect to a narrow class of aliens.

²⁸⁶ 533 U.S. 289 (2001).

²⁸⁷ AEDPA, Pub. L. No. 104-132, § 401(e), 110 Stat. 1214, 1268 (1996).

²⁸⁸ 8 U.S.C. § 1252(a)(2)(C) (2000). The INS argued in *St. Cyr* that these provisions as well as the creation in IIRIRA of 8 U.S.C. §§ 1252(a)(1) and 1252(b)(9) eliminated judicial review altogether of the question before the Court and removal orders for aliens convicted of the enumerated crimes. *St. Cyr*, 533 U.S. at 298.

²⁸⁹ *St. Cyr*, 533 U.S. at 297. The majority emphasized the fact that *St. Cyr*'s application raised a pure question of law. See *id.* at 298.

²⁹⁰ *Id.* (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1868); *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996)); see *St. Cyr*, 533 U.S. at 299 ("Congress must articulate specific and unambiguous statutory directives to effect a repeal." (citing *Yerger*, 75 U.S. (8 Wall.) at 105)).

measure,²⁹¹ and concededly, it is this canon that seems to have done much of the heavy lifting for the majority.²⁹²

But at its core, *St. Cyr* flowed very much from *Yerger*-inspired construction. Because, the Court held, AEDPA's "Elimination of . . . Review by Habeas Corpus" does not refer to § 2241 specifically, it should be read merely to repeal only the more specific avenue of habeas review previously created to govern deportation proceedings.²⁹³ Here again the Court emphasized the historical pedigree of § 2241 and placed great significance on the fact that "[i]ts text remained undisturbed by either AEDPA or IIRIRA."²⁹⁴ Along these lines, the repeal in AEDPA and IIRIRA of the specific avenue of habeas review created by the INA should not be read "to eliminate what it did not originally grant—namely, habeas jurisdiction pursuant to 28 U.S.C. § 2241."²⁹⁵ The majority posited—correctly, I believe—that this proposition followed directly from *Yerger* and a reluctance to read congressional action as reaching more broadly than the statutory language evidenced.²⁹⁶

Still, the jurisdiction-stripping language in *St. Cyr* was forceful. Two provisions in IIRIRA spoke of "judicial review" in the context of final removal orders as coming "only" under prior Hobbs Act procedures incorporated by the INA²⁹⁷, AEDPA's section 401(e) repealed those procedures for

²⁹¹ The majority invoked the Suspension Clause as support for the assertion that wholesale preclusion of review of legal questions "would give rise to substantial constitutional questions." *St. Cyr*, 533 U.S. at 300. Justice Scalia, in dissent, relied on *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), to counter that no Suspension Clause problems were implicated by the case. *See St. Cyr*, 533 U.S. at 338, 339–41 (Scalia, J., dissenting) (arguing that the Clause does not "guarantee[] any particular habeas right that enjoys immunity from suspension").

²⁹² The majority spent a good portion of its holding explicating the historical purpose and scope of the writ. *See St. Cyr*, 533 U.S. at 300–04; *see also* HART & WECHSLER, *supra* note 269, at 354 (commenting that Justice Stevens's majority opinion "emphasiz[ed]" the avoidance canon). The majority posited that the historical "core" of the writ is its use to "review[] the legality of executive detention" and the writ was made available in England and the Colonies prior to 1789 to "nonenemy aliens as well as to citizens." *St. Cyr*, 533 U.S. at 301–02 (citing, *inter alia*, *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.")).

²⁹³ Here, the Court highlighted the fact that "[t]he actual text of § 401(e), unlike its title, merely repeals a subsection of the 1961 statute amending the judicial review provisions of the 1952 [INA]." *St. Cyr*, 533 U.S. at 309.

²⁹⁴ *Id.* at 305 n.25; *see also id.* at 308 ("The INS argues . . . that AEDPA and IIRIRA contain four provisions that express a clear and unambiguous statement of Congress' intent to bar petitions brought under § 2241, despite the fact that none of them mention that section."); *id.* at 309 (noting that in AEDPA section 401(e), "[n]either the title nor the text makes any mention of 28 U.S.C. § 2241"); *cf.* *Johnson v. Robison*, 415 U.S. 361 (1974) (following similar approach and reading statute not to bar judicial consideration of constitutional claims where "no explicit provision" in the statute precluded such review).

²⁹⁵ *See St. Cyr*, 533 U.S. at 310.

²⁹⁶ *Id.* (citing *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105–06 (1868) (The repeal of "an additional grant of jurisdiction" does not "operate as a repeal of jurisdiction theretofore allowed.")).

²⁹⁷ *See* 8 U.S.C. § 1252(a)(1), (b)(9) (2000).

criminal aliens (such as *St. Cyr*), and a third provision in IIRIRA set forth that “no court shall have jurisdiction to review *any* final order of removal” in such circumstances “[n]otwithstanding any other provision of law.”²⁹⁸ The majority addressed this rather inconvenient language with what the dissent viewed as some creative statutory construction—IIRIRA’s language barred only “judicial review,” a term that does not encompass “habeas corpus,” because the latter has “in the immigration context” a “historically distinct meaning[]” as well as an “accumulated legal tradition and meaning.”²⁹⁹

Here, the canon against implied repeals took on arguably greater force than in prior decisions in this line.³⁰⁰ Yet, it is also here that it performs the very same function—preserving an important and foundational jurisdictional statute from displacement based on ambiguous legislative indicators and, in this particular context, preserving the balance of powers from unnecessary interbranch friction.³⁰¹ My own view is that the interpretive question in *St. Cyr* was not nearly so difficult. The statute’s preclusion of “judicial review” targeted exclusively “final order[s] of removal” and was so limited. The Court in *St. Cyr* was not faced with reviewing the merits of a specific removal order but instead to opine on a broader legal question surrounding the administration of IIRIRA. The case, accordingly, fell well outside the scope of the statute’s plain language.

Only days on the heels of *St. Cyr*, the Court handed down *Zadvydas v. Davis*,³⁰² in which it again held that IIRIRA did not displace § 2241 habeas review—this time in cases challenging the indefinite detention by the Attorney General of aliens ordered deported.³⁰³ As it had in *St. Cyr*, the Court saw nothing in IIRIRA that implicated the longstanding general habeas statute’s grant of review authority.³⁰⁴ The Court also highlighted again that

²⁹⁸ *Id.* § 1252(a)(2)(C) (emphasis added). To be sure, an argument could be made that this disclaimer was intended to operate as a non obstante clause or a legislative directive that the canon against implied repeals be disregarded by the courts when interpreting the statute’s reach. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (discussing the historical use of the non obstante clause).

²⁹⁹ *St. Cyr*, 533 U.S. at 312 n.35 (quoting *Morrisette v. United States* 342 U.S. 246, 262 (1952)).

³⁰⁰ In Justice Scalia’s view, the canon did far too much heavy-lifting. The majority, he argued, had created a “magic words” clear statement rule for displacing § 2241 jurisdiction. *Id.* at 327 (Scalia, J., dissenting); see *id.* at 332 (“Unquestionably, unambiguously, and unmistakably, IIRIRA expressly supercedes § 2241’s general provision for habeas jurisdiction.”). *Felker* and *Yerger*’s canon disfavoring repeals by implication, Scalia believed, had no application here because the Court was not even called upon “to imply from one statutory provision the repeal of another.” *Id.* at 333 (“All by their terms prohibit the judicial review at issue in this case.”). Finally, Justice Scalia saw no place for the avoidance canon in the case; the majority’s contrary view had transformed the Suspension Clause into a “one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction.” *Id.* at 342.

³⁰¹ As discussed below, see *infra* note 321, there are substantial arguments that a wholesale divestiture of jurisdiction by IIRIRA and AEDPA would be unconstitutional in this context, a conclusion that would have the Court striking down Congress’s work as invalid.

³⁰² 533 U.S. 678 (2001).

³⁰³ Curiously, in *Zadvydas*, Justice O’Connor and Justice Kennedy switched places in the five-to-four split, with Justice Kennedy penning a dissent. See *id.* at 705 (Kennedy, J., dissenting).

³⁰⁴ See *id.* at 687–88 (majority opinion).

prior to the INA's creation of an immigration-specific avenue of judicial review, judicial review of "immigration-related detention" almost always came via the § 2241 avenue.³⁰⁵ Once again the canon against implied repeals played a central role.³⁰⁶

*DeMore v. Kim*³⁰⁷ is the latest example in this line of authority. Once again, the Court found itself charged with determining whether ostensibly jurisdiction-stripping language in IIRIRA implicated § 2241 jurisdiction. In *Kim*, an alien challenged the constitutionality of 8 U.S.C. § 1226(c), which provides for mandatory detention of criminal aliens during the pendency of their deportation proceedings.³⁰⁸ Before getting to that question, however, the Court had to wrestle with § 1226(e), also enacted as part of IIRIRA, in which Congress admonished:

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.³⁰⁹

The Court of Appeals' analysis of whether this language precluded its review of the constitutionality of § 1226(c) amounted to nothing more than the following: "The district court had jurisdiction pursuant to Section 2241. *See INS v. St. Cyr*, 533 U.S. 289 (2001)."³¹⁰ Indeed, the applicability of § 2241 seemed so clear in light of *St. Cyr* that the parties failed even to address the issue in their briefs to the Supreme Court.³¹¹

³⁰⁵ *Id.* at 687.

³⁰⁶ To be sure, the avoidance canon played a significant role as well. *See id.* at 687–88. In particular, the majority remarked that serious due process implications would flow from the Government's argument that aliens ordered deported may be held indefinitely where host countries will not take them back. *See id.* at 692.

³⁰⁷ 538 U.S. 510 (2003).

³⁰⁸ The Court upheld the detention law. *See id.* at 531.

³⁰⁹ 8 U.S.C. § 1226(e) (2000).

³¹⁰ *Kim v. Ziglar*, 276 F.3d 523, 526 tbl. (9th Cir. 2002).

³¹¹ An amicus brief highlighted the jurisdictional question for the Court. *See generally* Amicus Brief of Washington Legal Foundation et al., *DeMore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491). The brief highlights another interesting development—that of members of Congress submitting amicus briefs to the Supreme Court setting forth their respective views regarding what they intended in voting for certain legislation. (Five members of the House and one Senator joined the Washington Legal Foundation amicus brief in *Kim*.) Estimating dynamic theory likely would give substantial deference to such briefs where they represent widely-held views of members of Congress, and such briefs would probably flourish in an estimating theory interpretive regime. But these submissions to the Court may present the worst form of legislative history: namely, they are removed from the legislative process entirely, and are more likely to constitute a venue for legislators to appease special interests by taking a low-visibility position friendly to such interests. *Cf.* Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974) (amicus brief filed by thirty-six members of Congress constituted nothing more than "personal views of the[] legislators" (quotations omitted)); *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967) (noting that postenactment "personal views" of a legislator are entitled no special weight).

Although much of the oral argument focused on the antecedent jurisdictional question,³¹² the Court dealt quickly with the issue in its decision. Once again, the Court upheld its jurisdiction to review the legal question before it under the § 2241 general habeas writ.³¹³ Again the Court reached this conclusion by carefully parsing the language of the newer statutory overlay as it related to § 2241 jurisdiction and, finding no direct evidence that the former was meant to undercut the latter, concluded that § 2241 remained intact.³¹⁴ Writing for the majority on this issue, Chief Justice Rehnquist highlighted that § 1226(e)'s terms spoke only to “discretionary judgment[s]” by the Attorney General and “decision[s]” regarding an individual’s detention or release.³¹⁵ They said nothing of Kim’s claims, which were “challenges [to] the statutory framework that permits his detention without bail.”³¹⁶ The Court also invoked the longstanding presumption that it retains jurisdiction to address constitutional violations absent a clear statement from Congress to the contrary.³¹⁷ Building off *St. Cyr*, the Court deemed this rule all the more powerful where the statute is said to deprive the courts of habeas review.³¹⁸ Thus, *Kim* was little more than a replay of *St. Cyr*, at least with respect to the jurisdictional question posed.³¹⁹ It stands as yet another example of the Court properly harmonizing two intersecting statutes and not running amuck with limited or unclear legislative directives.

The constitutional issues underlying *St. Cyr*, *Zadvydas*, and *Kim* were substantial, though clouded by the discretionary nature of the Attorney General’s authority at issue in each case.³²⁰ Much ink has been spilled sug-

³¹² During oral argument, Justice Scalia (a dissenter in *St. Cyr*) immediately flagged the issue and expressed the view that § 1226(e) simply had “no wiggle room” for the courts to exercise review. *See generally* Transcript of Oral Argument at 3–7, *DeMore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491); *id.* at 5 (Scalia, J.) (“[O]ther statutes had some wiggle room I think, even *St. Cyr*, and there just is no wiggle room here. It doesn’t refer to judicial review. It simply says, no court may set aside any action by the Attorney General under this section.”); *cf.* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (authored by Scalia and taking an uncompromising view that jurisdictional questions must always be addressed in the first instance).

³¹³ The majority on this issue added the Chief Justice to the *St. Cyr* majority of five.

³¹⁴ *See Kim*, 538 U.S. at 516–17.

³¹⁵ *Id.*

³¹⁶ *Id.* at 517.

³¹⁷ *See id.* (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 367 (1974)).

³¹⁸ *See id.* (citing *INS v. St. Cyr*, 533 U.S. 289, 308–09 (2001)).

³¹⁹ Justice O’Connor wrote separately in *Kim* to reiterate her disagreement with the outcome in *St. Cyr* and argued regardless that the language of § 1226(e)—that “[n]o court may set aside any action or decision” of the Attorney General—was a far stronger dose of jurisdiction-stripping medicine. *See Kim*, 538 U.S. at 533–37 (O’Connor, J., concurring in part and concurring in the judgment). She also highlighted the lack of historical use of § 2241 to review interlocutory detention pending conclusion of removal proceedings, contrasting the historical use of § 2241 to review deportation and exclusion authority like that at issue in *St. Cyr*. *See id.* at 538–39.

³²⁰ In *St. Cyr*, the majority viewed the issue as “serious and difficult” so much so that “the desirabil-

gesting that the wholesale removal of jurisdiction in these circumstances would indeed cross the as-yet undefined constitutional line.³²¹ It is enough for our purposes to say that the avoidance canon was far more powerful in these cases than in *Felker*. But I still do not believe its invocation was necessary to resolve these cases. Indeed, even without the avoidance canon or broader separation of powers concerns that may have informed the positions of some Justices, the Court's decisions in *St. Cyr*, *Zadvydas*, and *Kim* properly line up with *Felker* and *Yerger*. In each case, the canon against implied repeals and broader harmonization norms strongly supported a reading that preserved the general habeas writ in the absence of unwavering evidence of a congressional purpose to eliminate its availability. Further, when one views these cases within the greater historical framework, the preservation of § 2241 jurisdiction does not appear nearly so radical. This is because from the late nineteenth century until 1952 (the enactment of the INA), review of these kinds of issues often came under general habeas jurisdiction.³²²

Had the Court reviewed these cases through the lens of estimating dynamic theory, it probably would have been led down a different path. Even before the events of September 11, 2001 (and all the more so after), it is fair to say that legislation increasingly took on an anti-immigrant flavor. A desire to detain and streamline deportation of problematic aliens provided much of the impetus for both AEDPA and IIRIRA, and post-September 11

ity of avoiding th[e] necessity [of reaching it] reinforces the reasons for requiring a clear and unambiguous statement of congressional intent" before doing so. 533 U.S. at 305. But the Court went further to suggest that judicial review should lie at least where the issue of discretion involves a legal question. *See id.* at 305–08 (relying on *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (permitting deportable alien to challenge Executive failure to exercise discretion authorized by law)); Neuman, *supra* note 281, at 1991 (noting the "strong tradition in habeas corpus law . . . that subjects the legally erroneous failure to exercise discretion, unlike a substantively unwise exercise of discretion, to inquiry on the writ"). The question was not hard in the view of the dissenters, who asserted that executive discretion has always existed entirely beyond the judicial grasp. *See St. Cyr*, 533 U.S. at 343–45 (Scalia, J., dissenting) (finding persuasive Justice Jackson's powerful dissent in *Accardi*, 347 U.S. at 271 (Jackson, J., dissenting)).

³²¹ *See generally* David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998); Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068 (1998) (focusing on the Due Process Clause and Article III as the limiting principles); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537 (1998) (analyzing the problem from Article III perspective to encompass excluded aliens); Neuman, *supra* note 281; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998). Of course, one of the earliest and most important commentators on this question was Henry Hart, who in his famous dialogue suggested that the wholesale removal of judicial review of deportation orders would be unconstitutional. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1397 (1953); *see also* *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("Under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.").

³²² *See* Neuman, *supra* note 281, at 1967. *But see Kim*, 538 U.S. at 538–39 (O'Connor, J., concurring in part and concurring in the judgment) (noting the lack of historical use of § 2241 to review interlocutory detention pending conclusion of removal proceedings).

legislation goes even further in this regard.³²³ A Court more keenly attuned to goings-on in Congress probably would have received the message that, to achieve these goals, the legislature wanted to restrict judicial review of deportation decisions and, in particular, discretionary decisions such as those at issue in *St. Cyr* and *Kim*.³²⁴ The Supreme Court itself had already recognized that the “theme of the [IIRIRA] legislation” is “protecting the Executive’s discretion from the courts.”³²⁵ (Make the easy substitution of “insulating” for “protecting” and we might have a different outcome in *St. Cyr*, although more recent decisions suggest that the constitutional issues would then be front and center to the Court’s analysis.³²⁶) This would have been a mistake, however, for it would have read Congress to depart from the long-settled availability of original habeas as a broad venue for judicial review and drastically alter the balance of powers on the basis of disputable evidence. Such a reading would have rested on the presumption that Congress’s failure to address the important and longstanding original writ need not matter for purposes of gauging its pulse when drafting later laws. Portions of AEDPA and IIRIRA may or may not be short-lived like the reactionary 1868 Act at issue in *Yerger*. The core of the writ embodied in § 2241 has proven its vitality over two hundred years, and that ought to count for something.

Elhauge reads *St. Cyr* as supporting his theory nonetheless. He views the Court’s invocation of avoidance and clear statement principles to preserve general habeas as “justified on preference-eliciting grounds because

³²³ See USA Patriot Act, Pub. L. No. 107-56, § 411(a)(1)(F), 115 Stat. 272, 346–47 (2001) (amending 8 U.S.C. § 1182(a)(3)(B)(iv)) (providing for removal of immigrants proven to have solicited funds, recruited personnel, or supplied other tangible assistance that directly furthers terrorist activity); *id.* § 411(a)(2), 115 Stat. at 348 (codified at 8 U.S.C. § 1182(a)(3)(F) (2005)) (providing for the removal of immigrants who render assistance to groups designated by the Secretary of State as engaging in terrorist activity); *id.* § 412(a), 115 Stat. at 350–52 (codified at 8 U.S.C. § 1226a(a)) (authorizing the Attorney General to certify and detain noncitizens where there are reasonable grounds to believe that they are involved in terrorist activities or “engaged in any other activity that endangers the national security of the United States”); *id.* (authorizing indefinite detention of such persons if their release “will threaten the national security of the United States or the safety of the community or any person”).

³²⁴ See Aleinikoff, *supra* note 282, at 368 (“[I]t is quite doubtful that the statute—as construed by the Court [in *Zadvydas*—]effectuates congressional intent.”).

³²⁵ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (“Of course many provisions of IIRIRA are aimed at protecting the Executive’s discretion from the courts—indeed, that can fairly be said to be the theme of the legislation.”). In *American-Arab*, the Court construed IIRIRA’s transitional rules precluding judicial review of certain decisions made by the Attorney General in the course of deportation proceedings, *see* 8 U.S.C. § 1252(g) (providing that the Attorney General’s “decision or action” to “commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act,” should not be subject to judicial review), and upheld those limitations to bar petitioners’ attempts to obtain preemptive review of their selective prosecution claims. In doing so, the Court left open the larger question whether such “discretionary determinations” by the Attorney General may be reviewed as part of a challenge to a final deportation order once issued. *See American-Arab*, 525 U.S. at 482–83, 485. For criticism of this decision, consult Neuman, *supra* note 281, at 1985–86.

³²⁶ *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

aliens who might face deportation have poor access to the legislative agenda.”³²⁷ That is, he reads the case as a judicial attempt to elevate the influence of a politically weak group on the legislative agenda. Nonsense. First, it is a stretch to read the *St. Cyr* opinion as encouraging or “eliciting” further legislative endeavors to constrict judicial review of immigration matters. There is simply no evidence to support such a reading. Indeed, if anything, the *St. Cyr* Court fired a shot across the bow telling Congress to back off. Thus, the decision may be viewed as a staunch defense of judicial turf from encroachment, although I mean to suggest and defend a far less dramatic reading of the decision here. Second, there is no evidence to suggest that the *St. Cyr* Court had any mind to give a voice to a politically powerless group. The decision reads instead as an attempt to make sense of intersecting statutes by assigning meaning to both and presuming that Congress will not effect drastic change to the statutory landscape without making such a desire manifest.

D. Post-Script: The Terrorism Cases

The Supreme Court’s 2003 Term was yet another blockbuster for habeas cases. As part of its so-called War on Terror, the Bush Administration has detained both citizens and noncitizens deemed to be “enemy combatants” and taken the position that the validity of such detentions should be immune from judicial scrutiny. Two of these cases bear special attention: one for breaking with the interpretive trend described and defended above, and the other for taking a presumption in favor of original habeas jurisdiction to a new level.

First, *Hamdi v. Rumsfeld*³²⁸ presented the Court with the issue whether the executive could detain citizens as part of its counter-terrorism efforts and to what extent such detention could escape judicial scrutiny. Writing for a fractured Court, Justice O’Connor determined that Congress’s Authorization for Use of Military Force (“AUMF”)³²⁹ following the September 11 attacks granted the executive branch broad authority to detain individuals—even citizens—as part of its War on Terror.³³⁰ The language on which the executive relied for such authority set forth:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,

³²⁷ Elhauge, *Preference-Eliciting*, *supra* note 10, at 2210. He continues: “This is consistent with a more specific canon that instructs courts to construe statutory ambiguity in favor of aliens in deportation cases,” *id.*, a canon with which Elhauge appears to agree. Again, Elhauge’s selective use of canons exposes him to the very criticisms that he levels against Sunstein and others for heralding canons that favor the politically weak.

³²⁸ 542 U.S. 507.

³²⁹ Pub. L. No. 107-40, 115 Stat. 224 (2001).

³³⁰ See *Hamdi*, 542 U.S. at 590–97.

or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.³³¹

Such language, Justice O'Connor believed, provided sufficiently clear authorization of the detention of citizens to overcome the prohibitory language in 18 U.S.C. § 4001(a) providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."³³² Deeming the detention authorized, the plurality then turned to the constitutional issue of what, if any, judicial review should follow, and concluded that a suspect like Hamdi should be permitted a fair opportunity to challenge his classification as an enemy combatant subject to detention.³³³ Justice Scalia, joined by Justice Stevens, dissented and argued that Hamdi's detention was not authorized and could only follow from a Suspension of the Writ by Congress.³³⁴

The Due Process and Suspension Clause issues implicated by *Hamdi* are of undeniable import. The interpretive exercise that preceded the constitutional inquiry into the propriety of Hamdi's detention, however, invites special scrutiny. Indeed, the interpretation of the intersection of § 4001(a) and AUMF should have precluded any discussion of the constitutional issues raised by Hamdi. This is because, as discussed below, a proper reading of the two laws standing together inevitably leads to the conclusion that Hamdi's detention was not authorized by Congress and therefore illegitimate. The constitutional issues, in short, should have been nothing more than an irrelevant sideshow in the case.

Justice O'Connor's contrary interpretation of the intersecting statutes held sway in *Hamdi*—and is quite troubling. She took what can be best described as a vague and general authorization to launch a war effort and construed it to provide sufficient authorization to detain citizens as part of that effort, notwithstanding the specific and unwavering legislative directive in § 4001(a) that citizens not be held absent clear congressional authorization as well as the background principles in our constitutional tradition calling such a practice into question.³³⁵ Her reading of a broadly-worded war au-

³³¹ AUMF § 2(a).

³³² Congress enacted § 4001(a) in part as a reaction to the internment of Japanese-Americans during World War II. See *Hamdi*, 542 U.S. at 590–93 (opinion of O'Connor, J.).

³³³ See *id.* at 601. Justice O'Connor's opinion on this point, joined by a majority of the Justices, set forth a framework in keeping with *Mathews v. Eldridge*, 424 U.S. 319 (1976), pursuant to which Hamdi and others could challenge the basis for their classification. See *Hamdi*, 542 U.S. at 598–99.

³³⁴ See *id.* at 620–21, 625–27 (Scalia, J., dissenting).

³³⁵ See *id.* at 608 (Souter, J., dissenting in part and concurring in the judgment) (denying that the AUMF authorized Hamdi's detention and arguing that Congress "understand[s] the need for clear authority before citizens are kept detained . . . and § 4001(a) must be read to have teeth in its demand for congressional authorization"); see also *id.* at 626–27 (Scalia, J., dissenting) (finding no clear authorization in the AUMF). Justice Souter's opinion highlights an absurdity in the conclusion reached by the Court—because the USA Patriot Act limits the detention of aliens in the absence of criminal charges or

thorization that said *nothing* of detention of citizens as permitting the executive to break with settled policy as embodied in § 4001(a)'s forceful language and our fundamental constitutional principles protecting individual liberties constitutes a radical and regrettable break with continuity norms.

In *Hamdi*, no one argued that § 2241 jurisdiction did not lie,³³⁶ or for that matter, that Congress had suspended the writ.³³⁷ Thus, no one questioned the Court's jurisdiction, as the government did in *Rasul v. Bush*.³³⁸ The petitioners in *Rasul*, noncitizens accused of being enemy combatants and detained by the United States Military at Guantanamo Bay, Cuba, sought the opportunity to challenge the legitimacy of their detentions. The circumstances of the detention of the *Rasul* petitioners were unique in many respects in the Court's habeas caselaw. The petitioners, for example, had been denied review of their detention in any forum at the time of the Supreme Court's review of their case; they had not even been provided with

the initiation of deportation proceedings to seven days, suspected alien terrorists ostensibly enjoy greater rights than suspected citizen terrorists. *See id.* at 613 (Souter, J., dissenting in part and concurring in the judgment).

³³⁶ Support for this conclusion comes from *Ex parte Quirin*, 317 U.S. 1 (1942), in which the Court exercised habeas jurisdiction to review the claims of six Germans (one of whom claimed American citizenship) who had landed on United States shores with the purpose of spying and committing other acts of espionage. A military tribunal condemned the petitioners to death following a closed trial. The Supreme Court put the case down for argument during a special term session and rejected the petitioners' claims on the merits. *See id.* at 25 ("And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."). Days later, on August 8, 1942, the executions were carried out.

³³⁷ *See Hamdi*, 542 U.S. at 596–97. Such an argument could have been advanced in reliance upon the President's military order issued November 13, 2001, *see* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,836 (Nov. 13, 2001) [hereinafter November 13 Order], though the argument would have to wrestle with *Ex parte Merryman*, 17 F. Cas. 144 (1861) (opinion of Chief Justice Taney as circuit justice), which opined that the President lacks the unilateral authority to suspend the writ. The November 13 Order provides that an individual designated a terrorist by the President "shall not be privileged to seek *any remedy* or *maintain any proceeding, directly or indirectly*, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof." November 13 Order, *supra*, § 7(b)(2), at 57,836 (emphasis added). In a New York Times Op-ed, President Bush's then-White House Counsel wrote that in his view, section 7 of the President's Order does *not* strip detainees captured on United States soil of the right to seek a writ under § 2241. *See* Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27. He wrote:

The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review.

Id. Nonetheless, the Bush administration apparently contemplated pressing Congress to consider suspension. Press accounts suggest that the original draft of the antiterrorism bill sent by the President to Congress in late 2001 included a provision calling for the suspension of habeas corpus. *See, e.g.,* Jonathan Alter, *Justice vs. Terror; Between the Lines*, NEWSWEEK, Dec. 10, 2001, at 48.

³³⁸ 542 U.S. 466 (2004).

an opportunity to present their claims before a military tribunal.³³⁹ In addition, the United States government held the petitioners at the United States Naval Base at Guantanamo Bay, Cuba, an area controlled under a perpetual lease by the United States, but over which the United States is not sovereign. In an opinion that offered several bases for its conclusion, the Court upheld jurisdiction under § 2241, which authorizes district courts, “within their respective jurisdictions,” to entertain habeas petitions brought by parties claiming to be held “in custody in violation of the . . . laws . . . of the United States.”³⁴⁰ The habeas petitioners were not within the standard reach of the United States District Court for the District of Columbia, but this fact, according to the majority, did not matter.³⁴¹

Justice Scalia’s dissent makes a strong case for interpreting the reach of § 2241 in a more limited fashion. He noted, for example, that a subsection of § 2241 refers to “*the* district court of *the* district wherein the restraint complained of is had,”³⁴² and a neighboring provision refers again to “the district in which the applicant is held.”³⁴³ Further, the dissent observed that Congress knows well how to expand federal jurisdiction to cover places like Guantanamo Bay, given that it has taken similar steps in the past to establish federal courts encompassing unique United States enclaves within their jurisdiction.³⁴⁴ The dissent put more weight on the doctrine of stare decisis than it can bear, however, given that the *Rasul* case truly presented novel circumstances. Nor did the dissent cede nearly enough ground to the majority’s point that the Court’s precedents have already overlooked the statutory requirement that a habeas petitioner be confined within the precise district in which a petition is brought.³⁴⁵

³³⁹ Contrast the case of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which the Court declined to find habeas jurisdiction over noncitizens detained outside the sovereign territory of the United States; those detainees, notably, had at least been afforded a hearing before a military commission. *See id.* at 778.

³⁴⁰ 28 U.S.C. § 2241(a), (c)(3) (2000). *Rasul*’s majority opinion, penned by Justice Stevens, on the one hand emphasized that the custodians were well within the reach of the district court and therefore implicated the court’s “respective jurisdiction.” *See Rasul*, 542 U.S. at 560 n.9 (quoting 28 U.S.C. § 2241(a)). At other points, the Court highlighted the unique status of Guantanamo Bay Naval Base as a place over which the United States may “exercise . . . control permanently if it so chooses.” *Id.* at 561.

³⁴¹ *See id.* at 562–63.

³⁴² *See id.* at 566 (Scalia, J., dissenting) (quoting 28 U.S.C. § 2241(a)).

³⁴³ *Id.* (quoting 28 U.S.C. § 2242); *see also id.* (“[T]his case turns on the words of § 2241, a text the Court today largely ignores.”).

³⁴⁴ *See id.* at 577 n.7 (observing that Congress created a special district for the Panama Canal Zone).

³⁴⁵ On the first point, as Justice Kennedy’s concurrence sets out, *Rasul* differs from *Eisentrager* in many ways, *see id.* at 564–65 (Kennedy, J., concurring in the judgment), not the least of which was the fact that the *Eisentrager* petitioners had been afforded an opportunity to challenge their detention in a hearing before a military tribunal. On the second point, as the majority notes, *see id.* at 559–60, the decision in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), held that a prisoner’s presence within the territorial jurisdiction of the relevant district court is not “an invariable prerequisite” to the exercise of habeas jurisdiction. *Id.* at 495.

A full explication of the interpretive implications of the Court's decision in *Rasul* is beyond the scope of this Article. What the decision highlights, however, is the Court's aggressive commitment to preserving a role for itself in the constitutional order—particularly through the avenue of § 2241 jurisdiction. This commitment, in turn, may call into question whether my account of what the Court was doing in the *Felker-St. Cyr* line of cases—applying well-settled and hardly radical continuity norms—really drove those decisions. Nonetheless, I remain convinced that the earlier Rehnquist Court decisions are best read in that light.

* * *

The Supreme Court's decisions from *Yerger* through *Kim* highlight the significant role that background norms grounded in continuity and coherence play in the Court's treatment of difficult questions of statutory construction. Animating the Court's reading in each of these cases is a combination of the canon against implied repeals and a clear statement rule protecting structural harmony, as well as a heavy dose of stare decisis—namely, continuing and strong reliance on the model set forth in *Yerger*. The immigration decisions also embrace the avoidance canon for good measure. The presumption against implied repeals can and does do much of the heavy lifting in these cases, as well it should.³⁴⁶ The canon is, after all, built on the idea that statutes must find their place within the framework of what has come before and that only Congress holds the power to remove the fruits of its labor (i.e., previous enactments) from the body of enacted law. By embracing these harmonization values, the canon against implied repeals works as a bridge between the old and the new; likewise, it provides a workable roadmap to aid the courts in resolving the otherwise intractable problem of intersecting statutes.³⁴⁷

³⁴⁶ The norms underlying this canon have similarly informed other decisions in this line. In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the Court applied a fairly powerful dose of the *expressio unis* canon, reading a jurisdiction-stripping provision covering three “discrete events” in the deportation process not to cover other issues implicated by deportation proceedings. *See id.* at 482 (“It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting.”); *see also* *Castro v. United States*, 540 U.S. 375, 377, 381 (2004) (reading AEDPA’s limitation on “second or successive application[s]” for habeas corpus in a limited fashion, observing that “we ‘read limitations on our jurisdiction to review narrowly’” (citation omitted)).

³⁴⁷ This approach is not limited solely to cases (like those discussed herein) implicating background constitutional norms or separation of powers concerns, and applies more broadly to the situation of intersecting statutes. To take one example, consider again *Morton v. Mancari*, 417 U.S. 535 (1974), discussed *supra* note 171, in which the Court was faced with making sense of one longstanding statutory mandate that Native Americans be given an employment preference by the Bureau of Indian Affairs, *see* 25 U.S.C. § 472 (2000) (section 12 of the Indian Reorganization Act of 1934), and a later statute setting out a general policy of nondiscrimination in federal government hiring that said nothing of the Native

The clear statement rule applied in these cases in many ways is synonymous with the canon against implied repeals, for it is grounded in many of the same presumptions about how Congress goes about writing statutes. At a more general level, the application of a clear statement rule protecting § 2241 jurisdiction embraces broader structural values as well, for it evinces a choice in favor of interbranch harmony versus conflict over the source and scope of judicial power. To borrow from Eskridge, the norm promotes some “breathing room” in the separation of powers structure.³⁴⁸

To be sure, clear statement rules (and the canon against implied repeals) may be a form of hypertextualism and “each instance represents an area in which the resistance to change is especially acute.”³⁴⁹ But where, as here, the Court would otherwise be called upon to address some of the hardest questions about the scope of legislative control over the judicial role, application of clear statement rules ensures that “the political process [has] pa[id] attention to the constitutional values at stake.”³⁵⁰ In all events, at their best, clear statement rules can “promote a continuity in the development of substantive law that may be extremely healthy, and may serve rather than disserve the purposes of legislators.”³⁵¹

Construing statutory ambiguity instead based upon shifting political majorities, as various forms of dynamic theory would have the Court do, cannot preserve this important continuity in the law. Such an approach would lead to divergent resolutions of similar statutory questions as they arise over time and thereby undercut much of what underlies basic rule-of-law values. By contrast, building a bridge between cases like *Yerger* and *St. Cyr* constructs an interpretive regime as a continuum—permitting greater cooperation between the legislative and judicial branches in the creation and interpretation of statutory law and allowing the governed to frame decisions aware of settled background norms that will guide the resolution of new questions as they arise.

American preference previously established, see 42 U.S.C. § 2000e-16(a) (2000) (section 11 of the Equal Employment Opportunity Act of 1972). By giving effect to both statutes, the Court properly adhered to the canon against implied repeals and broader continuity norms. See *Mancari*, 417 U.S. at 550 (“In the absence of some affirmative showing of any intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”). As the Court held: “[C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.” *Id.* at 551.

³⁴⁸ See Eskridge, *Public Values*, *supra* note 54, at 1026.

³⁴⁹ Shapiro, *supra* note 42, at 940.

³⁵⁰ Eskridge & Frickey, *Quasi-Constitutional Law*, *supra* note 143, at 597. Critics have targeted this justification for the federalism-based clear statement rules by pointing out that the states are, of course, fully represented in Congress (indeed, Representatives and Senators are *both* citizens of the United States and of their particular State) and therefore very much a part of the creation of laws that in turn affect their interests. See, e.g., *id.* at 636. This same criticism cannot be leveled against the Court, which (at least formally speaking) does not have a direct role in the political process.

³⁵¹ Meltzer, *supra* note 321, at 2586.

CONCLUSION

This Article contends that any approach to construing ambiguous statutory language that has the courts in the business of tracking prevailing political winds or social norms will have troubling ramifications for rule of law and separation of powers principles. The notion that courts should choose interpretations with the aim of spurring legislative reaction is similarly troubling. Any default rule regime built on these premises improperly sacrifices important harmonization values underlying statutory continuity and coherence for lesser short-term gains. Further, as the discussion of intersecting statutes has demonstrated, default rules placing controlling weight on contemporary political preferences will undervalue longstanding statutes that by the very fact of their continuing vitality deserve special respect.

Courts instead do their best work in construing statutes when they fulfill their role as guardians of the law's continuity and coherence. Although "fitting new federal enactments into a complex existing structure of disjointed federal statutes and a plethora of state statutory and common law regimes" undoubtedly presents "an enormous challenge,"³⁵² it is a charge that the federal courts can and must take up in these cases. By choosing and consistently applying interpretive guides that advance continuity and coherence values, courts evince a respect for legislative supremacy, build a legal framework within which parties can predict the ramifications of their actions, and protect structural values and individual rights and obligations from being unsettled in the absence of clear legislative directives instructing such a departure.

Accordingly, an interpretive framework constructed out of a healthy regard for stare decisis and canons advancing continuity and coherence values protects important rule of law principles and enhances the efficiency and harmony of the legislative-judicial relationship. If statutory law is to evolve in a stable fashion, such a framework is not only normatively attractive, but imperative. It was no less than Learned Hand, after all, who once said that judges who "trim their sails to the prevailing winds" will suffer an unhappy fate.³⁵³

³⁵² Meltzer, *supra* note 107, at 385.

³⁵³ Learned Hand, *The Contribution of an Independent Judiciary*, in *THE SPIRIT OF LIBERTY* 163 (3d ed. 1977).

