Against Constitutional Mainstreaming

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Courts interpret statutes in hard cases. Statutes are frequently ambiguous, and an enacting legislature cannot foresee all future applications of a statute. The Supreme Court in these cases often chooses statutory interpretations that privilege the values that it has emphasized in its recent constitutional jurisprudence. In doing so, the Court rejects alternative interpretations that are more consistent with the values embodied in more recently enacted statutes. This is constitutional mainstreaming—an interpretive practice that molds statutes toward the Court's own preferred values and away from values favored by legislative majorities.

In addition to providing a novel descriptive framework for what the Court is doing in these hard cases, this Article offers two normative contributions. The first is a critique of constitutional mainstreaming. Challenging the prevailing view that constitutional norms should have primary influence on the interpretation of statutes in hard cases, I argue that the Court should not engage in constitutional mainstreaming because it implicitly undermines a central principle of statutory interpretation: legislative supremacy. The Article's second normative contribution is an alternative to constitutional mainstreaming. I suggest that in hard cases the Court should prioritize the values reflected in more recently enacted statutes rather than the values emphasized in its own constitutional jurisprudence. These evolving statute-based values are more likely to reflect evolving democratic preferences than are judicially emphasized constitutional norms.

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INTRODUCTION

In 2009, the Voting Rights Act of 1965[1] (VRA) was at an interpretive crossroad. Circumstances not foreseen by the Congress that amended the Act in 1982 opened the door to a new challenge.[2] What interpretation would the Supreme Court give to an ambiguous statute intended to address representational inequality when the enacting legislature's tool for securing this goal was no longer available?[3]

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1 Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1973 et seq.

2 See Voting Rights Act Amendments of 1982 (1982 VRA Amendments), Pub L No 97-205, 96 Stat 131, codified as amended at 42 USC § 1973 (1982). The context not foreseen was one in which there were advancements in residential racial integration but continued racially polarized voting, such that white voters in parts of the country rarely voted for minority-preferred candidates. See John Iceland and Daniel H. Weinberg, *Racial and Ethnic Residential Segregation in the United States: 1980–2000* 60 (US Census Bureau 2002), online at http://www.census.gov/prod/2002pubs/censr-3.pdf (visited Apr 1, 2011) (finding up to a 12 percent decline in segregation between blacks and non-Hispanic whites from 1980 to 2000 in metropolitan areas); Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 Harv L Rev 1385, 1395, 1413–30 (2010) (describing the continued persistence of "racially differential voting patterns" in southern states during the 2004 and 2008 presidential elections).

3 The primary tool that the enacting legislature intended to be used to address representational inequality was the requirement that under certain conditions states and political subdivisions draw majority-minority districts—that is, districts that contain a majority of minority voters. See *Thornburg v Gingles*, 478 US 30, 50–51 (1986) (establishing the prerequisites for a majority-minority district that the minority group be politically cohesive, that it be sufficiently numerous to constitute a majority in a compact district, and that whites usually vote as a bloc to defeat the minority's preferred candidate). These districts provided minorities with an opportunity to elect their candidate of choice. By 2009, increased residential integration made

In *Bartlett v Strickland*,[4] the Court had two choices in interpreting § 2 of the VRA to address this challenge.[5] The Court could have interpreted § 2 consistent with the norm of colorblindness it had recently advanced in a constitutional case.[6] This interpretation would have effectuated the goal of limiting the contexts in which government can rely on racial classifications in implementing the Act. But it would do so at the cost of creating severe obstacles to minority voters' ability to exercise effective political power. Alternatively, the Court could have interpreted § 2 to permit race-conscious enforcement of the Act. This interpretation would have addressed the concern for fair representation reflected in the legislative statements of purpose ascribed to a recent voting statute.[7] But it would do so at the cost of infusing racial considerations into governmental decision making. Both interpretations would have been constitutional.[8]

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it difficult in some places to draw geographically compact districts that would provide minorities with the opportunity to elect the candidate of their choice.

4 129 S Ct 1231 (2009).

5 According to § 2 of the VRA, as amended in 1982:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, . . . as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that . . . members [of a class of citizens protected by subsection (a)] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

1982 VRA Amendments § 3, 42 USC § 1973.

6 See *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701, 747–48 (2007) (invalidating, under the Fourteenth Amendment Equal Protection Clause, a voluntary school integration plan on the basis of the colorblindness principle).

7 The recent voting statute reauthorizes § 5 of the Voting Rights Act. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRA Reauthorization Act of 2006), Pub L No 109-246, 120 Stat 577, 580–81, codified at 42 USC § 1973 et seq. Examples of the concern for fair representation can be found in the Act and in the legislative history surrounding the Act. See VRA Reauthorization Act of 2006 § 2, 120 Stat at 577–78 (recounting congressional findings and purposes); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (*VRA Reauthorization Act of 2006 Senate Committee Report*), S Rep No 109-295, 109th Cong, 2d Sess 2 (2006) (describing the purpose of the Voting Rights Act).

8 The more race-conscious interpretation would have been closer to the fringe of what the Court considers constitutional, but there is ample evidence to suggest that this interpretation would have nonetheless been constitutional. In particular, the Court's own test for when jurisdictions would be liable under the Voting Rights Act for failure to draw majority-minority districts requires the consideration of race. See *Gingles*, 478 US at 50–51. And given this standard, it is not clear why the race-conscious drawing of majority-minority districts would be any different from the race-conscious drawing of crossover districts, the issue presented in *Bartlett*. Given this distinction without difference, it is unlikely that the Court would have found the latter mandate unconstitutional if, for example, the VRA had explicitly required it.

However, the norms underlying the two interpretations were in sharp tension. How should the Court have resolved this case?

The interpretive conundrum presented in *Bartlett* is not unique.[9] The Supreme Court often interprets ambiguous statutes in contexts not foreseen by the enacting legislature.[10] When faced with these so-called hard cases,[11] the Court frequently has a choice between at least two plausible interpretations of a statute. One interpretation accords with values reflected in subsequently enacted statutes but lies near the outer bounds of what the Court considers constitutional. A second interpretation is well within the mainstream of what the Court considers constitutional but will be less consistent with the values reflected in subsequently enacted statutes. The Court's choice of interpretation is important because the legislature, given its extensive agenda, will rarely revisit the decision. As a result, the Court's interpretation is likely to set a statute on a long-lasting, path-dependent course.[12]

A closely divided Court in *Bartlett* settled on the more colorblind interpretation of § 2. I call the interpretive practice that *Bartlett* exemplifies "constitutional mainstreaming." Under this approach, the Court interprets an ambiguous statute in unforeseen contexts to accord with the evolving values that it has emphasized in its decisions interpreting the Constitution but in a manner that conflicts with the values reflected in subsequent legislative enactments. Constitutional mainstreaming reflects the efforts of the Court to read a statute so that it fits more comfortably within a zone of constitutional jurisprudence—a zone constructed from a reasonably consistent set of decisions in the Court's constitutional cases—that evidence the extent to which the Court itself has privileged one competing constitutional value over another. Importantly, the constitutional mainstream does not represent the entire domain of possible statutory interpretations that are constitutional. When interpreting ambiguous statutes in

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9 During the past two terms, two other landmark cases have presented interpretive challenges similar to those in *Bartlett*. See generally *Skilling v United States*, 130 S Ct 2896 (2010) (involving the interpretation of the honest services fraud statute, 18 USC § 1346); *Ricci v DeStefano*, 129 S Ct 2658 (2009) (involving the interpretation of Title VII of the Civil Rights Act).

10 Unforeseen circumstances can arise for a variety of reasons, including changes to the Constitution, society, and technology, as well as judicial interpretations not anticipated by the enacting legislature. See Lawrence Lessig, *Fidelity in Translation*, 71 Tex L Rev 1165, 1175–79 (1993).

11 See Ronald Dworkin, *Taking Rights Seriously* 81 (Harvard 1978). These "hard cases" present "one of the most vexing problems in the theory of statutory interpretation." Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 106 (Chicago 1991).

12 The constitutional requirements of bicameralism and presentment combined with congressional procedural obstacles to bill passage make it difficult to enact or amend statutes. See Walter J. Oleszek, *Congressional Procedures and the Policy Process* 1 (CQ 8th ed 2011).

unforeseen contexts, however, the Court will often favor interpretations that fit statutes more neatly into its constitutional mainstream and away from the fringe of what it considers constitutional.[13]

In this Article, I introduce constitutional mainstreaming as a novel descriptive framework for how the Court is interpreting statutes in hard cases. In addition, I offer two normative contributions to this important statutory-interpretive debate. The first is a critique of the practice of constitutional mainstreaming, building on the theory of dynamic statutory interpretation.[14] Although constitutional mainstreaming is implicitly endorsed by dynamic theory, the practice is inconsistent with the theory's own commitment to legislative supremacy. Dynamic statutory interpretation theory suggests that when interpreting ambiguous statutes in unforeseen contexts, the Court should look to evolving, present-day public values derived from the Constitution, statutes, and the common law.[15] The theory, which in one common formulation defines public values as "legal norms and principles that form fundamental underlying precepts of our polity,"[16] contends that the Court should prioritize values reflected in the Constitution over values reflected in statutes because Constitution-based values are "fundamentally 'constitutive' of our public society."[17]

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13 The Court employs several tools to engage in constitutional mainstreaming, including the modern constitutional avoidance canon, the clear statement rules, and the manipulation of indeterminate evidence of the enacting legislature's intent and purpose to identify a meaning that accords with values that the Court emphasizes in the Constitution. See Part II.A. This Article focuses on the Supreme Court's constitutional mainstreaming of statutes. The descriptive theory is likely applicable to other courts, but due to limited empirical data about Supreme Court behavior, the question of broader application remains an open one. See Part II.B.

14 William Eskridge coined the term "dynamic statutory interpretation" in his seminal work in the field, William N. Eskridge Jr, *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479, 1479 (1987). Other scholars also have developed theoretical insights that are critical to a broader dynamic statutory interpretation theory. See also Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 41 (Harvard 2008); Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 Ala L Rev 1281, 1285–86 (2003); Peter L. Strauss, *The Common Law and Statutes*, 70 U Colo L Rev 225, 254–55 (1999); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 504–05 (1989); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich L Rev 20, 21 (1988); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S Cal L Rev 541, 627 (1988); Ronald Dworkin, *Law's Empire* 313–17 (Belknap 1986); Guido Calabresi, *A Common Law for the Age of Statutes* 31–32 (Harvard 1982). Dynamic interpretation is now among the leading theories of statutory interpretation, along with textualism, intentionalism, purposivism, and pragmatism.

15 See William N. Eskridge Jr, *Public Values in Statutory Interpretation*, 137 U Pa L Rev 1007, 1094 (1989).

16 Id at 1008.

17 Id at 1036. See also Levin, 54 Ala L Rev at 1285–86 (cited in note 14) (arguing for the prioritization of Constitution-based values because they arise from fundamental law that has past supermajoritarian support); Sunstein, 103 Harv L Rev at 468 (cited in note 14) (arguing that the emphasis of constitutional values in the interpretation of statutes serves a constitutional-norm enforcing function).

Dynamic theory, however, overlooks an important reality in making this claim: evolving constitutional values do not necessarily reflect *the public's* evolving fundamental values. In spite of certain salient examples of constitutional-value evolution driven by public activism, such as the civil rights movement of the 1960s and the women's rights movement of the 1970s, constitutional values are often not derived from, and do not evolve through, the influence of broad-based social movements or public dialogue that leads to a rough popular consensus.[18] Instead, these constitutional values emerge and evolve primarily through the Court's day-to-day interpretations of the Constitution, which are usually subject only to minimal and indirect input from the public through the judicial appointment process. In these everyday interpretations, the Court often engages in a process of balancing competing constitutional values contained in the text or structure of the Constitution. In doing so, the Court chooses which constitutional values should be prioritized, and to what degree, in its evolving jurisprudence.

The Court's central role in balancing constitutional values follows from two constitutionally embedded principles: judicial supremacy and judicial independence. Because of general adherence to these two doctrines by the public and the other political branches, evolving constitutional values primarily reflect the value orientation of the majority of justices on the Court rather than the majority views of the public.[19] As a result, the constitutional values emphasized in the Court's jurisprudence often shift when a new majority with a new constitutional-value orientation emerges on the Court through either the judicial appointment process or the ideological drift of pivotal justices.[20] Dynamic theory's incompletely theorized suggestion that the Court should prioritize Constitution-based values is therefore better understood as endorsing the proposition that the Court should prioritize values *that the Court itself emphasizes in its own constitutional jurisprudence*.

Yet according to dynamic theorists' own conception of legislative supremacy, the Court should act as a junior cooperative partner to the current legislature, "attuned to [its] current policies, its reliance on

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18 Popular constitutionalism describes a broad public role in the construction and evolution of constitutional norms. See, for example, Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 7 (Oxford 2004); Bruce Ackerman, *We the People: Transformations* 345–49 (Belknap 1998); Robert C. Post and Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind L J 1, 2 (2003).

19 The value orientation of a majority of the justices on the Court that is developed in case law is often shaped and influenced by the preferences of the median justice who supplies the critical vote for any given majority. See text accompanying notes 65–72.

20 See notes 68–71 and accompanying text.

prior statutes and judicial interpretation of those statutes, and its shifts in policy directions."[21] Underlying this conception of legislative supremacy is the norm that statutes should be interpreted in a manner consistent with evolving democratic preferences.[22] But when the Court engages in constitutional mainstreaming, it acts less as a subordinate institution interpreting statutes to accord with the evolving preferences of the public and more as a superlegislature interpreting statutes in accordance with the constitutional values that it prizes.

In addition to identifying and critiquing the practice of constitutional mainstreaming, the final contribution of this Article is a normative account of how the Court should interpret statutes in hard cases. If the Court is to be faithful to the dynamic conception of legislative supremacy and its underlying premise of responsiveness to evolving democratic preferences, it must resist the gravitational pull of the constitutional mainstream. The Court should instead look first to the values embodied in subsequently enacted statutes, which are a better guide to evolving democratic preferences, before turning to the norms that it emphasizes in its constitutional jurisprudence.

Skeptics of such an approach would likely point to public choice theory to argue that the legislature, in its enactments, is not actually responsive to evolving democratic preferences. According to the public choice account, legislative enactments represent deals supplied by legislators to politically organized special interest groups, which pay for these favorable enactments with campaign contributions. Statutes, under this account, are therefore more likely to reflect the values of small special interest groups rather than the preferences of the broad public.[23] If that were true, then there would seem to be little reason to prefer statute-based values as interpretive guidelines.

Even if one starts from a public choice–based view of the legislative process, however, statute-based values derived from subsequently enacted statutes will still reflect evolving democratic preferences to a significant degree. The reason is twofold. First, statute-based values should be derived not from the content of legislation but instead from the articulated purposes surrounding the statute contained in the statute's preface, its description of purposes, and the congressional deliberations about the statute in the legislative

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21 William N. Eskridge Jr, *Spinning Legislative Supremacy*, 78 Georgetown L J 319, 343 (1989).

22 See Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U Colo L Rev 1, 23–24 (2004) (articulating the underlying premises of legislative supremacy).

23 See Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, in Daniel A. Farber and Anne Joseph O'Connell, eds, *Research Handbook on Public Choice and Public Law* 20–25 (Edward Elgar 2010); Steven P. Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* 18–19 (Princeton 2008).

history. Second, building on a dynamic described by Jonathan Macey,[24] I argue that such purposes will usually be "public-regarding" and ultimately accord with democratic preferences.

The basis for my argument that statute-based values will usually be public-regarding is that voters are not rationally apathetic and ignorant, as public choice theory assumes.[25] Instead, many individuals vote on the basis of political information that is distributed to them cheaply and broadly through campaign advertisements.[26] Legislators will therefore have strong incentives to hide most enactments favoring special interests behind a veil of public-regarding purposes that reflect democratic preferences in order to forestall potential challenges by future opponents that might mobilize the public against them.[27] The Court should use these public-regarding purposes, which surround most statutes, as the primary source of statute-based values in assessing the meaning of ambiguous statutes in unforeseen contexts. Ultimately, those public-regarding purposes are far better evidence of the public's evolving preferences than the Court's constitutional jurisprudence. I call this approach of prioritizing evolving statute-based values a "modified dynamic" approach to statutory interpretation.

Constitutional mainstreaming is especially important to think about now because we have a conservative Court whose constitutional norms often sharply oppose the values reflected in the statutory enactments of recent liberal Congresses. The argument against constitutional mainstreaming thus matters because it addresses a fundamental conflict in authority over the interpretation of federal statutory law: Should the meaning of statutes be rooted in the Court's reading of the Constitution, or should it be guided by the actions of Congress? Does the Court's role as arbiter of constitutional meaning inherently give it the power to shape legislation in similar ways? Or should the Court step back and cede at least some interpretive power to legislators themselves? These are important questions that go to the heart of what it means to be ruled by representative institutions within the context of a constitutional republic. I begin to address them here.

This Article proceeds in four parts. Part I shows that the roots of constitutional mainstreaming lie in dynamic theory's prioritization of Constitution-based values. Part II explains why constitutional mainstreaming is inconsistent with the dynamic conception of

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24 See Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum L Rev 223, 225 (1986).

25 See note 177.

26 See text accompanying notes 180–81.

27 See note 193 and accompanying text.

legislative supremacy. Part III makes the case for the prioritization of statute-based values from within the public choice account of legislative behavior. I then offer a preliminary framework for a modified dynamic approach to statutory interpretation. Part IV responds to objections.

I. THE ROOTS OF CONSTITUTIONAL MAINSTREAMING IN DYNAMIC STATUTORY INTERPRETATION THEORY

In this Part, I explain the dynamic statutory-interpretive theorists' view that evolving public values derived from the Constitution deserve precedence in the interpretation of statutes in hard cases. I respond to this view by showing that, while constitutional values are sometimes influenced by popular will, more often the Court's elaboration of constitutional values is rooted in the justices' own preferences. These values, therefore, tend to evolve through changes in judicial majority coalitions on particular issues rather than through changes in popular will.

The starting point of dynamic theory is that the interpretation of statutes in contexts not foreseen by the enacting legislature is inevitable. Statutes are often general and abstract and almost always have an indefinite life.[28] The theory emerged in the 1980s as a response to the deficiencies of the archaeological and public choice approaches to the problem of how to interpret ambiguous statutes in unforeseen circumstances.[29] Dynamic theorists analogized the process of statutory interpretation to the common law and the Constitution, areas in which ambiguous legal texts are interpreted dynamically "in light of their present societal, political, and legal context."[30] They argued that the Court in its interpretation of ambiguous statutes is in fact guided by evolving public values—defined as the "background norms that contribute to and result from the moral development of our political community."[31] The Court derives these public values from three legal sources—"the Constitution, evolving statutory policy, and common

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28 See William N. Eskridge Jr, *Dynamic Statutory Interpretation* 48–49 (Harvard 1994).

29 See id at 12; Sunstein, 103 Harv L Rev at 414–33 (cited in note 14). Under the archaeological approach, the Court seeks to discover the intent or purposes of the enacting legislature. In the context of unforeseen circumstances, the Court should imaginatively reconstruct what the enacting legislature would have done if faced with the particular question. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W Res L Rev 179, 189–90 (1986). Under the public choice approach, statutes should not be interpreted to address circumstances outside the clear language of the statute. Frank H. Easterbrook, *Statutes' Domain*, 50 U Chi L Rev 533, 540 (1983).

30 Eskridge, 135 U Pa L Rev at 1479 (cited in note 14). See also Dworkin, *Law's Empire* at 313 (cited in note 14); Calabresi, *Common Law* at 98 (cited in note 14).

31 Eskridge, 137 U Pa L Rev at 1008 (cited in note 15).

law"[32]—that are described by dynamic theorists as exerting gravitational influence on the Court's interpretive choices.[33]

As both an empirical and normative matter, dynamic theorists argue that the strength of these gravitational influences differs by source. Constitutional values have the greatest effect on statutory interpretation because they are "fundamentally 'constitutive' of our public society."[34] Values derived from subsequently enacted statutes have less of a gravitational pull while the common law, which is the source of certain presumptions and clear statement rules, should have the least influence on statutory interpretation.[35]

For dynamic theorists it is almost intuitive that courts when interpreting statutes in hard cases will be guided foremost by "the gravitational pull of deep constitutional principles."[36] As a result, only a few scholars have addressed in any depth why a court should prioritize evolving Constitution-based values over evolving statute-based values.[37] William Eskridge seems to make a descriptive claim about the prioritization of Constitution-based values when he explains that these values have the strongest gravitational pull on the interpretation of ambiguous statutes because of the Constitution's "special coercive force."[38] He suggests that statutes not particularly sensitive to constitutional values run a greater risk of invalidation. Therefore—and here he draws a normative lesson—these values should "influence—though not necessarily dictate—the direction in which the interpreter is willing to bend the statute."[39]

Cass Sunstein also advances an argument in favor of prioritizing Constitution-based values. He argues that since they occupy the highest position in the hierarchy of public values, prioritizing them

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32 Id at 1009. See also Sunstein, 103 Harv L Rev at 466 (cited in note 14) (suggesting, in a slightly different vein, that courts should look to the Constitution for "understandings about how statutory interpretation will improve or impair the performance of governmental institutions" and "an understanding of statutory function and failure").

33 See Eskridge, 137 U Pa L Rev at 1009 (cited in note 15). See also Calabresi, *Common Law* at 99 (cited in note 14).

34 Eskridge, 137 U Pa L Rev at 1036 (cited in note 15). See also Levin, 54 Ala L Rev at 1283 (cited in note 14); Sunstein, 103 Harv L Rev at 468 (cited in note 14).

35 See Eskridge, 137 U Pa L Rev at 1051 (cited in note 15).

36 Calabresi, *Common Law* at 99 (cited in note 14).

37 Some advocates of a dynamic approach to interpreting ambiguous statutes in unforeseen contexts simply contend that the Court should look to values derived from the Constitution, statutes, and the common law without any explicit prioritization among the three sources. See, for example, Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw U L Rev 1389, 1434 (2005); Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 Case W Res L Rev 1130, 1191 (1992); Aleinikoff, 87 Mich L Rev at 59 (cited in note 14).

38 Eskridge, 137 U Pa L Rev at 1019 (cited in note 15). See also Calabresi, *Common Law* at 99 (cited in note 14).

39 Eskridge, 137 U Pa L Rev at 1034 (cited in note 15).

serves a constitutional-norm enforcing function.[40] Similar to Eskridge, he argues that by "pushing statutes away from constitutionally troublesome ground," the prioritization of Constitution-based values "provides a way for courts to vindicate constitutionally based norms and does so in a way that is less intrusive than constitutional adjudication."[41]

Most recently, Nickolai Levin has argued that courts should incorporate the "gravitational force" of changing constitutional principles because they arise from fundamental law and have popular legitimacy on the basis of their past supermajoritarian support.[42] He sees the prioritization of these values as an attractive means of reconciling statutes with evolving constitutional principles. In addition, he argues that the judiciary has a special competency in the interpretation of the Constitution and therefore has a comparative advantage with respect to incorporating Constitution-based values into statutory interpretation.[43]

Since dynamic theorists have largely assumed that Constitution-based values should be prioritized over values derived from other sources, important questions related to this prioritization have been left unanswered or undertheorized. What does it mean to prioritize Constitution-based values? How do they evolve? Do they deserve the primacy that they have been accorded in statutory interpretation?

One can imagine at least three potential sources of Constitution-based values: the text and structure of the Constitution, the people, and the Court. No one can take seriously the text and structure of the Constitution as the exclusive source of Constitution-based values for use in statutory interpretation, because the text is often too general to support a particular interpretation of an ambiguous statute. For example, the text and structure of the Constitution call for the protection of values as broad as equal protection, due process, federalism, separation of powers, and the freedoms of speech, of religion, and of the press. Values at this level of generality will often provide little direction as to the meaning of ambiguous statutes in a particularized context. In addition, multiple conflicting values found in different constitutional provisions can be relevant to the interpretation of an ambiguous statute. For example, the

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40 Sunstein, 103 Harv L Rev at 466, 505 (cited in note 14) (noting that the Constitution is the "first and most straightforward" source of values).

41 Id at 468 (observing that a reason the judiciary is reluctant to enforce constitutional principles directly is its less democratic "pedigree").

42 Levin, 54 Ala L Rev at 1285–86 (cited in note 14), citing Dworkin, *Taking Rights Seriously* at 111 (cited in note 14).

43 Levin, 54 Ala L Rev at 1286–87 (cited in note 14).

Constitution's text-based values of equality and federalism are both applicable to federal civil rights statutes that regulate states' behavior such as the Voting Rights Act and Title VII of the Civil Rights Act of 1964.[44] And there is no clear, nonarbitrary text-based means to resolve the conflict between these two values.

Not only is the text of the Constitution an inadequate source of Constitution-based values, but the process of changing the text through amendments is not the primary means by which Constitution-based values evolve.[45] As our fundamental law, the Constitution incorporates an arduous amendment process under Article V that requires the approval of a supermajority of both houses of Congress as well as the states.[46] As a result, in the more than two centuries since the ratification of the Bill of Rights, only seventeen additional amendments have been ratified, with several touching on technical matters that do not inherently reflect the evolution of public values.

To the extent that the text of constitutional provisions is ambiguous or in tension with each other, the proper resolution cannot be ascertained through an assessment of how the values have evolved or which values are preeminent at any particular point in time. As a tool for the dynamic interpretation of statutes in unforeseen contexts, the utility of constitutional text as the exclusive source of evolving Constitution-based values is therefore quite limited.

A second potential source of constitutional values is the people. Eskridge's description of Constitution-based values implicitly suggests that these values are derived from judicial decisions that emerge after a dialogue between the Court and the people. *United Steelworkers of America v Weber*[47] is a paradigmatic case of such dialogue. Eskridge's argument suggests that the constitutional value underlying the Supreme Court's interpretation of Title VII in *Weber* was drawn from a decade-long "intense public debate" that ultimately reached a rough consensus on a nondiscrimination principle that sustained race-conscious decision making through affirmative preferences for minorities.[48] In that case, the Court interpreted ambiguous provisions of Title VII to permit the use of affirmative action by a private

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44 Pub L No 88-352, 78 Stat 241, codified at 42 USC § 2000a et seq.

45 Compare Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 19 (Harvard 1997) (describing Article V as the exclusive mechanism for constitutional change), with Jamal Greene, *Selling Originalism*, 97 Georgetown L J 657, 668 (2009) (arguing that Article V as the exclusive vehicle for constitutional change does not describe our actual constitutional practice).

46 US Const Art V (requiring two-thirds of both houses of Congress or two-thirds of the states to propose an amendment and three-quarters of the states to ratify it).

47 443 US 193 (1979).

48 Eskridge, 137 U Pa L Rev at 1034 (cited in note 15).

employer to rectify past discrimination.[49] And a year after the Court decided *Weber*, it articulated this value as a constitutional norm in *Regents of the University of California v Bakke*[50] when it suggested that it would approve a limited form of affirmative preferences in university admissions to promote diversity.[51]

The idea that constitutional values are derived from the people is closely related to the theory of popular constitutionalism advocated by scholars such as Larry Kramer, Robert Post, and Reva Siegel.[52] For these scholars, group mobilization and "the evolving political understandings of the nation" are of unique importance in the construction of constitutional meaning.[53] In particular, the Constitution's meaning emerges and changes through a dialogue between the Court and contemporary political culture; the Court ultimately interprets the Constitution in a manner that is "responsive to the nation's political values."[54] Bruce Ackerman has developed a more formalized version of popular constitutionalism in which he draws a connection between the popular will and the evolving meaning of the Constitution through what he describes as "constitutional moments."[55] During these moments, a political or social movement signals an issue and persuades a majority of the people to support its initiative through discussions in deliberative forums.[56] The people then ratify this initiative, and its principles are consolidated in landmark statutes that endure over time.[57] Examples of these constitutional moments include Reconstruction, the New Deal, and

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49 *Weber*, 443 US at 197 (holding that "Title VII does not prohibit [ ] race-conscious affirmative action plans [of private sector employers and unions]"). See also Eskridge, 137 U Pa L Rev at 1034 (cited in note 15) (stating that "*Weber* . . . illustrate[s] a broader way in which constitutional values may affect statutory interpretation").

50 438 US 265 (1978).

51 Id at 307.

52 See, for example, Kramer, *The People Themselves* at 227 (cited in note 18); Robert C. Post and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L J 1943, 2020–23 (2003); Post and Siegel, 78 Ind L J at 2 (cited in note 18); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv L Rev 4, 10–11 (2001); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U Pa L Rev 297, 300 (2001).

53 Post and Siegel, 78 Ind L J at 23 (cited in note 18). See also Kramer, *The People Themselves* at 8 (cited in note 18) (explaining that, historically, "American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution"); Post and Siegel, 112 Yale L J at 2020 (cited in note 52) (describing how the Court was responsive to a mobilized citizenry's advocacy for a new understanding of the constitutional value against sex discrimination).

54 See Post and Siegel, 78 Ind L J at 23 (cited in note 18).

55 Ackerman, *We the People: Transformations* at 345–49 (cited in note 18); Bruce Ackerman, *The Living Constitution*, 120 Harv L Rev 1737, 1761–88 (2007).

56 Bruce Ackerman, *We the People: Foundations* 266–67 (Belknap 1991).

57 Id at 267, 285–90.

the civil rights revolution of the 1960s, with the landmark statutes from these eras serving as effective amendments to the Constitution.[58] Thus, the process of value evolution under the popular constitutionalism model is much more fluid and inchoate than that established in the Article V amendment process.

When combined with text and structure, the account of evolution through the popular construction of Constitution-based values does tell a more complete story than one based on the text and structure alone. However, it is still extremely underinclusive in describing the universe of means by which Constitution-based values evolve. Popular mobilizations that lead to the evolution of constitutional text, doctrine, or landmark statutes are relatively infrequent compared to the occasions for shifts in the meaning of the Constitution. To the extent that dynamic-interpretation scholars focus on popular constructions as a source of Constitution-based values, they understate the important role of the Supreme Court in the development of these values.

Instead of evolving through the amendment of text or popular constructions of the Constitution, Constitution-based values emerge primarily through the Court's everyday interpretations of the Constitution. These interpretations sometimes resolve ambiguity in constitutional provisions. But often the Court is reconciling tension between constitutional provisions along the three main axes of the Constitution: individual rights, federalism, and separation of powers.[59] The Court in doing so engages in a balancing process in which it chooses which value should be emphasized and to what extent it should be emphasized in different cases and over time.[60] At times, this tension is resolved through text or reliance on popular constructions; but at other times the Court balances constitutional values without specific guidance from the text, the people, or the other branches of government.[61]

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58 See Ackerman, *We the People: Transformations* at 345–49 (cited in note 18); Ackerman, 120 Harv L Rev at 1761–88 (cited in note 55).

59 See, for example, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 S Ct Rev 341, 342.

60 Constitutional scholars have recognized that much of the function of constitutional interpretation involves the balancing and reconciliation of constitutional values. See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 139 (Free Press 1990); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* 5 (Princeton 1988); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv L Rev 1, 10–11 (1979).

61 See David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U Chi L Rev 859, 863 n 8 (2009), citing *Roper v Simmons*, 543 US 551, 574–75 (2005). Departmentalists have argued for an approach to constitutional interpretation in which all three branches are involved in the development of the meaning of the Constitution. But they concede that over at least the past half-century the other political branches have deferred to the Court as being the ultimate

The Court's resolution of these questions in its everyday constitutional interpretations is especially resilient to external pressures because of the doctrines of judicial supremacy and judicial independence. The doctrine of judicial supremacy, which originated in Supreme Court case law, posits that the Court "authoritatively interprets constitutional meaning" and that the other branches of government have a duty to accept the Court's holdings as the final word on the meaning of the Constitution.[62] The doctrine of judicial independence, which emanates from the Article III requirements of life tenure and prohibition on judicial salary reductions,[63] stipulates that the Court should decide cases free from majoritarian pressures and political branch interference.[64] This latter doctrine mandates that the Court determine meaning on the basis of its independent view of the Constitution.

The consistent adherence by the public and the political branches to these two doctrines has elevated the Court to the role of primary and often exclusive decider of constitutional meaning and conveyer of constitutional values. Dynamic theory's premise that the Court should prioritize values derived from the Constitution should therefore be understood in most contexts as an argument that the Court should prioritize the constitutional values that the Court itself has chosen to emphasize in its constitutional decisions over time.

Since constitutional values are primarily defined by the Court's choice of doctrinal emphasis in resolving particular conflicts between values, they usually evolve as a result of changes to the Court's majority coalition. It is commonplace that different Courts comprising different majority coalitions interpret the Constitution in markedly different ways. Even popular constitutionalists concede that

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interpreter of the Constitution. See, for example, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L J 217, 224–25 (1994).

62 Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* 7 (Princeton 2007). Judicial supremacy has been a part of constitutional doctrine since the Supreme Court famously declared in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Id at 177. Although there has been disagreement about whether the statement in *Marbury* ineluctably led to the doctrine of judicial supremacy, see, for example, Kramer, 115 Harv L Rev at 89 (cited in note 52), the Court's elaboration of *Marbury* in *Cooper v Aaron*, 358 US 1 (1958), as "declar[ing] the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," *Cooper*, 358 US at 18, has been generally understood "as the moment when the Court truly declared itself the ultimate interpreter of the Constitution." Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 Hastings Const L Q 359, 369 (1997).

63 US Const Art III, § 1.

64 As described in the Federalist Papers, judicial independence is "an essential safeguard against the effects of occasional ill humors in the society." Federalist 78 (Hamilton), in *The Federalist* 521, 528 (Wesleyan 1961) (Jacob E. Cooke, ed).

"constitutional moments" and the Article V amendment process do not account for the entire universe of constitutional change. Instead, it is generally understood that both "transformative appointments" and the ideological drift of pivotal justices play important roles in changing the Constitution.[65] In particular, the key to shifts in constitutional understanding is often the replacement of the median or "swing" justice[66] through either the presidential appointment of new justices or the ideological drift of remaining justices on the Court.[67] This replacement of the median justice leads to corresponding shifts in constitutional understandings through both changes in the ideological orientation of this pivotal justice and in the personal dynamics between the various justices, which may alter the composition of the majority coalition on issues.[68]

Sometimes this shift is subtle, as occurred with the replacement due to ideological drift of the moderate conservative Justice Byron White as the median justice during the 1983 term with the slightly more conservative Justice Lewis Powell during the 1984 term.[69] But at other times, the shift can be quite dramatic, as exemplified in the presidential appointment that shifted the median justice from the conservative Justice Tom Clark during the 1961 term to the very liberal Justice Arthur Goldberg during the 1962 term.[70] This shift in the median justice resulted in a dramatically different emphasis on the protection of civil liberties after 1962 that carried forward until 1969, when a similarly dramatic shift in the ideological orientation of the

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65 See Bruce Ackerman, *Transformative Appointments*, 101 Harv L Rev 1164, 1166 (1988). See also Lee Epstein, et al, *Ideological Drift among Supreme Court Justices: Who, When, and How Important?*, 101 Nw U L Rev 1483, 1485–86 (2007).

66 A median justice is one who lies "in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more 'conservative' than) the median and half are to the left of (more 'liberal' than) the median." Andrew D. Martin, Kevin M. Quinn, and Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 NC L Rev 1275, 1277 (2005). See also Duncan Black, *On the Rationale of Group Decision-Making*, 56 J Polit Econ 23, 26–28 (1948) (establishing the median voter theorem).

67 See Martin, Quinn, and Epstein, 83 NC L Rev at 1278 (cited in note 66) (explaining that "the legal policy desired by the median justice will . . . be the choice of the Court's majority"); Jack M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va L Rev 1045, 1067 (2001) (developing a theory about how the Constitution evolves through changes in the Court's membership).

68 See Scott R. Meinke and Kevin M. Scott, *Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices*, 41 L & Socy Rev 909, 914–15 (2007) (describing how changes in the collegial context through the addition of new justices affect the voting behavior of continuing justices); Charles Cameron, Jee-Kwang Park, and Deborah Beim, *Shaping Supreme Court Policy through Appointments: The Impact of a New Justice*, 93 Minn L Rev 1820, 1856–64 (2009) (finding direct and peer effects on the opinions of continuing justices after the addition of Justice Sandra Day O'Connor to the Court).

69 See Lee Epstein and Tonja Jacobi, *Super Medians*, 61 Stan L Rev 37, 54 (2008).

70 Id.

median justice occurred, this time back to the right.[71] Unlike the formal Article V process or the informal process of popular construction, the transformative appointment of a new justice or the ideological drift of a pivotal justice can lead to changes in constitutional meaning or values largely outside the purview of, and with limited input from, the public.[72] This suggests that the development and evolution of constitutional norms are less the product of public preferences and more the product of the individual ideology of justices.

Ultimately, it is the source of Constitution-based values in the decisions of judicial actors combined with the Court's prioritization of these values in hard cases that leads to the problem of constitutional mainstreaming—a problem unaccounted for in dynamic statutory interpretation theory. In the next Part, I describe and critique constitutional mainstreaming.

II. CONSTITUTIONAL MAINSTREAMING: A CRITIQUE

A. Constitutional Mainstreaming in Theory

The idea of constitutional mainstreaming relies on the metaphor of a judicially constructed constitutional continuum, in which the constitutional values that the current Court has prioritized lie at the center of the continuum—in the constitutional mainstream.[73] Values that the Court has disfavored lie at the ends of the continuum—at the constitutional fringes. When the Court interprets an ambiguous statute in an unforeseen context, it often has the choice of at least two plausible interpretations. One interpretation is more consistent with the Court's prioritization of constitutional values and thus lies in the constitutional mainstream. An alternative interpretation lies on the constitutional fringes and may be in tension with the Court's prioritized constitutional values. This alternative interpretation, however, accords more closely with the values reflected in subsequent

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71 See Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J Polit 3, 13–21 (1992). This second shift was the result of the replacement of liberal Justice Thurgood Marshall as the median justice in the 1968 term with moderate conservative Justice John Marshall Harlan as the median justice in the 1970 term. See Epstein and Jacobi, 61 Stan L Rev at 54 (cited in note 69).

72 The Senate, which was intended to be the forum through which the public could influence the selection process, has proven to be particularly inept in ascertaining and judging the judicial philosophies of nominees. See Stephen Carter, *The Confirmation Mess*, 101 Harv L Rev 1185, 1195 (1988).

73 See Epstein and Jacobi, 61 Stan L Rev at 45 (cited in note 69) ("[A] rather large body of literature tells us that a single left-right dimension underlies virtually all Supreme Court cases in virtually all areas of law.").

statutory enactments—the values Congress has embedded in substantive federal law. And importantly, it is also constitutionally valid—that is what distinguishes constitutional mainstreaming from the avoidance of constitutional invalidation, in which the Court interprets a statute in a particular way because the alternative interpretation would be unconstitutional.[74]

The constitutional mainstream, therefore, often represents only part of the continuum of what is constitutionally permissible. The contours of the mainstream can be imagined if we focus on the Court's constitutional decisions balancing federalism against individual rights. At issue in many of these cases is the tension between congressional power to enforce constitutional rights under § 5 of the Fourteenth Amendment and the prerogatives of the states to control their own affairs as established in the text and structure of the Constitution. A particular Court's mainstream along this constitutional continuum is reflected in the relatively consistent set of choices that it has made in constitutional cases describing the breadth and limits of congressional authority to protect individual rights vis-à-vis the federalism principle. For example, the second Warren Court—from the retirement of Justice Felix Frankfurter in 1962 to the retirement of Chief Justice Earl Warren in 1969—consistently upheld congressional enactments under § 5 of the Fourteenth Amendment against claims that Congress had exceeded its authority and impermissibly intruded on the prerogatives of the states.[75] In contrast, the Rehnquist Court—from the retirements of Justices William Brennan and Thurgood Marshall in 1990 and 1991, respectively, to the death of Chief Justice William Rehnquist in 2005—dramatically narrowed the breadth of congressional authority under the Fourteenth Amendment in favor of preserving state prerogatives.[76]

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74 While the constitutionality of the alternative interpretation is often difficult to prove in practice since it necessarily involves a counterfactual (that is, if the Court had chosen the interpretation, it would have been nonetheless constitutional), in many cases circumstantial evidence in the form of related constitutional doctrine or analogous case law would support such a conclusion. I use the example of *Bartlett* as an illustration of this in the Introduction.

75 See, for example, *Katzenbach v Morgan*, 384 US 641, 646 (1966) (upholding § 4(e) of the Voting Rights Act as a proper exercise of congressional authority under § 5 of the Fourteenth Amendment against a challenge that it usurped New York's authority to enforce its election laws); *South Carolina v Katzenbach*, 383 US 301, 307–08, 323 (1966) (upholding the Voting Rights Act of 1965 as a proper exercise of congressional authority under § 2 of the Fifteenth Amendment against an argument by several states that it violated their right to implement and control elections). See also *Heart of Atlanta Motel, Inc v United States*, 379 US 241, 261–62 (1964) (upholding the Civil Rights Act of 1964's prohibition on racial discrimination in public accommodations against a challenge that it exceeded Congress's Commerce Clause authority).

76 See, for example, *City of Boerne v Flores*, 521 US 507, 535–36 (1997) (invalidating the federal Religious Freedom Restoration Act, Pub L No 103-141, 107 Stat 1488, codified as amended at 42 USC § 2000bb et seq (1997), because it exceeded Congress's enforcement

The place of a particular Court's mainstream on the overall constitutional continuum cannot be ascertained by reading its decisions in isolation. Instead, one must examine how the Court's decisions in a particular substantive area relate to that of a previous Court's and whether the Court has a relatively consistent set of constitutional holdings that modify, distinguish, or even overrule precedent of prior Courts. Through these holdings and the reasoning that underlies them, the Court's shift in emphasis from one constitutional norm to another is manifested. And ultimately, a new constitutional mainstream along a different part of the continuum emerges.[77]

Three questions arise from this idea of a constitutional mainstream. The first two relate to the dimensions of the constitutional mainstream: First, given the importance of the replacement or drift of the median justice to shifts in constitutional understanding, why is the constitutional mainstream a range on the constitutional continuum rather than a single point reflecting the preferences of the median justice? And second, if the constitutional mainstream does not reflect a single point on the continuum, how broad is this mainstream? Clearly, the median justice by virtue of her position has considerable power to influence the content of constitutional norms. Judicial decision making, however, involves much more than deference to the preferences of the median justice.[78] Although every median justice between 1953 and 2006 has been in the majority in at least 75 percent of cases during each term,[79] the median justice never writes all of the opinions in a term. Justice Sandra Day O'Connor authored the highest percentage of opinions by a median justice, and that was only 44.4 percent during the 2002 term.[80] While the median justice is likely to express her preferences in the opinions she writes, other justices who author opinions will not merely parrot

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authority under § 5 of the Fourteenth Amendment). See also *United States v Morrison*, 529 US 598, 625–27 (2000) (invalidating parts of the Violence Against Women Act, Pub L No 103-322, Title IV, 108 Stat 1902 (1994), codified in various sections of Titles 18 and 42, on the basis of the test established in *City of Boerne*).

77 A separate constitutional continuum might be posited for different substantive areas, or where multiple constitutional values are at play.

78 See Cameron, Park, and Beim, 93 Minn L Rev at 1841 (cited in note 68) (describing as one of the extraordinary predictions of the median voter approach as applied to the Supreme Court that "majority opinion locations on a natural court do not vary irrespective of which Justice authored the opinion").

79 See Epstein and Jacobi, 61 Stan L Rev at 55–57 (cited in note 69) (finding that the mean during this period was 88.6 percent).

80 Id at 69–70. In fact, six median justices between 1953 and 2006 did not write a single opinion in an important case. Id at 65–66.

the preferences of the median justice but will instead act strategically.[81] When writing opinions, the authoring justice will include reasoning for the decision that reflects the values most consistent with her preferences that will keep the majority coalition intact. She can engage in this strategic behavior because she will have information about the preferences of the other justices—and importantly the pivotal justice—through the conference following oral argument, bargaining memos, and internal memos on draft opinions.[82] The constitutional preferences of the authoring justice, who may be to the left or right of the median justice, are therefore likely to be prominent in the opinion.[83] And she will have some degree of slack to shift reasoning toward her preferences because of the cost to the median justice of writing concurring opinions and the unwillingness of another coalition of justices to choose a policy closer to her preferences.[84]

The constitutional mainstream is the result of this slack and consists of the range of preferences of justices in the majority coalition that extend beyond the median justice's ideal point on the constitutional continuum. At times, such as when the distance between the median justice and the minority coalition is large, members of the majority coalition will have a large degree of slack to impose their preferences in constitutional cases, and the constitutional mainstream will be broad.[85] At other times, such as when the distance between the median justice and the minority coalition is small, the members of the majority coalition have much less slack to impose their preferences in constitutional cases and the constitutional mainstream will be narrower. Only in the rarest of cases, such as when the median justice

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81 See Lee Epstein and Jack Knight, *The Choices Justices Make* 12–13 (CQ 1998).

82 Id at 65–79.

83 See Cameron, Park, and Beim, 93 Minn L Rev at 1847–53 (cited in note 68) (describing author-influence theories that predict the preferences of the author of majority opinions will be reflected in the opinion and that therefore opinion assignments by the chief justice are extremely important).

84 See id at 1849–53 (describing author-influence models that reflect the costs of writing and the gravitational influence created by the need to identify a coalition). See also id at 1854–67 (suggesting, on the basis of a case study, that the two author-influence models best describe judicial decision making). This account very much relies on an agenda-control model of judicial coalition formation and final voting. Under this model, it is assumed that the median justice "will support the majority opinion if it is better for them than [the status quo] but will not support the majority opinion if it is worse for them than [the status quo]." Thomas H. Hammond, Chris W. Bonneau, and Reginald S. Sheehan, *Strategic Behavior and Policy Choice on the U.S. Supreme Court* 110–11 (Stanford 2005). I believe this model provides a more accurate description of voting behavior than other models suggesting that justices engage in a constant bidding war until the majority opinion reflects the preferences of the median justice, because of the combination of constraints on time and ideology as well as collegial pressures.

85 For a model that supports this account, see Hammond, Bonneau, and Sheehan, *Strategic Behavior* at 110–25 (cited in note 84).

is writing all of the opinions in a particular constitutional area or the distance between the median justice and justices on either side is equal, will the constitutional mainstream reflect something so narrow as the ideal point of the median.

The third question that arises about the constitutional mainstream is why there is space on the continuum for decisions that are constitutional but outside the mainstream. It is true that shifts in the constitutional mainstream are usually accompanied by changes in the Court's determination of the limits on what is constitutional. For example, the Rehnquist Court drew narrower limits on Congress's authority to enact statutes under § 5 of the Fourteenth Amendment than the Warren Court.[86] However, these changes in constitutional limits are not usually coextensive with the constitutional mainstream.

One reason that this constitutional space exists outside the mainstream is the force of precedent in constraining judicial choice.[87] While the Court can always overrule its prior decisions and construct new constitutional limits consistent with its emphasized constitutional norms, from a legitimacy perspective most of its members recognize that it is not prudent to do so.[88] In particular, the justices rightly recognize that the legitimacy of a Court comprising unaccountable and life-tenured members is very much dependent on the public perceiving it as an apolitical institution that, in the words of Chief Justice John Roberts, "call[s] balls and strikes, and [does] not [ ] pitch or bat."[89] Overruling the decisions of prior Courts, especially when it can be directly linked to changes in membership, undermines this legitimacy.[90] The Court will therefore often have to live uncomfortably with precedent that a majority of the Court disagrees with even when it is constructing a constitutional mainstream that diverges from this precedent.

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86 See, for example, *Flores*, 521 US at 518–19 (interpreting *Katzenbach v Morgan* in a manner much more protective of federalism values than originally understood).

87 See, for example, Earl Maltz, *The Nature of Precedent*, 66 NC L Rev 367, 367–72 (1988); Benjamin N. Cardozo, *The Nature of the Judicial Process* 149–50 (Yale 1921).

88 See *Planned Parenthood v Casey*, 505 US 833, 867–68 (1992) (describing the costs to the legitimacy of the Court when it overrules prior precedent "unnecessarily and under pressure"); Maltz, 66 NC L Rev at 371 (cited in note 87) (explaining that adherence to precedent reinforces the notion that "principles governing society should be 'rules of law and not merely the opinions of a small group of men who temporarily occupy high office'"), quoting *Florida Department of Health v Florida Nursing Home Association*, 450 US 147, 154 (1981) (Stevens concurring).

89 Confirmation Hearing on the Nomination of John G. Roberts Jr to Be Chief Justice of the United States, Senate Committee on the Judiciary, 109 Cong, 1st Sess 56 (2005) (reproducing a transcript of John Roberts's opening statement for his nomination proceedings).

90 See Cardozo, *Nature of the Judicial Process* at 150 (cited in note 87) ("The situation would [ ] be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings.").

For example, the Rehnquist Court after the additions of Justices Antonin Scalia and Anthony Kennedy had a majority that strongly valued federalism norms. That majority nonetheless chose not to directly overturn precedents that diminished state prerogatives;[91] instead, the Court turned to statutory interpretation to achieve these goals indirectly. Thus, a space existed along the continuum in which particular interpretations of a statute were constitutional under existing precedents but still were outside the Rehnquist Court's constitutional mainstream and lay at the constitutional fringes.

Importantly, the constitutional mainstream may have unruly or blurry edges. Idiosyncratic views of pivotal justices in particular cases may ultimately contradict the values being emphasized in the mainstream of the jurisprudence of the majority of the Court. An example is Justice O'Connor with respect to the colorblindness norm. Although the later Rehnquist Court certainly placed a greater emphasis on the constitutional colorblindness norm, Justice O'Connor ruled on these issues in a manner that made recognition of both the constitutional mainstream and the Constitution's limits difficult.[92] In addition, at times a Court's constitutional jurisprudence may be so disjointed that a mainstream cannot be clearly demarcated. For example, while it is relatively easy to identify the constitutional mainstream of the Warren Court and the later Rehnquist Court on the balance between congressional enforcement authority under § 5 of the Fourteenth Amendment and the federalism principle, it is almost impossible to identify a similar mainstream in the current Roberts Court.[93]

But when the Court does develop a consistent zone of jurisprudence, it often interprets statutes in the manner that best fits within the mainstream of its emphasized constitutional values even

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91 In *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), the Court majority—which emerged after the ideological drift of Justice Harry Blackmun toward a less federalism-protective coalition—had stated that federalism norms were politically safeguarded by the representation of states and that Congress therefore had broad commerce clause authority. Id at 550–52. Rather than overturning this precedent, the new majority coalition that emerged with the appointments of Justices Scalia and Kennedy established clear statement rules as a means of protecting the coalition's emphasized federalism norms. See, for example, *Gregory v Ashcroft*, 501 US 452, 470 (1991).

92 See, for example, *Grutter v Bollinger*, 539 US 306, 328 (2003) (holding that diversity is a compelling state interest justifying race-conscious admission decisions).

93 The Roberts Court's federalism decisions have thus far been somewhat inconsistent and have not broken down along typical ideological lines. For good summaries of the Roberts Court's federalism decisions, see John Dinan and Shama Gamkhar, *The State of American Federalism 2008–2009: The Presidential Election, the Economic Downturn, and the Consequences for Federalism*, 39 Publius 369, 394–98 (2009); John Dinan, *The State of American Federalism 2007–2008: Resurgent State Influence in the National Policy Process and Continued State Policy Innovation*, 38 Publius 381, 401–10 (2008).

though it may run contrary to evolving statute-based values—that is, values reflected in subsequently enacted statutes. I call this interpretive practice "constitutional mainstreaming."

The Court uses several tools to engage in the constitutional mainstreaming of statutes. The most obvious and familiar tool is the modern constitutional avoidance canon. According to this canon, "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."[94] In contrast to the classic constitutional avoidance canon in which the Court chooses an interpretation of the statute consistent with the Constitution to avoid invalidation of the statute, the modern avoidance canon "allow[s] serious but potentially unavailing constitutional objections to dictate statutory meaning."[95] At times, the Court abuses this canon, applying it when the constitutional concern is implausible.[96] In these contexts, the Court raises the concern about "serious constitutional problem[s]" to situate the statute within the constitutional mainstream and to keep it away from the constitutional fringes.[97]

Less obvious tools of constitutional mainstreaming include the various clear statement rules that protect underenforced constitutional norms such as federalism.[98] The use of these canons often permits the Court to make value choices in interpreting statutes that can result in its bending statutes into its constitutional

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94 *Edward J. DeBartolo Corp v Florida Gulf Coast Building and Construction Trades Council*, 485 US 568, 575 (1988). See Adrian Vermeule, *Saving Constructions*, 85 Georgetown L J 1945, 1949 (1997).

95 Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Colum L Rev 1189, 1203 (2006). Proponents of the modern avoidance canon have suggested that it serves as an important and legitimate means by which the Court enforces the fundamental values underlying the Constitution. See, for example, Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Cal L Rev 397, 402 (2005); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex L Rev 1549, 1552 (2000). Opponents have suggested that the canon is primarily used by the Court to enforce its preferred views of the Constitution through its interpretation of ambiguous (and sometimes, unambiguous) statutes. See, for example, Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 Case W Res L Rev 1031, 1038 (2006) (suggesting that the Court often uses the canon to enforce its views of the Constitution); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 Cornell L Rev 831, 861 (2001) (suggesting that the *sub silentio* constitutional lawmaking through the modern avoidance canon is problematic).

96 See Morrison, 106 Colum L Rev at 1208 (cited in note 95).

97 See, for example, *Zadvydas v Davis*, 533 US 678, 682 (2001).

98 See *Gregory*, 501 US at 464.

mainstream.[99] Finally, as is often the case in the dynamic interpretation of statutes, constitutional mainstreaming sometimes occurs beneath the legitimating veil of archaeological methodologies—that is, methods that involve searches for the original legislative intent or purpose.[100] Although the Court says that it is relying on seemingly indeterminate evidence of intent or purpose to provide determinate answers as to what the statute means, it often in fact is deriving this meaning from the Constitution-based values that it has emphasized in its constitutional jurisprudence.

These tools of constitutional mainstreaming can be distinguished from the tools used to avoid constitutional invalidation. For example, when the Court relies on the traditional constitutional avoidance canon to bypass an alternative interpretation of the statute that accords with evolving statute-based values but would be unconstitutional, it has made a legitimately restrained choice to avoid the constitutional invalidation of a statute.[101] However, when the Court bypasses an alternative interpretation of the statute that accords with evolving statute-based values and *would* be constitutional, its approach raises important democratic legitimacy concerns. This sort of problematic constitutional mainstreaming is represented in the modern constitutional avoidance canon, the clear statement rules, and the Court's manipulation of intent and purpose.

B. The Inconsistency of Constitutional Mainstreaming with the Dynamic Conception of Legislative Supremacy

In this Section, I argue that the Court's practice of constitutional mainstreaming is unlikely to accord with legislative preferences or with underlying democratic preferences. As background, I first explain dynamic theory's conception of legislative supremacy. Then I address, but ultimately reject, several arguments suggesting that the Court might in fact actively reflect the legislative will or the democratic will in its decisions. The first argument points to the possibility of legislative overrides as a means by which the Court is forced to constrain itself to legislative desires; the second argument suggests that the Court is highly sensitive to popular opinion and will not stray far from democratic preferences for fear of backlash. While both are facially appealing theories, I demonstrate that neither matches up well

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[99] This is the classic constitutional avoidance canon. See Vermeule, 85 Georgetown L J at 1949 (cited in note 94); William N. Eskridge Jr and Philip P. Frickey, *Quasi-constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand L Rev 593, 598–99 (1992).

[100] See William N. Eskridge Jr and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan L Rev 321, 363–64 (1990).

[101] See Vermeule, 85 Georgetown L J at 1949 (cited in note 94).

to the reality of judicial decision making. The upshot is that the Court's constitutional mainstreaming is most likely to reflect the preferences of the justices, not those of the legislature or the people themselves.

The traditional doctrine of legislative supremacy establishes a role for courts that is subordinate to legislative will in the statutory-interpretive process.[102] Scholars have derived this doctrine from two sources. First, these scholars argue that it is mandated by Article I of the Constitution, which vests all legislative powers in the Congress.[103] This constitutional provision has been interpreted to mean that the enacting legislature is superior to the courts and its judgments as to the statute's meaning and that its determinations should guide the courts' judgment on a statute's scope and proper application.[104] The other source of the traditional doctrine of legislative supremacy is democratic theory and the premise that the legislature, through its enactments, is the best representative of democratic will. This will, according to most accounts, should also be reflected in the courts' interpretation of statutes.[105]

Dynamic theorists argue that this traditional doctrine of legislative supremacy is inadequate because it fails to account for the hard cases in which ambiguous statutes must be interpreted in contexts not foreseen by the enacting legislature.[106] How can courts act in a manner consistent with the traditional doctrine of legislative supremacy when the text and legislative history provide no specific answers about how the statute should be applied in those particular contexts? Because of this difficulty, dynamic theorists endorse a conception of legislative supremacy that contends courts should serve as a subordinate partner to the *current* legislature in the interpretation of ambiguous statutes.[107] In this partnership, courts "should be attuned

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102 See Correia, 42 Case W Res L Rev at 1130 (cited in note 37); Eskridge, 78 Georgetown L J at 326–27 (cited in note 21). Consider Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Georgetown L J 281, 317–18 (1989).

103 US Const Art I, § 1.

104 See, for example, Correia, 42 Case W Res L Rev at 1129, 1132 (cited in note 37); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 Tulane L Rev 1, 9 (1988). In addition to these formal Article I accounts of the source of legislative supremacy, John Manning argues that the faithful-agent theory of legislative supremacy follows from the constitutional separation of powers and the bicameralism and presentment requirements of Article I, § 7 of the Constitution, which he argues are inconsistent with broad judicial lawmaking and discretion in the interpretation of statutes. John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum L Rev 1, 57–78 (2001).

105 See Martin H. Redish and Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 Tulane L Rev 803, 811 (1994).

106 See Eskridge, 78 Georgetown L J at 323–24 (cited in note 21).

107 See id at 343. Eskridge suggests that this cooperative partnership model follows from the general and uncontroversial practice of judges equitably construing statutes to address the

to the legislature's current policies, its reliance on prior statutes and judicial interpretation of those statutes, and its shifts in policy direction."[108]

Taking this dynamic conception of legislative supremacy literally, the argument that it is inconsistent with constitutional mainstreaming seems easy. When the Court engages in constitutional mainstreaming, it does not act as a subordinate partner to the current legislature. Instead, the Court devalues the best evidence of the preferences of the current legislature (namely, subsequent legislative enactments) in favor of the norms underlying its own constitutional decisions.

However, if dynamic theorists wished to justify constitutional mainstreaming, they would likely point out that judicial interpretations of statutes contrary to democratic preferences are subject to override through "the ordinary processes of electorally accountable policymaking."[109] Since Congress has the last word on the meaning of a statute, this should eliminate, or at the very least ameliorate, concern about the judiciary using its discretion to impose its own policy preferences.[110]

The problem with this argument is that such overrides are exceedingly rare, making it risky to rely on them as a means of ensuring consistency between the Court's statutory interpretations and legislative preferences. In fact, one scholar has famously argued that statutory overrides are so rare that the Court's interpretation of statutes is "hardly less 'final' than the Court's decisions interpreting the Constitution."[111] This account has been supported by empirical

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unprovided-for cases during the Founding era. This approach, he argues, was not challenged during the Constitutional Convention and was supported during the state ratifying debates. See generally William N. Eskridge Jr, *All about Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 Colum L Rev 990 (2001).

108 Eskridge, 78 Georgetown L J at 343 (cited in note 21). Dynamic statutory interpretation suggests another reason for looking to the values of the current legislature. From the perspective of majoritarianism, dynamic theorists argue that the current legislature and not the enacting legislature will reflect current majoritarian preferences when the circumstances have changed from that which existed at the time of the original enactment because "there is usually good reason to believe that the historical majority has vanished." Eskridge, 135 U Pa L Rev at 1527 (cited in note 14).

109 See, for example, Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* 28 n * (Yale 1982).

110 The possibility of overrides is also a reason that scholars have paid relatively little attention to the concerns of countermajoritarianism in the context of statutory interpretation. See Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Stare Decisis*, 88 Mich L Rev 177, 204 (1989).

111 Glendon A. Schubert, *Constitutional Politics: The Political Behavior of Supreme Court Justices and the Constitutional Policies That They Make* 258 (Holt, Rinehart and Winston 1960).

evidence showing that the great majority of the Court's statutory interpretations are left undisturbed by Congress.[112]

Dynamic theorists, however, argue that despite the infrequency of overrides, their possibility nonetheless ensures the consistency of the Court's dynamic interpretation of statutes with the dynamic conception of legislative supremacy. Specifically, relying on positive political theory, dynamic theorists contend that the infrequency of overrides is due to the fact that when the Court interprets a statute, it accurately anticipates the preferences of the political branches. By doing so, it avoids overrides.[113] If we transfer this argument to the context of constitutional mainstreaming, it would suggest that even though the Court is favoring its own emphasized constitutional norms over the values reflected in subsequent statutes in its interpretation of statutes, it may nonetheless be accurately reflecting the current legislature's preferences. Specifically, when the Court engages in constitutional mainstreaming, it may be anticipating the congressional response and choosing only interpretations that will not be overridden. These interpretations of statutes would therefore accord with the preferences of the current legislature and the dynamic conception of legislative supremacy.

While the argument is attractive, the positive political theory explanation of the infrequency of legislative overrides is undermined by two problems. First, the theory lacks empirical support. Second, the theory is incompatible with the actual institutional separation of the Court and Congress. This institutional separation makes it extremely difficult for the Court to be able to accurately anticipate the preferences of specific political actors as predicted by the theory.

To see the empirical weaknesses underlying the positive political theory predictions of judicial behavior, it is necessary to first provide a

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112 See Nancy C. Staudt, René Lindstädt, and Jason O'Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954–2005*, 82 NYU L Rev 1340, 1353–54 (2007) (finding that only 8 percent of the tax cases heard by the Supreme Court were overridden by Congress); Virginia A. Hettinger and Christopher Zorn, *Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court*, 30 Legis Stud Q 5, 10 (2005) (finding an override rate of only 6.9 percent among civil rights and civil liberties cases decided from 1967 to 1989); Michael E. Solimine and James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 Temple L Rev 425, 445 (1992) (finding that Congress overrode Supreme Court decisions most often in the immediate wake of those decisions but that it only did so successfully ranging from 5.4 percent in federalism cases to 26.8 percent in economic regulation cases); Beth Henschen, *Statutory Interpretation of the Supreme Court: Congressional Response*, 11 Am Polit Rsrch 441, 445 (1983) (finding that only 12 percent of labor and antitrust cases were overridden by Congress from 1950 to 1970). But see Jeb Barnes, *Overruled? Legislative Overrides, Pluralism, and Contemporary Court–Congress Relations* 43 (Stanford 2004).

113 See William N. Eskridge Jr, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Cal L Rev 613, 643–64 (1991) (describing the anticipatory-response game).

simplified account of the model. The argument that the Court is constrained by the possibility of legislative override relies on a game-theoretic model in which the Court calibrates its interpretation of statutes in anticipation of how Congress will respond. The most basic formulation of the model situates the Court, Congress, and the President in a one-dimensional linear space in which the preferences of the relevant actors are "charted along a left–right, or liberal–conservative, spectrum."[114] In addition to the majority of the Supreme Court, the relevant actors include congressional gatekeepers that control the congressional agenda: congressional committees with jurisdiction over the statute, the committee chair, and the party leadership. These gatekeepers decide whether to introduce override legislation and can also use procedural devices to impede or delay a proposed override with which they disagree.[115] The two other relevant actors are the median member of Congress, whose vote is necessary to overrule the Court, and the President, who can veto legislation.[116]

In the typical formulation of the sequential game, the Court makes the first move when it interprets the statute. Congress then must decide whether to seek an override. If the override is successful, then the President assesses whether to veto the congressional override and, if he does, Congress must determine whether to override the veto.

According to the model, the Court will choose an interpretation that is as close to its preference as possible but will be constrained in its choice by its desire to avoid an override.[117] In contexts in which the Court's ideal preference point is one that the congressional gatekeeper prefers to that of the preference point of the median member of Congress, the Court will impose its own preference on the interpretation of the statute since it can be assured that the gatekeeper will not allow passage of override legislation. In other contexts in which the Court's ideal preference point is out of line with at least one of the gatekeepers, it will choose the interpretation that is closest to its preference that is also consistent with the preferences of

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114 Id at 643–44 (describing the basic model). For variations of the anticipated-response game model, see John A. Ferejohn and Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 Intl Rev L & Econ 263, 265 (1992); John Ferejohn and Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J L, Econ, & Org 1, 5–6 (1990).

115 A congressional committee can "kill" legislation by "rewrit[ing] the bill entirely, reject[ing] it, or simply refus[ing] to consider it." Oleszek, *Congressional Procedures* at 89 (cited in note 12).

116 More complicated versions of the game-theoretic model account for bicameralism and the possibility of senatorial holds and filibusters. See Ferejohn and Weingast, 12 Intl Rev L & Econ at 267 (cited in note 114). An elaboration of these more complex models is not necessary for purposes of this discussion.

117 See id at 271, 276–78.

at least one of the gatekeepers that can prevent an override. This model contains two strong assumptions. First, it assumes that the Court has perfect information about the optimal preferences of each of the other actors and can therefore anticipate their responses to its interpretation of statutes.[118] Second, it assumes that the Court prefers not to be overridden.[119]

The positive political theory models, for which this simplified account is but one example, are elegant, but their explanatory force has proven to be quite limited. Tests of the models have found little empirical support for the anticipated-response game.[120] In perhaps the most well known of these tests undermining the theory, Jeffrey Segal and Harold Spaeth examined the ideological values of individual justices and assessed whether their votes deviate from their predisposition as the political environment changed.[121] Contrary to early studies that had found that the Court acted strategically and interpreted statutes to avoid an override, Segal used controls that more accurately accounted for the attitudinal predisposition of members of the Court. Specifically, rather than looking to party identification of the nominating President as evidence of attitudinal disposition, a measure that unrealistically clumps, for example, Republican nominees Justices Brennan and Scalia into the same category,[122] Segal looked to the ideological value scores of individual

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118 Eskridge, 79 Cal L Rev at 644 (cited in note 113).

119 Id.

120 See, for example, Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 345–48 (Cambridge 2002); Jeffrey Segal, Chad Westerland, and Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model* *23 (unpublished manuscript, Nov 2007), online at http://ssrn.com/abstract=998164 (visited May 9, 2011); James F. Spriggs II and Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J Polit 1091, 1107 (2001); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 Am Polit Sci Rev 28, 33–34 (1997). See also Jeffrey A. Segal and Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 NC L Rev 1323, 1334 (2005) (citing additional scholarship finding no support for the separation of powers model). But see Mario Bergara, Barak Richman, and Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 Legis Stud Q 247, 262–63 (2003); Barry Friedman and Anna L. Harvey, *Electing the Supreme Court*, 78 Ind L J 123, 139 (2003); Pablo T. Spiller and Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988*, 23 RAND J Econ 463, 484 (1992).

121 See Segal and Spaeth, *Attitudinal Model Revisited* at 399–403, 424–28 (cited in note 120).

122 See Segal, 91 Am Polit Sci Rev at 34–35 (cited in note 120) (noting that "there are obvious problems in assuming that both Democrats (e.g. Brennan and Jackson) and Republicans (e.g. Warren and Scalia) on the Court are homogenous" for the purposes of this model). For an example of categorization according to the nominating President's party identification, see Spiller and Gely, 23 Rand J Econ at 491 (cited in note 120).

justices.[123] He found that there was "serious doubt on whether the justices vote other than sincerely with regard to congressional preferences, except on the rarest occasions."[124] Justices' votes on statutory interpretation issues were influenced by their attitudinal dispositions and were seemingly unconstrained by congressional gatekeeper preferences.[125]

But even if the empirical evidence indicated the opposite—that the Court does seek to avoid legislative override—this would not resolve the deeper conflict between constitutional mainstreaming and legislative supremacy. Congressional gatekeepers are often actors that do not reflect the median preferences of Congress or the broader democratic preferences of the polity. Because of the increased polarization of the two chambers of Congress, the existence of congressional gatekeepers does little to constrain judicial discretion to interpret statutes contrary to democratic preferences. For example, Segal's examination of the political preference of House and Senate Judiciary Committee chairs showed that they were often "located at complete opposite ends of the political spectrum."[126] The Court could often avoid an override simply by not interpreting a statute in an extreme way. So long as the Court's interpretation lies between the preferences of these two gatekeepers, neither could successfully introduce an override to pull the statute closer to their own preferred policies, since their counterpart in the other chamber would block such a move. This leaves the Court with great leeway in its interpretation of ambiguous statutes.[127] The possibility of override in most contexts, therefore, often does little to ensure that the Court's decision making is consistent with the dynamic conception of legislative supremacy.

Ultimately, the findings in the empirical studies contradicting positive political theory seem rather intuitive once one accounts for institutional separation of the Court from the two political branches.

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123 These scores were derived from a content analysis of major newspaper editorials about the justices from point of nomination to confirmation. See Jeffrey A. Segal and Albert D. Cover, *The Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 Am Polit Sci Rev 557, 559–60 (1989).

124 Segal, 91 Am Polit Sci Rev at 42 (cited in note 120). Later studies found similar results. See, for example, Hettinger and Zorn, 30 Legis Stud Q at 21 (cited in note 112); Segal and Spaeth, *Attitudinal Model Revisited* at 348 (cited in note 120); Spriggs and Hansford, 63 J Polit at 1107 (cited in note 120). But see Bergara, Richman, and Spiller, 28 Legis Stud Q at 267 (cited in note 120).

125 Segal, 91 Am Polit Sci Rev at 37–38 (cited in note 120).

126 Id at 39.

127 See id at 38–39 (finding that the Court has an "extraordinary" range of positions available to it on the political spectrum and concluding that many justices "cannot be constrained by Congress").

The constitutional design of the Court as an institution insulated from the elected branches of government results in justices who usually (and quite expectedly) lack enough information about the preferences of specific congressional actors to anticipate the possibility of override. Although justices may be familiar with the basic political composition of the congressional committee with jurisdiction over the particular statute being interpreted, it is difficult to conceive of most justices as having knowledge about the specific political dynamics of these committees. Motivated by rules of judicial ethics, justices do not sit in on congressional committee meetings and rarely have private meetings with members of Congress.[128] In addition, their clerks do not interact with legislative staffs.[129] Thus, even assuming that the Court does not want its decisions overridden, there is no reason to think that justices should be particularly good at anticipating the preferences of congressional gatekeepers.

Dynamic theorists likely recognize that the perfect-information assumption of the anticipated-response game model is too strong. But even the assumption that justices have merely adequate information of congressional gatekeepers' preferences still seems too strong. It is difficult to see how the Court could, with such limited information, accurately anticipate the response of Congress to its interpretation of statutes.[130]

The empirical evidence and the institutional separation of the Court from Congress suggest that, contrary to the predictions of positive political theory's anticipated-response game, constitutional mainstreaming is in considerable tension with the dynamic conception of legislative supremacy. In particular, if members of the Court either cannot or choose not to anticipate the preferences of congressional actors who could prevent overrides, then the possibility of a rare

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128 See Code of Conduct for United States Judges, Canons 1–2 (2009) (providing that judges should "uphold the integrity and independence of the judiciary" and "avoid impropriety and the appearance of impropriety in all activities"). See also Mike McIntire, *The Justice and the Magnate*, NY Times A1 (June 19, 2011) ("Although the Supreme Court is not bound by the code, justices have said they adhere to it.").

129 See Code of Conduct for Judicial Employees, Canons 1–2 (2009) (providing the same ethical guidelines as for judges). See also Rule 2.12(A): Supervisory Duties, ABA Model Code of Judicial Conduct Canon 2 (2009) (requiring court staff to act in manner consistent with Code).

130 The conventional account of the reason for the infrequency of legislative overrides is therefore more likely to be accurate. Under that account, legislative overrides are rare because Congress may not be aware of the Supreme Court interpretation of a statute. See, for example, Marshall, 88 Mich L Rev at 186 (cited in note 110). Even when it is aware, congressional inaction may reflect the difficulty of getting override legislation—even legislation consistent with the preferences of the majority of the legislators and the President—through a busy legislative process that is oriented toward maintaining the status quo. See Cass R. Sunstein, *The Partial Constitution* 170–72 (Harvard 1993) (observing that endowment effects create legislative status quo bias).

override acts as a futile constraint on judicial discretion. And, as a result, the door is open for the Court to engage in the constitutional mainstreaming of statutes without accounting for the preferences of the current Congress.

Dynamic theory also urges that the Court should interpret statutes consistent with current congressional preferences because it is thought that this will lead to interpretations reflecting evolving democratic preferences. The current Congress is therefore just a proxy for the broader public will. According to this account, even if the Court is not able to anticipate current congressional preferences, as long as the Court's constitutional mainstreaming of statutes reflects broader democratic preferences, it is acting consistently with the dynamic conception of legislative supremacy. Contrary to this account, I argue that there are also strong reasons to believe that the Court does not reflect broader popular preferences in its practice of constitutional mainstreaming. As a result, constitutional mainstreaming conflicts with the deeper democratic norms underlying the dynamic conception of legislative supremacy.

Legal scholars and political scientists over the past fifty years have argued that the Court is an institution that is responsive to democratic preferences.[131] In particular, they have suggested that Mr. Dooley's famous dictum that "th' Supreme Court follows th' illiction returns"[132] aptly describes the behavior of the Court.[133] According to this view, the Court is responsive to democratic preferences in its constitutional decisions over time. Extending this argument to the statutory-interpretive context, it would suggest that when the Court engages in the constitutional mainstreaming of statutes, it decides difficult interpretive matters in a manner consistent with evolving majority desires.

The broad acceptance of Mr. Dooley's dictum among academics can at least partially be attributed to its counterintuitiveness. The idea that the Court's decisions track popular preferences is inconsistent with the desires of the Framers of the Constitution to ensure the

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131 See, for example, Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 383 (Farrar, Straus and Giroux 2009); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 21 (Chicago 2d ed 2008); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J Pub L 279, 293 (1957). But see Richard H. Pildes, *Is the Supreme Court a 'Majoritarian' Institution?*, 2010 S Ct Rev 103, 105–06.

132 See Peter F. Dunne, *Mr. Dooley's Opinions* 26 (R.H. Russell 1901).

133 See, for example, Steven G. Calabresi, *Thayer's Clear Mistake*, 88 Nw U L Rev 269, 272 (1993); William Mishler and Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 Am Polit Sci Rev 87, 98 (1993).

independence of the federal courts from legislative and majoritarian encroachments.[134] Article II of the Constitution establishes a judicial selection method that lacks a mechanism for direct electoral accountability since it requires that the President nominate and the Senate confirm justices to the Supreme Court.[135] The nomination process in practice is idiosyncratic, with the President usually making the decision out of public view.[136] And the confirmation process, which could in theory serve as the public's venue for assessing the consistency of the justice's values with its own, does little to reveal the judicial ideologies of appointees. This makes it impossible for the senators to ensure that the nominees will decide cases in a manner consistent with current majoritarian values.[137] Finally, any possibility for later direct public input into the decision of judicial actors has been eliminated by the Article III grant of life tenure to justices during good behavior.[138] Nonetheless, in spite of these institutional features of the judiciary, scholars have argued that the responsiveness of the Court to democratic preferences is accurate as an empirical matter.

Robert Dahl was one of the first scholars to advance this claim in the 1950s. He argued that the periodic appointment and confirmation of justices by an electorally accountable President and Senate ensures that the views of the Court "are never for long out of line with the policy views dominant among the lawmaking majorities."[139] Dahl, in his study, did not fully account for two important aspects of the appointment process that result in a much less responsive Court. The first is that there is likely to be a much more considerable time lag than even Dahl anticipated in the responsiveness of the Court to lawmaking majorities.[140] At the time that Dahl wrote his seminal piece in 1957, justices were on average appointed every twenty-two

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134 See Federalist 78 (Hamilton), in *The Federalist* 521, 527–29 (cited in note 64).

135 US Const Art II, § 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.").

136 See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Georgetown L J 965, 978 (2007).

137 Commentators are nearly unanimous in the view that the confirmation process is ineffective in bringing the philosophy or values of judicial appointees into public view. See, for example, Ackerman, 101 Harv L Rev at 1168 (cited in note 65); Carter, 101 Harv L Rev at 1195 (cited in note 72) ("[T]he Senate may lack the institutional capacity to evaluate judicial philosophy in any non trivial theoretical sense."); Elena Kagan, Book Review, *Confirmation Messes, Old and New*, 62 U Chi L Rev 919, 941–42 (1995).

138 US Const Art III, § 1.

139 Dahl, 6 J Pub L at 285 (cited in note 131).

140 Dahl does concede that there will be "short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions" in which the Supreme Court could lie outside of the dominant alliance. Id at 293.

months.[141] Over time, the rate of turnover has decreased to an average of one new justice for each presidential term in office.[142] Thus even a two-term President would be unlikely to appoint more than two justices, in contrast to the four that Dahl anticipated.

The opportunity for the Court to "catch up" to the views of the lawmaking majority is complicated by a second limit to the political appointment process as a means of securing responsiveness: strategic retirements. Justices engage in strategic retirements when they "time[] their retirements based on which president would nominate their successors."[143] Strategic retirements limit the opportunity for new lawmaking majorities to secure a Supreme Court that reflects their values.

Thus, even if we assume that the judicial appointment process should eventually align the Supreme Court's views with those of the lawmaking majority, such congruence is likely to occur only with a substantial lag. And in many circumstances, given the two-term limit on the presidency, the judiciary may not ever catch up to the values of the current lawmaking majority.[144] The lag in responsiveness that Dahl envisions can therefore evolve into a permanent disjuncture between the values reflected in the Court's decisions and those reflected in the decisions of the elected branches.

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141 Id at 284. Dahl calculated that each President therefore could "expect to appoint about two new justices during one term of office; and if this were not enough to tip the balance on a normally divided Court, he [was] almost certain to succeed in two terms." Id. Even assuming the turnover calculated by Dahl, there will be a lag between the change in the party administration of the President and Senate and the time it takes to appoint a sufficient number of justices to accord with the ideological orientation of the elected branches. Nearly two decades after Dahl's study, Richard Funston demonstrated empirically that this lag period is approximately five years, during which the Court will be out of line with the lawmaking majority after electoral or partisan realignments. See Richard Funston, *The Supreme Court and Critical Elections*, 69 Am Polit Sci Rev 795, 806–07 (1975).

142 The average tenure of justices has risen from 12.2 years in the period from 1941 through 1970 to 26.1 years in the period from 1971 to 2000. See Pildes, 2010 S Ct Rev at 140 (cited in note 131); Steven G. Calabresi and James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv J L & Pub Pol 769, 771 (2006).

143 James E. DiTullio and John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 Va L Rev 1093, 1101 (2004). While the extent of strategic retirements is empirically debatable, they may increasingly be part of the justices' calculations as members of the Court. Based on an empirical analysis, Keith Krehbiel finds that support for the strategic retirement hypothesis is weak. See Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 Am J Polit Sci 231, 238 (2006). The study does not, however, account for unsuccessful attempts by justices to remain on the bench until a President of their party can appoint their successors. Also, the study fails to account for the desire of Republican nominees such as Harry Blackmun to be replaced by a Democratic appointment. See DiTullio and Schochet, 90 Va L Rev at 1103–04 (cited in note 143).

144 When the same party controls the executive for three consecutive terms, the replacement hypothesis may hold. However, this has occurred only once since 1952.

Political scientists and legal scholars have recently looked beyond the replacement hypothesis and have argued that the Court is directly responsive to public opinion.[145] The reason for this direct responsiveness to public opinion is the Court's recognition that its authority as a political institution "depends on public deference and respect."[146] Justices "[c]oncerned with maintaining their political power . . . [are] careful not to jeopardize their collective authority or legitimacy by deviating too far or too long from strongly held public views on fundamental issues."[147] These scholars advance a "political adjustment hypothesis" that justices "modify their decisions—if not their personal beliefs—on some issues in response to what they individually perceive as long term and fundamental changes in public opinion" in order to maintain the power of the Court and secure implementation of its decisions.[148] The Court, according to the political-adjustment hypothesis, therefore decides cases by feeling out the public mood and assessing whether its decisions accord with the identifiable preferences, or at least the strongly identifiable preferences, of the public.[149]

While the hypothesis has a following among legal scholars,[150] there is only weak empirical support for it. Studies most sympathetic to the political-adjustment hypothesis suggest that there is a statistically significant but very modest correlation between public opinion and the decisions of certain moderate judges and that the effect of public opinion on judicial decisions occurs at a lag ranging from one to seven years.[151] These studies suggest, consistent with Dahl's replacement

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145 See William Mishler and Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-analytic Perspective*, 58 J Polit 169, 194 (1996); Mishler and Sheehan, 87 Am Polit Sci Rev at 96 (cited in note 133).

146 Mishler and Sheehan, 58 J Polit at 173 (cited in note 145).

147 Id at 174.

148 Id. See also Kevin T. McGuire and James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J Polit 1018, 1019 (2004). William Mishler and Reginald Sheehan also advance a "political conversion" hypothesis in which public opinion "may stimulate a change in that justice's thinking thereby influencing the justice's behavior." Mishler and Sheehan, 58 J Polit at 175 (cited in note 145). This line of argument is similar to the one put forward by legal scholars responding to the countermajoritarian difficulty. See Friedman, *The Will of the People* at 370–71 (cited in note 131).

149 See Mishler and Sheehan, 58 J Polit at 174 (cited in note 145).

150 See, for example, Friedman, *The Will of the People* at 374–76 (cited in note 131). But see Pildes, 2010 S Ct Rev at 158 (cited in note 131).

151 See Mishler and Sheehan, 87 Am Polit Sci Rev at 96 (cited in note 133); Mishler and Sheehan, 58 J Polit at 194 (cited in note 145); Michael W. Link, *Tracking Public Mood in the Supreme Court: Cross-Time Analyses of Criminal Procedure and Civil Rights Cases*, 48 Polit Res Q 61, 72–73 (1996); Robert S. Erikson, Michael B. MacKuen, and James A. Stimson, *The Macro Polity* 313 (Cambridge 2001). But see Helmut Norpoth and Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 Am Polit Sci Rev 711, 713–14 (1994).

hypothesis, that most, if not all, of the effect of public opinion on the Court's decision instead occurs through the appointment process.[152] Other studies indicate that the combined effect of public opinion through the appointment process and political adjustments by justices is substantially less and occurs at a greater lag than the effect of public opinion on the decisions of *elected* actors.[153] These empirical results reflect the relative strength of electoral constraints on elected officials as compared to any perceived need for justices to maintain the institutional legitimacy of the Court by complying with public opinion.

In sum, Dahl's argument that the Court is "never for long out of line with the policy views dominant among the lawmaking majorities" is weakened but not necessarily disproven by the empirical studies.[154] Still, even if his claim is true over a longer time horizon, the Court will still regularly have views and hold values that are inconsistent with those of the current Congress, the President, and the public. A disjuncture is therefore likely to recur between the values emphasized in the mainstream of the Court's constitutional jurisprudence and the values of the other elected branches. It is in this context of value disjuncture that constitutional mainstreaming comes into conflict with the substantive democratic principles underlying the dynamic conception of legislative supremacy.

III. AN ALTERNATIVE APPROACH: THE PRIORITIZATION OF STATUTE-BASED VALUES

In the previous Part, I argued that the Court's constitutional mainstreaming of ambiguous statutes is inconsistent with a formal understanding of the dynamic conception of legislative supremacy because the Court is not well positioned to anticipate the preferences of the current Congress. In addition, I argued that constitutional mainstreaming is inconsistent with a more substantive understanding of the dynamic conception of legislative supremacy because there is usually a substantial lag in the responsiveness of the Court to public preferences.

In this Part, I argue that when the Court confronts ambiguous statutes, it should instead look to values derived from subsequently enacted statutes.[155] Evolving values derived from subsequently enacted

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152 See, for example, Erikson, MacKuen, and Stimson, *The Macro Polity* at 313–14 (cited in note 151).

153 Id. See also McGuire and Stimson, 66 J Polit at 1022 (cited in note 148); Mishler and Sheehan, 58 J Polit at 187–95 (cited in note 145).

154 Dahl, 6 J Pub L at 285 (cited in note 131).

155 As I discuss below, in looking to the values underlying subsequently enacted statutes, the Court should prioritize more recently enacted statutes over older statutes. See Part III.B.

statutes will better reflect evolving democratic preferences than judicially emphasized constitutional norms. I then offer a preliminary framework for a modified dynamic approach to the interpretation of ambiguous statutes in unforeseen contexts.

A. Statute-Based Values and Evolving Democratic Preferences

Dynamic theorists identify subsequently enacted statutes as the most important source of statute-based values. At first blush, it seems obvious that statutory enactments by Congress will tend to be more responsive to democratic preferences than judicially emphasized constitutional values. The legislature is a representative institution that, unlike the judiciary, is designed to be accountable to the public through periodic elections. According to the standard US constitutional theory of representative government, members of the legislature, motivated to "act[] in the interest of the represented,"[156] should enact statutes that are at the very least driven by the legislator's perception of what the public needs or wants.[157] Of course, this theory implicitly assumes that special interest groups have been successfully constrained and a certain degree of political equality exists among the members of the public[158]—assumptions that are ultimately unrealistic. As an alternative model of legislative behavior, pluralism suggests that, although special interest groups are not constrained and legislation results directly from interest group lobbying, those legislative outcomes do reflect the balance of power in society.[159] Under either model, statutes should roughly mirror democratic preferences.

Dynamic theorists are skeptical of both of these accounts of the political process, and this skepticism underlies their preference for public values derived from the Constitution rather than from statutes. They view the legislative process, and its outcomes, through the lens of

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156 Hanna Fenichel Pitkin, *The Concept of Representation* 209 (California 1972).

157 See, for example, R. Douglas Arnold, *The Logic of Congressional Action* 37 (Yale 1990); John W. Kingdon, *Congressmen's Voting Decisions* 31 (Michigan 3d ed 1989); David R. Mayhew, *Congress: The Electoral Connection* 37–38 (Yale 1974); Richard F. Fenno Jr, *Congressmen in Committees* 1 (Little, Brown 1973); Aage R. Clausen, *How Congressmen Decide: A Policy Focus* 2 (St Martin's 1973).

158 See Federalist 10 (Madison), in *The Federalist* 56, 62 (cited in note 64).

159 For an elaboration of the pluralist model, see Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex L Rev 873, 875 (1987); Robert A. Dahl, *Who Governs?* 271–73 (Yale 1961); Robert A. Dahl, *A Preface to Democratic Theory* 124–51 (Chicago 1956); Earl Latham, *The Group Basis of Politics: A Study in Basing-Point Legislation* 7 (Cornell 1952); David B. Truman, *The Governmental Process: Political Interests and Public Opinion* 56–62 (Knopf 1951). See also Kay Lehman Schlozman and John T. Tierney, *Organized Interests and American Democracy* 7–8 (Harper & Row 1986).

public choice theory.[160] Public choice theory emphasizes collective action problems, which give small and unrepresentative special interest groups an advantage over more diffuse interests in organizing to influence the legislature politically.[161] Since these politically organized special interest groups coexist with a mostly unorganized public, they are usually able to secure favorable legislation at the expense of the broader public.[162] Through the use of campaign contributions, promises of future electoral favors, and even bribes,[163] these special interest groups pressure legislators (who are motivated primarily by the prospect of reelection) into enacting rent-seeking legislation that transfers wealth from the broader public to the interest groups.[164] While public choice theory does not go so far as to suggest that all legislation enacted will be of the rent-seeking variety, it does contend that because of the prevalence of special interest groups in the legislative process, such legislation will be common.[165] Therefore, many statutes will reflect the values of the special interests rather than those of the public.

For theorists who subscribe to this account, the unaccountability of judges becomes a virtue rather than a vice. Since judges are appointed and enjoy life tenure, they are not motivated by the concern for reelection.[166] As a result, unlike in the legislative process,

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160 William N. Eskridge Jr, *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va L Rev 275, 322 (1988). The dynamic theory's public choice account of the political process generally does not take into account the more sophisticated and complex modern incarnations of public choice theory. See Daniel A. Farber and Anne Joseph O'Connell, *Introduction: A Brief Trajectory of Public Choice and Public Law*, in Daniel A. Farber and Anne Joseph O'Connell, eds, *Research Handbook on Public Choice and Public Law* 1, 4–6 (Edward Elgar 2010) (describing the trajectory of public choice theory).

161 See Croley, *Regulation and Public Interests* at 18–19 (cited in note 23); Mancur Olson Jr, *The Logic of Collective Action* 46–48 (Harvard 1965). See also Richard A. Posner, *Economic Analysis of Law* 496–98 (1977); James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 220–22 (Michigan 1962).

162 See Croley, *Regulation and Public Interest* at 19 (cited in note 23); Farber and Frickey, 65 Tex L Rev at 892 (cited in note 159).

163 See William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J L & Econ 875, 877 (1975).

164 See Farber and Frickey, 65 Tex L Rev at 878 (cited in note 159). But see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L Rev 1217, 1250 (2006) (citing studies suggesting that campaign contributions merely provide interest groups access to legislators rather than influence the vote of legislators).

165 See, for example, Kay Lehman Schlozman, *What Accent the Heavenly Chorus? Political Equality and the American Pressure System*, 46 J Polit 1006, 1011 (1984) (finding that "the pressure system is heavily weighted in favor of business organizations"); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U Chi L Rev 263, 269 (1982) (explaining that "interest group theory does not deny the possibility that a large group . . . occasionally might procure legislation on its own behalf" and describing certain statutes that belong in the public interest category and others that belong in the interest group category).

166 See Eskridge, 74 Va L Rev at 305 (cited in note 160).

politically organized special interest groups do not have an advantage over a politically unorganized public in securing favorable results in judicial decisions.[167] Instead, judges decide cases in a context in which two opposing parties each have an equal opportunity (although not necessarily equal resources) to present their arguments to an adjudicator who is principally motivated by a desire to influence the direction of the law and perhaps not be overturned.[168] Courts, thus, are better institutionally positioned than the legislature to avoid results that benefit narrow groups at the cost of the wider public.

If public choice theory has it right, as dynamic theorists suggest it does, then it directly undermines the argument here that the Court's practice of constitutional mainstreaming shortchanges democratic preferences. In particular, while the judiciary's responsiveness to the public is limited, the public is likely better off if the Court interprets statutes according to its own emphasized constitutional norms. Although such interpretations will at best reflect the democratic preferences of the past, they should leave the public better off than interpretations based on narrow special interest values that do not reflect democratic preferences at all.

Such a public choice–theoretic account is widely subscribed to not only by dynamic theorists, but also by legal scholars and political scientists more generally.[169] However, it has been challenged both within and outside the legal academy. Scholars have questioned both the empirical bases for the theory[170] and its simplifying assumptions that legislators are motivated primarily by reelection[171] and that only special interest groups seeking private gain have an organizational

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167 Id at 303–04. Recent studies suggest some reasons to doubt this account. See Lee Epstein, William M. Landes, and Richard A. Posner, *Is the Roberts Court Pro-business?* *1–2 (unpublished manuscript, Dec 2010), online at http://www.scribd.com/doc/50720643/EPSTEIN-LANDES-POSNER-Is-the-Roberts-Court-Pro-Business (visited May 11, 2011).

168 See Eskridge, 74 Va L Rev at 304 (cited at note 160).

169 See Farber and O'Connell, *A Brief Trajectory* at 1 (cited in note 160) ("Public choice theory plays a critical role in public law, particularly for legal scholarship and to some extent for doctrine.").

170 See, for example, Croley, *Regulation and Public Interests* at 38–47 (cited in note 23); Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* 32–36 (Yale 1997); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U Pa L Rev 1, 7 (1990); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 Va L Rev 199, 217–20 (1988); Farber and Frickey, 65 Tex L Rev at 893–94, (cited in note 159); Michael T. Hayes, *Lobbyists and Legislators: A Theory of Political Markets* 44–53 (Rutgers 1981).

171 See, for example, Croley, *Regulation and Public Interests* at 45–47 (cited in note 23); Mashaw, *Public Law and Public Choice* at 35 (cited in note 23).

advantage.[172] I will not attempt to rehash these arguments or to refute public choice theory, since that exceeds what is necessary here.

Instead, I assume arguendo that the public choice account is accurate and that most legislation constitutes a special interest bargain. Even so, I argue that legislators have incentives to surround special interest statutes with purposes that are public-regarding and consistent with democratic preferences.[173] The Court's prioritization of values from subsequently enacted statutes will therefore be the best means of respecting evolving democratic preferences. It is not the details of the legislation that matter for my argument; it is the broader values embodied in the legislation. Thus, when the Court dynamically interprets ambiguous statutes in unforeseen contexts, it is the more broadly articulated purposes underlying subsequently enacted statutes that should inform the Court's interpretation.

For example, we might assume that the 2006 VRA Reauthorization Act constituted a special interest bargain between legislators and a civil rights lobby that promised campaign contributions and future electoral support in return.[174] Even so, it is the more broadly articulated purpose of providing opportunities for minority voting and representation found in the statute—in the preface or description of purpose—and in the legislative history surrounding the statute that a court will be able to identify and use in the interpretation of related ambiguous statutes over time.[175] The suggestion here is that the Court, when interpreting related ambiguous statutes, should rely on these public-regarding purposes as relatively accurate indicia of democratic preferences. I explain my reasoning below.

There are two key questions that arise from the public choice account: First, why would reelection-minded legislators surround special interest statutes with public-regarding purposes? Second, how likely are these purposes to reflect evolving democratic preferences? There are two categories of special interest legislation: open-explicit statutes that are "naked, undisguised wealth transfers to a particular, favored group" and hidden-implicit statutes "couched in public

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172 Croley, *Regulation and Public Interests* at 40–44 (cited in note 23).

173 Jonathan Macey and others have argued that even under the public choice–theoretic account, legislators will articulate broader public-regarding purposes for special interest statutes that are inconsistent with the special interest goals. See Macey, 86 Colum L Rev at 251–53 (cited in note 24). See also Posner, *Economic Analysis of Law* at 586–87 (cited in note 161). The analysis here builds on these contributions.

174 See generally VRA Reauthorization Act of 2006, 120 Stat 577, 42 USC § 1973 et seq.

175 See VRA Reauthorizaton Act of 2006 § 2(b), 120 Stat at 577–78 (reporting congressional findings and purposes); *VRA Reauthorization Act of 2006 Senate Committee Report*, S Rep No 102-295 at 2 (cited in note 7) (describing the purpose of the Voting Rights Act).

interest terms."[176] The cost of political information for voters is the critical variable in determining which types of special interest statutes legislators will enact.[177] If, on the one hand, political information is costly and therefore narrowly distributed to the public, then legislators will perceive minimal reelection costs from enacting open-explicit special interest statutes and will rarely enact special interest statutes hidden behind a veil of public-regarding purposes. When legislators do seek to enact hidden-implicit statutes, they will not be attempting to deceive the broader public but only a small segment of elites and rival special interest groups. The public-regarding purposes, to the extent that there are any, will therefore *not* be broadly responsive to democratic preferences.

If, on the other hand, political information is cheap and broadly distributed to the public, then legislators will have strong incentives to hide their special interest deals to avoid voter backlash. Under this scenario, the public that the legislator seeks to deceive with the public interest facade will include the broader public rather than just rival special interest groups or the elites since members of the broader public will be able to learn about such deals relatively easily.

So the pivotal question is this: How hard is it for voters to acquire political information? In the 1950s, when campaign speeches on the radio and in newspapers served as the primary source of political information for voters, it was difficult.[178] This information was costly in terms of time and attention needed to comprehend and digest it. As a result, it was only narrowly distributed to an attentive elite public.[179] By the 1960s, however, television had overcome newspapers as the chief source of political information.[180] The subsequent emergence of the televised political advertisement as the central tool of modern

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176 Macey, 86 Colum L Rev at 232–33 (cited in note 24).

177 The public choice account implicitly relies on the premise that the unorganized public consists of politically apathetic, ignorant individuals. This assumption is derived from the theory of rational-voter apathy first developed by Anthony Downs in the 1950s. See Anthony Downs, *An Economic Theory of Democracy* 38–50 (Harper & Brothers 1957). As he explained, acquiring political information is costly, and it is often incomplete. Id at 46. As a result, potential voters are uncertain about what decisions the governing party has made or what decisions it or the opposing party will make after an election. Id at 46–47. In addition, and perhaps more importantly, potential voters will often not be able to trace how these decisions have impacted or will impact their personal utility. Id at 46.

178 See Paul F. Lazarsfeld, Bernard Berelson, and Hazel Gaudet, *The People's Choice: How the Voter Makes Up His Mind in a Presidential Campaign* 120–29 (Columbia 3d ed 1968).

179 Id at 124–25.

180 See Tien-Tsung Lee and Lu Wei, *How Newspaper Readership Affects Political Participation*, 29 Newspaper Rsrch J 8, 9 (Summer 2008); Stephen Ansolabehere and Shanto Iyengar, *Going Negative: How Attack Ads Shrink and Polarize the Electorate* 1 (Free Press 1995).

political campaigns made this form of acquiring political information nearly costless in terms of time and attention required to receive it.[181]

Not only are political advertisements virtually costless to potential voters, there is evidence that they provide voters with useful political information. The early conventional wisdom from studies conducted in the 1940s and 1950s was that the effect of media on political learning was minimal.[182] However, in a pathbreaking study performed during the 1972 presidential campaign, Thomas Patterson and Robert McClure undermined this account as applied to televised political advertisements.[183] Voters who had a high exposure to the ads "showed a greater increase in knowledge than persons with low exposure."[184] This gain in knowledge came despite the advertisements' brevity and narrow focus on issues potentially helpful to the candidate and harmful to the opponent.[185] The advertisements were effective because they were abundant and they provided potential voters with the opportunity to efficiently identify differences between candidates' policies in terms of their effect on the potential voters' well-being.[186]

More recent studies confirm these early findings.[187] As one study concluded, "if the political diet of most Americans is lacking in crucial information, campaign ads represent the multivitamins of American politics."[188] These subsequent studies also contributed two additional findings. First, political advertisements in congressional campaigns provide a greater information boost for less educated and less politically attentive individuals than they do for more educated and

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181 See Ansolabehere and Iyengar, *Going Negative* at 52–54 (cited in note 180) (showing evidence that despite the opportunity to channel surf, political advertisements reach "uniniterested and unmotivated citizens [ ] who ordinarily pay little attention to news reports, debates, and other campaign events").

182 See Larry M. Bartels, *Messages Received: The Political Impact of Media Exposure*, 87 Am Polit Sci Rev 267, 267 (1993) (citing and quoting studies finding a minimal effect of media on voting).

183 See Thomas E. Patterson and Robert D. McClure, *The Unseeing Eye: The Myth of Television Power in National Politics* 21–24 (Paragon 1976).

184 Id at 116–17.

185 See id at 117.

186 See id at 116. See also Ansolabehere and Iyengar, *Going Negative* at 60 (cited in note 180) (explaining that because of individuals' short attention span for political information, "[t]he brevity of the advertising message may actually strengthen its information value" and that voters prefer information that is easy to digest and simple to obtain).

187 See Paul Freedman, Michael Franz, and Kenneth Goldstein, *Campaign Advertising and Democratic Citizenship*, 48 Am J Polit Sci 723, 726 (2004); Craig Leonard Brians and Martin P. Wattenberg, *Campaign Issue Knowledge and Salience: Comparing Reception from TV Commercials, TV News and Newspapers*, 40 Am J Polit Sci 172, 172 (1996); Ansolabehere and Iyengar, *Going Negative* at 38–39 (cited in note 180); Marion Just, Ann Crigler, and Lori Wallach, *Thirty Seconds or Thirty Minutes: What Viewers Learn from Spot Advertisements and Candidate Debates*, 40 J Communication 120, 127 (1990). But see Gregory A. Huber and Kevin Arceneaux, *Identifying the Persuasive Effects of Presidential Advertising*, 51 Am J Polit Sci 957, 965 (2007).

188 Freedman, Franz, and Goldstein, 48 Am J Polit Sci at 725 (cited in note 187).

more politically attentive individuals.[189] Second, potential voters derive most of their information about the issues from negative advertisements—advertisements that either offer a contrast between the issue positions of the two candidates or simply criticize the position of the opponent—as opposed to positive ones, which tend to be focused less on the issues and more on the image of the candidate paying for the ad.[190] This finding is especially important because with the exception of one prominent, outlier study,[191] it has been shown that those with greater exposure to negative advertisements are more likely to vote than those with less exposure.[192]

Political advertisements' wide distribution of political information thus creates incentives for legislators to at least try to deceive the public into viewing them as acting in the public interest. Of course, under the public choice account, the availability of cheap, broadly distributed political information does not necessarily mean that the rational legislator will stop enacting special interest, rent-seeking legislation. The reelection benefits of campaign contributions from special interest groups and their use in funding political advertisements and get-out-the-vote operations may outweigh the potential costs in terms of the relatively small loss of votes from the public that will penalize legislators for enacting such legislation. However, a rational legislator will look to minimize any reelection costs that could result from the passage of rent-seeking legislation. The concern for a legislator is that a potential future political opponent will be able to use information about the incumbent's

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189 See Ansolabehere and Iyengar, *Going Negative* at 54–55 (cited in note 180) (finding initial results but diminishing returns in advertising).

190 See, for example, Steven E. Finkel and John G. Geer, *A Spot Check: Casting Doubt on the Demobilizing Effect of Attack Advertising*, 42 Am J Polit Sci 573, 577 (1998).

191 See Ansolabehere and Iyengar, *Going Negative* at 99–109 (cited in note 180).

192 For findings that negative advertisements have a mobilizing effect, see Freedman, Franz, and Goldstein, 48 Am J Polit Sci at 732–33 (cited in note 187); Paul S. Martin, *Inside the Black Box of Negative Campaign Effects: Three Reasons Why Negative Campaigns Mobilize*, 25 Polit Psych 545, 552–57 (2004); Ken Goldstein and Paul Freedman, *Campaign Advertising and Voter Turnout: New Evidence for a Stimulation Effect*, 64 J Polit 721, 733–35 (2002); Richard R. Lau and Gerald M. Pomper, *Effects of Negative Campaigning on Turnout in US Senate Elections, 1988–1998*, 63 J Polit 804, 816–17 (2001); Kim Fridkin Kahn and Patrick J. Kenney, *Do Negative Campaigns Mobilize or Suppress Turnout? Clarifying the Relationship between Negativity and Participation*, 93 Am Polit Sci Rev 877, 883 (1999); Paul Freedman and Ken Goldstein, *Measuring Media Exposure and the Effects of Negative Campaign Ads*, 43 Am J Polit Sci 1189, 1202 (1999). For findings that negative advertisements do not have a demobilizing effect on voters, see Deborah Jordan Brooks, *The Resilient Voter: Moving toward Closure in the Debate over Negative Campaigning and Turnout*, 68 J Polit 684, 691–92 (2006); Martin P. Wattenberg and Craig Leonard Brians, *Negative Campaign Advertising: Demobilizer or Mobilizer?*, 93 Am Polit Sci Rev 891, 892–95 (1999); Richard R. Lau, et al, *The Effects of Negative Political Advertisements: A Meta-analytic Assessment*, 93 Am Polit Sci Rev 851, 858 (1998); Finkel and Geer, 42 Am J Polit Sci at 584 (cited in note 190).

support for rent-seeking legislation to galvanize the public against her.[193] To decrease this risk, it is rational for legislators to ensure that the content of most special interest deals is hidden behind a public interest facade even if the facade increases the uncertainty to special interest groups about how the statute will be interpreted by courts and agencies. Thus, legislators should strongly prefer hidden-implicit special interest statutes that include a public-regarding purpose over the alternative open-explicit special interest statutes.

Importantly, to be effective as a facade to impress voters, the public-regarding purpose must reflect what legislators perceive to be the democratic preferences of the broader public. This is not to suggest that the public-regarding purposes will always accurately reflect these preferences; legislators may be out of touch with their constituents. But given the relatively close proximity of legislators to public concerns and wants, they are more likely to correctly assess the public's preferences than are judges.[194]

Thus, the broad, costless distribution to potential voters of relevant political information in the form of political advertisements, combined with the motivation of legislators to be reelected, suggests that the public-regarding purposes underlying statutes will tend to accord with democratic preferences. In sum, even if we assume that the most cynical account of the political process is correct, evolving statute-based values are still a good indicator of evolving democratic preferences. In the next Section, I describe the methodology that the Court should use to interpret ambiguous statutes in light of those evolving statute-based values.

B. Toward a Modified Dynamic Approach to Statutory Interpretation

In this Section, I argue that the Court should prioritize values underlying subsequently enacted statutes when interpreting

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193 See Arnold, *The Logic of Congressional Action* at 30 (cited in note 157) (noting the role of a political instigator in mobilizing previously inattentive publics).

194 This argument is borne out by studies showing that the public perceives elected officials as generally being responsive to their preferences in their roll call votes and enacted policies. See, for example, Erikson, MacKuen, and Stimson, *The Macro Polity* at 316 (cited in note 151); Robert S. Erikson, Gerald C. Wright, and John P. McIver, *Statehouse Democracy: Public Opinion and Policy in the American States* 78, 80–81 (Cambridge 1993); Benjamin I. Page and Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 Am Polit Sci Rev 175, 179 (1983). But see Alan D. Monroe, *Public Opinion and Public Policy, 1980–1993*, 62 Pub Opinion Q 6, 12–13 (1998); Warren E. Miller and Donald E. Stokes, *Constituency Influence in Congress*, 57 Am Polit Sci Rev 45, 48 (1963). For a discussion of the limitations of the studies, see Benjamin Page, *The Semi-sovereign Public*, in Jeff Manza, Fay Lomax Cook, and Benjamin I. Page, eds, *Navigating Public Opinion* 325, 326 (Oxford 2002); Paul Burstein, *Why Estimates of the Impact of Public Opinion on Public Policy Are Too High: Empirical and Theoretical Implications*, 84 Soc Forces 2273, 2286 (2006).

ambiguous statutes in unforeseen contexts. This method will usually result in interpretations consistent with the dynamic conception of legislative supremacy—that is, interpretations that reflect both the legislative will and the preferences of the broader public. To help contextualize my proposed method, I first describe alternative proposals recently suggested by other scholars. I then explain my method in more detail and how it differs from these proposals.

The early dynamic theorists failed to articulate a clear method for deriving statute-based values or interpreting ambiguous statutes to accord with these values. However, two statutory interpretation scholars, Amanda Frost and Einer Elhauge, have more recently proposed interpretive approaches that are useful starting points for a modified dynamic approach that prioritizes statute-based values.[195] Frost has offered an extremely innovative proposal, suggesting that when the Court is faced with an ambiguous statute in a context not foreseen by the enacting legislature, it should simply certify the question to Congress.[196] Congress would then have the opportunity to amend the statute, and when it does the Court should apply the new law to resolve the pending case.[197] This proposal implicitly relies on the formal dynamic conception of legislative supremacy and its idea that current congressional preferences should determine the meaning of ambiguous statutes in unforeseen contexts. But the approach raises two important questions. First, since Congress cannot be forced to respond to the certified question, is it likely to respond given time and resource pressures? Frost's solution might be ideal in a world where Congress would actually consistently respond, but the likelihood of that seems low. Second, assuming that Congress does respond to the certified question, would this response lead to interpretations that accord with evolving democratic preferences?

If we view the political process through either the representative-government lens or the optimistic pluralist lens, then the Frost proposal is attractive. These accounts suggest that the products of the legislative process, which presumably would include responses to certified questions, are responsive to democratic preferences. But if we assume, as dynamic theorists traditionally have, that the public choice–theoretic account is an accurate description of the political process, then there will be strong reasons to question whether the congressional answer to the certified question will in fact be responsive to democratic preferences. Instead, it is likely that the

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195 See Amanda Frost, *Certifying Questions to Congress*, 101 Nw U L Rev 1, 24–25 (2007); Elhauge, *Statutory Default Rules* at 8 (cited in note 14).

196 Frost, 101 Nw U L Rev at 6–8 (cited in note 195).

197 Id at 7.

content of such legislation will, like other legislation, reflect what particularly powerful and organized special interest groups want and are willing to provide campaign contributions to legislators to support. Since most Supreme Court decisions involving statutory interpretation tend to have limited political salience,[198] all that legislators would need to do to cloak their rent-seeking amendment would be to surround it with a public-regarding purpose. But this public-regarding purpose will do little to ameliorate the harm to the public interest brought about by a statutory amendment that serves special interests and has precedential effect for future judicial decisions interpreting the statute.

Separately, there is the problem of what the Court should do when Congress does not respond (and even Frost concedes that this will often be the case). Frost contends that congressional silence should be viewed "as an implicit delegation of legislative power to the courts" and that judges would be justified "engag[ing] in . . . freewheeling and creative readings of legislation."[199] This embrace of unconstrained judicial creativity in the interpretation of statutes is rather unappealing, given that the certification proposal is itself implicitly premised on legislative supremacy.

Einer Elhauge offers an alternative that is more consistent with the formal dynamic conception of legislative supremacy, insofar as it looks to the official actions (or lack thereof) of the legislature as its chief guide, without relying on judicial creativity to fill the breach. Elhauge's normative and descriptive starting point is that courts adopt a set of interpretive default rules for ambiguous statutes that will tend to maximize "political satisfaction."[200] Since politicians prefer present influence over all statutes to future influence over a subset of statutes, he contends that the default rules that maximize political satisfaction are ones that accord with current enactable preferences.[201] These preferences, Elhauge explains, are "reliably ascertained from official action," which includes "subsequent legislative statutes that help reveal current enactable preferences even though they do not amend

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198 See James W. Stoutenborough, Donald P. Haider-Markel, and Mahalley D. Allen, *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 Polit Rsrch Q 419, 420 (2006) (citing studies showing that "the public is poorly informed about the Court"). For a classic account, see Walter F. Murphy and Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 L & Socy Rev 357, 360–64 (1968) (finding from a survey that the political salience of Supreme Court decisions is low).

199 Frost, 101 Nw U L Rev at 6 (cited in note 195).

200 Elhauge, *Statutory Default Rules* at 4 (cited in note 14).

201 Id at 42.

the relevant provision."[202] He cites two primary examples of default rules that are employed by the court to satisfy current enactable preferences: (1) the presumption that a prior interpretation of a statute is correct if it has been brought to the attention of the legislature and it has chosen not to amend the statute, and (2) the Supreme Court's occasional reliance on "legislative history underlying subsequent legislation."[203]

Elhauge's approach is a good first step toward a modified dynamic approach to statutory interpretation, but it does not go far enough. It is a good first step because the Court's employment of post-enactment legislative history to interpret ambiguous statutes in unforeseen contexts will usually result in interpretations consistent with the dynamic conception of legislative supremacy. Legislators generally construct a public interest facade for rent-seeking statutes via statements in committee reports, legislative sponsor statements about the purpose of the bill, and the preface and the description of purposes contained in many statutes.

Elhauge's suggestion is too limited in scope, though, because it apparently reaches only post-enactment legislative history directly concerned with the provision being interpreted. The Court's approach to using post-enactment legislative history has generally been similarly limited. For example, the Court will at times give weight to a post-enactment committee report to a bill amending another provision that includes statements about the legislative intent of the statutory provision being interpreted.[204]

The Court, however, should not limit its universe to post-enactment statements of purpose about the statutory provision being interpreted. The modified dynamic statutory approach that I propose here suggests that the Court look also to the purposes underlying other subsequently enacted statutes insofar as they are related to the statute being interpreted. These purposes underlying related subsequently enacted statutes provide the Court with a broader set of sources to ascertain evolving democratic preferences. That broader set of materials will lessen the Court's need both to defer to agency interpretations, which tend to be a less reliable source of these preferences, and to rely on its own constitutional norms.

To illustrate how the Court might use related subsequently enacted statutes, consider the Court's statutory interpretation in *Bob*

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202 Id at 9.

203 Id at 71–74.

204 See, for example, *Andrus v Shell Oil Co*, 446 US 657, 666 n 8 (1980).

Jones University v United States.[205] In *Bob Jones*, the Court addressed the question whether Bob Jones University was a "charitable" organization and thus entitled to tax-exempt status under 26 USC § 501(c)(3) of the Internal Revenue Code,[206] which was first enacted in 1894.[207] The Internal Revenue Service (IRS) had determined that because the university prohibited interracial dating and marriage, it was no longer entitled to a tax exemption; the university challenged that determination.[208] The Supreme Court agreed with the IRS. The Court first determined that an organization could not be considered charitable if it engaged in activity contrary to fundamental public policy.[209] It then relied in part on subsequently enacted statutes, including Titles IV and VI of the Civil Rights Act of 1964, the Voting Rights Act of 1965, Title VIII of the Civil Rights Act of 1968[210] (the Fair Housing Act), and the Emergency School Aid Act of 1972[211] as evidence that Bob Jones was not charitable, because these statutes reflected a legislative "agreement that racial discrimination in education violates a fundamental public policy."[212]

The Court in *Bob Jones* thus derived values from other subsequently enacted statutes because the purposes underlying them related to the interpretive ambiguity. But how does the Court know which subsequently enacted statutes are sufficiently related to the statute at hand? It should rely on other statutes when they express evolving public values at a level of specificity that can usefully inform the Court's interpretation of the ambiguous statute. For example, in *Bob Jones* the value of racial nondiscrimination expressed in the civil rights statutes cited by the Court was sufficiently specific to inform the question of whether Bob Jones could still be considered a charitable organization while barring interracial dating and marriage. We could imagine other congressional enactments, such as environmental or copyright statutes, that would be insufficiently related because they would not provide any guidance to the Court on the meaning of the

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205 461 US 574 (1983). For an illuminating account on the background of *Bob Jones*, see generally Olatunde Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence*, in William N. Eskridge Jr, Philip P. Frickey, and Elizabeth Garrett, eds, *Statutory Interpretation Stories* 127 (Foundation 2011).

206 *Bob Jones*, 461 US at 577.

207 Act of August 27, 1894, ch 349, 28 Stat 509.

208 *Bob Jones*, 461 US at 580–82.

209 Id at 592.

210 Pub L No 90-284, title VIII, 82 Stat 81, codified as amended at 42 USC § 3601 et seq.

211 Pub L No 92-318, title VII, 86 Stat 354, repealed by Emergency School Aid Act of 1978, Pub L No 95-561, 92 Stat 2252, codified at 20 USC § 3191 et seq.

212 *Bob Jones*, 461 US at 594.

ambiguous term "charitable" in § 501(c)(3) and its application to institutional acts of racial discrimination.

When examining the relevant subsequently enacted statutes, the Court should give relatively more weight to more recent enactments since they better reflect current values. While the Court's universe of potentially related, subsequently enacted statutes should include all relevant statutes enacted subsequent to the ambiguous statute at hand, the Court should employ a sliding scale in which it gives values from older related statutes less weight than values from more recent statutes. To the extent that the values from related subsequently enacted statutes conflict, the Court should therefore prioritize the values reflected in the most recently enacted statutes since they are more likely to be consistent with current preferences.

But is the Court really able to discern which statutes are sufficiently related to the one at hand to serve as interpretive guides? Further, is the Court competent to identify statutory meaning on the basis of sources outside its own work product, such as subsequently enacted statutes, or will it simply be guessing as to what interpretation would best accord with statute-based values? When answering these questions, it is important to note that when the Court tries to ascertain which values from which related statutes would be useful, it is not interpreting statutes in a vacuum. Prior to even considering evolving statute-based values, the Court will have narrowed the possible meanings of the statute through its examination of the text of the statute, as well as the intent and the purposes of the enacting legislature. What likely remains after this examination is a narrower set of questions for which only a narrow set of related statutes would provide useful evidence of statute-based values. The competency concerns associated with the indeterminacy of the Court looking to related statutes are therefore greatly diminished.

Once the Court has suitably narrowed the range of possible meanings, requiring the Court to identify evolving statute-based values from the context and deliberations surrounding subsequently enacted statutes does not raise any new competency concerns beyond those raised by other approaches to statutory interpretation. Any archaeological approach to statutory interpretation, such as intentionalism or purposivism, requires, as would the modified dynamic approach, that the Court look to the broad, general intent or purpose of the legislature. The only difference is that in the traditional context, the Court looks for this general intent or purpose in the statements of the enacting legislature, while in the dynamic context, the Court looks for this same information from statements of subsequent legislatures.

Finally, what should the Court do when statute-based values fail to provide answers to the interpretive question? There are at least three possible reasons for such a failure. First, statute-based values from related subsequently enacted statutes could be too general to provide guidance on which of the multiple interpretive possibilities the Court should choose. Second, statute-based values from related subsequently related statutes might conflict. And finally, there will be contexts in which the Court is unable to identify any relevant statute-based values because there are no subsequently enacted statutes related to the interpretive question.

The simple answer is that, under my approach, subsequently enacted statutes are not the only legitimate interpretive source. As recognized by dynamic statutory interpretation theory, agency interpretations of ambiguous statutes are another source of statute-based values. Although it is beyond the scope of this Article, I expect in future work to consider the weight that the Court should give to agency interpretations relative to judicially emphasized constitutional values. Further, although I have critiqued the Court's constitutional mainstreaming of statutes, my modified dynamic approach suggests only a *prioritization* of statute-based values—not that judicially emphasized constitutional norms are irrelevant. Thus, when statute-based values from subsequently enacted statutes or even agency interpretations fail to provide the Court with interpretive guidance, it should then look to Constitution-based values. As detailed in Part II, the Court's emphasized constitutional norms will likely still be related, although often with a lag, to evolving democratic preferences.

IV. THREE OBJECTIONS

My argument against constitutional mainstreaming and the contention that the Court should prioritize statute-based values over its own emphasized constitutional norms is subject to at least three major objections. The first objection is that the prioritization of statute-based values ignores the fact that Constitution-based values are derived from our fundamental law and validated by a past supermajority. The second objection is that the prioritization of statute-based values may result in the underprotection of already underenforced constitutional norms. The third objection is that constitutional mainstreaming serves an important prophylactic function, which is to keep statutes out of a zone of potential unconstitutionality.

The first objection derives from dynamic theorists' argument that Constitution-based values should have a "special coercive force" in the interpretation of ambiguous statutes.[213] Insofar as dynamic theorists are suggesting that the Court should interpret a statute so that it is constitutional, we are in agreement. But it is doubtful that this is the extent of their argument. If dynamic theory's prioritization of Constitution-based values were premised on such an uncontroversial argument, then the hierarchy of public values would be redundant to the traditional constitutional avoidance canon and not really worth a mention.[214] Instead, dynamic theory's prioritization of Constitution-based values must be read as requiring something more. Particularly, it is an argument that because the Constitution is the fundamental representation of our values as reflected in its validation by a past supermajority of the people, the values underlying it should be positively promoted in the interpretation of ambiguous statutes regardless of whether the Constitution actually *requires* such an interpretation.[215]

The problem is that constitutional values are mediated through the decisions of the Supreme Court. Its interpretations sometimes define the values contained in constitutional provisions; often they simply balance these values when they conflict. Which one of the conflicting constitutional values the Court chooses to emphasize depends, of course, on the value orientation of the majority of the justices on the Court at any particular point in time. Thus, as discussed previously, for the Warren Court, the congressional authority to enforce individual rights was frequently weighed more heavily than federalism when these two values conflicted, whereas in the Rehnquist Court, the opposite weighing occurred.[216] The changes in emphasis by different Courts did not mean that the deemphasized constitutional value suddenly lacked past supermajoritarian support; it meant simply that one constitutional value emerged as more important to the Court than the other because of the Court's composition.

Critically, then, when the Court is faced with the question whether to engage in the constitutional mainstreaming of a statute, it

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213 Eskridge, 137 U Pa L Rev at 1019 (cited in note 15).

214 For a description of the classic avoidance canon, see notes 94–96 and accompanying text.

215 Implicit within this idea is the view of the Constitution as a source of positive values with a supermajoritarian pedigree as opposed to a source of negative constraints on government action. If dynamic scholars understood the Constitution as simply a set of negative constraints on government action, then the very fact that the statute-based values accord with it would be enough to ensure that such an interpretation is consistent with Constitution-based values.

216 See notes 75–76 and accompanying text.

is often not choosing between an interpretation that comports with the Constitution (and thus has been validated as fundamental by a past supermajority of the people) and an interpretation that does not. Instead, it is choosing between two interpretations that comport with the Constitution. It is just that one interpretation better accords with the current Court's constitutional-value orientation than the other. Therefore, when the Court resists the gravitational pull of the constitutional values that it has emphasized and instead interprets ambiguous statutes consistent with statute-based values, it is not necessarily undermining our fundamental law. Rather, it is deferring to a good indicator of current democratic preferences.

A second objection to the argument against constitutional mainstreaming is that it may result in the underprotection of already underenforced constitutional norms. Lawrence Sager developed the concept of underenforced constitutional norms.[217] This concept later emerged as one of the main rationales underlying the use of two primary tools of constitutional mainstreaming: the modern constitutional avoidance canon and the clear statement rule to protect federalism values.[218] Sager argued that certain institutional-competency concerns related to expertise, experience, and the need for judicially manageable standards limit the Court's ability to enforce particular constitutional norms to their conceptual limit.[219] These norms, he suggested, should nonetheless be regarded as legally valid up to the conceptual limit because it is incongruous to treat "federal courts restrain[ing] themselves for reasons of competence and institutional propriety rather than reasons of constitutional substance . . . as authoritative determinations of constitutional substance."[220]

Relying on Sager's conceptual point, proponents of particular tools of constitutional mainstreaming have justified their use as a means of protecting underenforced constitutional norms.[221] Ernest Young has argued that, in addition to the familiar means of enforcing

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217 See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212, 1213 (1978).

218 See also Sunstein, 103 Harv L Rev at 469 (cited in note 14) (describing a function of the avoidance canon as strengthening judicially underenforced constitutional norms).

219 Sager, 91 Harv L Rev at 1220–26 (cited in note 218).

220 Id at 1226. Sager analogized to the political question doctrine, in which the Court often limits its enforcement of a particular constitutional norm on the basis of institutional concerns about the absence of a judicially manageable standard. He notes that in this context, the statement of judicial incompetency is generally not considered an "authoritative statement about the norm itself." Id.

221 See Young, 78 Tex L Rev at 1604–06 (cited in note 95); Frickey, 93 Cal L Rev at 402 (cited in note 95).

the Constitution through the invalidation norm of judicial review, the Court also enforces the Constitution through "resistance norms" like the modern constitutional avoidance canon and the clear statement rules.[222] These resistance norms serve as soft limits on government authority to act by making it "harder—but still not impossible—for Congress to write statutes that intrude into areas of constitutional sensitivity."[223] Young suggests that the establishment of these soft limits on government authority is particularly appropriate in areas in which there are likely to be underenforced constitutional norms. These include contexts in which there are difficult line-drawing problems or when "we can expect *political* safeguards to play the primary role in protecting the underlying constitutional values."[224]

Although Young recognizes that enforcement through resistance norms still involves the Court in constitutional judgments in areas in which Sager suggested it lacks institutional competency, he argues that these constitutional judgments are more tolerable because Congress can override them.[225] He also explains that the enforcement of resistance norms through canons "facilitate[s] the operation of political checks" by making clear to actors in the political process that constitutional values are at stake and by creating additional costs for the passage of legislation that touches upon constitutionally sensitive areas.[226]

From this perspective, the prioritization of statute-based values might be objectionable because it would theoretically lead to the further underenforcement of certain constitutional norms. Insofar as statutory interpretation canons are used to protect underenforced constitutional norms, they should be prioritized over evolving statute-based values because these underenforced norms are fundamental and reflect enduring public values that cannot be properly defended through judicial review.

This objection is a substantial one, but positing that judges should enforce underenforced constitutional norms through canons of

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222 See Young, 78 Tex L Rev at 1593–96 (cited in note 95).

223 Id at 1596. Young specifically describes the use of the modern avoidance canon and clear statement rules as important tools for protecting structural norms, which "rarely serve as a basis for invalidating federal legislation." Id at 1606. This view of underenforced constitutional norms contrasts sharply with Sager's conception, which focuses on the norms underlying the Fourteenth Amendment's Equal Protection, Due Process, and Privileges and Immunities Clauses. See Sager, 91 Harv L Rev at 1218–20 (cited in note 218). These contrasting positions demonstrate that whether a particular constitutional norm is underenforced, and specifically whether statutes intrude into constitutionally sensitive areas, can often depend on one's views about the importance of that particular norm.

224 Young, 78 Tex L Rev at 1603 (cited in note 95).

225 Id at 1607.

226 Id at 1608–09.

construction is a particularly significant and perhaps questionable departure from Sager. Sager recognized that because of institutional competency concerns, the Court was not well situated to enforce the underenforced constitutional norms that he was concerned about. Instead, he argued that the legislative and executive branches have to be trusted to establish the constitutional limits and to adjust their actions to accord with these limits. As Sager wrote, "[The] obligation to obey constitutional norms at their unenforced margins requires government officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions."[227]

If, as Sager pointed out, underenforced norms are not enforced to their limits precisely because the Court is not institutionally equipped to do so, it is not clear why in areas of underenforcement we should be less troubled by the Court enforcing the Constitution through soft limits of resistance norms. The judiciary in the context of drawing soft limits must still engage in a line-drawing exercise to determine which interpretations raise constitutional doubt or what contexts are appropriate for clear statement rules—a line-drawing exercise that is ultimately not that different from assessing whether a particular interpretation of a statute is unconstitutional.

Arguably, the line drawing matters less when soft limits are enforced. The legislature could always reenact the interpretation that pushes the statute beyond the judicially enforced limits; this is something the legislature cannot do when the Court enforces the Constitution through the hard limits of judicial invalidation. Upon closer examination, though, even these differences in the consequences of line drawing through resistance norms and invalidation norms are greatly overstated.

I have already argued that overrides are exceedingly rare and that the legislature does not often override judicial interpretations of statutes even when they are contrary to the preferences of the majority of the legislature.[228] The probability of an override is further diminished when the Court uses resistance norms in its interpretation of ambiguous statutes. By asserting that a particular interpretation that accords with current legislative preferences raises constitutional doubt, the Court deters Congress from overriding the Court's interpretation for fear that such an override will likely be invalidated.[229] Rather than spurring dialogue between the Court and

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227 Sager, 91 Harv L Rev at 1227 (cited in note 218).

228 See notes 111–12 and accompanying text.

229 See Frederick Schauer, Ashwander *Revisited*, 1995 S Ct Rev 71, 88; Alexander M. Bickel and Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 Harv L Rev 1, 34 (1957).

Congress through the establishment of soft limits on government conduct, the avoidance canon instead actually discourages such dialogue because of the "common perception [derived from the principle of judicial supremacy] that the Supreme Court has the 'last word' in the constitutional dialogue."[230] Thus, while Young relies on overrides as a means by which the legislature can achieve its goals after the Court enforces the Constitution through resistance norms, even he concedes that judicial reliance on Constitution-based canons has a "'go ahead make my day' quality to it" that makes such overrides extremely unlikely.[231] The effects of the Court's imposition of soft limits on government authority through resistance norms therefore become very similar to the effects of its imposition of hard limits on government authority through invalidation. And if we are concerned about the Court's institutional competency to implement underenforced constitutional norms, then the active judicial enforcement of norms that the Court is not particularly competent to enforce and to which the legislature is not likely to respond is a very problematic solution.

Instead, in the areas where institutional competence constrains the judiciary from enforcing the Constitution to its limit, the legislative and executive branches' conceptions of these limits should control. In other words, the Court should defer to the judgments of the legislative and executive branches in these areas. This means that it is appropriate for the Court to prioritize evolving statute-based values even if we understand canons as tools by which the Court seeks to protect underenforced constitutional norms. Evolving statute-based values will have the advantage of reflecting the conceptions of the branches of government that have the comparatively greater competence in these constitutional domains.

A final and related objection to the prioritization of statute-based values is that since it can result in interpretations that are on the constitutional fringe, constitutional mainstreaming serves as a necessary prophylactic tool that protects the constitutional core.[232] To understand this objection and the problems with it, it is necessary to examine the use of prophylactic rules in another context.

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230 Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 UC Davis L Rev 1, 19–20 (1996).

231 Young, 78 Tex L Rev at 1581 (cited in note 95).

232 Such an objection is implicit in one of Sunstein's arguments for prioritizing Constitution-based values. He argues that "pushing statutes away from constitutionally troublesome ground [ ] provides a way for courts to vindicate constitutionally based norms and does so in a way that is less intrusive than constitutional adjudication." Sunstein, 103 Harv L Rev at 468 (cited in note 14).

In constitutional law, a prophylactic rule is a court-created rule that adds a layer of safeguards to constitutional rights but "that can be violated without violating the Constitution itself."[233] The Court created the paradigmatic prophylactic rule in *Miranda v Arizona*,[234] a case in which the Court established the requirement that police officers notify arrestees of their rights prior to questioning.[235] The notification acted as an additional safeguard against the violation of the arrestee's "Fifth Amendment right to be free from compulsion to testify against oneself."[236] The prophylactic rule in this context functioned as a more administrable, easy-to-follow rule that "overprotect[s] a constitutional right because a narrow, theoretically more discriminating rule may not work in practice."[237] Thus, in *Miranda*, the Court traded a very hard line-drawing problem of determining at what point an arrestee has been compelled to incriminate himself for an easier one in which compulsion is essentially assumed when the police officer fails to instruct the arrestee of his rights.

In contrast to the *Miranda* rule, constitutional mainstreaming serves as an inappropriate and potentially dangerous prophylactic tool. It is inappropriate because an interpretation of a statute that avoids potentially constitutionally troublesome grounds will not inherently result in a more administrable, easy-to-follow rule for Congress, if it in fact decides to revisit the statute in the future. When the Court pushes statutes into the constitutional mainstream, it creates a penumbra of constitutional meaning with blurry edges, rather than a clear rule. For example, explaining that a statute raises serious constitutional questions, as the Court does with the modern constitutional avoidance canon, provides the legislature with very little guidance about what changes to the statute would be constitutional. Instead, to establish a clear rule the Court should use

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233 Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U Chi L Rev 174, 177 (1988). See also Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 Tenn L Rev 925, 925 (1999); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw U L Rev 100, 105 (1985); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv L Rev 1, 21 (1975).

234 384 US 436 (1966).

235 Id at 444–45. See also Grano, 80 Nw U L Rev at 106 (cited in note 233).

236 Landsberg, 66 Tenn L Rev at 925 (cited in note 233).

237 Monaghan, 89 Harv L Rev at 21 (cited in note 233). Prophylactic rules also seek to prevent hard-to-detect constitutional violations because of the difficulty, for example, of ascertaining official motive or intent. See Grano, 80 Nw U L Rev at 105 (cited in note 233); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U Chi L Rev 190, 200 (1988). Consider Samuel L. Bray, *Power Rules*, 110 Colum L Rev 1172, 1173 & n 3 (2010) (situating prophylactic rules within the broader category of power rules). This function does not seem particularly applicable in the statutory interpretation context.

the traditional constitutional avoidance canon when an interpretation is on the fringe of constitutionality. This canon would require the Court to decide explicitly whether the interpretation consistent with statute-based values is constitutional, and if it is not, to choose a fairly plausible alternative interpretation that is.[238] When the Court employs this canon, rather than the modern constitutional avoidance canon,[239] it gives clear guidance to Congress as to where the constitutional boundary lies, so that Congress can better decide whether and how to amend the statute to be more consistent with its preferences.[240] And ultimately, giving Congress greater information about what is constitutional and what is not is a better means of protecting the constitutional core against future legislative infringement.

In addition to its limited usefulness as a prophylactic tool, constitutional mainstreaming is a potentially dangerous prophylactic tool from the perspective of separation of powers. The reason is that it allows the Court to de facto decrease the zone of what is constitutionally permissible. This de facto contraction of what is constitutionally permissible in turn limits the legislature's range of choice and its opportunities to influence statutory meaning consistent with evolving democratic preferences. The constitutional mainstreaming of statutes justified as a prophylactic tool therefore allows the Court to "exceed[] [its] legitimate judicial role and arrogate[] [to itself] legislative power."[241]

Three important points should be taken away from this discussion. First, while the Constitution is in fact a fundamental source of values, judicially emphasized constitutional norms often represent the justices' own value choices regarding which constitutional values require greater protection. Second, protecting underenforced constitutional norms is important, but the institutions best situated to protect these norms are the legislature and executive, not the judiciary. Finally, constitutional mainstreaming is neither a necessary nor proper prophylactic tool for the protection of the constitutional core.

CONCLUSION

The Court's constitutional mainstreaming of § 2 of the Voting Rights Act in *Bartlett* brought the statute closer to irrelevance in the

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238 See notes 94–96 and accompanying text.

239 See note 95 and accompanying text.

240 See Vermeule, 85 Georgetown L J at 1949 (cited in note 94) (distinguishing between the modern and classic avoidance canons).

241 Landsberg, 66 Tenn L Rev at 958 (cited in note 233). See also Grano, 80 Nw U L Rev at 123 (cited in note 233).

changed context of 2009.[242] Given the legislative articulation of a continued need for color-conscious remedies to political inequality in the reauthorization of the Voting Rights Act just three years prior to *Bartlett*, it appears that the Court did not accurately reflect the preferences of the current Congress. And it is unlikely that a Congress that takes months, if not years, to enact statutes will seek to amend the statute to ensure its continued effectiveness. Thus, the ruling in *Bartlett* has opened up a gap between the Act as interpreted by the Court and evolving democratic preferences.

Yet the Court's constitutional mainstreaming of § 2 in *Bartlett* is consistent with one of the primary tenets of dynamic statutory interpretation. Since dynamic statutory interpretation is in many ways a normatively compelling theory of how courts should interpret statutes in contexts not foreseen by the enacting legislatures, it is worth preserving. The problem embodied in *Bartlett* thus suggests the need to modify the dynamic approach to comport with both a formal and substantive understanding of the dynamic conception of legislative supremacy. In particular, to make the theory more defensible, it should be modified to achieve a greater degree of internal consistency and to ensure interpretations of statutes that comport with current congressional policies and evolving democratic preferences. One step in that direction is the reprioritization of statute-based values over judicially emphasized constitutional norms.

Which values are prioritized is not a matter of merely theoretical importance, applicable only in rare circumstances. The gap between statute-based values and judicially emphasized constitutional norms will be a common result of the differences in how the justices of the Court and the members of Congress are selected, and the difference between the justices' life tenure and members' limited terms. In fact, we are currently living in a context conducive to value disjuncture. The presidency and the Senate are controlled by the Democratic Party, which has historically supported values such as race consciousness, expansive congressional power to enforce the Reconstruction Amendments, and a restrictive view of federalism. At the same time, a conservative core of five justices that has emphasized a colorblind vision of the Constitution[243] and has demonstrated lukewarm

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242 Residential integration is likely to continue, and despite the inspiring election of an African American to the presidency, the trends underlying his election as well as the reaction to his presidency indicate that racially polarized voting will continue to be an obstacle to minority representation in the political process. See Ansolabehere, Persily, and Stewart, 123 Harv L Rev at 1435 (cited in note 2).

243 See, for example, *Bartlett*, 129 S Ct at 1247–48; *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701, 747–48 (2007) (plurality).

enthusiasm about congressional authority to enforce the Reconstruction Amendments[244] controls the Supreme Court. In this time of disjuncture, it is even more important to seek an interpretive approach that ensures that the Court acts as a subordinate partner to the current legislature in the hard cases of statutory interpretation. The approach that will move the Court closer to this role is one in which it prioritizes the values promulgated by the elected branches and resists the gravitational pull of the constitutional mainstream.

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[244] See, for example, *Ricci v DeStefano*, 129 S Ct 2658, 2676 (2009); *Northwest Austin Municipal Utility District Number One v Holder*, 129 S Ct 2504, 2511–12 (2009).