CONTEMPORARY MEANING AND EXPECTATIONS IN STATUTORY INTERPRETATION

*Hillel Y. Levin**

This Article introduces and explores an approach to, or theme within, statutory interpretation, one grounded in contemporary meaning and expectations. This approach posits that judges interpreting ambiguous statutes are and should be constrained by the understanding and expectations of the contemporary public as to the law's meaning and application. These are developed in response to, and mediated by, the actions and statements of government officials and the broader community. The Article argues that this apparently radical approach is necessary for law to maintain its moral force, and further, that the principles underlying it are embedded in several doctrines and modalities of statutory interpretation. Further, the approach serves judicially conservative ends: promoting accessibility of the law to those governed by it, supporting social and legal stability and predictability, privileging organic and incremental change over radical breach, encouraging judicial minimalism and legislative maximalism, and fostering equality.

* Hillel Y. Levin is an Assistant Professor at the University of Georgia School of Law. He would like to thank the many people who offered advice, support, and feedback. Bill Eskridge, Phil Frickey, Bill Buzbee, Larry Solum, Peter Strauss, Robert Schapiro, Michael Perry, Joe Miller, Steve Heyman, Marc Blitz, Anita Krishnakumar, Aaron Bruhl, Bertrall Ross, and Jason Solomon all offered invaluable feedback and support. Thanks also to the many colleagues at the University of Georgia School of Law for their insight. In addition, I am grateful to Dan Markel and the participants in the Prawfsfest! Summer 2010 conference for their reflections and feedback. Finally, I greatly appreciate the excellent research assistance of Jennifer McNeely, Rachel Lambert, and Quinn Bennett.

TABLE OF CONTENTS

I. INTRODUCTION

Every student and scholar of statutory interpretation is familiar with the dominant approaches to statutory interpretation: textualism, intentionalism, purposivism, pragmatism, and dynamic interpretation.[1] This Article proposes and begins to explore an alternative, or at least complementary, approach to statutory interpretation, what I call the contemporary meaning and expectations approach. In contrast to the standard approaches, this approach posits that judges interpreting ambiguous statutes should be constrained by the understanding and expectations of the contemporary public as to the law's meaning and application. Stated more provocatively, the Article suggests that what people reasonably think the law requires should be recognized as the law by judges.

The contemporary meaning and expectations approach shares much with dynamic interpretation in the sense that both suggest that a statute's meaning and proper application may change over time. What distinguishes this new approach is its emphasis on social meaning and practice as the lodestar for identifying statutory meaning and application. By privileging these elements, the contemporary meaning and expectations approach offers more constraints on, and guidance for, judges than does dynamic statutory interpretation. More significantly, unlike dynamism, the contemporary meaning and expectations approach asserts that statutory meaning is substantially in the hands of the community regulated by the statute and the regulating officials, rather than in those of the legislature or judges.

There are both descriptive and normative aspects to this project. Descriptively, I identify several doctrines and modes of argument that the dominant approaches do not adequately account for, and offer the contemporary meaning and expectations framework as a better way to understand them. Normatively, I provide a theoretical justification and defense of this framework, explore its considerable implications, and ultimately promote an expanded role for these kinds of arguments in statutory interpretation.

The Article proceeds as follows. Part II briefly reviews the dominant approaches to statutory interpretation by considering how each ap-

1. *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 24–84, 102–133 (2009) (discussing textualism, intentionalism, pragmatism, and dynamic statutory interpretation); WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 669–817 (3d ed. 2001) (reviewing intentionalism); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14–47 (1994) (critiquing intentionalism, purposivism, and textualism).

proach would confront and analyze a case spun from H.L.A. Hart's classic "No Vehicles in the Park" hypothetical.[2] Part III then suggests that a contemporary meaning and expectations inquiry offers a contrasting—and more fruitful and realistic—framework for resolving the "No Vehicles" hypothetical. This exercise illustrates the approach's basic contours and its intuitive attraction. This Part then provides a theoretical foundation for the approach and argues that it must play a role in statutory interpretation for law to maintain its moral force.

Part IV suggests that the contemporary meaning and expectations approach is not novel, but rather is embedded in doctrines of statutory interpretation that cannot be satisfactorily explained by the approaches that dominate judicial and scholarly discourse. Thus, the approach exposes and extends principles that are already latent in the doctrine. I suggest, however, that these principles are both underexplored in the scholarly literature and not applied rigorously enough in the courts. Next, Part V refines the contemporary meaning and expectations approach by considering its potentially vast implications and the concerns it raises. Part V then proposes a judicial methodology that would yield the approach's benefits while being sensitive to its weaknesses.

Part VI then moves beyond theory and hypotheticals to present two case studies to show how judges may deploy the methodology. First, it reviews a fascinating and briefly notorious California case in which the court rejected the likely original meaning of a statute banning most homeschooling, in favor of a construction of the statute that conformed to the behaviors and understandings of the regulated public and regulating officials.[3] Next, it argues that the contemporary meaning and expectations approach offers the best lens through which to understand and critique the Supreme Court's recent and controversial pleading-doctrine decisions in *Bell Atlantic Corp. v. Twombly*[4] and *Ashcroft v. Iqbal*.[5]

Finally, because this Article can only begin to explore the contours and implications of the contemporary meaning and expectations theme, it concludes by identifying some avenues for further inquiry.

2. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958); *see* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008) (referring to this as "the most famous hypothetical in the common law world").

3. *In re* Rachel L., 73 Cal. Rptr. 3d 77 (Cal. Ct. App. 2008); Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 585–88 (Cal. Ct. App. 2008).

4. 550 U.S. 544 (2007).

5. 129 S. Ct. 1937 (2009).

II. THE DOMINANT APPROACHES TO STATUTORY INTERPRETATION

The literature on statutory interpretation has exploded in the last three decades and become rich and voluminous. For the purposes of this Article, however, the general approaches to statutory interpretation may be introduced and briefly explored through a simple thought experiment based on Hart's "No Vehicles in the Park" hypothetical.[6]

Suppose someone rides along on her skateboard one day and encounters an official sign that reads "No Vehicles Beyond This Point." Being an especially (and perhaps unusually) civic-minded and law-abiding skateboarder, she considers whether she is permitted to ride her skateboard beyond the sign. This question turns on whether a skateboard is a vehicle within the meaning of the ordinance.[7] Unfortunately, the term vehicle is ambiguous. On the one hand, in ordinary usage, people do not typically refer to skateboards as vehicles. On the other hand, the dictionary defines vehicle to mean "any means in or by which someone travels or something is carried or conveyed; a means of conveyance or transport."[8] Under this definition, a skateboard is a vehicle and is therefore prohibited. So how should our skateboarder interpret the law? What follows is a stylized and simplified account of how each of the dominant schools of interpretation would approach this question.

A. Intentionalism

"Anglo-American scholars from early modern times to the present have argued that original intent is and should be the cornerstone of statutory interpretation."[9] Intentionalists base their approach on the proposition that a statute becomes a law because of the enacting legislature, and therefore that a judge interpreting the statute, acting as an agent of the legislature, should seek to implement the will of the legislature by gleaning the enacting legislature's intent.[10] Because words are imperfect vehicles for conveying meaning, it may be necessary to look beyond the language of the statute to understand what the legislature meant with its words. Thus, intentionalists pay careful attention to legislative context and history to determine what the legislature had in mind.[11]

6. Hart, *supra* note 2, at 606–15.

7. Assume that the ordinance itself provides no definition.

8. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2109 (2d ed. 1987).

9. ESKRIDGE, *supra* note 1, at 14; *see also* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005) ("For the latter half of the twentieth century, [intentionalism] reflected the orthodoxy, at least among federal judges.").

10. *See* CROSS, *supra* note 1, at 59 (explaining the intentionalist view that interpretations of statutory language are legitimate only when they reflect what the law-making body intended to enact); *see also* ESKRIDGE, *supra* note 1, at 14–16.

11. *See, e.g.*, ESKRIDGE, *supra* note 1, at 208–21.

In the ideal case, when a court is confronted with a difficult question of statutory interpretation, researching the legislative history would reveal that the legislature considered the very question at issue and clearly resolved it.[12] Practically, though, the search for such golden nuggets rarely produces anything authoritative.[13] In most cases, therefore, intentionalists seek evidence of either the legislature's general intent (whether the legislature intended for the statute to be broadly or narrowly interpreted, for example) or its reconstructed or imagined intent (what would the legislature have agreed upon, had it considered this particular question?).[14]

Thus, turning back to our hypothetical, an intentionalist skateboarder would ask what the legislative body that adopted the ordinance most likely intended. To do so, she would consult the legislative record and historical context. Was the question of skateboards explicitly discussed? If so, what was the prevailing sense of the legislature on the question of skateboards? If not, what did the legislature appear to be most concerned with in its deliberations? Is it possible to determine what the majority of legislators would have thought about skateboards had they considered them? These kinds of questions would dominate the intentionalist inquiry.

B. Textualism

Textualists begin with the same originalist proposition that intentionalists do, namely that a statute's authority comes from its enactment as law and, thus, that a statutory provision "does not change in meaning as the political culture changes."[15] Textualists, however, fiercely reject the notion that judges should seek to determine legislative intent.[16] Con-

12. *See id.* at 16 ("The meaning colloquially suggested by the invocation of legislative intent is the actual intentions of the legislative coalition that enacted the statute. If a majority of our elected representatives had a specific meaning in mind when they passed a statute, understanding that meaning has obvious appeal in a representative democracy.").

13. *See* CROSS, *supra* note 1, at 10–11 (discussing why many critics doubt a court's ability to discover and apply the intent of a legislature); ESKRIDGE, *supra* note 1, at 16 ("[A]ctual legislative intent is rarely revealed in the historical record . . . ."); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 32 (Amy Gutmann ed., 1997) ("But assuming, contrary to all reality, that the search for 'legislative intent' is a search for something that exists, that something is not likely to be found in the archives of legislative history.").

14. *See* CROSS, *supra* note 1, at 10 (discussing how intentionalism is an attempt to reconstruct what the enacting legislature would have thought had it been presented with the same set of facts); ESKRIDGE, *supra* note 1, at 21–25 (addressing the practice of and problems with "imaginative reconstruction"); *id.* at 210–25 (discussing the rise and practice of imaginative reconstruction).

15. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 69 (1994).

16. Judge Alex Kozinski captured many of the textualists' sentiments towards intentionalism in writing that "legislative history can be cited to support almost any proposition, and frequently is. . . . [Legislative history is] not voted on by the committee whose views [it] supposedly represent[s], much less by the full Senate or House of Representatives . . . ." Wallace v. Christensen, 802 F.2d 1539, 1559–60 (9th Cir. 1986) (Kozinski, J., concurring). Likewise, Judge Easterbrook has argued that "[o]ften

sequently, they reject most uses of legislative history.[17] Instead, textualists argue that only the text of the statute itself has the force of law and that the job of the judge is to determine how the average member of the enacting legislature would have understood the text.[18]

To determine the appropriate textualist reading of a statute, textualists turn to the textual canons of interpretation, focusing primarily on the plain meaning rules.[19] That is, words are to be understood according to their ordinary meaning, which can be gleaned, as appropriate, from customary usage or dictionaries,[20] or, where relevant, by reference to well-developed technical or legal meanings.[21] Textualists also stress that the structure of the statute and its relationship with related statutes provides substantial guidance as to the appropriate interpretation or application.[22] Thus, where the words of the statute are amenable to multiple interpretations, textualists maintain that the judge should apply the one that is most coherent with the statutory scheme as a whole and the larger statutory landscape at the time the statute was enacted.[23] This requires the

there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize . . . ." *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

17. *See In re Sinclair*, 870 F.2d at 1344 (demonstrating Judge Easterbrook's refusal to allow contradictory legislative history to overcome the plain meaning of a statute's language); Hirschey v. Fed. Energy Regulatory Comm'n, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring); ESKRIDGE, *supra* note 1, at 34, 230–34 (claiming that for textualists like Scalia and Easterbrook, "the beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language").

18. *See* ESKRIDGE, *supra* note 1, at 225–27; Frank H. Easterbrook, *Judges As Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 916 (2010) ("[A] judge must carry out the policy created by the enacting Congress, even if later laws are in tension with the older ones, and even if the judge is convinced that the sitting Congress would amend the law were it to visit the subject anew.").

19. Scalia, *supra* note 13, at 25 ("Textualism is often associated with rules of interpretation called the canons of construction . . . .").

20. For examples of the use of dictionaries, see Rowland v. California Men's Colony, 506 U.S. 194, 199–200 (1993); see also John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989).

21. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys., 515 U.S. 687, 717–18 (1995) (Scalia, J., dissenting) (using wildlife law's technical meaning of the word "take" to interpret the Endangered Species Act); Sullivan v. Stroop, 496 U.S. 478, 483 (1990) (interpreting phrase "child support" as used in Title IV AFDC provisions of the Social Security Act, instead of relying on the common meaning); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989) (relying on traditional common-law agency principles to interpret the term "employee" in the Copyright Act).

22. Judge Easterbrook explained that judges must consider "the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure" in order to find the appropriate meaning for statutory text. Herrmann v. Cencom Cable Assocs., 978 F.2d 978, 982 (7th Cir. 1992); *see also Babbitt*, 515 U.S. at 697–703, 717–20 (interpreting the words "take" and "harm" as used in the relevant statutory provision by reference to their use elsewhere in the statute); Deal v. United States, 508 U.S. 129, 132 (1993) (Scalia, J.) (arguing that it is a "fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."); ESKRIDGE, *supra* note 1, at 226–29 (explaining that textualists believe that the meaning of statutory language "depends on context"; that "an ambiguous term is rendered clear if one possible definition is more coherent with the surrounding legal terrain than other possible definitions"; and focusing on "textual coherence").

23. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (arguing that textualists must assume that the entire enacting legislature understood and intended a statute to comply with the surrounding body of law); *see also Babbitt*, 515 U.S. at 697–703, 717–18 (inter-

judge to adopt a fiction—a "benign fiction," according to Justice Scalia, the judicial avatar of textualism, but a fiction nonetheless—that legislators mean, and have sufficient knowledge and information, to pass statutes that are internally coherent and coherent with the larger body of contemporaneous law.[24]

Thus, in confronting our hypothetical, and having concluded that the ordinance's plain meaning is questionable, the textualist skateboarder might look to other statutes that refer to vehicles to determine whether those statutes are clearer on the question of whether a skateboard is a vehicle. For example, if the vehicular manslaughter statute is clear that a skateboard is not a vehicle in that context, then the textualist might conclude that a skateboard is not a vehicle under the ordinance in question. On the other hand, if there is a separate ordinance that refers to "motorized vehicles," the textualist might conclude that the unmodified "No Vehicles" ordinance does apply to skateboards. Absent such statutes, perhaps there are clear rules as to whether skateboarders are subject to laws targeting automobiles or those targeting pedestrians. For example, are skateboards permitted on sidewalks? If so, then perhaps skateboarders are best understood as pedestrians rather than as vehicle operators, and vice versa.

C. Purposivism

Purposivism, associated most closely with Henry Hart and Albert Sacks,[25] focuses on two questions: (1) why was the law in question adopted, and (2) how is the law's purpose best promoted under the current circumstances?[26] To make the first determination, one would first consult the ordinance itself. Some statutes and ordinances explicitly state their purpose as part of the text of the statute and render the first inquiry rela-

preting the word "take" by reference to its legal meaning developed through common law and other statutory schemes); Chisom v. Roemer, 501 U.S. 380, 404–05 (1991) (Scalia, J., dissenting); ESKRIDGE, *supra* note 1, at 226–29.

24. *Green*, 490 U.S. at 528 (Scalia, J., concurring). To be sure, some have argued that even for originalists, statutory meaning is sometimes updated over time when a court must reconcile statutes passed at different times and when treating later statutes as establishing principles that are then applied to earlier statutes. *See* Bernard Bell, *Hypnotized by Images of the Past: Dynamic Interpretation and the Flawed Majoritarianism of Statutory Law*, ISSUES LEGAL SCHOLARSHIP, Dec. 2002, at 1, 22–28. In my view, this argument captures some of the elements of the contemporary meaning and expectations approach discussed in this Article. In addition, some textualists concede that textualism sometimes requires judicial discretion because the text of the statute itself offers no clear or definitive answer. Judicial practitioners of textualism like Justice Scalia and Judge Easterbrook, however, have proven unwilling to concede that the textual methodology requires judicial discretion and policy choices. In any event, this Article offers insight to textualists by suggesting that when textualism yields uncertain results, judicial discretion should be channeled through the contemporary meaning and expectations approach or theme of interpretation.

25. *See* ESKRIDGE, *supra* note 1, at 26 (associating purposivism with Hart and Sacks); *id.* at 213–18 (discussing the development and practice of purposivism and the role played by Hart and Sacks).

26. *Id.* at 25–26.

tively simple. Others identify competing purposes. Still others identify no purpose at all. In such circumstances, the purposivist would consult legislative history and context, but with a different goal in mind than the intentionalist conducting a similar inquiry. The purposivist's driving impulse would be to ascertain the broad rationale for the statute rather than to focus on hyper-specific legislative intent.[27]

Thus, a purposivist skateboarder should try to ascertain why the ordinance was adopted in the first place. Was it to promote public safety? For example, were there fatal accidents involving motorized vehicles and pedestrians that led to the law's passage? Alternatively, was the ordinance adopted out of a concern for noise or air pollution? Whatever purpose she identifies, the skateboarder would have to engage in further analysis to decide whether the statute's purpose is better served by permitting or prohibiting skateboards. Are skateboards dangerous? Do they produce noise pollution? This probably depends on context. If small children are present and paths are marked, then perhaps a skateboard is dangerous; and if the area is a library or meditation center, then perhaps a skateboard would be considered noisy.

D. Pragmatism

Pragmatism offers yet another approach. Steeped in the tradition of legal realism, pragmatists reject the formalist and mechanical approaches offered by intentionalists and textualists, and instead maintain that the object of statutory interpretation is to produce the best results for society through a process of what Judge Richard Posner calls practical reasoning.[28] This process cannot be translated into a clear methodology.[29] Instead, it requires judges to consider, on a case-by-case basis and in an open-ended way, the text of the statute, its history and purpose, the coherence of the legal system, the relationship between old statutes and present realities, common sense, the practical consequences of different rulings, custom, experience, intuition, and so forth.[30]

Pragmatism is justified on the basis of three primary claims. First, the legislature cannot reasonably, and does not actually, expect that its statutes will govern every situation that arises.[31] It has neither the time

27. *Id.* at 214 (quoting Justice Frankfurter's position that "[l]egislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government"); *id.* at 215 (quoting an influential purposivist to the effect that "judges should [interpret ambiguous statutes] in such a way as to advance the objectives which, in their judgment, the legislature sought to attain by the enactment of the legislation").

28. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 71–74 (1990); *see also* CROSS, *supra* note 1, at 102–05 (introducing and explaining Posner's pragmatism).

29. CROSS, *supra* note 1, at 104–05 (discussing the lack of formal clarity in pragmatism).

30. *Id.* at 104–05.

31. *See* Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989) (Posner, J.) (reasoning that it would be impossible for Congress to consider every possible application of a statute in the real

nor the expertise to resolve every future question that may arise under the statutory regime it enacts. Further, because legislators often cannot agree amongst themselves on how to resolve the most difficult questions, they may leave statutory gaps that render some questions unresolved or addressed in only vague language in order to allow them to pass a bill. As a result, the legislature effectively delegates the resolution of unforeseen or vaguely addressed issues to the courts.[32]

Second, pragmatists maintain that judges are institutionally well-situated to resolve questions of statutory interpretation and application in a sensible way.[33] Judges have a broader understanding and command of the law than most legislators, and therefore can bring a measure of coherence to the law.[34] Moreover, the judiciary is relatively stable over time and thus brings stability and predictability to the law.[35] Finally, judges deal with issues on a case-by-case basis, which allows them to consider how the law affects real people rather than the abstract and hypothetical circumstances often anticipated by legislatures.[36]

Third, pragmatists point out that legislation is exceedingly difficult to enact, amend, or repeal. As a result, as society changes and as more and more law is produced, old laws remain on the books.[37] Sometimes, newer laws and older laws will be in tension with each other; at other times, older laws will be profoundly anachronistic. In his seminal work, *A Common Law for the Age of Statutes*, Guido Calabresi famously argued on this basis for allowing judges to expressly abrogate even unambiguous statutes that they deemed anachronistic, much as judges may be

world); CROSS, *supra* note 1, at 6 ("[Statutes] will constantly be applied to new circumstances which may not even have existed at the time of their passage."); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) ("[A] statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.").

32. *See* CROSS, *supra* note 1, at 4 ("The legislature lacks the resources to control the case-by-case interpretation and application of . . . laws, and this is the judicial power delegated to judiciary by statutes.").

33. *See, e.g.*, *id.* at 120 ("[D]efenders of pragmatism argue that the courts' independence and their deliberative capacities give them significant advantages over a legislature that may be influenced by parochial interests and is frequently responsive to monetary demands." (internal quotation marks omitted)); RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 257–58 (2002) (arguing that judges are in a good position to make policy decisions about statutory text because they are generally well-educated, mature, and schooled in the law, which "sets a high value on listening to both sides of an issue," and must publish their opinions, encouraging well-reasoned conclusions).

34. *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 127–29 (1982); CROSS, *supra* note 1, at 120–23.

35. *See* CROSS, *supra* note 1, at 120–23.

36. *See id.* at 14 ("It is judges who directly witness how the law works in practice and where it may fail to work."); *id.* at 122 (arguing that because judges are intimately aware of the circumstances of a given case, they are in the best position to make a policy judgment about statutory language).

37. *See, e.g.*, *id.* at 107 (discussing how modification of outdated statutes by Congress is not usually possible given how difficult it is to pass legislation and Congress's priority in implementing new policy).

empowered to do when considering common law principles.[38] Most contemporary pragmatists do not extend the theory this far, but they do rely on the same political reality that statutes are difficult to change as circumstances and the surrounding body of the law change, and suggest that where statutes are internally ambiguous or where old and new statutes sit together uneasily, judges should use their practical reasoning to introduce coherence into the law.[39]

Thus, pragmatism rejects the formalist notion, associated with intentionalism and textualism, that statutory meaning is fixed at enactment. Instead, it encourages judges to consider modern realities and the practical consequences of their rulings, which implicitly suggests that as realities change, so may the interpretation or proper application of the statute.[40]

Returning to our hypothetical skateboarder, it is unclear precisely how she should resolve her dilemma. She would begin with the question of whether skateboarding in the questionable area would represent a good or bad social policy, but this question has no clear answer and is presumably dependent on social judgments—judgments as to which the average skateboarder may well differ from the average elderly person using a walker. The lack of certainty generated by pragmatism is its primary weakness.[41]

E. Dynamism

Dynamic statutory interpretation, the theory pioneered by Bill Eskridge, shares many insights with pragmatism.[42] The three theoretical pillars of pragmatism—congressional delegation to judges, the relative ability of judges to bring coherence and stability to the law, and the problems associated with the difficulty of enacting, amending, and repealing statutes—feature prominently in his work.[43] Eskridge's primary additional insight is that statutory meaning develops (and should develop) over time in a way that is responsive to the changing preferences of the

38. *See* CALABRESI, *supra* note 34, at 1–7.

39. *Id.* at 101–14.

40. *See, e.g.*, Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1415 (2000) ("Pragmatism makes room for changing circumstances and changing conceptions of justice to mold the interpretation of statutes, making meaning dynamic rather than static.").

41. *See* CROSS, *supra* note 1, at 104–05 (identifying indeterminacy as the primary focal point of the critique of pragmatism).

42. *See* ESKRIDGE, *supra* note 1, at 50–57 (discussing the pragmatics of dynamic statutory interpretation); CROSS, *supra* note 1, at 105 (identifying dynamic statutory interpretation as a unique variant of pragmatism).

43. *See* ESKRIDGE, *supra* note 1, at 111–204 (providing an extended justification of dynamic statutory interpretation).

political branches.[44] Eskridge observes that the courts, legislature, and executive are engaged in a "game" in which executive branch officials and the courts adopt interpretations that they prefer, but only insofar as they predict that the other branches of government will not be driven to take action to override those interpretations.[45]

Therefore, according to Eskridge, the preferences of contemporary legislators, judges, and administrative officials, together with the other considerations identified by the pragmatists, are to be taken into account by the judge engaging in statutory interpretation and application.[46] Naturally, because legislative and administrative preferences may change over time, so too may statutory meaning and application.

As with pragmatism, it is not altogether clear how our skateboarder should apply dynamic interpretation. One focus of the inquiry may be on whether current government officials (in all branches of government) approve or disapprove of skateboarding, but this is likely to be a difficult question to answer unless skateboarding is somehow a salient political issue. Thus, like pragmatism, dynamic interpretation's primary weakness is its inherent uncertainty.

F. The Missing Piece

As I stated at the outset, this account is highly stylized. At the same time, it captures the characteristics of the distinct modes of statutory interpretation. The dominant approaches, however, have embedded within them the unrealistic assumption that citizens are equipped to undertake the sort of analysis they would demand. As a result, they ignore or minimize the manner in which citizens actually determine what the law requires of them, namely, by observing the behaviors of other citizens and officials. Perhaps a statute's meaning and proper application are sometimes best identified in the precise place that statutes first gain meaning and are actually applied, long before judges ever get their hands on them: among the community of people and entities that are actually regulated by the statute and the government officials who are charged with doing the regulating.

44. *See* CROSS, *supra* note 1, at 105–06; *see also* ESKRIDGE, *supra* note 1, at 111–12 ("[S]tatutes [must] be interpreted dynamically once changed circumstances have undone the legislature's earlier assumptions.").

45. *See* ESKRIDGE, *supra* note 1, at 74–80 (describing the game theory aspect of dynamic statutory interpretation); *see also* Bell, *supra* note 24, at 3–23 (describing and assessing dynamic statutory interpretation). For further engagement with and criticism of dynamic statutory interpretation and antecedent approaches, see Samuel Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126, 1165–71 (1982); John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2245–49 (1995).

46. ESKRIDGE, *supra* note 1, at 70; *see also* Nagle, *supra* note 45, at 2212 ("Judges . . . may properly consider the interpretation preferred by the current legislature when deciding how to interpret a statute . . . .").

III. A CONTEMPORARY MEANING AND EXPECTATIONS APPROACH TO STATUTORY INTERPRETATION

I suggest that judges should look to, and sometimes defer to, the way in which the contemporary public understands the law, as mediated by the actions of the officials who have a hand in shaping its design and enforcement and as reflected in their collective behavior under the statute. Stated most strongly and simply, but in a way that will require substantial refinement, how people behave under the law is the law.[47]

In this Part, I introduce this approach, which I call a contemporary meaning and expectations approach to statutory interpretation and application. I begin by offering an alternative approach for the skateboarder in the "No Vehicles" hypothetical introduced above.[48] I then offer a theoretical justification for the approach and consider some of its potential benefits.[49]

47. Readers familiar with the classical legal realist works may intuit that this assertion seeks to give normative power in the statutory interpretation context to the general descriptive realist claims that the law is what people predict courts will do and what government officials actually do. These descriptive claims are most closely associated with Llewellyn's approach, articulated in *The Bramble Bush*, and Holmes's bad man theory. KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 79–85 (11th prtg. 2008); O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

48. Hart, *supra* note 2, at 606–15.

49. Like most ideas in the law, the approach offered in this paper is not *sui generis*. It relates to and builds upon the work of others. Most obviously, it incorporates some of Eskridge's pioneering insights about the relationship between courts and the legislature in the context of statutory interpretation. As I have already suggested, however, the thrust of the approach differs substantially from Eskridge's theory of dynamic interpretation and bears a closer relationship with the works in the area of Alexander Aleinikoff and Peter Strauss. *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225 (1999). Aleinikoff suggests that a statute is like a ship, and the legislature is like its builder and launcher. Aleinikoff, *supra*, at 21. That is, the legislature may set the general course and direction, but it does not control each water current and gale of wind. *Id.* Thus, it does not control each and every turn that the ship takes. *Id.* Instead, according to Aleinikoff, it is the courts, together with other actors in the legal system, who captain the ship. *Id.* In this conception, it is possibly—indeed, likely—that the ship will take turns never anticipated, intended, or predicted by its builder; and the captain is bound not simply by the builder but by other factors as well. *Id.* Strauss draws on the role played by the judge in the development of the common law and suggests that her role in the context of statutory interpretation is only somewhat different. Strauss, *supra*, at 233. That is, the judge is of course bound by the legislature, but that the nature of the relationship between courts and the legislature is dialogic, and also that the judge has a critical role to play in maintaining the coherence and predictability of the law. *Id.* at 253. Therefore, according to Strauss, courts must look not only to the legislature that enacted the law, but also to the preferences of the contemporary legislature and to other factors like the expectations produced by other actors in the legislative system. *Id.* This Article offers an approach that shares much with those suggested by Aleinikoff and Strauss. This Article, however, pushes beyond their work by showing, descriptively, how deeply entrenched the approach already is in the judicial system, by developing a robust normative and theoretical defense for it, and by translating it into a practical approach to statutory interpretation.

A. Rethinking the "No Vehicles" Problem

Consider again our hypothetical. The most obvious and most likely way for the skateboarder to resolve her dilemma is to look past the sign and see if other skateboarders are present. Indeed, only a lawyer would suggest otherwise. If skateboarders are present, then our skateboarder has at least some reason to conclude that skateboards are not vehicles under the law. Further, if the skateboarder looks around and sees a police officer smiling and waving at the skateboarders, then that assumption is buttressed. Finally, if another police officer is ticketing a driver of a motor vehicle while all of the skateboarders are going about their skateboarding business, the new skateboarder on the scene will likely believe that it is perfectly lawful to engage in skateboarding in this area.

This account seems obvious to me as a descriptive matter. That is, we often look at communal behavior for guidance on how we ought, or must, behave. But it is also persuasive to me as a normative matter. It would be unjust if a new police officer were to arrive on the scene and start ticketing the skateboarders, and if she did, it would be wrong for a judge to interpret the statute consistently with the new officer's actions: whatever the original intent, meaning, or purpose of the statute; whatever the most pragmatic rule would be; and whatever current government officials would prefer. In other words, the behaviors and norms of the community, supported as they are by official action (or, as in the hypothetical, inaction), should guide how the executive branch enforces them going forward and how they are construed by the judicial branch. What people do *is* the law, at least in some cases. Others are sometimes entitled to rely on that law, and judges should use this law to fill statutory gaps. This, in a nutshell, is the core of the contemporary meaning and expectations approach.[50]

50. Following the tradition in the field, I have offered a simplistic story to introduce and illustrate the basic approach. *See* ESKRIDGE, *supra* note 1, at 40 (using a simple soup meat hypothetical to show that the meaning of any text is influenced by its context); Aleinikoff, *supra* note 49, at 21 (offering a nautical metaphor); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 541–43 (1982) (using a chain novel as a model of statutory interpretation). The hypothetical is obviously loaded and begs interrogation. After all, I have posited a large number of skateboarders who seem to have uniformly adopted one interpretation of the statute, a police officer waving, and yet another police officer writing a ticket to the operator of a motor vehicle; but which of these circumstances compels us to adopt an interpretation or application of the statute that permits skateboarding? Consider: what if skateboarders were present, but police officers were absent? What if some skateboarders were present, but other skateboarders avoided this area because they believe that their skateboards are vehicles? What if the skateboarders who were present simply did not care whether their skateboards are vehicles and chose to congregate here despite their understanding that it may be unlawful to do so? Or what if they knew it is unlawful to do so and simply enjoyed flouting the law? In other words, what triggers the application of the contemporary meaning and expectations approach? The remainder of the Article addresses these questions and by the end, I hope, provides both direction for resolving them and a compelling account for how the contemporary meaning and expectations approach might work in the much more complex reality of modern statutory law.

B. Theoretical Foundations

At its core, a statute is a legal command that obligates the community to behave in a particular way. It follows from this, morally and practically, that the regulated community must be able to understand the statute. Thus, a statute's authority rests, in part, on the ability of those affected by it to know what it requires of them. This should be an uncontroversial claim. If a legislature were to pass a law in secret and refuse to print or otherwise disseminate the statute in any fashion to anyone other than to those charged with enforcing it, surely we would object if someone were prosecuted for violating the statute. In all likelihood, the courts would declare this sort of Orwellian secret law a violation of due process, but it would never get that far because the very notion of such a law is absurd. It is for this reason that a law is declared void for vagueness when the public cannot possibly decipher what is required of them.[51]

The question, then, is not whether the public's ability to understand what the law expects of them is relevant, but rather what the public may reasonably consider and rely on in generating such an understanding. For example, may the public rely on statements, enforcement patterns, and other signals from nonlegislative government actors, such as agencies and courts? For the truly committed textualist—call her the Platonic textualist—the answer must be no, because only the statute itself, situated within the surrounding legal terrain at the time of enactment, is a legitimate source of statutory meaning.[52] The answer must be the same for the Platonic intentionalist, because only the enacting legislature's intent should be relevant.[53] Any subsequent declarations by a court or administrative or enforcement officials are merely predictive of what future courts will determine to be the statute's original meaning; they have no

51. *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (holding void for vagueness a statute that made being a "gangster" a punishable offense); Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927) (holding a trade statute unconstitutional based on the doctrine of void for vagueness); United States v. L. Cohen Grocery Co., 255 U.S. 81, 92–93 (1921) (holding section 4 of the Lever Act void for vagueness). In a similar way, although in an altogether separate context, the *Restatement Third of Torts* provides that the violation of a statute does not constitute negligence per se where "the actor's violation of the statute is due to the confusing way in which the requirements of the statute are presented to the public." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 15(d) (2010). Again we see that an unclear statute cannot be the basis of liability.

52. *See infra* Part IV.A. As I will show, there probably is no such thing as a Platonic textualist. That is, even the most ardent textualist would likely agree that judicial and agency action deserve *some* deference. (Of course, they would not go nearly as far down this road as the contemporary meaning and expectations approach proposes.) The fact that even the most committed textualist would allow for some consideration of, and deference to, subsequent judicial and agency action—because of the reliance interests of the public—lends credibility to the contemporary meaning and expectations approach and its animating principles. For present purposes, however, I refer to Platonic textualism for the sake of illustrating why the textualist approach ultimately must, and does, give way to a weak form of mediated public meaning.

53. What I have said in the previous footnote about the difference between the Platonic textualist and actual textualist applies equally to an analysis of the intentionalist approach.

inherent authority of law. In other words, according to a Platonic textualist or intentionalist of either stripe, each member of the public must be deeply engaged in an inquiry into a law's original meaning, and a law's meaning can never be settled.

These demands are unfair because they would force individuals to engage with the law in ways that they are ill-equipped to do, that run counter to their practical experiences, and that are at odds with government officials' claims to legal authority. After all, government officials (among whom I include judges) routinely purport to tell those subject to their jurisdiction what the law *is*, no differently from how legislators instruct the public through their statutes. Even more problematically, a statute's meaning is never settled for the Platonic textualist and intentionalist because a judge will never bind herself to an earlier interpretation or application of the statute if she believes it to be at odds with the original meaning of the statute. In other words, the Platonic intentionalist and textualist approaches demand too much of the regulated community and offer too little in return.

For the purposivist, pragmatist, or dynamic interpreter, it is even less clear what the public may consider in developing an understanding of a statute's meaning. As with the Platonic textualist and intentionalist, these approaches would force the public to engage with the law in ways that they are ill-equipped to do and, worse, that are so open-ended that a member of the public simply seeking what the law requires, permits, and prohibits would be left not knowing where to turn.

Of course, there will be many laws with a clear meaning or application, if by "clear meaning or application" we mean that it will be possible to predict what a court would do if faced with a question about the statute's meaning or application. But in the hard cases—that is, with respect to statutes that are most in need of judicial interpretation, because they have terms that are complex or unclear, feature internal tension or are potentially in tension with other laws, and/or have produced intricate regulatory schemes—the regulated community can never have a settled meaning under the extant approaches to statutory interpretation.

The trouble is that a law that is incapable of developing a settled meaning is little better than a vague law or a secret law. Like a vague or secret law, a statute that offers no promise of developing a settled meaning ultimately subjects members of the public to unpredictable liability and risks, and creates an unstable polity. To be sure, a statute need not produce a settled meaning at the moment it is enacted; nor could it, given that unforeseen questions will surely arise. When a law's terms, however, are unclear or new questions arise, the public will naturally be cautious in relying on a possible interpretation or assuming that it will be applied in a particular way. As public officials provide guidance as to the law's meaning and application, the public will act accordingly, and confi-

dence in a law's meaning will predictably become more and more settled. Thus, the regulated community's understanding of the law is mediated by the guidance and actions of public officials and even by the behaviors of other members of the regulated public, and this guidance ought to carry normative weight as well.

This justification for the contemporary meaning and expectations approach resonates with Lon Fuller's requirements for a moral legal system. Fuller famously described eight features that would render a legal system immoral.[54] These are (1) inconsistent adjudication due to the lack of law; (2) failure to publicize the law; (3) lack of clarity in the law; (4) retroactive laws; (5) contradictory laws; (6) legal duties that the regulated community cannot comply with; (7) lack of stability in the law due to constant revision; and (8) inconsistent application and interpretation of the law.[55] In this account, the law must be predictable and stable in order to be moral. Unfortunately, the complex nature of contemporary statutory law and its interplay with administrative, enforcement, and judicial officials makes it susceptible to pitfalls of unpredictability and instability if the lodestars are intentionalism, textualism, purposivism, pragmatism, or dynamism. In order for the law to maintain predictability and stability—or, as Fuller would have it, in order for our legal system to be moral—the mediated public meaning of the law must have independent normative authority.

To be sure, by adopting or incorporating a contemporary meaning and expectations approach, we may lose some of the rule-of-law benefits associated with the originalist approaches, namely the democratic pedigree associated with the intentionalist and textualist theories.[56] At the same time, we would also lose some of the realist benefits associated with the flexibility of the extant living statutist approaches. But, as I will show, we would trade those benefits in return for the rule-of-law benefits associated with stability and predictability. I suggest that sometimes those tradeoffs are worth making.

C. Potential Benefits

The contemporary meaning and expectations approach carries with it several benefits, some of which should by now be obvious. First, the approach promotes fairness. Indeed, as we have seen, it is the concept of fairness that fundamentally underlies the contemporary meaning and expectations approach in the sense that it is *unfair* to allow a court to un-

54. LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969).

55. *Id.* ("A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all . . . .").

56. I discuss objections to the contemporary meaning and expectations approach based on the democracy deficit *infra*, and suggest that the approach is legitimated by other, less formal democracy markers. *See infra* Part V.A.2.

dermine reliance interests on the part of the public that have reasonably developed as a result of government action.

Further, the related values of predictability and stability are similarly promoted by the contemporary meaning and expectations approach. That is, the thrust of the approach is that courts should rule in a manner consistent with what people would have reasonably predicted, as reflected by their actual behaviors and the actions and statements of public officials. Allowing courts to rule in unpredictable ways—as a result of commitments to intentionalism, textualism, purposivism, pragmatism, or dynamism—threatens to destabilize both the law and the formation and maintenance of social and legal relationships. In contrast, the contemporary meaning and expectations approach promotes stability by assuring that judges will not radically disturb the status quo and the negotiated relationships that develop in the shadow of ambiguous laws.[57]

At the same time, even as the contemporary meaning and expectations approach advances predictability and stability, it does not impose an unhealthy stasis.[58] To the contrary, it promotes incremental change by respecting the ability of officials to nudge the public understanding of the law in new directions. To return to the skateboard hypothetical, if skateboarding becomes a threat to public safety or otherwise objectionable, law enforcement can impose change by adequately notifying park users that skateboards would henceforth be considered vehicles, as implied by the dictionary definition of the word. For example, law enforcement

57. For much more on the value of stability and the way in which the rules of statutory interpretation promote stability, see David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 941–50 (1992). For more on how relationships and behaviors are negotiated in the shadow of the law, I refer the reader to the rich "norms and the law" literature. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

58. Obviously, the approach also allows for radical departure from the status quo in that it imposes no constraints at all on the legislature. Thus, if the legislature becomes sufficiently concerned with skateboarders, it can clarify the statute or enact a new one. Legislatures are institutionally better situated to weigh reliance interests and mitigate the costs inherent in destabilizing the status quo than courts, as the legislative process, unlike judicial action, is typically prospective rather than retrospective, and also because the legislature has more tools at its disposal than courts to moderate potential ill-effects of sudden legal change. *See* Shapiro, *supra* note 57, at 947–50 (urging courts to avoid upsetting the status quo in statutory interpretation by deferring to conservative canons of construction because legislatures are in the better position to decide when destabilization is worth it). Therefore, the courts should focus on maintaining the status quo and endorsing incremental change and leave to the legislature the job of imposing more fundamental change. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–8 (1999); *see also* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1455–58 (2000) (explaining that a resurgence in judicial minimalism has been endorsed by former and current judges and has sparked scholarly debate); *see generally* Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny As Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 314 (1998) (explaining the virtues of judicial minimalism). *But see* Matthew Steilen, *Minimalism and Deliberative Democracy: A Closer Look at the Virtues of "Shallowness,"* 33 SEATTLE U. L. REV. 391, 392–93 (2010).

could post signs, issue direct warnings, and use the media to spread the new policy. Over time, as official behavior concerning the statute changes, so too will public understanding and behavior. At some point, it will become reasonable for officials to enforce the new standard and for courts to uphold it.

Courts, too, have a role in fostering incremental change. Each judicial opinion that adds new analysis to the law or applies the law to new facts will be incorporated into the public conception of the law and therefore into public behavior. For example, if a court rules under a different statute that a skateboarder who strikes and kills a pedestrian is guilty of vehicular manslaughter on the grounds that a skateboard is a vehicle, the skateboarding public would do well to take note. Likewise, if a court were to determine that a bicycle is a vehicle under the "No Vehicles" statute, the regulating and regulated community would then have to reevaluate whether a skateboard also qualifies.[59] Adopting the contemporary meaning and expectations approach can thus promote judicial minimalism, by constraining judges to rule consistently with mediated public expectations, without foreclosing the evolution of the law.

Further, and as a result of its judicially minimalist characteristics, the approach may be democracy enhancing. By restricting judges to the task of determining how people actually behave and whether this behavior finds support in official action, the contemporary meaning and expectations approach may put pressure on the legislature to consider and enact more substantial change. That is, legislatures will be prevented from relying on courts to do their work for them.

Finally, the contemporary meaning and expectations approach fosters equality because it limits the instances in which government officials may target their enforcement of ambiguous statutes differently against minority groups from the way in which it targets majority groups. That is, if law enforcement generally enforces an ambiguous law in one way,

59. Courts can also introduce incremental changes by subtly indicating or explicitly stating that a line of reasoning is open to question and not worthy of generating reliance. Consider, for example, in the constitutional context, the difference between a judicial opinion that insists that *Roe v. Wade* and its progeny must be overruled and a judicial opinion that allows the federal government to regulate so-called partial-birth abortion. *See* Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (holding that a federal ban on partial-birth abortion was not unconstitutional); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 982 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that *Roe v. Wade* should be overruled). Both opinions may be interpreted as representing a break from earlier law, but the former is a radical, destabilizing departure while the latter is an incremental departure. In the context of statutory interpretation, consider Justice Scalia's dissenting opinion in Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 657–72 (1987), considered at greater length in notes 69–78 and in the accompanying text. Justice Scalia first indicates that he would prefer to overturn *Weber* explicitly. *Id.* at 669–72. As an alternative, however, he suggests simply opting not to extend *Weber* to *Johnson*. *Id.* Had the Court taken the latter approach, it would have led to public reconsideration of the law and thus to greater wariness among employers in instituting affirmative action programs, but it would not have represented the destabilizing rupture that Justice Scalia preferred.

then that manner of enforcement in effect becomes the law; and enforcing the law differently (or arbitrarily) against minority groups then represents a violation of the law. This limits law enforcement's discretion by allowing us to scrutinize their activities for patterns of discriminatory or arbitrary enforcement of ambiguous statutes.

IV. DISCOVERING THE CONTEMPORARY MEANING AND EXPECTATIONS APPROACH

Although the contemporary meaning and expectations approach represents a substantial departure from the dominant theories of interpretation, its principles are latent in legal doctrines and modes of argument that cannot be adequately accounted for by the extant approaches. Indeed, the approach's animating principles are deeply embedded in the fabric of the interpretive project.

A. Stare Decisis

Few doctrines of legal reasoning are more basic and entrenched than the concept of stare decisis. When a court considers an issue that has previously been decided, every first-year law student knows that there is a strong presumption that, absent special circumstances, the court should reaffirm the previous ruling rather than overturn it. This doctrine runs counter to the Platonic originalist impulse. After all, when a court has the authority to overrule a prior precedent, a Platonic intentionalist or Platonic textualist would ignore the precedent and simply conduct an inquiry into the original meaning of the statute.[60]

There are generally two justifications offered for the principle of stare decisis in the statutory interpretation context. First, some argue that a legislature's inaction in the face of a court's initial ruling is tantamount to acquiescence to that ruling, endowing it with legislative, and thus democratic force.[61] This is sometimes referred to as the "super strong stare decisis rule" in statutory interpretation.[62] It posits that out of concern for separation of powers, rejecting precedent must be left to the legislature rather than to the courts.[63] This justification for stare decisis has fallen out of favor recently as it has become evident that a legisla-

60. Gary Lawson famously argued that deference to precedent is anti-originalist in the constitutional context. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23–24 (1994). His arguments have equal salience in the statutory context.

61. *See* ESKRIDGE, *supra* note 1, at 252–53 (discussing the presumption in favor of precedent).

62. *See id.*

63. For more on the super-strong stare decisis rule in the statutory context, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 118 (1988); Lawrence C. Marshall, *Contempt of Congress: A Reply to the Critics of an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 2467, 2467 (1990); see also Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeal*, 73 GEO. WASH. L. REV. 317, 317–18 (2005).

ture's nonresponse to a judicial opinion is not a reasonable basis upon which to conclude that a majority of the legislature agrees with the judicial opinion.[64] There are simply too many reasons that a legislature may not be able to respond to a judicial opinion to conclude that the original opinion was correct.[65]

The second justification for stare decisis is that the earlier ruling set public expectations and generated reliance among the interested parties such that it would be unfair for the court to reverse course.[66] Where there has been substantial reliance, reversal would severely destabilize the equilibrium that has developed as a result of the earlier ruling.[67] Those who justifiably relied on the court's earlier ruling and adjusted their behavior accordingly could potentially face liability because of their reliance, and it would be unjust for the court to penalize them for behaving in the way that the court itself required or sanctioned.[68] This justification, which may be understood as a kind of estoppel and which has become the preferred basis for deferring to stare decisis, resonates with the contemporary meaning and expectations approach.

A classic example of these principles at work comes from the civil rights context, in *Johnson v. Transportation Agency*.[69] In a previous case, *United Steelworkers v. Weber*,[70] the Supreme Court held that the Civil Rights Act permits an employer to voluntarily institute an affirmative action program.[71] *Johnson* basically reaffirms *Weber*, which was itself questionable as an originalist interpretation of Title VII of the Civil Rights Act of 1964.[72] Justice Scalia dissented in *Johnson* on textual grounds, arguing that *Weber* itself was wrongly decided.[73] Two of the Justices voting with the majority in *Johnson* respond directly to Justice Scalia's textualist critique on stare decisis grounds. First, Justice Brennan's majority opinion adopts the classic legislative acquiescence argument: "Congress has not amended the statute to reject our construction [in *Weber*], nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct."[74]

64. *See* Barrett, *supra* note 63, at 344–47; *see also Johnson*, 480 U.S. at 671–72 (Scalia, J., dissenting).

65. *Johnson*, 480 U.S. 671–72 (Scalia, J., dissenting).

66. *See* ESKRIDGE, *supra* note 1, at 253; *see also* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 844 (2009) (arguing for limited use of precedent in the constitutional context because of reliance interests and noting that these arguments apply with equal or greater force in the statutory context).

67. McGinnis & Rappaport, *supra* note 66, at 844.

68. *Id.*

69. 480 U.S. at 648 (O'Connor, J., concurring); *see also* ESKRIDGE, *supra* note 1, at 40–42 (discussing this case and its use of precedent).

70. 443 U.S. 193 (1979).

71. *See id.* 209.

72. ESKRIDGE, *supra* note 1, at 40–41; *see also Weber*, 443 U.S. at 255 (Rehnquist, J., dissenting).

73. *See Johnson*, 480 U.S. at 669–72 (Scalia, J., dissenting).

74. *Id.* at 629 n.7 (citing CALABRESI, *supra* note 34, at 31–32).

In contrast, Justice Stevens, concurring in the judgment, adopts the reliance argument. In his concurring opinion, he candidly admits that he believes that *Weber* was wrongly decided.[75] In deciding "whether to adhere to [precedent, even though it] is at odds with [his] understanding of the actual intent of the authors of the legislation,"[76] however, he "conclude[s] without hesitation," that he should indeed defer to precedent.[77] As he put it,

> *Bakke* and *Weber* have been decided, and are now an important part of the fabric of our law. This consideration is sufficiently compelling for me to adhere to the basic construction of this legislation that the Court adopted in *Bakke* and in *Weber*. There is an undoubted public interest in "stability and orderly development of the law."[78]

The "public interest in stability and orderly development of the law" is, of course, the interest in affirming the reliance interests of those who have been affected by the law—in this case, the employers who instituted affirmative action policies in light of and in reliance on *Weber* and the employees who were hired under these policies. To overturn *Weber* would be to throw all of this into doubt, introducing questions about the liability businesses would face and the job security of those employed pursuant to these policies. In other words, Justice Stevens believes judges should respect the contemporary public meaning of the statute that has reasonably developed as a result of actions by judges themselves.

Perhaps the most surprising aspect of the case is that Justice Scalia, the avatar of textualism on the Court, does not categorically reject the reliance justification for stare decisis (though he does categorically reject the legislative acquiescence justification[79]). Instead, he argues that the reliance induced by *Weber* was not sufficient to justify the majority's decision in *Johnson*. In his view, the majority in *Johnson* not only affirmed *Weber*, but extended it by (1) applying it to public employers, and (2) effectively requiring rather than merely permitting employers to adopt affirmative action programs.[80] Further, Justice Scalia maintains that *Weber* itself could not have induced reliance because it was inconsistent with the larger body of civil rights law, and because it was only seven years old.[81] In other words, he does not reject the principles underlying the contemporary meaning and expectations approach; he simply believes that the majority in *Johnson* applied the approach too aggressively. Fundamen-

75. *Id.* at 642–47 (Stevens, J., concurring).
76. *Id.* at 644.
77. *Id.*
78. *Id.* (internal citations omitted).
79. *See id.* at 671–73 (Scalia, J., dissenting).
80. *Id.* at 675–76.
81. *Id.* at 672–73.

tally, Justices Stevens and Scalia's disagreement in *Johnson* centers on differing views concerning what the reasonable contemporary public understanding of the law was, rather than on whether contemporary public understanding is a legitimate element of statutory interpretation and application.

B. Deference to Landscape Precedents

In addition to the strong presumption in favor of stare decisis, there also exists a weaker form of deference to prior judicial opinions we may call landscape precedents. Whereas stare decisis applies to cases in which the precise legal question at issue in the case at bar was already decided by a court with the same authority, landscape precedents, as I use the term, are merely relevant judicial opinions that the present court could freely ignore or reject.[82] Landscape precedents might be earlier opinions of any court that construe statutory, constitutional, or common law provisions that are related to the statutory language at issue in the case at bar. Another type of landscape precedents are those earlier opinions of sister or lower courts that construe the same statutory language at issue in the later case. In both contexts, judges will sometimes defer to the landscape precedents even where the bona fides of the earlier cases are in doubt.

Consider Justice Stevens's recent dissenting opinion in *Morrison v. National Australia Bank*, which offers an example of the second sort of landscape precedent.[83] *Morrison* raised the question of whether a provision of the Securities Exchange Act governs securities listed on foreign exchanges.[84] Justice Scalia's majority opinion concludes that it does not, almost exclusively on textualist grounds.[85] Justice Stevens, however, argues that although the majority's reasoning is "plausible," it is not "so compelling" as to overcome the nearly four decades' worth of settled case law in the lower courts that held to the contrary.[86] Justice Stevens's entire opinion is based on the notion that the fact that the law was settled one way by the lower courts for years was sufficient to settle the question of what the law actually is.[87] In other words, Justice Stevens eschewed a textualist or intentionalist reading of the statute in favor of lower courts' consistent interpretation and application of the statute.[88] Once again, the

82. For an extensive discussion of different kinds of landscape precedents, see Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 239–42 (2010).

83. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888–95 (2010) (Stevens, J., concurring).

84. *Id.* at 2875.

85. *Id.* at 2881–88.

86. *Id.* at 2888 (Stevens, J., concurring).

87. *Id.* at 2888–95.

88. Among recent Supreme Court Justices, Justice Stevens appears to be the most attuned to contemporary meaning and expectations principles. In addition to his opinions in *Johnson* and *Morri-*

best way to understand this mode of argument is through the contemporary meaning and expectations approach.[89]

C. The One-Congress Fiction

A similar doctrine of statutory interpretation that resonates with the contemporary meaning and expectations approach is what Bill Buzbee calls "the one-Congress fiction," which is the nearly universal assumption that statutory language is to be interpreted consistently across time and across statutes.[90] The one-Congress fiction applies even where the statutes were enacted by different congresses, adopted far apart in time and context, and/or directed at entirely different behaviors or groups—in other words, even when the statutes have little to do with one another.[91] If a court interprets one statutory phrase in a particular way, then the court assumes that if the same phrase appears in a different statute, it should be interpreted consistently with the court's earlier interpretation.[92] Similarly, if two unrelated statutes feature similar but not identical phrases, the court's assumption is that they have similar but not identical meanings.[93]

Justice Scalia calls this doctrine a "benign fiction" and relies on it in formulating his textualist approach,[94] but as Buzbee has persuasively shown, this fiction can be at odds with Platonic textualism and intentionalism.[95] Specifically, the Supreme Court sometimes applies the one-Congress fiction in order to render statutory language consistent with a judicial interpretation of a different statute that was issued after the statute in question was enacted.[96] An example may help to clarify. Suppose Congress enacts Statute *A* regulating "animals" in 1940. In 1975, Con-

son, see *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A., 511 U.S. 164, 196–201 (1994) (Stevens, J., dissenting) (focusing on the settled views, on which many had relied, of courts and the administrative agency); see also Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. (forthcoming 2012). Unfortunately, Justice Stevens never mounted a sustained account or consistent application of these principles. To be sure, Justice Stevens does not have a monopoly on this type of argument. For example, in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397–402 (1951), Justice Frankfurter's dissent focuses on the passage of years since the statute was enacted and the intervening actions by courts and legislatures in rejecting the majority's interpretation of a statute.

89. Lower court judges seem to be better attuned to the force of landscape precedent and the way it shapes doctrine than most legal scholars or Supreme Court Justices. *See* Gerard E. Lynch, *What Judges Do, Part I*, *in* PETER L. STRAUSS, LEGAL METHODS: UNDERSTANDING AND USING CASES AND STATUTES 829, 829–31 (1st ed. 2005). For more on the role of district court judges, see Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 977–80 (2008).

90. *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 171 (2000).

91. *Id.* at 173.

92. *See id.* at 179–80 (describing the Supreme Court's use of the one-Congress fiction).

93. *Id.*

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

95. *See* Buzbee, *supra* note 90, at 220.

96. *Id.* at 220–23.

gress enacts Statute *B*, which also refers to "animals." In 1980, the Supreme Court interprets the word "animals" in Statute *A* to include single-celled organisms. Subsequently, in 1990, when the Court must decide whether Statute *B*'s use of the term "animals" includes single-celled organisms, it adopts the one-Congress fiction and decides that because it interpreted "animals" in Statute *A* to include single-celled organisms, it should adopt the same interpretation in Statute *B*. This makes no sense as a textualist or intentionalist matter, because (1) there is no reason (without a separate inquiry into legislative history) to believe that the 1940 and 1975 congresses intended or understood the word "animal" in the same way; and (2) the 1975 Congress could not possibly have understood or intended, actually or constructively, the word "animal" to incorporate the court's interpretation of the 1940 statute—since the court's interpretation was not announced until 1980. Nevertheless, as Buzbee shows, the Court, including its avowed textualists and intentionalists, applies the one-Congress fiction in this manner.[97]

Although the one-Congress fiction makes little sense as part of textualist and intentionalist approaches, it is more logical and defensible when viewed through the lens offered by the contemporary meaning and expectations approach. In determining how to behave in keeping with the law, regulated entities may have no choice but to assume that statutes are coherent and consistent with one another and the larger body of law. Further, to the entities regulated by a statute, it should matter little when statutes were enacted in relation to the date on which the Supreme Court issues a judicial opinion interpreting a related statute. In other words, the public is justified in relying on the one-Congress fiction to inform a statute's meaning. Further, the public may reasonably assume that this meaning will apply when the same statutory term is used elsewhere. As such, the Court should adopt the one-Congress fiction because it protects and respects legitimate reliance and expectations interests.

D. The Rule of Lenity and Mistake of Law

Next, consider the rule of lenity and the mistake of law doctrines. The rule of lenity holds that when a criminal statute that is malum prohibitum is amenable to multiple interpretations, the court should apply the more lenient interpretation for the benefit of the criminal defendant.[98] The mistake of law doctrine holds that "where the government has

97. *See id.* at 230–34. Buzbee also shows that the one-Congress fiction can incentivize legislators to generate unclear and imprecise legislation, and thus undermines one of the primary justifications offered for textualism. *See id.* at 232–36.

98. *See* Shapiro, *supra* note 57, at 935–36; Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 514, 530 (2002) (critiquing the use of the rule in sentencing); David E. Filippi, Note, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENVTL. L. 923, 931–35 (1996) (analyzing the history of the rule of lenity as well as the Supreme Court's recent expansive use

affirmatively, albeit unintentionally, misled an individual as to what may or may not be legally permissible conduct, the individual should not be punished as a result."[99]

These doctrines, which have been thoroughly explored by scholars, are applied sparingly and much more narrowly than the contemporary meaning and expectations approach would urge.[100] They reflect similar values, however, to those underlying the contemporary meaning and expectations approach. The rule of lenity is justified by the principle that a law can only have force if the regulated community can reasonably understand the law;[101] and the mistake of law doctrine is justified by the principle that the regulated community is entitled to seek guidance from government officials as to the meaning of the law and to rely on that guidance.[102]

E. Administrative Estoppel

Consider also a concept from administrative law. In *Alaska Professional Hunters Ass'n v. FAA*, which concerned Alaskan hunting and fishing guides who pilot light aircraft as part of their services, the D.C. Circuit considered whether an agency's longstanding informal, oral advice to the guides could be overturned by the simple announcement of a policy change by the agency.[103] The court held that because informal advice

of the rule in noncriminal cases); Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 216 (1994) (arguing that "[t]he rule . . . provides the most appropriate and natural reading of ambiguous statutory language"); Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2428–34 (2006) (explaining the modern critique of the rule as used by the Rehnquist Court); *see also* United States v. R.L.C., 503 U.S. 291, 305–07 (1992) (addressing the conflicts between the rule of lenity and legislative history and the standard for when the rule should be applied); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 516–17 (1992) (affirming the application of the rule of lenity in a civil law suit); Crandon v. United States, 494 U.S. 152, 157–58, 160–68 (1990) (addressing the applicability of the rule of lenity when resolving the ambiguity in a statute's coverage).

99. People v. Marrero, 507 N.E.2d 1068, 1071–72 (N.Y. 1987).

100. *Id.* at 1072.

101. *See* Zachary Price, *The Rule of Lenity As a Rule of Structure*, 72 FORDHAM L. REV. 885, 899–906 (2004) (noting the use of the rule of lenity in modern practice); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 86–141 (1998) (answering the common critiques, both old and new, against the use and purpose of the rule of lenity); Steven Wisotsky, *How to Interpret Statutes—or Not: Plain Meaning and Other Phantoms*, 10 J. APP. PRAC. & PROCESS 321, 333–37 (2009) (explaining the Supreme Court's view on the proper application of the rule).

102. *See* John T. Parry, *Culpability, Mistake and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 3 (1997) (posing the question as to whether state courts should recognize the reliance defense as an excusable mistake of law); David De Gregorio, Comment, People v. Marrero *and Mistake of Law*, 54 BROOK L. REV. 229, 230 (1988) (questioning the court's denial of the use of "mistake of law" as a defense); *see also Marrero*, 507 N.E.2d at 1070–72 (noting that the defendant's reliance on the "official statement" was wrong because the underlying statute did not authorize his conduct at all). *But see id.* at 1076–78 (Hancock, Jr., J., dissenting) (questioning the logic of the majority's opinion that a defendant can only assert a mistake of law defense when said defendant's reading of the applicable statute is correct and not mistaken).

103. 177 F.3d 1030, 1033 (D.C. Cir. 1999).

permitting the practices of the guides had been given and adhered to consistently over time by the agency, and because the regulated community had organized itself around this advice, the agency would have to promulgate an official regulation through the formal notice and comment procedure in order to enforce the rules differently.[104] As the court put it,

> Those regulated by an administrative agency are entitled to know the rules by which the game will be played. [The guides] relied on the advice FAA officials imparted to them [and organized their affairs accordingly]. That advice became an authoritative departmental interpretation, an administrative common law applicable to [the guides].[105]

In other words, the public meaning of the law, as mediated by informal statements by officials, effectively became the law. This, like some of the other doctrinal antecedents to the contemporary meaning and expectations approach, is narrow in its application,[106] but, like the other doctrinal antecedents, it shares much with the principles justifying the contemporary meaning and expectations approach.

F. The Limits of the Status Quo

What I have offered here are a few examples of doctrines and modes of argument that exhibit sensitivity to and respect for contemporary meaning and expectations.[107] As we have seen, however, legal scholars and judges have offered little by way of justification for or sustained focus on these doctrines and modes of argument in developing the dominant theories of interpretation. Perhaps as a result, these doctrines and argument types are applied and developed inconsistently and narrowly rather than as expressions of a coherent and robust set of normative values. It is for this reason that this Article offers a sustained account and urges that the application of these principles shift away from individual

104. *Id.* at 1034–36.

105. *Id.* at 1035 (internal quotations and citations omitted).

106. *See* MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 509–10 (D.C. Cir. 2009) (distinguishing *Alaska Hunters* by concluding that "conditional or qualified statements . . . do not establish definitive and authoritative interpretations"); Air Transp. Ass'n of Am. v. FAA, 291 F.3d 49, 57–58 (D.C. Cir. 2002) (distinguishing *Alaska Hunters* because the FAA interpretation relied upon was ambiguous and could not provide the "definitive interpretation" needed).

107. Several other doctrines and modes of argument also exhibit these characteristics, but in the interest of space, and because these examples may have alternative justifications than the contemporary meaning and expectations approach, I simply identify some of them here: (1) judicial deference to agency litigation positions, see *Auer v. Robbins*, 519 U.S. 452, 461 (1997); (2) the reliance defense in criminal law, see *United States v. Achter*, 52 F.3d 753, 755 (8th Cir. 1995); (3) the constitutional avoidance doctrine, see *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); (4) interpreting statutes against prestatutory practice, see *Shine v. Shine*, 802 F.2d 583, 588 (1st Cir. 1986); and (5) reliance on "no action" letters in the administrative law context, see 2 Charles H. Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE § 5:17 (3d ed. 2010).

doctrines and argument types and toward consistent and cohesive expression as a theme within or approach to statutory interpretation.

V. REFINING THE CONTEMPORARY MEANING AND EXPECTATIONS APPROACH

This Part refines the contemporary meaning and expectations approach by confronting potential objections and exploring how it could be practically deployed by judges.

A. Confronting Objectives

1. Why Is Statutory Ambiguity Necessary?

One obvious question is why the contemporary meaning and expectations approach requires that the statutory provision in question be ambiguous in order for it to operate. After all, even an *un*ambiguous statute may be long ignored by the public and government officials;[108] in such circumstances, why should the principles supporting the contemporary meaning and expectations approach not protect a person who acts in a manner that is consistent with community practices rather than with the statute itself? If we take the contemporary meaning and expectations approach seriously, why should we limit its application to ambiguous statutes?

Consider, for example, the case of speed limits. Suppose we observed that, until today, along a particular stretch of road where the speed limit is set at fifty-five, the police have never pulled a driver over for driving fifty-six miles per hour. But suppose that today someone was pulled over and ticketed for driving at fifty-six miles per hour. In this case, the statutory provision is unambiguous, but should the contemporary meaning and expectations principles offer a defense?

Perhaps, but not necessarily. On the one hand, there is something unfair about penalizing one person for behaviors that many others have indulged in without penalty. Moreover, extending the contemporary meaning and expectations approach to such a case would be a powerful means by which to prevent law enforcement personnel from enforcing the law arbitrarily, maliciously, or discriminatorily. Further, to the extent that the approach seeks to bring the law in line with people's actual behaviors, that interest is triggered equally in the speed limits case as in the skateboard hypothetical I previously introduced. So, perhaps the contemporary meaning and expectations approach should extend to unambiguous statutes.

108. This problem has been of longtime interest to legal scholars. *See* CALABRESI, *supra* note 34, at 42; *see also* Bell, *supra* note 24, at 12–21.

Such an extension, however, would reduce the approach to one of statutory *application* rather than one of statutory *interpretation*. That is, there could be no argument in such a case that the readers of the statute—the drivers or the police—*interpreted* the statute's language in one way or another. A speeder, speaking honestly, would more likely identify himself as a law breaker. Indeed, she would likely never claim that she understood the law to permit her to drive above fifty-five miles per hour, but rather admit that she took her chances. This is in contrast to the skateboarders, who might say that they understood the word vehicles to exclude skateboarders. Instead, the speeder's argument would simply be that the statute might *mean* one thing, but in light of extraneous factors, it would be unfair to apply that meaning in light of the unequal treatment it would impose.

This is not the perfect expression or primary thrust of the contemporary meaning and expectations approach. The approach seeks to identify what a person would *reasonably* understand the law to be. Therefore, in the case of statutory ambiguity, it is sensible to defer to the settled expectations and understandings of the regulated community, as reflected in their actions and as mediated by the behaviors of government officials. Where the statute is unambiguous, however, a pattern of behavior that contravenes the unambiguous statutory language cannot be said to represent a *reasonable* understanding of what the law requires. If nothing else, limiting the contemporary meaning and expectations approach to the context of ambiguous statutes would serve to help us distinguish between conscious risk-taking lawbreakers and those who have reasonably developed an understanding of the law based on public and official behavior.

To be sure, there may be reasons to defer to public expectations of enforcement even in the case of unambiguous statutes for reasons of fairness in individual cases. For example, pulling over a driver for driving at fifty-six miles per hour may not only be an arbitrary application of the law, but it may also suggest pernicious behavior on the part of law enforcement, such as racial profiling.[109] But this is conceptually different from the contemporary meaning and expectations approach because it

109. This issue may have been troubling Justice Stevens during oral argument in *Illinois v. Caballes*:

> JUSTICE STEVENS: [The Defendant] was pulled over for speeding at 71 miles an hour in a 65 miles an hour zone on I-80. Right?
>
> MS. MADIGAN: Yes, that is correct, Justice
>
> JUSTICE STEVENS: Did they know in advance that he was someone to look for? Because I don't imagine you arrest everybody on I-80 that goes 70 miles an hour. I've done it many times myself is why --

Transcript of Oral Argument at 7, Illinois v. Caballes, 543 U.S. 405 (2004) (No. 03-923). Alas, he did not proceed with this line of questioning and never fully explored its implications. As I suggested earlier, of all recent Supreme Court Justices, Justice Stevens appears to have been most attuned to these sorts of arguments. *See supra* note 88.

focuses on the potentially wrongful conduct of the police officer rather than on the conduct and reasonable expectations of the driver. I suggest that the contemporary meaning and expectations approach be limited to the context of ambiguous statutes, but that we should retain certain equitable doctrines that would protect against malicious or discriminatory enforcement of an unambiguous statute in limited circumstances.

These questions—what to do about unambiguous statutory language when contemporary meaning and expectations interests counsel against the literal meaning—appear to be precisely what the Justices grappled with in *United States v. Locke*,[110] a case familiar to students of statutory interpretation. There, a statute provided that holders of unpatented mining claims had to file certain paperwork each year "prior to December 31" with the administrative agency.[111] Failure to do so would extinguish the claim holders' rights on the grounds of abandonment.[112] When the claim holders in the case contacted the local office of the administrative agency, however, they were apparently told to file the paperwork "on or before December 31."[113] Following this advice, they filed their paperwork on December 31.[114] Several months later they received a notice that their claims were being extinguished because of their late filing.[115] The loss of their claims was devastating to the claim holders because they had developed and worked the mines in question for years and their livelihoods depended on their mining rights.[116]

The district court held in their favor on the grounds that losing their rights simply as a result of filing their paperwork a day late violated due process.[117] On appeal, the Supreme Court reversed.[118] This case, perhaps more than any other, shows the Supreme Court Justices grappling with two competing rule-of-law concerns: unambiguous statutory text and the counterintuitive demands imposed by a literal reading of the statute[119] (even the agency shows confusion at various points[120]). The implications for the claimholders here are quite severe, and the claimholders apparently relied in good faith on the oral representations.

110. 471 U.S. 84 (1985).
111. *Id.* at 89 (quoting 43 U.S.C. § 1744(a) (1982)).
112. *Id.* (quoting 43 U.S.C. § 1744(c)).
113. *Id.* at 110–11 (O'Connor, J., concurring).
114. *Id.* at 111.
115. *Id.* at 90 (majority opinion).
116. *Id.* at 111 (O'Connor, J., concurring); *id.* at 114 (Powell, J., dissenting).
117. *Id.* at 91 (majority opinion).
118. *Id.*
119. None of the Justices offered any rational reason for why the paperwork would have to be filed the day before the final day of the year. Indeed, it appears that they were all bothered by this question. *See id.* at 93–97; *id.* at 111 (O'Connor, J., concurring); *id.* at 115–17 (Powell, J., dissenting); *id.* at 117–28 (Stevens, J., dissenting).
120. *Id.* at 111 (O'Connor, J., concurring).

For the majority, the unambiguous statutory language trumped.[121] In light of the interests at stake the claim holders were unreasonable in relying on oral advice given by government officials. The majority suggests that they should have consulted an attorney and, had they done so, they would have filed on time given the clarity of the statute and regulations, and the emphasis on the statute's requirement in relevant legal treatises.[122] What is notable here is that although the majority ultimately rules consistently with the textualist approach, it takes seriously the contemporary meaning and expectations modes of argument.[123] It rejects them because it finds the reliance unreasonable under the circumstances.[124]

For the remaining Justices, although they express it in an inchoate and nonsystematic manner, the arguments that resonate with contemporary meaning and expectations, taken together, suggest that the text itself is a scriveners' error, as proposed by Justice Stevens,[125] or that estoppel may be in order, which appears to animate Justice O'Connor's concurrence and Justice Powell's dissent.[126]

My own instinct, for reasons that I have expressed, is along the lines suggested by Justice O'Connor, namely that even where a statute is unambiguous, as I believe it is here, contemporary meaning and expectations types of arguments may well trump textual clarity, but only in rare and specific cases. That is, the contemporary expectations approach or theme is not at its sharpest where statutory text is clear, though doctrines like estoppel that reflect these arguments are salient.

2. The Democracy Deficit

A different sort of objection might be that the power to make laws lies with the legislature, and that by taking that power and devolving it to some combination of regulated communities and regulators, statutes lose their constitutional and democratic legitimacy.[127]

Although this critique has force, it falls short as an indictment of the contemporary meaning and expectations approach. This objection implies that the legislature is robustly democratically representative and accountable. But there is ample literature that undermines this assump-

121. *Id.* at 93–94 (majority opinion).
122. *Id.* at 94–95.
123. *Id.* at 93–94.
124. *Id.* at 94–95.
125. It appears that, in dissent, Justice Stevens concludes that Congress intended to require filing on or before December 31 rather than "prior to December 31." *Id.* at 118–19 (Stevens, J., dissenting).
126. Justice O'Connor and Justice Powell express this principle differently, with Justice O'Connor articulating a straightforward estoppel-based argument and Justice Powell making a constitutional due process argument. *Id.* at 111 (O'Connor, J., concurring); *id.* at 112, 115–17 (Powell, J., dissenting).
127. A similar critique is typically leveled against the pragmatic and dynamic interpretive approaches. *See supra* notes 28–46 and accompanying text.

tion. For example, William J. Stuntz's work shows that the generation of criminal statutes by the legislature is a one-way ratchet.[128] The legislature has all sorts of incentives to overcriminalize and allow the executive to decide which laws to enforce and which to ignore; and the legislature has few incentives to decriminalize.[129] As a result, we are burdened by a glut of criminal laws, many of which do not reflect democratic will.[130] Public choice theorists have shown similar patterns operating well beyond criminal law.[131] Anytime the public interest is diffused among members of society but is opposed by a focused interest group, the legislature is likely to fail to represent the public will.[132] Similarly, the legislature is likely to pass laws that favor one interest group or represent the will of the majority but that overburden and shift costs towards disfavored minority groups.[133] Finally, as Eskridge has shown, the legislature itself relies on the executive branch to change the law over time, thereby shifting the job and risks of law making.[134] Thus, the gap between the democratic legitimacy of those theories that defer to the legislature and the contemporary meaning and expectations approach is reduced because the legislature is less democratically representative and accountable than we typically believe.

At the same time, the contemporary meaning and expectations approach may offer greater democratic accountability and legitimacy than

128. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 557–58 (2001) ("Given prosecutorial discretion, legislatures have a natural bias toward overcriminalization.").

129. *Id.* at 529–33 (stating that legislatures tend to focus on further criminalization, and in particular harsher sentences, because it makes for a simple platform to get behind—one that the public can understand—when it comes time for reelection; also explaining that legislatures will often respond to public outcry to a particular and rare event by creating a new crime that is not really needed, simply as a symbolic gesture to satisfy voters).

130. *Id.* at 549 ("The imbalance of legislative incentives does not only mean that criminal legislation will tend to be tilted in the government's favor. . . . [It also means that] criminal legislation will tend to be *more* tilted than the public would demand. Criminal lawmakers . . . are elected officials, and there is every reason to believe that they take voters' preferences seriously. But criminal law is *not* democratic." (second emphasis added)).

131. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 290 tbl.1 (1988); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 706 (1987) ("As a result of . . . supply and demand forces, the legislature will pass a great many statutes which serve little more than the interests of powerful and well-organized interest groups. . . . [and] fewer 'public interest' laws will be passed . . . ."); Bell, *supra* note 24, at 5–22.

132. *See* Eskridge & Frickey, *supra* note 131, at 705 ("[T]he legislator prefers 'nonconflictual' demand patterns in which there is substantial consensus among interested persons and groups. Thus, the legislator will want to do nothing if opposition to legislation is organized . . . but will be willing to grant subsidies to organized groups paid out of general revenues . . . when the general public is largely unaware of what is happening."); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1518–19 (1987) (explaining that the first priority of the legislature is reelection, and therefore its members have an incentive to do nothing when there is not an organized call for legislation from the public, particularly when special interest groups oppose such legislation).

133. Eskridge, *supra* note 132, at 1519–20.

134. *Id.* at 1532 (noting that public choice theory posits that when Congress is faced with strong competing interests, it will often "delegate hard political choices to agencies, which are often 'captured' by the regulated interests").

is immediately apparent. First, what is more democratic than the apparent understanding of the statute adopted by the community of people and entities regulated by the statute? Second, the contemporary meaning and expectations approach's focus on the actions of executive branch officials—from high-level administrative bureaucrats and policymakers to ground-level clerks and local enforcers—may render it more democratically responsive, accountable, and transparent than the legislature. Consider: if someone wishes to understand what the town zoning law requires of her, she is more likely to contact the town clerk or zoning department than to contact the town legislative body. Likewise, because the zoning department regularly confronts the demands of the citizenry and enjoys some technical expertise, it may be in a better position than the legislative body to tailor its interpretations and enforcement in light of public needs and sentiment.[135] To be sure, this is merely a hypothesis; but before rejecting the contemporary meaning and expectations approach as antidemocratic, those who object to it must contend with this question.

Third, recall that the contemporary meaning and expectations approach applies only to ambiguous statutes—those in which the legislature has failed to adequately tailor its language. In such cases, why *should* a judge who is trying to interpret and apply ambiguous language use the legislature as her reference point? After all, the legislature has already failed to perform its job. Or, more fundamentally, why should the public be bound by an unclear legislative pronouncement? Where is the democratic legitimacy in *that*? Indeed, the contemporary meaning and expectations approach may provide democratic legitimacy in such cases because, as explored *supra*, it may be democracy enhancing in that it prevents courts from fixing legislatures' mistakes and encourages legislatures to more closely monitor public and official behavior.[136]

Finally, we may grant that the contemporary meaning and expectations approach sacrifices some democratic legitimacy. But that sacrifice purchases a different set of rule-of-law benefits. These benefits—stability, predictability, not upsetting settled expectations and reliance interests—may be, at least in some cases, of greater practical consequence than the primarily theoretical interest served by the compro-

135. *See* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 435–36, 494 (1999) (explaining that agency rules can provide for significant public participation in the policy creating process, but also noting the tension between the need for flexibility in adapting the law to serve public needs and the need for bright-line rules, which, although assuring the political accountability of agencies, can often be both overinclusive and underinclusive); Robert L. Strayer, *Making the Development of Homeland Security Regulations More Democratic*, 33 OKLA. CITY U. L. REV. 331, 339 (2008) (arguing that the public will is better reflected when agencies use a "notice-and-comment rulemaking process" focused on an open dialogue between the agency and interested citizens which results in rules "more closely aligned with the public interest").

136. *See* discussion *supra* Part III.C.

mised and questionable democratic legitimacy offered by textualists and intentionalists.

3. Practical Concerns

The most important objections to the approach relate to its practical implications. This Subsection considers two different, though closely related, possible concerns.

First, the contemporary meaning and expectations approach could generate a race to the bottom in statutory interpretation because it cedes control of statutory meaning to, in part, the regulated community. The regulated community is likely to push at the boundaries of the law in such a way as to maximize its own benefits, even if those benefits come at great expense to the general public. Consider again the "No Vehicles" example. Skateboarders have every incentive to "interpret" the provision to permit skateboards, even if the use of skateboards is dangerous to others. Or consider a more serious example: banks and other financial institutions are incentivized to interpret statutory requirements in ways that maximize the benefits to shareholders and directors, even if doing so imposes substantial risks on customers and society.[137] Should we really adopt an approach to statutory interpretation that encourages regulated communities to be self-interested and then reifies into law their maneuvers by instructing courts to vindicate their interpretations as they become settled?

The most obvious response to this concern is that the contemporary meaning approach does not cede total power to define statutes to regulated communities. Indeed, it provides much authority to the regulators charged with implementing and enforcing the statutory regime and to the public at large. Thus, in the skateboarding example, the skateboarders' interpretation is mediated by the interpretation of police officers who, in turn, represent the rest of society's interests. Likewise, in the context of financial regulation, layers of administrative officials who represent the public interest retain substantial control over statutory meaning.

The trouble is that this response is not altogether persuasive as a practical matter for reasons that point to a second practical objection to the contemporary meaning approach. Specifically, regulators may have any number of reasons for enforcing statutes in the manner that they do, and it may be nearly as problematic to cede control over statutory meaning to *them* as it is to the regulated community. For example, the regulators may be underfunded and understaffed, and therefore may have to

137. *See* Joe Nocera, *Propping Up a House of Cards*, N.Y. TIMES, Feb. 28, 2009, at B1 (discussing the A.I.G. bailout and concluding that, although such companies supposedly rationalized their reckless behavior as satisfying customers, they were really taking advantage of the fact that somebody else, namely taxpayers, would have to clean up the inevitable mess).

choose their enforcement priorities carefully—by, say, enforcing the "No Vehicles" statute against drivers of motor vehicles, but not against skateboarders.[138] Alternatively, regulators may simply be ignorant and uninformed as to the practices of the regulated community, or may act in ways that preserve and promote their own authority or that reinforce their own preferences and prejudices. Most perniciously, perhaps the relevant agency has been captured or bought off by the regulated community.[139] Thus, although public officials *may* help to temper the potential race to the bottom, it by no means resolves the problem. The challenges may be restated as follows: do we really want to adopt an approach that cedes the project of statutory interpretation to regulated entities and the regulators?

It is important to note, first, that the contemporary meaning and expectations approach is likely to generate this problem in only one set of circumstances, namely where the regulated community is a cohesive, concentrated group, while the opposing interests are dispersed across a much larger group within society and not particularly visible. In such a situation, public choice theory would suggest that the regulated community may indeed be able to both (1) develop an interpretation and practice under the statute that is favorable to the group, but that is suboptimal for the rest of society, and (2) capture the regulating or enforcement authority such that it too adopts this meaning.[140]

The alternative scenarios—where the regulated community is disorganized or itself divided, where the opposing interests are represented by an organized and cohesive group, or where the opposing interests are highly visible across society—are unlikely to facilitate a race to the bottom.[141] Instead, we would likely observe pushback against the interpreta-

138. *See* City of Chicago v. Morales, 527 U.S. 41, 65 (1999) (O'Connor, J., concurring in part and concurring in judgment) ("[S]ome degree of police discretion is necessary to allow the police to perform their peacekeeping responsibilities satisfactorily." (internal quotations omitted)); Debra Livingston, *Gang Loitering, the Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 193 (explaining that police discretion is necessary because of limited resources which create the need to prioritize, particularly with the enforcement of lower-level offenses).

139. *See* David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 497 (1999) (explaining that, according to capture theorists, government officials do not work for the public interest but rather for the benefit of the industry they are charged with regulating and that the problem is exacerbated when the government agency is charged with the regulation of only one industry); Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security*, 10 AM. U. J. GENDER SOC. POL'Y & L. 381, 387–88 (2002) (stating that agencies, which are composed of a relatively small number of government officials who hold a significant amount of power to make and enforce the law, are comparatively more susceptible to pressure from interest groups because of their insulation from the political process, which can lead to capture); Seidenfeld, *supra* note 135, at 494 (pointing out that internal agency norms play a big role in agency policy and also that these norms can be affected by special interest groups that can sometimes establish "decisionmaking ruts" in their favor).

140. *See* Dana & Koniak, *supra* note 139, at 497.

141. *See* Eskridge, *supra* note 131, at 290 tbl.1 (illustrating, according to the interest group model, the relationship between interest groups, the public, and the legislators with regard to potential legislation); *see also* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW,

tion preferred by a regulated community by either government officials, representing the interests of the competing interest group, or by society as a whole, expressing itself through its elected officials. Such pushback may either yield a settled meaning that appropriately mediates the competing interests (possibly vindicating one over the other), or result in a constant battle over the statute's meaning, with no clear contemporary meaning and expectations emerging. The absence of a contemporary meaning and expectations may be marked and identified by inconsistent official advice and declarations (perhaps following election patterns), regular engagement on the issue in the legislature, frequent litigation over the issue yielding inconsistent or nondefinitive judicial declarations, and general public uncertainty. Where such indicators are present, courts should conclude that the statute has developed no settled meaning, and therefore that the contemporary meaning and expectations approach has little to say about how to resolve the statutory ambiguity. Thus, the potential practical problem we have identified with the contemporary meaning and expectations approach is somewhat limited and cabined.

Further, the alternative approaches to statutory interpretation would likely yield no better outcome. As public choice theorists have shown, where a cohesive, concentrated group faces off against a dispersed and low-visibility social interest, the cohesive, concentrated group is likely to see its interests vindicated in the legislature.[142] That is, because of its lobbying power and the relative indifference or disorganization of its opposition, it will get the laws that it wants or effectively dilute the laws that regulate it.[143] Similarly, such conditions would also enable the cohesive group to capture the agency tasked with implementing the statute such that any approach that favors agency deference (which is to say, all approaches) would also find itself yielding to the interests of the regulated group.[144] In other words, the problem that we have identified with the contemporary meaning and application approach is replicated in *any* approach to statutory interpretation. Indeed, it is a problem that plagues the whole project of legislation: interest groups get what they want unless opposing interest groups fight them or society as a whole cares a great deal about the interests at stake.[145] The only possible approach to statutory interpretation that would resolve this problem is one

ECONOMICS, AND PUBLIC POLICY 54–56, 216–30, 240–44 (1994) (describing and applying interest group theory); James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 370–72 (James Q. Wilson ed., 1980).

142. *See* Eskridge, *supra* note 131, at 287 (pointing out that groups that are formally organized and are able to spend money can "monopolize the attention of legislators" as compared to unorganized groups whose interests will go unrepresented unless their preferences are "strong and commonly held" throughout society).

143. *See id.*; *see also* Niles, *supra* note 139, at 387–88.

144. *See supra* note 139 and accompanying text.

145. Niles, *supra* note 139, at 385–400.

that would have judges unself-consciously view themselves as representing a broader social good, whatever the statute says and whatever people understand it to mean. Not surprisingly, no one seriously promotes such an approach to legislation or statutory interpretation because it lacks democratic and constitutional legitimacy. In this sense, therefore, the contemporary meaning and expectations approach is likely no worse than any other approach to statutory interpretation.

Further, to the extent that the contemporary meaning and expectations approach would vindicate a reading of the statute that benefits an entrenched interest group at the expense of society, this may help to galvanize a social movement that forces a legislative response. That is, under some conditions the contemporary meaning and expectations approach may provoke a democratic response to, and thus ameliorate, the pathological qualities of our legislative and administrative structure by making those pathologies visible.

To be sure, these are imperfect and incomplete responses to the public choice problem that we observe across all of the approaches to interpretation. All that can be said is that judges would do well to tread warily in cases following this pattern.

B. A Proposed Methodology

An approach to statutory interpretation is likely to gain traction among judges only if it can be translated to a practical, workable judicial methodology. Candidly, any methodology can consist of little more than several nondispositive factors for judges to consider when considering a difficult case of statutory interpretation; there is no scientific approach that will always produce the right answer.[146] The same can be said, however, for any other interpretive methodology: they all require judges to apply *judgment* to ambiguous statutes. As such, to be considered a success, the contemporary public meaning methodology need not produce certain results in all cases; it merely must be no less determinative than the alternative methodologies.[147]

In an ideal world, it would be simple for a judge to determine what the public reasonably understands and expects concerning a particular statutory scheme or provision. That is not the world in which we live. As a result, it is necessary for judges to use proxies in assessing contemporary meaning and expectations. I suggest that judges interpreting ambiguous statutory language focus on the factors discussed in the following Subsections.

146. Easterbrook, *supra* note 15, at 61.

147. *See generally*, James v. United States, 550 U.S. 192, 227 (2007) (Scalia, J., dissenting) (observing that while "my [textualist] approach is not perfect. . . . it is substantially better than what the Court proposes" and indicating that is good enough).

1. The Contemporary Ordinary Meaning of the Statutory Language

Unambiguous statutes, or, more precisely, statutory provisions that are unambiguous with respect to the issue in question, require no interpretation. Thus, any inquiry ends when a statute is unambiguous.[148] Sometimes, though, an ambiguous statutory term will nevertheless have an ordinary meaning in context.[149] According to the contemporary meaning and expectations approach, judges should typically defer to the ordinary public meaning of even an ambiguous statute. Unlike the textualists, however, those adopting a contemporary meaning approach should not consider the ordinary public meaning at the time of statutory enactment, but rather at the time of interpretation. Thus, whatever the statute meant at the time of its passage, that meaning may have changed as the public's understanding of the words in the statute have changed.

Consider again the "No Vehicles" statute. As we have seen, the term "vehicles" is ambiguous because it may or may not include skateboards. My own sense, though, shared by all of my students over the years, is that in most contexts we do not describe skateboards as vehicles, and thus that the ordinary meaning of vehicles does not include skateboards. But what matters to me, and what should matter to a court, is not whether this ordinary meaning was dominant at the time of enactment but rather whether it is dominant today. Indeed, the public meaning may change over time. Perhaps at the time of enactment, the term vehicle did typically include skateboards, but over time the meaning changed either because words sometimes gain or lose meaning, the context changed (for example, the sign was posted in front of a grassy children's playground, but now a skate park has been erected and the sign remains the same), or the surrounding legal terrain has changed such that the public understanding of the term vehicle has also changed. In any of these cases, the clear implication of the contemporary meaning and expectations approach is that the meaning of the statute changes as ordinary meaning changes, and it is the contemporary meaning rather than the original meaning that should determine the outcome.[150]

2. The Nature and Consistency of Official Action and Statements Concerning the Statute

A central focus of the public meaning and expectations approach is the actions and signals sent by public officials concerning the demands of the law. This suggests that judges should look carefully at how the statute is publicly portrayed by officials.

148. *See* discussion *supra* Part V.A.1.

149. *See* Scalia, *supra* note 13, at 23–28.

150. Aleinikoff has similarly argued that judges should seek to interpret a statute based on the time of application rather than the time of original enactment. *See* Aleinikoff, *supra* note 49, at 29–31.

One element of the inquiry should focus on the statute's legislative history because the legislature is typically the first branch to provide the public information about what the statute requires. In contrast to the intentionalist approach, however, which encourages judges to scrutinize committee reports and other publicly obscure sources for clues as to legislative intent,[151] the public meaning and expectations approach places emphasis on those legislative debates that provide information and guidance to the public.[152] Thus, public statements as to a statute's effects would carry greater weight than committee reports, which are seen, at best, only by members of Congress, staffers, and lobbyists.[153] Likewise, post-enactment legislative activity, including the holding of hearings, proposals to amend or repeal, and so forth—especially with respect to old statutes—may provide guidance to the extent they provide information to the public as to the present state of the law. In other words, we are not concerned with the legislature's intent or its acquiescence or objection to a statutory scheme, but rather with the signals it sends to the public as to what the statute requires.

Courts should also look to relevant opinions from other judges, focusing on whether a consensus has emerged such that the public would likely—and justifiably—have developed an understanding of the statute's demands and relied on them. Obviously, a Supreme Court opinion on point carries greater weight than a district court opinion on similar language from a different statutory context; but a Supreme Court opinion on point is not necessary to have generated a public meaning and induced reliance. Consistent and longstanding declarations of lower courts could have a similar effect.

Likewise, courts should look to the pronouncements and actions of administrative and enforcement officials. Has the relevant administrative agency developed a formal rule implementing the statute? Has it provided informal rules and direction? Has it undertaken enforcement actions? Has a spokesperson for the agency made any relevant public statements? Have other officials provided information and guidance to the public through action or inaction? Again, a formal agency interpre-

151. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395–96 (1951) (Jackson, J., concurring) (stating that if a statute is ambiguous, the only legislative history that should be looked to is committee reports because they are "well considered and carefully prepared" in stark contrast to "casual statements from floor debates"); Jorge Carro & Andrew Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 tbl.II (1982) (finding that from 1938 to 1979, over forty-five percent of Supreme Court citations to legislative history were to committee reports, far more than to any other type of legislative history).

152. In *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, Bernard W. Bell argues for a similar use of legislative history, though he offers an originalist account for why it is legitimate to do so. 60 OHIO ST. L.J. 1, 80–81 (1999).

153. *See* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in judgment) (rejecting the use of committee reports because they "are increasingly unreliable evidence of what the voting Members of Congress actually had in mind" because only a small percentage of Congressmen actually even read them).

tation of a statute carries more weight than the offhand statement of a local clerk. But this is not for the formalist reasons that courts typically make distinctions between formal regulations worthy of *Chevron* deference and other forms of guidance that are entitled to less (or no) deference.[154] Rather, it is because the public is likely to have its expectations more strongly set by official regulations than by less formal guidance. To the extent that even something as informal as a pattern of behavior may, if it is longstanding enough, set public expectations, courts should take them into account.

The more consistently legislative, executive, and judicial officials have interpreted and applied statutory language, the more readily judges should defer to that interpretation and application. Consistency is a critical factor because consistent interpretation and application of a statute are likely to generate reasonable reliance on the part of the public. In considering these kinds of official actions and the signals they send, it is vital to look for both vertical consistency (consistency over time) and horizontal consistency (consistency within or across branches). If the courts consistently interpret statutory language in a particular way over a period of years, or if an agency maintains a particular interpretation over several administrations, then there has been vertical consistency. If several district court judges interpret a statute one way, and none have interpreted it differently, then there is horizontal consistency within the judicial branch. Similarly, if the courts interpret a statute in a way that comports with the agency's interpretation, then there is horizontal consistency between these branches. The more consistency there is, within and across the branches and over time, the more a public meaning is likely to develop and reliance to follow.[155]

3. The Broader Legal Landscape

The modern reality of statutory law requires judges to look well beyond any one specific statute or statutory provision to determine whether a public meaning and public expectations have been set. Indeed, statutes often overlap, by speaking on the same subject, to the same object, or by using similar language to address different behaviors or entities.

154. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984) (recognizing that when Congress leaves a gap in a statute, which is subsequently filled by a regulation of an agency, then the agency's interpretation controls unless it is an unreasonable one because of "the principle of deference to administrative interpretations").

155. The consistency factor helps explain Justice Scalia's dissent in *Johnson*, in which he insists that *Weber* itself is inconsistent with other precedent. His point seems to be that there has been neither vertical nor horizontal consistency, and thus the public cannot have reasonably relied on *Weber*; as such, it is not worthy of stare decisis. *See supra* note 59 and accompanying text.

For example, several different statutes prohibit discrimination against different minority groups.[156] Further, the Constitution also prohibits certain kinds of discrimination.[157] And, of course, agencies and courts have interpreted and applied all of these statutes, leading the public to develop reasonable understandings and expectations about how the broad framework operates on new cases.[158] Consequently, when a court interprets or applies any particular statutory provision concerning discrimination—even if it is the first court to consider the particular provision in question—it should be at least as mindful of this broader legal landscape as it is of any original meaning that may be ascribed to it. Thus, words and phrases should be interpreted the same way across statutes that regulate similar behaviors, activities, or entities; and interpretations that would destabilize or cast doubt on a well-entrenched legal norm should be avoided.[159]

This factor mirrors the one-Congress fiction discussed above, but the animating principle here is not that the enacting Congress understood (actually or constructively) statutory terms to be consistent with uses of the same terms in other statutes;[160] rather, the reason for a judge to consider the surrounding legal terrain is that the public would likely assume that a new statutory provision's meaning is informed by administrative, judicial, and legislative interpretations of earlier, related statutory provisions.[161]

4. Actual Public Behavior

A court should also consider actual behaviors of the public under the statute. Indeed, there may be no better gauge of contemporary meaning and expectations than the actual behavior of the public. To be sure, such behavior may be more difficult for judges to assess than the factors I have previously identified, all of which require little more than legal research and are consistent with the demands imposed by other approaches. A further concern is that a court must, as we have seen, be careful not to confuse conscious lawlessness on the part of the public

156. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); *see also* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006); Telecommunications Act of 1996, 47 U.S.C. § 255 (2006).

157. U.S. CONST. amends. V & XIV.

158. *See* Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 647–57 (1987) (O'Connor, J., concurring) (emphasizing, in this Title VII discrimination case, the importance of deferring to other lines of cases that "reconcile the same competing concerns," here referring to the Equal Protection Clause and specifically to *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), when adopting a standard).

159. *See id.*

160. *See* discussion *supra* notes 90–92 and accompanying text.

161. Bertall L. Ross, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1239–46 (2011).

with a reasonable understanding of the requirements of the law.[162] These difficulties explain why this factor, although potentially the best evidence of a statute's contemporary public meaning, must be considered in tandem with the other factors; it is the presence of those other factors that will indicate whether or not the behavior of the public reflects a reasonably developed public meaning.

5. The Potential Consequences of the Court's Opinion

The final factor for a court to consider in determining how to interpret a statute is what the potential consequences of the various possible interpretations would be. Courts should avoid destabilizing either the larger body of law, or the equilibrium and settled expectations that have developed as a result of the social understanding of the law.[163] We may call this the "do not make waves" principle. If the court can predict that a particular interpretation would upset the law and settled expectations, then the likely implication is that this interpretation is at odds with the contemporary understanding, and, as such, the court should avoid it. This factor helps to achieve the predictability- and stability-enhancing features of the approach, and encourages judicial minimalism and legislative maximalism.

VI. CASE STUDIES

This Part presents two case studies that illustrate how and when the contemporary meaning and expectations approach may be deployed. The first case study offers a model of how judges reasonably could implement the contemporary meaning and expectations approach; the second offers a model of what judges should not do. The difference between them is that the first exemplifies restraint on the part of the judges in a way that enhances predictability and stability, while the second shows how the approach may be abused when used in an unrestrained manner.

A. In re Rachel L.

In 2008, a California appellate court considered the circumstances in which a parent could legally homeschool a child.[164] California's education code contains the following provision: "Each person between the ages of 6 and 18 years . . . is subject to compulsory full-time education.

162. *See* discussion *supra* Part IV.A.

163. *See* Shapiro, *supra* note 57, at 925 (arguing that courts should and do prefer "continuity over change" by reading statutes in light of "the entire background of existing customs, practices, rights, and obligations").

164. *In re* Rachel L., 73 Cal. Rptr. 3d 77 (Cal. Ct. App. 2008).

Each person subject to compulsory full-time education . . . shall attend . . . public full-time day school . . . ."[165] The statute, which was enacted in 1929, excepts from the public schooling requirement "[c]hildren who are being instructed in a private full-time day school by persons capable of teaching"[166] or "who are being instructed . . . by a private tutor . . . [who] hold[s] a valid state credential for the grade taught."[167]

Under this statute, is homeschooling by a parent lacking a teaching credential permitted as a form of private schooling?[168] This turns on whether homeschooling is a form of private schooling within the meaning of the statute.[169] The most obvious reading of the statute is that homeschooling is prohibited except where the parent is credentialed. First, as a matter of ordinary usage, people do not typically refer to homeschools as private schools.[170] Second, statutory exceptions are construed narrowly, and treating a homeschool as a private school would be expansive.[171] Third, all provisions of a statute must be given meaning, and if a homeschool is a private school, then the second exception—which requires private tutors to be credentialed—would be rendered problematic, for why would it make sense to permit a noncredentialed parent to teach his child, but not to allow that same parent to appoint a noncredentialed tutor to do so?[172]

This reading is also supported by contextual evidence of the legislature's intent in passing the law. The previous version of the statute provided exceptions to the mandatory public schooling provision for children "being taught in a private school, or by a private tutor, or at home by any person capable of teaching."[173] Thus, the previous version of the law permitted homeschooling by anyone "capable of teaching"; by taking that provision out, the legislature signaled that homeschooling is not permitted unless the parent or other tutor is credentialed.[174] In light of all

165. CAL. EDUC. CODE § 48200 (West 2012).

166. *Id.* § 48222.

167. *Id.* § 48224.

168. *See In re Rachel L.*, 73 Cal. Rptr. 3d at 80–84; Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 585–88 (Cal. Ct. App. 2008).

169. *In re Rachel L.*, 73 Cal. Rptr. 3d at 82 ("[H]ome education . . . is not the legal equivalent of attendance in school in the absence of instruction by qualified private tutors." (quoting *In re* Shinn, 16 Cal. Rptr. 165, 173 (Cal. Ct. App. 1961)).

170. *Id.* (noting that there would be no need for the distinction the legislature makes between private schools and home tutors if the legislature intends for them to be treated the same).

171. *Id.* (observing that it would be unreasonably difficult and expensive for the state to monitor parents homeschooling their children as opposed to monitoring teachers in private schools) (construing People v. Turner, 263 P.2d 685, 687–88 (Cal. App. Dep't Super. Ct. 1953)).

172. *Id.* (arguing that in contrast with homeschooling parents it is reasonable for the legislature to conclude that teachers in private schools would be directly supervised by the persons who have an interest in maintaining the required standard of instruction to qualify for continued exemptions).

173. 1903 Cal. Stat. 388.

174. Jonathan L. v. Superior Court, 81 Cal. Rptr. 3d 571, 577 (Cal. Ct. App. 2008) (noting that case law in 1953 and 1961 confirm the legislature's intent to exclude homeschooling as a form of private schooling).

of this, the textualist or intentionalist should likely conclude that the state prohibits homeschooling except where the homeschooler is credentialed.

The California appellate court faced with this question initially adopted this analysis.[175] After issuing the ruling, the court immediately came under a firestorm of criticism, especially from political conservatives.[176] In the face of this criticism, and in response to requests from the parties and several nonparties, the appellate court reheard the case[177] and reversed itself, holding that the statute permits homeschooling as a form of private schooling.[178] The contemporary meaning and expectations approach and methodology helps to explain and justify this decision.

In its second decision, the court focused on a host of developments since the statute was enacted in 1929. Beginning in the 1980s, homeschooling took hold as a movement throughout the country, especially in California.[179] In 2008 alone, more than 150,000 children in California were homeschooled, and homeschooling enjoyed the tacit, and often explicit, support of the State Department of Education.[180] The Superintendent of Public Instruction and the Department of Education expressed their opinion:

175. *In re Rachel L.*, 73 Cal. Rptr. 3d at 79, 83.

176. For example, a post on the California GOP's official blog screamed *Activist Judiciary Targets Kids.*

> Republicans have long warned of the risks of activist judges who choose to make law rather than interpret it.
>
> The latest victims of this judicial activism are California's more than 166,000 children who are receiving their education at home rather than in traditional public and private schools. That's because an appeals court in Los Angeles last week decreed that parents cannot home school their children without a government-issued teaching credential.
>
> It's an outrageous decision that threatens to wipe out an important education option that hundreds of thousands of families have chosen to exercise.

Ron Nehring, *Activist Judiciary Targets Kids*, CAL. REPUBLICAN PARTY (Mar. 12, 2008, 11:32 AM), http://blog.cagop.org/2008/03/activist-judiciary-targets-kids.html.

Similarly, social conservative James Dobson, the founder of Focus on the Family, called the ruling an "assault on the family," and the State Department of Education was "barraged with calls from parents, and even picketed" by supporters of home schooling who went so far as to call Department officials "all sorts of horrible names." Linda Jacobson, *Home-School Advocates Push to Blunt, Reverse California Ruling*, EDUC. WEEK, Mar. 19, 2008, at 15.

Politicians got into the act as well. Governor Schwarzenegger called the ruling "outrageous" and demanded that the courts "protect parents' rights." Jill Tucker & Bob Egelko, *Governor Denounces Ruling on Education: He Vows to Change Law if Needed to Save Homeschooling*, S.F. CHRON., Mar. 8, 2008, at A1.

177. Bob Egelko, *State Appeals Court Agrees to Rehear Homeschooling Case: Written Arguments Invited from Officials*, S.F. CHRON., Mar. 27, 2008, at B2.

178. *Jonathan L.*, 81 Cal. Rptr. 3d at 590.

179. *See* Michael F. Cogan, *Exploring Academic Outcomes of Homeschooled Students*, J.C. ADMISSION, Summer 2010, at 18, 19 (estimating that the number of homeschooled K-12 students has increased from 800,000 to 1,508,000 in 2007); *see also* Krista Jahnke, *More Resources and Support Help Metro Homeschoolers Go Mainstream*, DETROIT FREE PRESS, Aug. 23, 2010, at 1A (noting that according to the National Home Education Research Institute, the number of homeschoolers had doubled in ten years to 2.3 million at a rate of seven percent annually).

180. *Jonathan L.*, 81 Cal. Rptr. 3d at 591.

> "[I]t is legally permissible for [parents] to qualify as a private school and teach their children in their own home." Both the Governor and Attorney General agree with this interpretation, as does the Los Angeles Unified School District (LAUSD). . . . [Further, t]he Legislature [was] aware that home schooling parents file affidavits as private schools . . . . The Department of Education has not challenged the practice, and the LAUSD has not asserted that the children of such parents are truant.[181]

Indeed, over the past thirty years or more, there appear to be have been no prosecutions of homeschooling parents on the grounds that they violated this statutory provision.

In addition, although the legislature had not touched the most relevant statutory language since 1929, it did tinker at the edges in ways that suggested publicly that homeschooling was lawful. For example, in 1991, the legislature exempted "private schools with five or fewer students" from certain reporting requirements that private schools had to comply with.[182] Similarly, in 1998, the legislature exempted "a parent or legal guardian working exclusively with his or her children" from a requirement that private school instructors be fingerprinted for criminal background checks.[183] Other recently adopted statutory and regulatory provisions also suggest that officials operated under the assumption, and with the intention, that homeschooling is permitted as a form of private schooling.[184]

These changes alone would not likely be sufficient to convince a committed textualist or intentionalist that the statute permits homeschooling.[185] This is because many other statutory provisions plainly do not treat homeschools as private schools.[186] For example, as the court in *Jonathan L. v. Superior Court* noted, one provision "prohibits anyone from taking off or landing a helicopter 'within 1000 feet of the boundary of any public or private school that maintains kindergarten classes or any classes in grades 1 through 12, unless at a permitted heliport or an EMS landing site, without [a permit].'"[187] This provision would be impossible to comply with if every home was potentially a private school.[188] Moreover, to allow the most fundamental provisions of the statutory code—mandatory attendance at public schools—to be effectively rewritten to

181. *Id.* (second alteration in original).
182. 1991 Cal. Stat. 1085.
183. CAL. EDUC. CODE § 44237(b)(4) (West 2012).
184. *See Jonathan L.*, 81 Cal. Rptr. 3d at 595–96.
185. *See id.* at 595 (observing that home schooling in California is permitted as a result of "implicit legislative recognition rather than explicit legislative action").
186. *See In re* Rachel L., 73 Cal. Rptr. 3d 77, 82 (Cal. Ct. App. 2008).
187. *See Jonathan L.*, 81 Cal. Rptr. 3d at 589 n.28 (quoting CAL. CODE REGS. tit. 21, § 3532(c)(1) (2008) (alteration in original)).
188. *Id.*

permit homeschooling by some tinkering at the edges of the code would be to violate the rule against implied repeals.[189]

But viewed through the contemporary meaning and expectations lens and methodology, the court's opinion is more defensible.[190] Compare this case to the "No Vehicles" hypothetical. Anyone with an interest in homeschooling a child in California in the early twenty-first century would look around and see hundreds of thousands of parents homeschooling their children, just as the skateboarder sees other skateboarders. He would further notice government officials—police, agency officials, legislators, and judges—tacitly or explicitly approving of homeschooling, just as the skateboarder observes officials approving of skateboarding. What is the parent to conclude *but* that homeschooling is permitted?

Let us briefly consider the case in light of the methodology I have proposed. First, the clarity of the statutory provision: as we have seen, the language of the statutory provision favors a reading that homeschooling is prohibited. Based on recent changes to the statutory scheme, however, there has been guidance from the legislature that homeschooling would be treated as a form of lawful private schooling.

Second, the nature and consistency of official action and statements: for decades, there has been extensive and consistent official action supporting homeschooling by parents lacking teaching credentials. *All* of the relevant officials publicly and explicitly opined that, and acted as though, homeschooling was a permissible form of private schooling. Neither the legislature nor the relevant agencies ever moved to prevent homeschooling or to penalize those who engaged in it. Indeed, recent legislative debates and action concerning the statutory scheme clearly indicated that the legislature understood and intended to treat homeschooling as a form of private schooling. Likewise, agency officials have publicly come out in favor of homeschooling, and enforcers have chosen to never prosecute homeschoolers for truancy. There has thus been both horizontal and vertical consistency supporting homeschooling as a form of private schooling.

Third, the broader legal landscape: every state in the country permits homeschooling, including by parents without teaching credentials.[191]

189. *See* Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936).

190. Unsurprisingly, the court itself does not own up to applying any form of living statutism. Instead, it claims, absurdly, that the plain meaning of the statute is ambiguous because a home school could be a private school under the language of the provision in question. For the reasons recounted above—and indeed for the reasons that this very court argued in its previous ruling in the case—this claim stretches well beyond credulity. That the court felt the need to engage in this less-than-candid exercise amply demonstrates originalism's powerful hold in judicial discourse. The court finds it necessary to try to fit what is obviously a living statutist argument into an originalist construct.

191. *See* KAREN PEEBLES, HOMESCHOOLING REQUIREMENTS IN ALL 50 STATES: LAWS THAT APPLY FOR THE ENTIRE US (2006).

California would be an extreme outlier if it prohibited homeschooling. Further, current constitutional jurisprudence suggests—even though it does not clearly hold—that homeschooling may be a constitutional right.[192]

Fourth, actual public behavior: more than 150,000 children in California are homeschooled in any given year, with likely a majority of them taught by parents who hold no teaching credentials.

Fifth, the "do not make waves" principle: the immediate consequences of the court's opinion are clear; there would have been a powerful public outcry. Indeed, this is precisely what happened in the wake of the court's initial ruling.[193] The long-term consequences are also fairly predictable—the legislature would likely have tried to amend the education code to expressly permit homeschooling.[194] In the interim, however, the social equilibrium would be severely destabilized. Parents who had homeschooled would face deep uncertainty—would they be charged with truancy? Should they immediately send their children to public or private schools? And what of the public schools—should they now expect a sudden influx of formerly homeschooled children? Should they purchase additional desks, hire new teachers, order more food for the lunch program?

In short, the public meaning and expectations approach offers the best lens through which to view this case and offers a means of legitimating the court's opinion.

B. Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal

It is rare that a civil-procedure-focused Supreme Court case commands broad attention. But the Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[195] and *Ashcroft v. Iqbal*,[196] which have dramatically reshaped pleading doctrine, have taken the academy, the legal profession, and the judiciary by storm.[197] Legal scholars have struggled not only to

192. S*ee In re* Rachel L., 73 Cal. Rptr. 3d 77, 79 (Cal. Ct. App. 2008); *see also Jonathan L.*, 81 Cal. Rptr. 3d at 592 (cautioning that the constitutional "right must yield to state interests in certain circumstances").

193. *See* Editorial, *A Horrendous Ruling: California Judges Throw Homeschooling Movement into Peril*, AUGUSTA CHRON., Apr. 14, 2008, at A10; John Stossel, *Right to Homeschool in Courts*, POST-TRIB. (Merriville, Ind.), Apr. 6, 2008, at A20.

194. *See* Howard Mintz, *Home-Schooling in Court*, SAN JOSE MERCURY NEWS, June 23, 2008, at 3B (noting that the governor, attorney general, and state school superintendent were urging the court to reverse its decision); Jennifer Wolff, Letter to the Editor, *Homeschooling Endangered*, WASH. TIMES, Apr. 6, 2008, at B2 (calling for parents, organizations, and legal aid groups to band together); *see also* Assemb. Con. Res. 115, 2007–08 Reg. Sess. (Cal. 2008) (commending court of appeals for allowing rehearing of the decision in the *In re Rachel L.* case).

195. 550 U.S. 544 (2007).

196. 129 S. Ct. 1937 (2009).

197. *Compare* Quezada v. Hedgpeth, No. 1:09-cv-02040-LJO-SKO PC, 2010 WL 3431772 (E.D. Cal. Aug. 31, 2010) (dismissing complaint for failure to meet heightened pleading standard), *and* DeBartolo v. United Healthcare Servs., Inc., No. 10 C 1696, 2010 WL 3420316 (N.D. Ill. Aug. 27, 2010),

understand these cases' meaning and to predict their ultimate significance, but also to offer some justification, or at least explanation, for the Court's apparently radical reinterpretation of Rule 8(a) of the Federal Rules of Civil Procedure.[198] This Section suggests that the best explanation for Court's turn in these cases is that it took a contemporary meaning and expectations approach to the provision.[199] Further, it argues that in some respects, the Court's efforts in this regard were justifiable. I suggest, however, that these cases ultimately represent an illegitimate use of the contemporary meaning and expectations approach because the Court threw the law and social equilibrium into chaos—it made too many waves.

1. A Brief Introduction to Pleading Doctrine

The basic issue in both *Twombly* and *Iqbal* concerned what a complaint must allege to withstand a motion to dismiss. For roughly fifty years, the Supreme Court's jurisprudence on the sufficiency of pleadings

with McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 867 (Wash. 2010) (holding that dismissal is improper when underlying state laws are not preempted) *and* Butt v. United Bhd. of Carpenters & Joiners of Am., No. 09-4285, 2010 WL 2080034, at *1 (E.D. Pa. May 19, 2010) (refusing to follow dicta of *Iqbal*); *see also* Mark M. Maloney & Thaddeus D. Wilson, *Bankruptcy Courts' Interpretation of* Twombly *and* Iqbal*: Trends and Lessons*, AM. BANKR. INST. J., July–Aug. 2010, at 34 (noting how bankruptcy law has been affected by the two decisions); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1128 (2010) (arguing that there should be a higher standard for pleadings in complex cases).

198. *See* Symposium, *Two Watersheds: The New Case Law of Bundles, Rebates, and Class Certification*, 17 GEO. MASON L. REV. 927, 928 (2010); Alison Kato & Nicolette Rowe, Note, *Plausibility of Notice Pleading: Hawaii's Pleading Standards in the Wake of* Ashcroft v. Iqbal, 32 U. HAW. L. REV. 485, 505 (2010) (arguing that Hawaii should continue to following the notice pleading standard because Hawaii's pleadings jurisprudence is not fully developed); Ryan Mize, Comment and Note, *From Plausibility to Clarity: An Analysis of the Implications of* Ashcroft v. Iqbal *and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1256 (2010) (observing that both cases have resulted in the judiciary having more discretion and litigants having less confidence in where pleadings stand today).

199. One might question what these cases have to do with statutory interpretation. After all, strictly speaking, there is no statute at issue in *Twombly* or *Iqbal*. Instead, the relevant textual source is Rule 8(a) of the Federal Rules of Civil Procedure (the Rules), which was adopted not by any legislature, but rather through the rulemaking process. It is fair to say, however, that similar principles that apply to statutory interpretation also apply to Rule interpretation—and, indeed, the Court itself has suggested as much. The Rules are a textual source that are written like a statute and accepted as binding in the same way. The Court has generally approached the Rules through a similar lens that it approaches statutes. For instance, in *Swierkiewicz v. Sorema*, a straightforward originalist decision concerning the proper interpretation of Rule 8(a), the Court applied interpretive techniques that would be familiar to any student of statutory interpretation, ranging from parsing the language of the specific provision, to considering its relationship to other related provisions, to reflecting on the provision's role within the larger scheme of the Rules. 534 U.S. 506, 512–14 (2002). In addition, the Court considered the context in which the Rule was initially adopted and its purpose. *Id.* at 514. Finally, the Court brushed aside a policy-based objection to its conclusion by suggesting that the proper way to pursue such an argument is through the Rulemaking process—echoing the Court's (and particularly the originalists') general approach in the statutory context. *Id.* at 515.

was well-settled and minimalist.[200] Rule 8(a) states that a party's complaint must include the following:

> (1) a short and plain statement of the grounds for the court's jurisdiction . . .
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.[201]

In *Conley v. Gibson*, the Court's first major consideration of the issue, the Court announced that this Rule

> do[es] not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.[202]

Further, and somewhat more cryptically, the Court admonished that a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[203] This standard, generally known as notice pleading, requires the plaintiff to simply put the defendant on notice as to what she claims the defendant did wrong.[204]

The Supreme Court consistently reaffirmed this standard. For example, in *Swierkiewicz v. Sorema*, the Court confronted a heightened pleading standard imposed by the Second Circuit that required a plaintiff to plead all of the elements of a prima facie case in an age discrimination suit.[205] The Court rejected the heightened standard, indicating that all a plaintiff in a discrimination suit must do is make it clear to the defendant what the defendant is being sued for.[206] Thus, presumably, it would be sufficient for such a plaintiff to assert that the defendant terminated him because of his advanced age.

In 2007, the Court issued its opinion in *Bell Atlantic v. Twombly*, and things became far more complicated and controversial. In *Twombly* the Court considered the sufficiency of a pleading alleging that telecoms had conspired to engage in anticompetitive practices and violated anti-

200. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).
201. FED. R. CIV. P. 8(a).
202. *Conley*, 355 U.S. at 47.
203. *Id.* at 45–46.
204. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) ("Under the Federal Rules, 'notice pleading' applies. This merely requires a plaintiff to provide a short and plain statement of a claim sufficient to put the defendant on notice."); *see also* FED. R. CIV. P. Form 11.
205. 534 U.S. 506, 509 (2002).
206. *Id.* at 511, 513–15.

trust laws.[207] Rather than reaffirm the notice pleading standard, the Court introduced a new, heightened pleading standard—what it called the plausibility standard.[208] Although the Court refused to explicitly acknowledge that this was indeed a new and heightened standard, it did "retire" the "no set of facts" language from *Conley*; and the dissent and most civil procedure scholars and lower court judges immediately recognized this to be a doctrinal departure.[209] To the extent any questions remained as to whether the plausibility standard represented a departure from the notice pleading standard, those questions were soon answered by the Court's 2009 decision in *Ashcroft v. Iqbal*.[210] In *Iqbal*, which revolved around the plaintiffs' claim that they had been targeted by the government in the wake of the September eleventh attacks on the basis of their race, religion, ethnicity, and/or national origin, the Court made it clear that the plausibility standard required a plaintiff to allege specific facts in support of his discrimination claim.[211] This was a clear departure from notice pleading and implicitly rejected *Swierkiewicz* in particular.[212]

The majorities in these cases did not pretend to engage in any standard reading of Rule 8. So, what were they up to?

207. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548 (2007).

208. *See id.* at 553, 556–61; *see also* Mize, *supra* note 198, at 1256 (analyzing the effects of the newly imposed heightened pleading standards).

209. *Twombly*, 550 U.S. at 573–74 (Stevens, J., dissenting).

210. *See* 129 S. Ct. 1937, 1949–51 (2009); *see also* Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 700 n.183 (2009) (noting that the old interpretation of the pleadings standard has been retired); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 5 (2009) (expressing that *Twombly* and *Iqbal* bring the doctrine of "fact pleading" out of the "shadows"); *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 252, 258–59 (2009) (observing that *Iqbal* confirmed that the "'no set of facts test'" is no longer valid).

211. *Iqbal*, 129 S. Ct. at 1942, 1949.

212. *See* Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in* Ashcroft v. Iqbal, 62 FLA. L. REV. 951, 965 (2010) (observing that the interpretation of *Iqbal* is similar to that of *Swierkiewicz*); Joseph A. Seiner, *After* Iqbal, 45 WAKE FOREST L. REV. 179, 193–95 (2010) (pondering possible consequences of *Iqbal* to the validity of *Swierkiewicz*); Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 176 (2010) (expressing Adam Steinman's argument that *Iqbal* did not overturn either *Swierkiewicz* or *Leatherman*); *see also* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 851 (2010) (contrasting *Twombly* and *Iqbal*, noting that *Twombly* screened for meritless suits while *Iqbal* screened for weak lawsuits as well); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2044–54 (2010) (analyzing the difficulty of applying the heightened pleading standard in complex cases based on speculative allegations); Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 946 (2010) (noting that in *Iqbal* the Court took power away from the jury). *But see* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010) (challenging the idea that *Iqbal* and *Twombly* did not do away with standards established under *Conley*).

2. *A Contemporary Meaning and Expectations Reading*

The contemporary meaning and expectations factors that support a departure from the *Conley* standard are the second (the nature and consistency of official action), third (the broader legal landscape), and fourth (actual public behavior).

At first glance, it appears that official action has consistently affirmed *Conley*'s textualist and intentionalist reading of Rule 8(a). As we have seen, the Supreme Court had consistently adhered to the notice pleading standard.[213] Focusing only on the Supreme Court's decisions, however, can be misleading. Indeed, it is apparent from the practices of lower courts—where the law is really made in a legal realist sense[214]—that the Supreme Court's rulings concerning Rule 8(a) were the anachronistic outliers. Lower courts, to which litigators who draft complaints are most beholden, have imposed heightened pleading requirements in a stunning array of cases.[215] Indeed, notice pleading was the standard in name only.[216] To illustrate the distance between the Supreme Court's formal standards and the standards imposed by the lower courts, simply consider that the Court regularly had to step in to reject the heightened pleading standards imposed by lower courts.[217] The truth is that lower courts have been in a pitched battle with the Supreme Court over plead-

213. *See* Conley v. Gibson, 355 U.S. 41, 41–42 (1957); *see also* Swierkiewicz v. Sorema, 534 U.S. 506, 508 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).

214. *See* Levin, *supra* note 89, at 974 ("[F]rom a legal realist perspective, 'law' can only be defined by what it does and how it operates.").

215. *See* Fairman, *supra* note 204, at 1013–14. In the article, Fairman examines multiple examples of lower courts imposing heightened pleading standards to help combat mounting case loads and rising litigation costs. For example, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, the Court's dicta implied that lower courts could impose heightened pleading standards in antitrust cases. 459 U.S. 519, 528 n.17 (1983). In *Cash Energy, Inc. v. Weiner*, after surveying the judicial extension of heightened pleading standards (i.e. antitrust, RICO, civil rights, etc.), Judge Robert Keeton reasoned that CERCLA claims should be afforded the same treatment as other classes of cases. 768 F. Supp. 892, 900 (D. Mass 1991). Another example of the courts expanding heightened pleading standards is in the area of conspiracy claims. Fairman reasoned that "[b]ecause a conspiracy claim requires an underlying tort to be viable . . . . [c]ourts offer multiple justifications for these higher pleading burdens." Fairman, *supra* note 204, at 1033–34; *see also* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 493 (1986) ("Once the notice pleading chimera is banished, very difficult problems remain. Under the Federal Rules, there is a systematic tendency to react to the risk of inaccurate decisions by adding procedural layers intended to improve accuracy. . . . [T]his tendency c[ould] deprive litigants of *any* decision on the merits . . . .").

216. *See* Fairman, *supra* note 204, at 1021 n.209 (considering *DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53, 55–56 (1st Cir. 1999), where the court dismissed a section of the claim for failure to allege facts that establish all the elements of the claim after expressing that there was no heightened pleading standard in antitrust cases); *see also id.* at 1017 n.196 ("Where a claim involves the right to petition governmental bodies . . . we apply a heightened pleading standard." (quoting Or. Natural Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1999))).

217. *See* Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985) (requiring plaintiffs to plead with particularity in cases against government officials); *see also* Palmer v. City of San Antonio, 810 F.2d 514, 516–17 (5th Cir. 1987) (extending the holding in *Elliott* to municipal corporations).

ing standards, and the lower courts' consistent efforts to impose heightened standards reasonably led litigators to understand that more than notice pleading was required.

With respect to the broader legal landscape, *Twombly* emerged in a context radically different from that which existed at the time the Rules were adopted or from when *Conley* was decided. The Rules were adopted at a time when a dominant concern was increasing access to the courts. Thus, the Rules reduced the pleading requirements substantially and generally simplified the process of bringing and prosecuting a lawsuit.[218] Today, however, the context is decidedly different. Correctly or not, courts' dockets are declared ever-exploding;[219] lawsuits are viewed with skepticism; and politicians and social critics inveigh against strike suits, plaintiffs' lawyers, and a litigious culture. Defendants are often portrayed and viewed as victims of unscrupulous plaintiffs looking for an easy and quick buck. This view has found expression in the systematic construction of procedural and substantive barriers to access to the courts.[220] Thus, the reification of heightened pleading standards did not come out of the blue. It is fully in keeping with a larger legal, political, and social context; notice pleading was an anachronistic holdover from a different legal culture.

Finally, by considering litigators' actual pleading practices, we get a sense of what they understood the Rules to require. Anyone who has ever practiced as a litigator or clerked in a district court knows that actual pleading practice does not reflect the Rule 8 standard articulated in *Conley*. Actual complaints, for whatever reason or reasons, are nearly universally far more detailed with all kinds of factual allegations, than a perusal of the formal standards would suggest as necessary or desirable.[221]

In *Twombly*, the majority opinion focuses on just these factors, and especially the guidance provided by lower courts, to explain and justify its reasoning. Consider this passage:

> [A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. *See, e.g.*, *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d, 1101, 1106 (7th Cir. 1984) ("*Conley* has never been interpreted literally" and, "[i]n practice, a complaint . . . must contain either direct or inferential allega-

218. *See* Marcus, *supra* note 215, at 440.

219. *See* R. Jack Ayres, Jr., *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review*, 60 BAYLOR L. REV. 337, 449 (2008); Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 127 (2006); *see also* Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U. L. REV. 383, 383 (2003) (observing how the Supreme Court has a more favorable view of arbitration as a result of exploding dockets).

220. Levin, *supra* note 89, at 973–74.

221. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1672 (1998) (noting that "ordinarily plaintiffs in American litigation actually plead with the kind of specificity required elsewhere in the world"—that is, much more than *Conley* required).

> tions respecting all the material elements necessary to sustain recovery under *some* viable legal theory" (internal quotation marks omitted; emphasis and omission in original); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (tension between *Conley*'s "no set of facts" language and its acknowledgment that a plaintiff must provide the "grounds" on which his claim rests); *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) ("[W]hen a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional . . . action into a substantial one"); *McGregor v. Indust. Excess Landfill, Inc.*, 856 F.2d 39, 42–43 (6th Cir. 1988) (quoting O'Brien's analysis); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) (describing *Conley* as having "turned Rule 8 on its head"); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463–465 (1986) (noting tension between *Conley* and subsequent understandings of Rule 8).
>
> We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough.[222]

Note the Court's special focus on the interpretations of lower courts. It seems to be responding to the practices of lower courts and lawyers in an attempt to bring its own jurisprudence in line with what it perceived those practices to be. Viewed through the lens of the contemporary meaning and expectations approach, this instinct is justifiable. After all, the alternative is to maintain the fiction of notice pleading in Supreme Court jurisprudence while the reality of heightened pleading standards continues to be practiced, in unpredictable fits and starts, in the courts below. Thus, the *Twombly* and *Iqbal* majorities—mainly constituted, ironically, by the conservative wing usually associated with textualism—adopted a contemporary meaning and expectations approach to adjust doctrine in light of the emerging understanding of what the law required.

The problem with these cases, however, and the reason the Court's approach ultimately fails the contemporary meaning and expectations test, may be identified by focusing on the fifth and final factor suggested by the approach: the "do not make waves" principle. Consider what would have happened had the Court again reaffirmed *Conley*'s notice pleading standard. Most likely, we would have seen what we saw in the wake of the Court's earlier rulings reaffirming *Conley*: the lower courts would have adjusted in light of the Supreme Court's ruling, and after a

222. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007) (citation formats revised) (first alteration added).

period of time would have begun raising the pleading standards again. By introducing the plausibility standard, however, the Court threw the law and the social equilibrium into chaos. Lower courts have been explicit—they do not know what the Supreme Court now requires of them—and lawyers are similarly stymied.[223] Indeed, the reaction among courts and lawyers indicates that the Supreme Court's opinions in *Twombly* and *Iqbal* did not represent the contemporary public meaning of the pleading doctrine at all, and thus that the Court went too far. Indeed, rather than bring the doctrine in line with public expectations and practice, the Court severely destabilized the law. The contemporary meaning and expectations approach helps to explain what the Court was up to in these cases, but it does not ultimately justify them.

VII. CONCLUSION

The aim of this Article is to introduce a new approach or theme into the practice of statutory interpretation. This approach has vast implications, only some of which can be explored in a single Article, and it suggests several fruitful areas for further research. One such area would be the nature of the interaction between this approach and current administrative law doctrine. The contemporary meaning and expectations approach advises deference to administrative agencies. Students of statutory interpretation are familiar with *Chevron*[224] and *Skidmore*,[225] the dominant paradigms of administrative deference. *Chevron* deference applies where the legislature has delegated the task of implementing a statute to an administrative agency and left a statutory term ambiguous. *Skidmore* deference, which is far less robust than *Chevron*, applies where there has been no delegation. Traditionally, *Chevron* deference is justified on the grounds of its democratic pedigree and agency expertise. *Skidmore* is likewise justified on these grounds, but the democratic pedigree is weaker. Under *Chevron*, the agency's decision enjoys democratic legitimacy on the grounds that (1) administrative agencies are part of the executive branch of government, which, in turn answers to the polity, and (2) the legislature, itself a democratically legitimate entity, has expressly granted the agency the power to implement, and thus interpret, the statutory scheme. *Skidmore* deference applies where the first source of dem-

223. *See* Dennis Connolly, Twombly/Iqbal *Pleading Requirements in Preference and Fraudulent–Transfer Cases*, AM. BANKR. INST. J., Jul.–Aug., 2010, at 22, 76–77 (citing multiple cases post-*Twombly* and *Iqbal* in which the courts employed the heightened pleading standard to the detriment of plaintiffs); Kendyl Hanks et al., *Supreme Court Update: Decision from 2009*, BUS. L. TODAY, Sept.–Oct. 2009, at 43–46 (noting that *Twombly* and *Iqbal* have the potential to impair plaintiffs in their ability to withstand motions to dismiss); Richard J. Pocker, *Why the* Iqbal *and* Twombly *Decisions Are Steps in the Right Direction*, FED. LAW., May 2010, at 38, 38 (2010) (noting how critics of the two decisions say there is too much uncertainty and flexibility in such a subjective process).

224. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

225. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

ocratic legitimacy is present but the second absent. The contemporary meaning and expectations approach suggests an additional justification for administrative deference: the agency got there first and thus channeled public understanding and expectations. Exploring this rationale may help to explain some applications of the current deference schemes and suggest new normative directions for the doctrines.

Second, the approach suggests an expansion of our current notions of what constitutes precedent. If contemporary meaning and expectations justify deference to precedent, then perhaps landscape precedents, administrative precedents, foreign precedents, and other sources of contemporary meaning and expectations ought to be taken more seriously. Perhaps the distinctions between binding and persuasive authority should be less rigid, with the focus placed instead on how much reliance and contemporary meaning has coalesced around a particular interpretation. Once again, this has both descriptive and normative dimensions, as well as implications for current debates about how different decision makers ought interpret and implement statutes.[226]

Finally, if contemporary meaning and expectations considerations are to emerge as a dominant and coherent theme within statutory interpretation, it will be necessary to explore how it might interact with other interpretive modes and to develop a hierarchy of sources and arguments. Such a project would consider whether the approach should have different application and reach in different contexts. For example, perhaps its application in criminal cases should differ from its application in civil cases. Likewise, maybe interpretations of statutes providing private causes of action should differ from some statutes allowing enforcement only by a regulator. And, in any type of case, we must consider how much social adoption of a single interpretation is necessary before it may be identified as legally binding by judges.

There is a great deal more to be done in considering how contemporary meaning and expectations do guide and should guide the judicial practice of statutory interpretation. This Article begins to explore the approach by showing that its principles are present in and relevant to the project of statutory interpretation, arguing that they should play a more prominent role, identifying some of the approach's dimensions and implications, and beginning to identify a methodology for how it could work in practice.

226. Aaron Bruhl, *supra* note 88, at 102 (suggesting that lower courts apply different methodologies of statutory interpretation from those applied by the Supreme Court); Jerry L. Mashaw, *Norms, Practices and the Paradox of Deference: A preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 535 (2005) (suggesting that administrative agencies apply different interpretive standards from those applied by courts).