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ACTIVIST OR AUTOMATON: THE INSTITUTIONAL NEED TO REACH A MIDDLE GROUND IN AMERICAN JURISPRUDENCE*

*Richard Lavoie***

I. INTRODUCTION

The recent political season saw the idea of judicial activism regularly trotted out as an electioneering boogeyman at all levels of government—from local judicial races to the Presidency of the United States.[1] A common theme is that activist judges regularly overturn the will of the people by "legislating from the bench." Such rogue jurists twist the law in a manner that usurps the role of the legislature and thwarts the popular will in favor of the judges' personal views. On the other side, one sometimes hears equally strident claims that limiting the judiciary to literalist modes of statutory interpretation transforms judges into mere automatons,

* This essay is based on a transcript of the author's remarks made at the Albany Law Review Symposium, *Issues Facing the Judiciary*, which was held at Albany Law School on October 28, 2004. These remarks were based upon the author's prior scholarship on this topic. *See* Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115 (2004).

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[1] *See, e.g.,* Valerie Bauerlein, *Senate Rivals Court Key Voters Down East*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 31, 2004, at A1 (identifying judicial activism as an issue used to motivate North Carolinians to vote in the hotly-contested U.S. Senate race for John Edwards's open seat); Editorial, *Courting Consistency*, COLUMBUS DISPATCH, Nov. 5, 2004, at 10A (applauding voters for effectively putting an end to an era of judicial activism by the Ohio Supreme Court); Jannell McGrew, *Roy Moore Backer Holds Lead*, MONTGOMERY ADVERTISER, Nov. 3, 2004, at A6 (describing the platform of Tom Parker, Alabama Supreme Court candidate, as one of "rein[ing] in 'judicial activism'" on the heels of public protest following the removal of Chief Justice Roy Moore for ignoring a federal court order to remove a monument of the Ten Commandments from the state Judicial Building); Richard Ruelas, *Judge Unexpectedly Targeted in Political Campaign*, ARIZ. REPUBLIC, Nov. 1, 2004, at 1B (discussing the tactics of a conservative Arizona political group intended to send a message to judges who are perceived as "trying to legislate increased abortion access and gay marriage from the bench"); Joan Vennochi, *Was Gay Marriage Kerry's Undoing?*, BOSTON GLOBE, Nov. 4, 2004, at A15 (suggesting that the Massachusetts Supreme Judicial Court played a role in John Kerry's presidential loss as a result of its approval of same-sex marriage during his campaign).

unwilling or unable to safeguard individual rights or apply the law in a reasonable manner to difficult factual situations.[2]

The purpose of this essay is to make a plea that we lay aside such strident rhetoric and approach the issue of the appropriate degree of judicial discretion from an institutional perspective. This essay suggests that neither extreme is a viable jurisprudential model from an institutional standpoint. Instead, the relative strengths and weaknesses of both our legislative and judicial institutions must be taken into account to find a middle ground with regard to judicial activism. Inherent in the idea of a middle ground is the need to accept that some degree of judicial activism is appropriate and necessary. The key difficulty, once this is agreed upon, is determining how to regulate judicial behavior to limit exercises of judicial activism to situations where it is institutionally beneficial. This essay maintains that internal constraints on judicial behavior can be used to effectively regulate judicial activism, but that this is only possible if steps can be taken to prevent politicizing the judiciary and to increase cohesion and consensus within the ranks of the judiciary itself. The theme for this symposium is issues facing the judiciary. This essay respectfully suggests that finding ways to foster judicial cohesion and consensus is one of the most important, and difficult, issues facing the judiciary today.

II. THE FUNCTION OF LAW AND THE LEGAL SYSTEM

Before discussing the proper role for judicial activism, it is first necessary to examine the function of the legal system and law itself. The law gives us order and rules by which we regulate the actions of individuals and channel activity to promote societal goals. To achieve these ends, the law must be both respected and obeyed. That is, the 'Rule of Law' must obtain. This concept dates back to Aristotle, who said that the law strives to be "reason unaffected by

[2] *See* Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999) (defining "formalism" as "an attempt to make the law both *autonomous*, in . . . that it does not depend on moral or political values of particular judges, and also *deductive*, in . . . that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases."). *See also* Stephen J. Fortunato, Jr., *Judging Judges Judging*, 48 HOW. L.J. 459, 484–89 (2004) (reviewing MARK KOZLOWSKI, THE MYTH OF THE IMPERIAL JUDICIARY: HOW THE RIGHT IS WRONG ABOUT THE COURTS (2003)) (remarking that the view of judges as mere automatons necessarily fails to account for the fact that judges are products of their various experiences and make decisions based thereupon).

desire."[3] While the Rule of Law is the centerpiece of a democratic society, there is surprisingly little agreement about its exact nature or how to achieve it.[4] The Rule of Law, in theory, can merely refer to a system where legal rules are uniformly adhered to and equally applied to all citizens.[5] But in a democratic society, individual obedience to the law requires more than mere fear of punishment for violations. For the law to serve as an effective constraint on behavior, members of a society must respect the substance of the laws and the process by which they are created and enforced.[6] This condition of respect for, and obedience to, the law will be referred to as the existence of the Rule of Law in a society.[7]

A. Establishing the Rule of Law—Promoting the Goals of Equality, Uniformity and Predictability

In a common formulation, the Rule of Law is characterized by laws that are equally, uniformly and predictably applied. For purposes of this essay, it will be assumed that these goals are

[3] ARISTOTLE, POLITICS 1287a:31–32 (B. Jowett trans.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1986, 2042–43 (Jonathan Barnes ed., 1984).

[4] *See* Patrick McKinley Brennan, *Realizing the Rule of Law in the Human Subject*, 43 B.C. L. REV. 227, 231–35 (2002) (suggesting that a rule of law, distinct from the "Rule-of-Law-not-of-men" ideal that has led some to declare the Rule of Law an impossibility, can be realized through the subjectivity of those who create, interpret, and administer the law).

[5] *See* Joseph Raz, *The Rule of Law and Its Virtue*, 93 LAW Q. REV. 195 (1977), *reprinted in* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 212–14 (1979) (noting that the Rule of Law—in its original, literal sense—"has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.").

[6] *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 807–08 (1989) (recognizing that a community's distaste for, and eventual disobedience of, a rule prevents the continued existence of that rule).

[7] For a more detailed discussion of the nature of the Rule of Law, see RONALD DWORKIN, A MATTER OF PRINCIPLE 11–13 (1985) (identifying and discussing, generally, two competing ideals of the Rule of Law: the "'rule-book' conception" and the "'rights' conception"); LON L. FULLER, THE MORALITY OF LAW 33–94 (rev. ed. 1969) (discussing eight procedural demands for creating and maintaining legal rules, and noting that failure to abide by any one of them results in an absence of the Rule of Law); Radin, *supra* note 6, at 783–92 (explaining the two primary, distinct conceptions of the Rule of Law: instrumental and substantive); JOHN RAWLS, A THEORY OF JUSTICE 235–43 (1971) (studying and understanding the Rule of Law in the context of a legal system); Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 12–16 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (criticizing both Fuller and Dworkin's models as overly idealistic given that they assume judges can divorce their opinions "from the normative and political context within which [their] ratiocinations take place"); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 36–38 (1997) (summarizing the four Rule of Law ideal types, and suggesting "that the Rule of Law, in its most idealized form, should be conceived as conjoining elements emphasized by each"); Robert S. Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1693–95 (1999) (outlining numerous principles of the rule of law recognized in Western legal systems).

necessary, but not sufficient, elements of the Rule of Law[8]. These characteristics and their relevance to this discussion are briefly outlined in the remainder of this section.

The first requirement of the Rule of Law is equal treatment. Applying the law equally to all citizens demonstrates the fairness and impartiality of the legal system. Since the system is not subject to manipulation by the rich and powerful, average citizens are more inclined to respect and obey the law themselves.

The second component of the Rule of Law is uniformity. Agreement among different judges regarding the meaning of a particular law promotes the public's belief in the law's rationality and encourages public reliance on the fixed meaning. Conversely, judicial disagreement regarding a statute's meaning instantly generates unequal treatment between similarly situated persons and delays arriving at a settled interpretation of the law.

The third characteristic of the Rule of Law is predictability. Predictability encourages citizens to plan their affairs in conformity with the law to society's benefit. If citizen reliance on the law is frustrated by unanticipated judicial interpretations, then faith in, and respect for, the law is diminished. The use of strict statutory construction arguably creates an environment in which both the judiciary and the public can more quickly understand the import of statutory language.

B. Facilitating Democracy—Ensuring the Law Reflects Its Society

Under the above approach to the Rule of Law, individuals can be protected from the arbitrary application of the law, while at the same time suffering from the creation of unjust laws. Thus, a dictatorship could exemplify the Rule of Law as long as the dictator's whims are clearly stated and enforced without regard to the violator's social or political status. Typically, however—and as used in this essay—the Rule of Law is thought to include safeguarding individual liberties from the arbitrary use of government power. The laws themselves must be just. The Rule of

[8] These elements are necessary but not sufficient since, as discussed in the next section, for the Rule of Law to truly exist there must also be a general respect for the law that grows out of the fact that the laws actually reflect shared societal values. *See* discussion *infra* Part II.B.

Law therefore requires the populace to freely accept the law, in addition to requiring that the law be fairly and impartially applied. In its most basic formulation, the Rule of Law represents a state where the law fairly communicates the will of society and society's members respect the law's expression of that will. Phrased so generally, the concept is not only uncontroversial, but is central to the existence of a democracy.

An important corollary to the requirement that the Rule of Law only exists when citizens believe that the law appropriately reflects societal values is that the law really only has meaning in its particular societal context.[9] Further, since society is constantly evolving, it is imperative that the institutions of government work to facilitate the law's adaptation to its ever-changing societal context.[10] With this understanding of the operation of the Rule of Law, and the goal of the legal institutions of government in fostering it, this essay can fruitfully turn to an examination of the appropriateness of judicial activism.

III. THE JUDICIAL ACTIVISM CONTROVERSY

A. Constraining Judges from "Making" Law—The Case for Strict Statutory Construction

While the case against judicial activism takes many forms, for purposes of illustration, the "New Textualism"[11] of Justice Scalia

[9] *See* John Dewey, Untitled Essay, *in* MY PHILOPSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 73, 76–77 (1941) ("[L]aw is through and through a social phenomenon; social in origin, in purpose or end, and in application."); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 18–19, 695 (2d ed. 1985) (declaring "[t]he law, after all, is a mirror held up against life," and "when we call law 'archaic,' we mean that the power system of its society is morally out of tune"); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living . . . "); GRANT GILMORE, THE AGES OF AMERICAN LAW 109–10 (1977):

> [The function of law] is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us. If the assumption is wrong, if there is no consensus, then we are headed for war, civil strife, and revolution, and the orderly administration of justice will become an irrelevant, nostalgic whimsy until the social fabric has been stitched together again and a new consensus has emerged.

Id.

[10] Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 142, 144–45 (2004).

[11] The phrase "New Textualism" was first used by Professor William Eskridge to describe Justice Scalia's approach to statutory interpretation. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24 (1990).

represents a well-articulated attack and means of addressing the perceived concern. The New Textualism is premised on the belief that strict statutory construction is required to promote the Rule of Law.[12]

In particular, as discussed above, a legal system is said to exemplify the Rule of Law if it promotes the goals of equality, uniformity and predictability.[13] The linchpin to Justice Scalia's approach to the Rule of Law is that judges must, in fact, be able to find only a single interpretation of the law and enunciate it in a clear and defensible fashion for these three characteristics to exist.[14] Uniformity among judges requires that they discern the same meaning for the same law, divorced from the facts of the particular case in point. To ensure equal treatment, the judge must be able to state clearly for the public the rule being applied. Predictability requires that not only judges, but also the public itself, be able to discern and anticipate the uniform meaning that ultimately will be given to a particular statute. Therefore, to make this interpretation of the Rule of Law possible, Justice Scalia limits judicial discretion to a highly constrained mode of statutory interpretation—New Textualism. This theory emphasizes adhering literally to the plain meaning of the statutory language and rejects undertaking any analysis of other sources of interpretive authority that otherwise might lead reasonable minds to differ regarding meaning.[15]

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[12] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182–83, 1185, 1187 (1989) (insisting that there must be at least *some* basis in the text upon which general rules of law are based).

[13] *See* discussion *supra* Part II.A; Scalia, *supra* note 12, at 1176–79, 1182–83 (arguing that, in deciding cases, judges must apply general rules, formulated from constitutional and statutory text, rather than rely on the facts of the particular case, in order to foster equality, uniformity and predictability in the law).

[14] *See id*. at 1182–84 (asserting that the ability to deduce a "precise [and] principled" statement of the law is "the essence of the judicial craft").

> Of course, the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one's method of textual exegesis. For example, it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.

Id. at 1183–84.

[15] While New Textualism focuses primarily on divining "the intent that a reasonable person would gather from the text of the law," in some limited situations even New Textualism deigns to broaden its inquiry. 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 3, 17 (Amy Gutmann ed., 1997). Thus, it is permissible to construe the text of a law in its statutory context to prevent ascribing a meaning contradicted by other parts of the statute itself. *Id*. at 16, 20–21. It is also permissible for a court to correct mere "scrivener's error[s]" in interpreting a statute. *Id*. at 20–21. Additionally, in rare circumstances where there is a "solid indication in the *text or structure of the statute* that something other than ordinary meaning was intended[,]" the

Unfortunately, as a result, New Textualism severely limits the discretion of judges to interpret the law consonantly with the views of society.[16] The literal text of the statute is thought to have a fixed meaning from which judges are not free to stray. In this view, judges should essentially be faithful agents, implementing the decisions that the legislature has arrived at as properly reflecting societal values. Thus, New Textualism advocates strict statutory interpretation as a means of reducing judicial activism—thereby realizing the Rule of Law—but does so at the expense of allowing the judiciary any role in molding the law to fit difficult or unanticipated situations. This approach places the entire burden of adapting the law to society's values upon the legislature. As discussed below, while this is the primary institutional role of the legislature, and the judiciary is generally not well-placed to make broad policy-oriented decisions for society, as an institutional matter, the legislature is ill-suited to carry this entire burden alone.[17]

B. Encouraging Judges to "Adapt" Law—The Case for Open-Ended Statutory Construction

The historic strength of the American judiciary has been the creation of common law through incremental case-by-case adjudication. While Justice Scalia maintains that this common law

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plain meaning of a statute can be modified by a court. Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting) (emphasis added). In Scalia's view the proper approach to statutory interpretation is to:

> first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.

Id. at 404 (Scalia, J., dissenting). Even when the ordinary meaning of the text is found to be contrary to the remainder of the statutory scheme, however, New Textualism maintains that the appropriate meaning is still to be ascertained by reference to the statute as a whole—in light of its plain meaning and statutory context—rather than by an analysis of the statute's legislative history or other evidence. *See, e.g.,* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring in judgment) (proffering that even when a text's ordinary meaning is absurd, legislative history and other evidence may only be used to confirm that the legislature did not conceive of the result, and may not be used to develop the actual meaning of the text). Consequently, even in the limited circumstances when New Textualism departs from the ordinary meaning of a statutory text, it refuses to permit extratextual values or authorities to inform the statute's meaning.

[16] *See* Sunstein, *supra* note 2, at 638–39 (noting that "formalism," as "*an interpretive strategy*," denies judges discretion to "make exceptions" to existing law or "allow meaning to change over time").

[17] *See* discussion *infra* Part IV.A–B.

tradition is of little relevance given the statutory, constitutional and precedential restraints on our modern-day judicial system, others believe there is still much room for courts to adapt and mold the law to fit specific factual situations.[18] By giving the judiciary a freer hand in applying the law, judges can adapt statutes to better effectuate legislative intent and ameliorate unintended consequences in certain factual situations. In this way, the judiciary helps to ensure that the law appropriately reflects societal values. Further, accepting a broader role for the judiciary in interpreting statutes also provides an important safety valve against short-sighted majority excesses that do not properly weigh long-term societal interests.

While the primary institutional role of the judiciary is to adjudicate specific cases and ensure that society's laws are evenly and fairly enforced, those advocating a broader interpretive role for the judiciary believe that courts must also create and adapt the law to properly perform their function. The risk, however, is that particular judges routinely disregard the will of society and the legislature in favor of unilaterally imposing their personal views on an unwilling populace.

IV. THE ROOT OF THE CONTROVERSY—HOW BEST TO REFLECT SOCIETY'S VALUES

This essay asserts that the crux of the disagreement between strict interpretationists—who are fearful of judicial activism—and open interpretationists—who embrace judicial activism—concerns how best to reflect the desires and values of society in the law. A central tenet of New Textualism is that judges cannot be trusted with any power to create law since this role should be the sole province of the legislature.[19] At the other extreme, the argument can be made that the judiciary must have complete latitude in creating law to protect the rights of political minorities from majoritarian excesses and permit judges to act as the conscience of society. This section will discuss these positions from an institutional perspective and argue that neither extreme represents an acceptable institutional solution. Instead, a middle ground,

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[18] *See* Scalia, *supra* note 12, at 1176–80.

[19] While there is a separation of powers aspect to this argument, this essay focuses exclusively on New Textualism's argument that democratic and other institutional concerns require denying any lawmaking function to the judiciary. For a discussion and rebuttal of New Textualism's separation of powers argument, see Lavoie, *supra* note 10, at 163–67.

where the judiciary is allowed some degree of lawmaking authority, but is also subject to constraints on the exercise of this authority, represents the best overall solution from an institutional perspective.

A. The Institutional Limits of the Legislature

Since New Textualism forecloses the judiciary from considering societal values when interpreting statutes, the law is less easily adapted to its societal context under this approach.[20] Since courts are prohibited from inserting societal values into the law, this burden must be shouldered entirely by the legislature. This is an institutional burden that the legislature is ill-equipped to bear alone. To the extent that the legislature fails in shouldering this burden, society's laws will become increasingly isolated from its collective values, and the public will begin to recognize that the law is no longer serving its desired societal function. As a result, citizens will become disenchanted with the entire legal system and the Rule of Law will be undermined.

In the first instance, the legislature is charged with reflecting society's values when it drafts the law. Legislatures are democratically elected bodies that are institutionally well-suited to deliberate over issues facing society. They can debate all the arguments, canvas their constituents, and consult with divergent interest groups and experts. Ultimately, legislative decisions are normally the product of delicately negotiated compromises between various interest groups. However, this does not mean that the legislature will always arrive at laws that appropriately reflect the values of a society. Legislatures can be strongly influenced by powerful minority interest groups and well-funded lobbyists. Similarly, a political party in control of the administrative functions of the legislature may use issue control and other parliamentary maneuvers to adopt legislation that, in fact, represents a minority position within the broader society. Consequently, it is by no means clear that delegating sole authority to the legislature for inserting societal values into the law is the best institutional approach.

[20] This is not to imply that a legal system based on strict judicial construction is theoretically impossible. For instance, if the institutions of government facilitated the rapid creation and revision of society's laws, the laws could be kept in tune with society's values without the need for the judiciary to fulfill this role. However, whether such a system is possible in practice is considerably more doubtful, as discussed below.

Additionally, New Textualism's refusal to look beyond a statute's literal words presents the legislature with a Sisyphean task. For instance, if a law containing only general principles is enacted, a literalist judiciary will either strike the law down for vagueness or enforce it strictly as drafted, thereby covering many specific situations that the legislature did not intend to cover. Conversely, if a detailed and narrowly crafted statute is enacted, individuals will devise methods to thwart the legislature's purpose without violating the specific provisions of the narrowly drafted statute. Since a literalist judiciary will refuse to narrow a general statute or extend a specific one to comport with societal and legislative purposes, the legislature faces the impossible task of drafting its legislation with every conceivable situation in mind. Since statutory language inevitably will prove insufficient, the legislature must continually and constantly revise its laws to ensure that society's goals are not frustrated. With so much legislative effort devoted to maintaining prior laws from such attacks, new societal concerns may go unaddressed for want of legislative resources.

Additionally, the legislature's constant revision of the law is likely to create rules so convoluted, specific, and complex that the average citizen simply despairs of ever understanding them. Such a situation breeds contempt for the law and raises concerns about equal treatment. Those who are well-advised by teams of attorneys can be expected to uncover technical gaps enabling them to "legally" avoid the law. The average citizen will assume that the complexity of the law is being exploited by the rich and powerful in this manner. When the law ceases to become understandable, and court decisions make literalist interpretations that society views as contrary to its desires, respect for the law evaporates.[21]

Further, even when the legislature is able to promptly amend the law to close particular loopholes, it is, in effect, encouraging the unethical acts that prompted the amendment. By implicitly rewarding those who are the first to discover and exploit unintended consequences in the law, strict interpretation creates a dynamic where citizens rush to undertake unethical actions to gain an advantage over competitors.[22] This rush to the bottom promotes

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[21] *See, e.g.,* William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1181, 1187 (1992) (concluding that Justice Scalia's approach to statutory interpretation is likely to "attract[] public disrespect rather than provid[e] the public with a reassuring image of the judicial process.").

[22] Of course, the legislature might try to stem this problem by enacting retroactive laws, but this itself would defeat one of New Textualism's main concerns about the Rule of Law—that it be predictable.

the belief that unethical action pays, and leads to the perception that the law itself is fundamentally unjust. It also creates an environment where uncertainties in the law will be uncovered and exploited quickly, thus putting the legislature under even greater pressure to keep revising the law to remedy each new loophole discovered.

By refusing to apply reason to the interpretation of statutory text, the judiciary validates the right of the well-advised to circumvent the law's intent by artifice and the identification of technical loopholes. Abdication of the judicial role of a fair interpreter of the law results in making the law not only unaffected by *desire*, but also unaffected by *reason*.[23] Detaching the law from its societal context leads to an increase in unethical action and public disenchantment with the legal system. Consequently, while the legislature has the primary role in interpreting societal desires and values, it should not be made to carry this burden alone. By giving the judiciary a role in closing statutory gaps and aligning the law with societal values and legislative intent, the legislature can function more efficiently, and society's need for laws that are in line with its values can be more efficiently satisfied.

B. The Legitimacy Problems of the Judiciary

The foregoing section demonstrated that, from an institutional perspective, the judiciary should be permitted some lawmaking authority to help further societal interests and ease the unmanageable burden that would otherwise be placed on the legislature. Nevertheless, lawmaking is not the primary function of the judiciary. Rather, the judicial function is one focused primarily on ensuring that the law is fairly and uniformly applied in particular factual situations. This incremental method of decision-making is at the very heart of the common law system. Institutionally, the judiciary performs best when acting pursuant to the facts of a particular case to ensure that justice is done.

Conversely, courts are typically not well-suited to consider broad policy matters regarding societal values and decisions. First, the judiciary only considers the issues presented to it. Consequently, a particular court may lack the information and access to different viewpoints that would be necessary to reach a sound interpretation

[23] As mentioned above, Aristotle believed and proclaimed that "[t]he law is reason unaffected by desire." ARISTOTLE, *supra* note 3, at 2042–43.

of societal values. The judiciary does not hold debates or consult outside experts on its own initiative. Second, the typical nature of the judicial inquiry is to choose between the positions presented by the litigants. As a result, courts lack the ability to arrive at the type of negotiated compromise over the scope of the law that usually results from legislative action. Finally, in many cases, the judiciary is not subject to direct democratic control. That is, to the extent that judges are appointed rather than democratically elected, they may not be as sensitive to the popular will, and thus may hold views not reflective of society as a whole.

Thus, while the judiciary needs some ability to actively inject societal values into the law, it is not institutionally positioned to take on this role as its primary function. The judiciary does best in this realm when it constrains its interpretations to filling gaps in a statutory framework. This relieves the legislature of the burden of drafting foolproof statutory language and generally promotes respect for the spirit of the law by citizens who are reassured that the courts will act as the caretaker of the societal values embodied in the law. Similarly, the courts also appropriately exercise lawmaking power when they act to protect against short-term majoritarian excesses, or to foster experimentation on issues that lack public consensus.

In short, there is a line that needs to be maintained regarding the appropriate level and circumstances for exercising judicial activism. When judges make decisions motivated by their own personal beliefs and actions, they are usurping an institutional role for which they are ill-suited. When judges totally eschew activism, citizens are incentivized to exploit statutory gaps and the Rule of Law begins to break down because the legislature is incapable of shouldering the full burden alone. The result of this institutional analysis is that we should structure our jurisprudence in such a way that the legislative and judicial institutions work together to achieve laws that are in line with what society is truly valuing at the time.

C. The Nature of a Balanced "Middle Ground" for Judicial Activism

While a legitimate debate could be pursued regarding the exact parameters of an ideal middle ground for judicial activism, this essay will set forth a baseline position that would attain more systemically optimal results than either of the extreme positions

regarding judicial activism. In this suggested middle ground, the legislature would be charged with making the law based on policies and political compromises that further overall societal interests and values. Ideally, the legislature would approach this task by adopting general, standards-based provisions, yet not engage in overly technical legislation that attempts to delineate every conceivable situation. The legislature should be comfortable in taking this approach since the judiciary is charged with applying the law in a manner that fills in any technical gaps and implements the societal choices made by the legislature.[24] The courts then are the guardians of the fair application of the law by acting to fill gaps and put flesh on the statutory framework.

This approach achieves a number of goals. It ensures that the law is always adaptive and dealing with unanticipated applications and consequences. It ensures that justice is done and creates faith in the common citizen that the system works fairly to implement shared societal values. It facilitates a self-adjusting set of laws, such that the legal system will achieve laws that are in line with what society is valuing overall.

However, judicial activism should not be solely limited to this type of gap-filling role. There are certain situations where courts must take a more activist role for the good of society. For instance, certain laws adopted by a legislature may be struck down by a court as not in accord with broader, typically constitutionally-based, long-term societal values. Thus, it is appropriate for courts to assume an anti-majoritarian role when necessary to protect the constitutional rights of political minorities. Additionally, the nature of the adjudicative function may insert the courts into controversial areas where no societal consensus exists. In such circumstances, a court may well be forced to rule in an area where there is no legislative guidance, or where existing guidance is arguably no longer representative due to society's evolving culture. In such situations it is appropriate for the judiciary to further the development of the law by crafting a solution to a particular case despite lively debate concerning the issue generally. That is, the judiciary can serve to further such debate. Such controversial judicial decisions are likely to be the topic of active debate in the legislature, which will then need to face an issue that it has perhaps eschewed. In this way, the

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[24] It should be noted that administrative agencies of the executive branch may also bear part of this interpretive burden for the legislature. Given the focus of this symposium on issues facing the judiciary, this essay does not explore this interplay between the legislative and executive functions.

judicial decision can be the starting point for a dialogue between the branches of government regarding the topic—allowing for an incremental give and take between the branches as laws are made, interpreted, and modified. Such incrementalism can be beneficial to society in limiting the speed with which changes occur in the law until a true societal consensus emerges regarding the issue.

V. SAFEGUARDING THE RULE OF LAW UNDER A "MIDDLE GROUND" APPROACH

This essay has asserted that based on institutional strengths, a middle ground position should be taken regarding judicial activism. That is, judges should be permitted to make and adapt the law in certain situations as a matter of overall institutional efficiency. This view permits the interplay of the judicial function with the implementation of societal values. It approaches the law as a fluid concept constantly adapting to society; and therefore judges must facilitate the ability of the law to reflect its changing cultural context. As Professor Radin states:

> judges are an interpretive community conscious of their obligation to act as independent moral choosers for the good of a society, in light of what that society is and can become. The law, as long as it is part of a viable and developing community, is neither "found" nor "made," but continuously re-interpreted. There are still rules. But there are no rules that can be understood apart from their context; nor are there rules that can be understood as fixed in time.[25]

However, this position is directly contrary to the assumption of New Textualism that the Rule of Law cannot exist if judges are given any lawmaking function. New Textualism's attack on judicial activism focuses on the alleged inability of a legal system with activist judges to maintain equality, uniformity and predictability in the law. This essay maintains that these concerns can largely be addressed in a manner that both promotes the Rule of Law and recognizes a legitimate role for judicial consideration of society's values. This section focuses on the New Textualist concerns and how they can be addressed by fostering greater cohesion and consensus within the judiciary itself.

[25] Radin, *supra* note 6, at 817.

A. *Achieving Equality, Uniformity and Predictability through Institutional Consensus*

New Textualism maintains that equality, uniformity and predictability are essential elements for promoting the Rule of Law. These three concepts are closely linked and share a similar aim: to cause every judge to reach similar results in similar cases based on similar rationales. New Textualism achieves this goal by limiting judicial interpretation to the plain meaning of the literal statutory language. While injustice may result because judges are denied the ability to tailor the law to particular facts, New Textualism's approach imposes similar results in all cases based on a standardized determination of the plain meaning of the statute. However, this is not the only means of achieving this end.

The key to designing a judicial system that appreciates its social context, while still substantially complying with the need for equality, uniformity and predictability, is to ensure that the system promotes genuine consensus among judges regarding the appropriate result for any particular case.[26] If most judges would agree on the proper application of the law to a particular fact pattern based on an examination of all the relevant information (including societal context), then equality, uniformity and predictability would be maintained, while the injustice of an inflexible rule would be avoided. Where the relevant judicial institutions create an interpretive community sharing similar values and approaches to legal interpretation, individual beliefs will be sufficiently constrained by reason and peer scrutiny, allowing substantial consensus to emerge.[27] Such a judicial system achieves true equality, uniformity and predictability in the law by constraining the passions and motives of individual judges from within the judiciary, rather than giving the mere semblance of eliminating such motives by imposing a New Textualist artificial

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[26] Note that this requirement is distinct from the statement that one should "'[t]reat like cases alike and different cases differently.'" H.L.A. HART, THE CONCEPT OF LAW 155 (1961). That statement is a justification for obeying past precedent by requiring that similar fact patterns receive the treatment previously applied under the law, but different facts can warrant departures from a prior rule. As such, the statement sidesteps the question of how one is to determine whether the addition or subtraction of a particular fact actually constitutes a significant difference. *Id*. at 155–56.

[27] Such general consensus was thought to exist within the context of the English common law. *See id*. at 131–32. Professor Bruner has asserted that the force leading to such general consensus in the common law was the shared understanding of the implicit moral precepts on which the law is ultimately based. *See* Jerome Bruner, *Psychology, Morality, and the Law*, *in* SOCIAL DISCOURSE AND MORAL JUDGMENT 99, 101–02, 105 (Daniel N. Robinson ed., 1992).

uniformity over all cases.

The American judicial system is institutionally positioned to produce consensus around its decisions.[28] Consensus is institutionally promoted by: (1) requiring published opinions stating the judges' reasoning so that it can be openly scrutinized, criticized and ultimately overruled or accepted by society; (2) requiring that decisions be grounded on the facts of the particular situation, prior precedents, accepted legal principles and the statutory text, thus ensuring that the law's evolution is well-considered; and (3) ensuring that the judges themselves share a common understanding of their role and how they are to reach their decisions.

The first two criteria are well-established in American jurisprudence and are considered hallmarks of the common law system.[29] However, the third requirement necessitates that judges agree on the correct mode of statutory interpretation. As New Textualism gains strength, the judicial schism over statutory interpretation becomes a threat to the system's traditional ability to reach consensus regarding legal meaning. Two judges examining the same case are more likely to reach dissimilar conclusions if one is bound to examine only the literal words of the relevant statute, while the other feels free to factor in societal values and statutory purpose. Thus, creating continued cohesion and consensus is a major challenge facing the judiciary today.

B. Meeting the Challenge of Fostering a Cohesive Judiciary

From an institutional perspective, a limited degree of judicial activism is a crucial ingredient for an effective legal system. While the appropriate degree of activism can be regulated internally via a

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[28] Popkin, *supra* note 21, at 1170 ("Courts are in a good position to apply public values to the resolution of disputes because . . . their process of reflective thought and collegial dialogue gives them a unique opportunity to work out the implications of public values.").

[29] *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10, 14, 18–23, 149 (1922) (discussing the nature of common law adjudication, and the function of judicial precedent and the judge's individual role within this process); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3 (1989) (stating: "The notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems"); Robert A. Leflar, *Some Observations Concerning Judicial Opinions,* 61 COLUM. L. REV. 810, 810–11 (1961) (discussing how the opinion writing process is in part the function of the law, and how this process should produce predictable and justifiable opinions if the process is functioning properly); Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 205 (1984) (arguing that the careful scrutiny given to court opinions promotes objective, rational thought by judges rather than imposition of their personal preferences).

shared consensus regarding their role within a professional judiciary, the judiciary is currently in crisis. New Textualism has created a schism regarding the appropriate mode of statutory interpretation. Additionally, the political process has increased the role of partisanship in the selection of judges at all levels.[30] This has resulted in a highly factionalized judiciary that is less cordial in its internal relations and less likely to respect its independent institutional role as a professional community charged with responsibility for enforcing the law in an equal, uniform and predictable manner.[31] Creating a judiciary that values internal discourse and is respectful of other viewpoints is a crucial element in forging overall consensus among judges.

This then is the conundrum facing the judiciary: the current political system, in the name of promoting the Rule of Law or protecting individual liberties (depending on your political leaning), is creating deep divisions in the judiciary that ultimately result in a less equal, uniform and predictable application of the law, and expose judges acting with an institutionally appropriate level of judicial activism to charges of inappropriate decisions. It also relaxes the internal institutional constraints that would otherwise prevent individual judges from engaging in unwarranted levels of judicial activism, and therefore allows certain judges to act on their personal biases and, in fact, to engage in institutionally counterproductive types of judicial activism.

VI. CONCLUSION

The purpose of this essay is not to offer a panacea for the difficult situation the judiciary is facing. Rather, the purpose here is to bring forth the real issues and separate the political rhetoric from the institutional realities. If our government is to act as intended—with appropriate checks and balances on the power of other branches, and effective methods for ensuring that the law is kept in

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[30] This is true on both ends of the political spectrum, with Democrats often using a judge's views on abortion or other issues as a litmus test for qualification and Republicans promoting only the most socially conservative and strongly textualist jurists.

[31] For a study of the effects of political ideology and panel composition on judicial voting, see Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004), concluding:

> Because of the disciplining effect of precedent, and because judges do not radically disagree with one another, there is significant commonality across political parties. But in the most difficult areas, the ones where the law is unclear or in flux, both party and panel effects are large enough to be a source of serious concern.

Id. at 348.

line with societal values—then there must be an acceptance that judicial activism is neither an unmitigated evil or an unassailable good. Instead, judicial activism is an important element in maintaining the overall balance and efficiency of our form of government. It must be appropriately constrained, but it must also be acknowledged as a necessary judicial tool. This essay is a plea to all parties to tone down their rhetoric and return to an age where jurists were selected based on legal acumen rather than politics.