Trumps, Inversions, Balancing, Presumptions, Institution Prompting, and Interpretive Canons: New Ways for Adjudicating Conflicts Between Legal Norms

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Abstract

This article begins by reviewing the axiomatic principles that govern courts when dealing with cases in which two legal norms are interpreted as standing in conflict. The article then makes three distinct contributions.

First, the article explicates the central justification behind the use and perpetuation of the extant principles. In briefest terms, the extant principles are best justified as an attempt to resolve cases in which legal rules stand in conflict in a way that enhances or preserves the democratic legitimacy of law. They do this by favoring norms created by entities of relatively strong democratic legitimacy over norms created by entities of relatively weak democratic legitimacy. For example, under the extant principles, a statute will trump a conflicting regulation. Statutes are the product of legislatures, while regulations are promulgated by administrative agencies; the former boasts stronger democratic legitimacy than the latter. In this way, the extant principles work to enhance the democratic legitimacy of law.

Second, the article explains the central problems that the extant principles engender. Despite the fact that the extant principles are justified by their tendency to enhance the democratic legitimacy of law, in many instances their rigid formalism will produce the opposite effect. For example, where a special interest statute of low democratic legitimacy stands in conflict with a popular regulation of strong democratic legitimacy, under the extant principles the former will trump the latter. This sort of anti-democratic outcome produces another problem - an incentive for
courts to manipulate their interpretive discretion in order to avoid anti-democratic outcomes. For example, rather than allow a special interest statute to trump a popular regulation, courts will use their interpretive discretion to adopt strained norm interpretations that avoid any conflict. One problem with this practice is that judicial opinions rationalize outcomes as following from neutral rules of legal interpretation, when in fact outcomes are driven by factors not addressed or mentioned in opinions.

Third, and most importantly, the article compares the extant principles with several suggested alternative sets of principles and explains the advantages that these alternatives offer over the extant principles. The article offers numerous alternative sets of principles that could minimize both the anti-democratic outcomes, and the incentive to manipulate the meaning of legal norms, produced by the extant principles. In short, the article explains the problems engendered by the understudied principles governing conflicts between legal norms, and then offers numerous alternative sets of principles aimed at alleviating these problems. The ultimate conclusion of the article is that no set of principles for dealing with cases of conflicting norms is ideal. All systems imply particular mixes of good and bad features. The bad features of the extant set of principles, however, do not seem to outweigh whatever good features they exhibit.
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I. Introduction

The late Summer of 2003 saw the eruption of a news media firestorm over the fate of the much publicized national ‘do not call’ registry.\(^1\) The registry, a product of Federal Trade Commission ("FTC") regulations, prohibited telemarketers from calling telephone numbers placed on a national list.\(^2\) Weary of ceaseless telemarketing calls, Americans placed over 50 million telephone numbers on the list.\(^3\) Much to the dismay of the public, however, an Oklahoma Federal District Court struck down the regulations as beyond statutorily authorized agency regulatory powers just days before they were to go into effect.\(^4\) Two days later, a Colorado Federal District Court held that the regulations violated First Amendment free speech rights.\(^5\) Luckily for the telemarketing-weary public, the Tenth Circuit Court of Appeals

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\(^1\) A Westlaw search performed by the author revealed 238 articles and editorials containing the phrase “do not call list” published in major U.S. newspapers during September of 2003. Internet and television news media also featured heavy reporting on the ‘do not call’ registry.


\(^3\) James P. Miller, FCC to Enforce ‘Do-Not-Call’: Agency Fares Better in Court Than FTC, Has O.K. to Carry Out Rules, CHI. TRIB., Sept. 30, 2003, at 1 (Stating that ‘do not call’ registry is “hugely popular, with over 50 million numbers registered”).


eventually stepped in to save the regulations by finding that they did not go beyond the scope of
statutorily delegated regulatory power and did not violate the First Amendment.\textsuperscript{6}

Though the media and the public naturally focused on whether the 'do not call' registry
would ultimately be implemented, the litigation turned on a cluster of understudied legal issues
related to conflicting legal norms. Both district court opinions found that the regulations stood in
irreconcilable conflict with either statutes or the Constitution.\textsuperscript{7} The Tenth Circuit found that
there existed no conflict between the regulations and the statutes or the Constitution.\textsuperscript{8} Taken
together, the opinions epitomize and illustrate three key elements present in all cases in which

\textsuperscript{6} Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228, 1246, 1250 (10th Cir.
2004) (holding that 'do not call' registry regulations did not violate First Amendment
Free Speech protections). Ironically, the district court of Colorado held that the
'do not call' registry regulations were within the FTC's statutory authority. \textit{Id}. at
1168-70.

\textsuperscript{7} See supra notes 4, 5.

\textsuperscript{8} See supra note 6.
legal norms may be read as standing in irreconcilable conflict.

First, courts dealing with these cases must decide whether two norms stand in conflict. This step involves the familiar judicial task of norm interpretation. Whether two norms stand in irreconcilable conflict very often depends on how broadly or narrowly a court interprets the norms. If a court determines that no conflict exists, all of the legal norms in question will remain in force. This was the outcome of the ‘do not call’ registry litigation in the Tenth Circuit.

If two norms are judged to stand in conflict, a second element comes into play. A set of rigid, formalistic axiomatic legal principles operates to resolve the conflict by determining which norm will be nullified. These axiomatic principles dictate, for example, that a regulation always and without exception will be nullified by a conflicting statute or conflicting constitutional norm. Had either of the district court opinions stood, the axiomatic principles would have nullified the ‘do not call’ registry regulations.

Third, a feedback mechanism between the first two elements may exert itself. Stated most simply, the nature of the principles used to resolve conflicts between legal norms may influence or bias the way courts interpret legal norms. The principles offer courts no flexibility or discretion. Courts know that if they find two legal norms in conflict, the principles will inescapably nullify a particular legal norm. Thus, if a court finds that a statute and a regulation stand in conflict, the principles will dictate that the statute inescapably trumps and nullifies the regulation. The rigid, discretion-denying nature of the principles, however, can prompt courts to manipulate whether a particular legal norm will be nullified by manipulating the meaning of legal norms and whether legal norms stand in conflict.

In the ‘do not call’ registry litigation, for example, the rigidity of the principles may have
driven the Tenth Circuit to find that the regulations did not stand in conflict with the relevant statutes or the Constitution. Had the court found a conflict between the regulations and the statutes or the Constitution, the rigid principles would have inescapably nullified the regulations. Rather than allow the principles to strike down the hugely popular ‘do not call’ registry,9 the court may have used its interpretive discretion to read the First Amendment and relevant statutes in a way that avoided any conflict with the regulations. If this was the case, the rigidity of the axiomatic principles provoked the court to circumvent them by using flexible interpretive discretion to insure survival of the popular ‘do not call’ registry regulations.10

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9. After the district court rulings striking down the ‘do not call’ registry regulations were reported, the media was flooded with public negative reactions. See, e.g., Sick of Telemarketers? Call Judges’ Homes, USA TODAY, September 30, 2003, at A22 (letter to editor expressing “extreme displeasure” with district court judges for striking down ‘do not call’ registry regulations and urging citizens to call judges’ homes at dinner time to voice displeasure over rulings); Editorial, Bad Calls, THE BOSTON GLOBE, Sept. 30, 2003, at A18 (quoting President Bush when signing the Do-Not-Call Implementation Act as stating that the American people, Congress, and the Executive Branch have concluded that a ‘do not call’ registry is needed); Jim Hughes, Judges’ Phones Ring Off The Hook Over No-Call Cases, DENVER POST, Sept. 28, 2003, at B2 (reporting that citizens annoyed by district court rulings striking down the ‘do not call’ registry regulations called both judges' chambers to complain to the point that judges' had to turn down ringers); Courts Are Not the Bosses, THE ARIZONA REPUBLIC, Sept. 27, 2003, at B9 (letter to the editor reacting to district court rulings striking down the ‘do not call’ registry regulations by arguing that “If the people and a 'Do Not Call' list, they can have it. Fifty-million Americans can tell the courts what they want, not vice versa. I am getting very tired of the courts assuming they run this country!”).

10. We can never know for sure whether the Tenth Circuit's norm interpretations were influenced by the desire to avoid nullification of the popular ‘do not call’ registry regulations. Close examination of the opinion, however, does not inspire great confidence in the Tenth Circuit’s interpretive approach. The FTC claimed authority to create the regulations under the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994’s (“Telemarketing Act” or “TCFPA”) requirement that the FTC “prescribe rules prohibiting...abusive telemarketing practices.” Telemarketing and Consumer Fraud and Abuse Prevention Act, 15
Though all cases similar to the ‘do not call’ registry litigation involve three basic elements, legal scholars usually focus only on the first – judicial interpretation of norms. This Article will focus on the second and third elements – the axiomatic principles and the potential feedback effect those principles work on the way courts interpret legal norms. The Article explains the axiomatic principles, the justification for their use, and the pathologies they foster.  

Most importantly, the Article compares the principles with several alternative sets of principles or systems that could serve the same function. The goal is to evaluate and compare the

U.S.C. § 6102(a) (1994); U.S. Security v. F.T.C., 282 F. Supp. 2d 1285, 1291 (W.D. Okla. 2003) (explaining that FTC “asserted jurisdiction to promulgate a do-not-call registry” under the Telemarketing Act of 1994). The main congressional committee report on the Telemarketing Act, however, reveals that Congress contemplated a narrow meaning for “abusive” telemarketing practices, and did not contemplate prohibition of telemarketing merely because recipients had placed their phone numbers on a list. H.R. REP. NO. 103-20, at 8 (1993) (listing “threats or intimidation, obscene or profane language, refusal to identify the calling party, continuous or repeated ringing of the telephone, or engagement of the called party in conversation with an intent to annoy, harass, or oppress any person at the called number” as examples of “abusive telemarketing activities” subject to regulation). The Tenth Circuit did not even mention the House Report. With scant analysis and in conclusory fashion, the Tenth Circuit held that the Telemarketing Act’s provision for regulation of abusive telemarketing practices authorized promulgation of the ‘do not call’ registry regulations. Mainstream Marketing Services, Inc., 358 F.3d at 1250 (holding that FTC had authority to promulgate ‘do not call’ registry regulations). The problem with the Tenth Circuit’s interpretation of the Telemarketing Act is not that it is necessarily incorrect or implausible. The problem is that the court fails to even mention the evidence of legislative intent that contradicts the court’s interpretation of the Act. This failing raises the distinct possibility that the court was ends oriented in interpreting the scope of regulatory powers granted by the Act. Ignoring the House Report enabled the court to hold that the Telemarketing Act could reasonably be read as empowering the FTC to promulgate the ‘do not call’ registry regulations.

See infra Sections II.-III.

See infra Section IV.
strengths and weaknesses of the extant principles alongside the strengths and weaknesses of alternative sets of principles.

As we will see, the principles that now govern conflicts between legal norms are plagued by serious drawbacks. They are best justified by their tendency to produce outcomes that, in a narrow and particular way, enhance or preserve the democratic legitimacy of law.13 Yet the discretion-denying rigidity of the principles often can undermine this democratic legitimacy enhancing or preserving effect, and lead to decidedly anti-democratic outcomes.14 Moreover, as may have been the case with the Tenth Circuit treatment of the ‘do not call’ registry litigation, the principles can bias or distort the way courts interpret legal norms. Rather than norm interpretations driven by applicable rules of legal interpretation, norm interpretation may be driven by the desire to avoid anti-democratic outcomes called for by the principles, and then rationalized as the unbiased product of applicable rules of legal interpretation.15 The feedback mechanism produced by the extant principles, in short, corrupts and contaminates the judicial task of norm interpretation.

Yet when we turn to alternatives to the extant principles we will find no easy solutions. Some of the alternative principles or systems for adjudicating cases involving conflicting legal norms would be superior in some ways to the extant principles. Some alternatives may be superior in terms of producing outcomes that enhance or preserve the democratic legitimacy of

13. See infra Section II.B.
14. See infra Section III.A.
15. See infra Section III.B.
Some alternatives can also minimize the feedback mechanism whereby the principles contaminate the way that courts interpret legal norms. Each of the alternative systems discussed herein, however, suffers serious problems of their own. Some of the alternatives might fail to constrain judicial discretion and open the door to judicial willfulness. Relatedly, some alternatives may undermine the rule of law features of the current principles and lead to legal instability and unpredictability. Others may unsettle traditional institutional roles and relationships, and fail to protect separation of powers values. Others may ask courts to perform tasks beyond their competence.

Ultimately, no set of principles or system governing adjudication of conflicting legal norms can maximize along all dimensions. At the end of the day, structuring a system for adjudication of cases involving conflicting norms involves hard choices between competing values and attributes. It is clear that the extant set of principles presents a host of serious problems. Alternatives to the extant set of principles, however, would present other problems. In the end, the optimal system will depend on one's personal preference for maximization of certain positive attributes and minimization of other negative attributes. Much of the article consists of an elaboration on these fundamental themes.

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18. See infra p. 72.
19. See infra pp. 57-60.
20. See infra p. 91-92.
21. See infra p. 74.
Part II of the article explains and summarizes the extant principles governing adjudication of cases in which legal norms are read as standing in conflict. Part II will also explain the peculiar democracy-reinforcing effect that the principles produce. Part III turns to the nature and scope of the pathologies the principles produce. Part IV considers alternative systems for resolving conflict between legal norms. Seven alternative systems are considered. Finally, Part V offers concluding remarks.

II.   The Framework for Adjudicating Conflicts Between Legal Norms

Both rules of legal interpretation and extra-legal factors, such as the ideology of a judge, can influence outcomes in cases where legal norms might be read as standing in a posture of irreconcilable conflict. This article, however, focuses on another set of factors important in these cases – the axiomatic principles, or what I have elsewhere called axiomatic meta-norms, that govern adjudication once a court determines that two legal norms stand in a posture of irreconcilable conflict.

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22. Legal scholars have done much to understand the influence of both interpretive norms and extra-legal factors, such as ideology, on judicial decision making. Regarding the influence of extra-legal factors, see Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision Making*, 104 COLUM. L. REV. 1150, 1157 (2004) (describing scholarship advancing the “attitudinal” model and idea that judges decide cases based upon ideological views and are not constrained by legal materials). For the vast recent scholarship regarding norms of statutory interpretation, see Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 S.M.U. L. REV. 9, 22-29 (2000) (appendix listing recent law review articles on statutory interpretation). For a brief overview of constitutional interpretation scholarship, see Gerard J. Clark, *An Introduction to Constitutional Interpretation*, 34 SUFFOLK U. L. REV. 485 (2000).
irreconcilable conflict.\textsuperscript{23} Part II.A briefly describes these meta-norms. Part II.B explores the tendency of the meta-norms to produce outcomes that in a particular way enhance or preserve the democratic legitimacy of law. Subsequently, Part III will explain the limits of this democracy-reinforcing narrative and explain the problems that the extant meta-norms engender. Part IV will survey several alternative systems for adjudicating cases in which legal norms stand in conflict.

A. The Axiomatic Meta-Norms

To understand the axiomatic meta-norms, consider two conflicting legal norms and how the meta-norms would resolve the conflict. Assume that one legal norm prohibits vehicles from entering the park, while another legal norm permits bicycle races in the park on the last Sunday of each month. Further assume that a court has interpreted the prohibition on vehicles in the park to include a prohibition on bicycles. Finally, assume that the norm prohibiting vehicles in the park (including bicycles) was created by a legislature, and that the norm permitting ‘last Sunday of the month’ bicycle races was generated by an administrative agency.\textsuperscript{24} Which of these two irreconcilably conflicting norms will survive and which will be nullified?

The outcome is obvious and inescapable. The statute prohibiting vehicles (including


\textsuperscript{24} Such definitional conundrums are common. \textit{See, e.g.}, Lalomia v. Bankers & Shippers Ins. Co., 312 N.Y.S.2d 1018 (N.Y. App. Div. 1970) (determining that motorized bicycle not considered a motor vehicle for purposes of insurance policy even though considered a motorized vehicle for purposes of state vehicle and traffic code).
bicycles) in the park will trump and nullify the regulation permitting bicycle races. The axiomatic meta-norms that make the outcome obvious and inescapable, however, are themselves not at all obvious. The meta-norms are four in number and can be stated as follows:

1. **The source axiom:** Legal norms emanating from different norm-generating institutions or entities belong to different legal categories; legal norms emanating from the same norm-generating institutions or entities belong to the same legal categories.

2. **The hierarchic axiom:** Legal categories populated by legal norms emanating from norm-generating institutions or entities of relatively greater democratic legitimacy are hierarchically superordinate to those legal categories populated by legal norms emanating from norm-generating institutions or entities of relatively lesser democratic legitimacy.

3. **The categoric axiom:** Legal norms belonging to legal categories of superordinate hierarchic status always and unconditionally trump irreconcilably conflicting legal norms belonging to legal categories of subordinate hierarchic status.

4. **The chronologic axiom:** Whenever two irreconcilably conflicting legal norms belong to the same legal category, the more recently created norm always and
unconditionally trumps the preexisting norm.\textsuperscript{25}

How would the axiomatic meta-norms govern the 'no vehicles in the park' illustration? First, apply the \textit{source axiom}. The two norms emanate from different norm-generating institutions. The first is the creation of a legislative body while the second is the product of an administrative agency. Under the source axiom the two norms would belong to different 'legal categories.' The first would be a member of the category 'statutory norms;' the second would be a member of the category 'administrative norms.'

Next, under the \textit{hierarchic axiom}, the legal category 'statutory norms' (along with all members of that category) is hierarchically superior to the legal category 'administrative norms' (along with all members of that category). This is so because the members of the former category emanate from legislatures while the members of the latter emanate from administrative agencies; legislative bodies boast greater democratic legitimacy than do administrative agencies. Thus, the norm prohibiting vehicles (including bicycles) in the park would be hierarchically superior to the norm permitting 'last Sunday of the month' bicycle races.

Finally, under the \textit{categoric axiom} the norm belonging to the hierarchically superordinate category – the statute prohibiting vehicles (including bicycles) in the park – would trump the norm belonging to the hierarchically subordinate category – the administrative regulation allowing ‘last Sunday of the month’ bicycle races in the park. If we were to suppose that both norms were statutes, the last step in the analysis would change. Rather than the categoric axiom,

\textsuperscript{25} González, \textit{supra} note 23, at 160 (cataloguing source, hierarchic, categoric, and chronologic axioms).
the *chronologic axiom* would apply. Where both norms emanate from a legislative body, both are members of the same category (source axiom) and are of equal hierarchic status (hierarchic axiom). Under the chronologic axiom the most recently created norm will trump the preexisting norm.

If we cut through the formalities of the four axiomatic meta-norms we see that they reflect the fundamental character of the American legal system's formula for managing cases in which legal norms stand in irreconcilable conflict. That formula boils down to the following: First, the system chops up the universe of legal norms into four different categories – constitutional, statutory, administrative, and common law – depending on the four principal sources of legal norms – We the People, legislative bodies, administrative agencies, and common law courts. Next, the system arranges the categories into a hierarchic layer cake, with the norms created by more democratically legitimate institutions in the top layers and the norms created by less democratically legitimate institutions in the bottom layers. Finally, the system grants norms from a higher layer a trump over conflicting norms from any lower layer, and grants newer norms a trump over conflicting preexisting norms from the same layer.

At this juncture two points must be stressed. First, the axiomatic meta-norms are legal rules. No lawyer or judge will cite them. They will not be discussed at oral argument. You will not find them inscribed in a constitution, statute, or regulation, or even in judicial pronouncements in reported cases. They are not the result of any positivistic act of norm creation of the sort that produces constitutions, statutes, regulations, or common law rules. Despite their 'invisible' profile the axioms count as secondary conduct regulating legal rules just as much as do, for example, the statutorily codified Federal Rules of Civil Procedure or the judicially
developed rules of statutory interpretation.

The nub of what I am suggesting is the following: There exists a class of legal meta-norms that are nowhere to be found in inscribed legal texts and that indeed may not even be the result of positivistic acts of norm creation. This special class of legal meta-norms becomes part of the law's fabric by emerging organically over time to become so deeply and invariably ingrained into the unconscious background assumptions of all members of the legal community that they take on the character of inviolable legal rules. Precisely because they are part of unconscious givens and assumptions they are ‘invisible' on the surface of legal discourse.

Though somewhat similar to extra-legal factors which influence outcomes in litigated cases – the ideology of the judge, for example – the meta-norm axioms decidedly belong to the legal, rather than extra-legal, universe. Unlike the ideology of a judge or other extra-legal factors, the axioms are universally and unvaryingly internalized and ingrained in all members of the legal community. When a set of principles has become so internalized and ingrained as to be hardwired into the conceptual framework of all members of a legal community, those principles become part of the legal framework in that legal community. The four axiomatic meta-norms enumerated above exemplify this phenomenon. There is no irregularity, dissent, argument, or

[26] Like extra-legal factors, the meta-norm axioms both impact outcomes and are not directly memorialized or superficially evident in constitutional, statutory, administrative, or common law legal texts. Nonetheless, crucial differences indicate that the axioms count as legal norms, rather than extra-legal factors, that influence outcomes. First, the presence or absence of inscribed words in legal texts does not determine whether something counts as a legal rule. Such inscribed words may provide evidence that a legal rule exists, but it is not the sin qua non of the legal or non-legal nature of a factor influencing judicial decision making. Moreover, whether a factor impacts outcomes in litigated cases is also not dispositive on whether that factor counts as law rather than an extra-legal factor.
diversity regarding how the meta-norms impact outcomes. To take the simplest example, no judge would seriously dispute the chronologic axiom – the notion that between two conflicting legal norms of the same kind, the more recent norm trumps the preexisting norm. Given a particular case or circumstance, all judges will (reflexively and unconsciously) apply the chronologic axiom in exactly the same unvarying way and with the exact same impact on the outcome.

Compare the ideology of a judge. Ideology will vary from judge to judge, with some being conservative and others liberal. This variation translates into judges of different ideological stripes reaching different outcomes in the same cases. The degree of influence ideology exerts will also vary from judge to judge. For one judge ideology can be a major factor in how the judge decides cases, while for another judge ideology plays only a minor role. These kinds of irregularities simply are not present when we consider the four axioms. The axioms are universally and consistently applied by all judges in the exact same way. For

27. See, e.g., James J. Brudney & Corey Ditslear, Canons of Construction and the Elusive Quest for Neutral Reasoning, 58 Vand. L. Rev. 24, 87-99, 125 (forthcoming 2005 available in SSRN) (recent empirical study finding that in labor and employment cases conservative Supreme Court justices are likely to join pro-business opinions while liberal justices are likely to join pro-employee opinions, and arguing that neutral canons of statutory construction are deployed to reach ideologically motivated outcomes); Richard L. Revesz, Environmental Regulation, Ideology, and the D.C. Circuit, 83 Va. L. Rev. 1717, 1719 (1997) (empirical study of D.C. Circuit decisions finding that ideology of judges affects outcomes in environmental law cases).

28. See Ruger et.al., supra note 22, at 1173-74 (statistical analysis suggesting that votes of some current Supreme Court justices are more predictable than other current justices using the political ideology of the justices as a metric, and that votes of ideological outlier Supreme Court justices are more predictable using ideology as a metric than votes of centrist justices).
example, when faced with a case in which two statutes stand in irreconcilable conflict, all judges will resolve that conflict in accord with the chronologic axiom in exactly the same way and without room for debate. All judges will rule that the newer statute trumps the older statute.29

A second issue that must be highlighted relates to the level of generality and abstraction at which the axioms are articulated. The four above enumerated meta-norms represent the most generalized statements possible that can explain and predict outcomes of cases involving irreconcilably conflicting legal norms. Abundantly familiar legal principles stated with less generality can also explain and predict at least some cases in which legal norms stand in conflict.

All lawyers, for example, would easily recognize and accept that, as a matter of extant legal principle, a constitutional norm will trump and nullify a conflicting statutory norm.30 The categoric axiom is stated at a higher level of generality than this easily recognizable principle. It encompasses not only the rule that constitutional norms trump conflicting statutory norms, but also encompasses a range of more specific (and commonly recognized) rules, such as the rule that a statute will trump a conflicting administrative regulation and the rule that a statute will

29. Let me be perfectly clear in this point. Judges may differ on the meaning of legal norms and whether two norms stand in a posture of conflict. Once two statutes have been interpreted as standing in a posture of irreconcilable conflict, however, all judges will agree that the newer statute trumps the older statute.

trump a conflicting common law principle.31

Stating the axioms at a higher level of generality than is commonly used in everyday legal parlance brings particular benefits. Most importantly, by stating the four axioms in the most generalized terms possible, the essential features of our system for managing cases in which legal norms irreconcilably conflict become abundantly obvious. The narrowly drawn rules or explanations, in contrast, obscure many of these features.32

How is this so? Return again to the ‘no vehicles in the park’ illustration. A statute prohibiting vehicles (including bicycles) in the park will trump and nullify an administrative

31. The same analysis applies to the chronologic axiom. All members of the legal community will recognize and acknowledge the notion than a new statute trumps a preexisting conflicting statute. See SUTHERLAND STATUTORY CONSTRUCTION § 34.01, at 31 (5th ed. 1984) (recognizing general rule that statutes continue in force unless abrogated by a subsequent statute). Likewise, all will recognize and acknowledge that a constitutional amendment will trump a preexisting conflicting constitutional provision, and that a new regulation trumps a conflicting preexisting regulation. See, e.g., U.S. CONST. amend. XXI (repealing Eighteenth Amendment); Nat’l Family Planning and Reprod. Health Ass’n, Inc. v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (“It is a maxim of administrative law that: ‘If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first’”). The chronologic axiom embodies all such chronology-based rules.

32. In addition, general explanations are usually preferable over narrowly drawn explanations, assuming that predictive power is not diminished. The categoric and chronologic axioms explain and predict a broader range of events (a broader range of case outcomes) than do the narrow rules, for example, that constitutional norms trump conflicting statutory norms, or that between two conflicting statutes the more recent statute will prevail.

Narrowly drawn explanations should not be ignored. Rather, one seeking to understand a given event should consider both general and narrowly drawn explanations. The legal community already fully understands the narrow rule that constitutional norms trump conflicting statutory norms, or the rule that between two conflicting statutes the more recent statute will prevail. The more generalized categoric and chronologic axioms can only add to understanding by offering a new perspective which reveals previously obscured issues.
regulation permitting 'last Sunday of the month' bicycle races. The standard way to explain and understand this outcome is that the first norm trumps the second norm because there exists a familiar rule stipulating that statutory norms trump conflicting administrative norms. More simply, the statutory norm trumps the conflicting administrative norm because there is a rule which demands just that. End of story. At best, one might question whether the statute over regulation rule makes sense.\footnote{The \textit{Chevron} doctrine arguably can dilute the statute over regulation ordering. Where a statute is ambiguous, a plausible agency interpretation will trump the most likely (but not entirely certain) legislative command. \textit{Chevron} U.S.A. Inc. v. N.R.D.C., Inc., 467 U.S. 837, 843 (1984) (elucidating \textit{Chevron} doctrine under which courts defer to agency interpretations of statutes "[i]f . . . Congress has not directly addressed the precise question at issue"). One justification for this weakening of the statute over regulation ordering is that where a statute is ambiguous, permitting expert administrators to fashion policy makes for better policy than adherence to judicial conjecture regarding the most probable legislative intent. \textit{See} Cass R. Sunstein, \textit{Law and Administration After Chevron}, 90 COLUM. L. REV. 2071, 2086-90 (1990). A similar strain of thought has recently emerged that implicitly challenges the constitutional norm over statute ordering. Some argue that permitting the political branches of government a large role in the interpretation of constitutional norms will alleviate the counter-majoritarian difficulty. \textit{See}, \textit{e.g.}, Neal Kumar Katyal, \textit{Legislative Constitutional Interpretation}, 50 DUKE L. J. 1335, 1358-94 (2001) (advocating enhanced congressional power to interpret constitutional norms). Though not necessarily formally overturning the Constitution over statute ordering, permitting political branches a role in constitutional interpretation would produce a dynamically changing Constitution. Rather than conforming new statutes to the Constitution, the possibility of conforming the Constitution to new statutes would become a possibility. \textit{Id.} at 1359-81.}
higher in the ordering a trump over conflicting norms belonging to categories lower in the
ordering. Rather than merely the restricted issue of whether statutory norms should trump
conflicting administrative norms, the more generalized explanation based on the axioms pushes
an entirely new range of questions to the foreground.

Consider a few of these new questions: Why should the legal system chop up the
universe of legal norms into different categories or kinds? If it should, why should the categories
be the ones that have emerged – constitutional, statutory, administrative, and common law –
rather than some other possible categorization? Why should the legal system arrange the
different categories in a rigid hierarchy rather than, to throw out one possibility, a flexible
continuum? Why should the hierarchic ordering be based on the democratic legitimacy of the
institution that creates a particular kind of legal norm? Why not instead base the hierarchic status
of a given legal norm on the democratic legitimacy of the particular legal norm? If we are to
have a hierarchy, why grant legal norms belonging to superordinate legal categories an
unconditional trump over legal norms belonging to subordinate legal categories? Why not
instead offer legal norms belonging to superordinate legal categories nothing more than a
rebuttable presumption that they will trump conflicting legal norms belonging to subordinate
legal categories?

If we think on the level of everyday legal parlance, we are stuck with, for example, the
particularized rules that constitutional norms trump conflicting statutes, or that statutes trump
conflicting administrative regulation. Focus on the particularized rules obscures all of the novel
and interesting questions. Once we see that the constitutional norms over statutes and statutes
over regulations rules, along with other similar particularized rules, are merely part of a more
universal and generalized set of axiomatic meta-norms, all of the interesting questions jump to the fore. We do not need the four meta-norms to predict how a court would resolve the conflict presented by the 'no vehicles in the park' illustration. Obviously, the statute will trump the conflicting regulation. We do need the four meta-norms, however, to open our eyes to a range of previously hidden foundational issues and questions that deserve scrutiny.

B. The Democracy-Reinforcing Justification Undergirding the Axiomatic Meta-Norms

Taken together, the four axiomatic meta-norms constitute a coherent system governing the adjudication of cases in which legal norms have been interpreted to stand in irreconcilable conflict. What justifies use of the extant system rather than some other possible system? Because the system emerged organically, there are no well thought out rationalizations to justify its use and perpetuation in official legal texts. However, a common justificatory theme underlying the various particularized rules that the axioms encompass can be detected. Each of the particularized rules, as well as the extant system as a whole, is best justified by a tendency to generate outcomes that, in a particular way, enhance or at least preserve the democratic legitimacy of law. The particularized rules and the more generalized meta-norms produce other salutary effects which might validate their use and perpetuation. The tendency to produce

34. Justifications underlying legal norms are usually advanced by those who advocate their adoption. The axioms emerged organically and are not the product of any discrete, identifiable act of positivistic norm creation promulgating or adopting the axioms. We can point to no single grand architect (or even group of architects) who designed and pushed for promulgation of the extant system. As a result, there was never an event or opportunity for law creators to explain and
outcomes which can be seen as enhancing the democratic legitimacy of law, however, is the overarching and bottom-line grounding for the extant system.\textsuperscript{35}

The extant system produces this effect by preserving legal norms generated by entities of greater democratic legitimacy and nullifying conflicting legal norms generated by entities of lesser democratic legitimacy. The 'no vehicles in the park' illustration posits a conflict between a statute and an administrative regulation. Legislatures, which are subject to periodic electoral checks, claim greater democratic legitimacy than do administrative agencies, which are only loosely controlled by democratically elected legislatures and chief executives.\textsuperscript{36} The extant system will preserve the legal norm created by the legislative body – the statute – over the legal norms created by the administrative agency – the regulation.\textsuperscript{37} More to the point, the system justify adoption of the extant system.

\textsuperscript{35} For example, the extant system enhances the stability of law and protects separation of powers boundary lines between norm-generating institutions. When we compare the extant system to possible alternatives, however, we will see that the tendency to produce democracy-enhancing outcomes is the paramount justification undergirding the extant system. \textit{See infra} pp. 65-70.

\textsuperscript{36} \textit{See, e.g.}, Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465, 1473 (D. Colo. 1988) (agency regulation in conflict with statute must be nullified because "value judgments which amount to changes in a statute, which are what the new regulations represent, should be made by the elected, accountable Congress and not by the Executive branch [agencies]")

\textsuperscript{37} Consider again how the four axioms would produce this outcome. First, under the source axiom, the two norms will be treated as different in kind or as members of distinct legal categories. The norm emanating from the legislative body will belong to the category 'statutory norms.' The norm emanating from the administrative agency will belong to the category 'administrative norms.' Second, under the hierarchic axiom, the category 'statutory norms' (and all of its members) will be treated as hierarchically superior to the category 'administrative norms' (and all of its members). Third, under the categoric axiom, the norm belonging to the superordinate legal category will be granted a trump over the norm belonging
preserves the legal norm created by the entity of greater democratic legitimacy, and nullifies the legal norm created by the entity of lesser democratic legitimacy.

The extant system works a similar effect in cases involving conflict between other kinds of legal norms, such as cases involving conflicts between constitutional and statutory norms. We the People, the ultimate source of constitutional norms, command the strongest possible claim to democratic legitimacy. The legislative stand-ins, creators of statutes, possess only a second best claim to democratic legitimacy. By privileging a constitutional norm over a conflicting statute, the extant system preserves the norm created by the entity of greater democratic legitimacy.

The same holds true in a case of conflict between norms of the same kind or category. In a conflict between two statutes, for example, the extant system would preserve the newer statute and nullify the preexisting statute. Legislatures with a recent electoral sanction claim stronger democratic legitimacy than do long-retired legislatures whose electoral sanctions have long since

to the subordinate legal category. As a result, the legal norm produced by the legislative body (the entity of relatively greater democratic legitimacy) will be preserved, while the conflicting legal norm produced by the administrative agency (the entity of relatively lesser democratic legitimacy) will be abolished.

38. See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 123 (Max Farand ed., Yale, rev. ed. 1937) (James Madison’s notes) (James Madison at Philadelphia constitutional convention explaining that legislatures could not ratify the Constitution in the name of We the People because legislative ratification would not equal ratification by “the supreme authority of the people themselves”). See also Carlos E. González, Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution’s Ratification Clauses, __ U.C. DAVIS L. REV. __, at __ [manuscript Section III.] [forthcoming February 2005] (detailing historical evidence on original understanding that legislatures could not ratify the Constitution in the name of We the People because legislatures are considered agents of We the People rather than embodiments of We the People).
gone stale. As such, the extant system ensures the survival of the norm created by the more democratically legitimate incarnation of the legislature. In this way, the system works to reinforce the democratic legitimacy of law.

We find evidence of the democracy-reinforcing theme not as explicit justifications for the generalized axioms themselves, but as a series of uniform or parallel rationales for the more particular and recognizable legal principles. Thus, the superior democratic legitimacy of We the People over our legislative agents justifies constitutional norms trumping conflicting statutory norms. Similar rationales justify, for example, the statute over regulation, statute over common law, and regulation over common law rules. A parallel justification is at work in

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39. See Karen Petroski, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 488 (2004) (stating that “[L]egislature’s most recent enactments are more likely aligned with the electorate’s current political preferences than are earlier enactments to the contrary”).

40. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-180 (1803) (holding that a statute conflicting with the constitution is void and unenforceable); *The Federalist No. 78*, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that judicial review is justified when courts are enforcing constitutional norms over statutory norms because constitutional norms emanate from the People while statutory norms emanate from a legislature); Thomas E. Baker, *Exercising The Amendment Power to Disapprove Of Supreme Court Decisions: A Proposal for A Republican Veto*, 22 HASTINGS CONST. L.Q. 325, 326-27 (1995) (suggesting that under the Marshallian view, judicial review involves constitutional norms generated by the popular sovereign trumping conflicting statutory norms created by legislatures).

cases involving conflicts between the same kinds of legal norms. The superior democratic legitimacy of the recent legislature over the long-retired legislature, for example, justifies a new statute trumping a preexisting conflicting statute. 42

The particularized justifications behind each of the particularized and commonly recognized rules are all variations on the same democracy-reinforcing theme. This is not coincidence. We do not have a jumble of discrete and independent rules governing conflicts between the Constitution and statutes, or statutes and administrative regulations, or statutes and common law rules, to name just three. We instead have a coherent system composed of four overarching axiomatic meta-norms that unify all of these recognizable particularized legal principles as similar expressions of a single essential theme: The preservation of legal norms created by entities of greater democratic legitimacy over conflicting legal norms created by

451 U.S. 77, 95 (1981) (stating that federal judicially developed common law principles are “subject to the paramount authority of Congress”); Parham v. Hughes, 441 U.S. 347, 351 (1979) (“[A] court is not free...to substitute its judgment for the will of the people...as expressed in the laws passed by their popularly elected legislatures”); In re Asbestos Litig., 829 F.2d 1233, 1240 (3d Cir. 1987) (recognizing that statutes overrule common law precedent because “in a democracy the legislature may be the more appropriate branch to draw classifications based on public policy. As a popularly elected body, the legislature is in a position to tap the thinking of its constituency and has the resources to secure data generally not available to the courts”); Planned Parenthood Fed'n of America, 680 F. Supp. at 1473 (agency interpretation in conflict with statute must be nullified because “value judgments which amount to changes in a statute, which are what the new regulations represent, should be made by the elected, accountable Congress and not by the Executive branch”).

42. In holding that a new statute trumps a preexisting conflicting statute, courts rely on the the greater democratic legitimacy of the newer legislature over the earlier legislature. See Petroski, supra note 39, at 488 (stating that new statutes trump or repeal preexisting conflicting statutes "because the legislature's most recent enactments are more likely aligned with the electorate's current political preferences than are earlier enactments to the contrary").
entities of lesser democratic legitimacy. 43

Some Bill of Rights cases may at first glance appear not to fit the overarching democracy-reinforcing theme. In recent decades the Supreme Court has used interpretations of Bill of Rights clauses which probably do not enjoy majority support to nullify sub-constitutional norms and government actions that probably do enjoy majority support. First Amendment holdings protecting flag burning may exemplify this phenomenon. See Texas v. Johnson, 491 U.S. 397 (1989) (striking down state law prohibiting desecration of United States flag). Modern justifications for such holdings center not on any pretense of enhancement of the democratic legitimacy of law, but rather on protection of minority rights against majority tyranny. See Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1991) (stating that “the Bill of Rights...according to conventional wisdom, was [intended] to vest individuals and minorities with substantive rights against popular majorities” but arguing that contrary to conventional wisdom, Bill of Rights was intended more as majority right protecting set of norms than individual or minority rights protecting set of norms). Unpopular First Amendment free speech and press protections, for example, have been justified as protecting the “rights of paradigmatically unpopular individuals or groups to speak out against a hostile and repressive majority.” Id. at 1147. In other words, the outcomes in these sorts of cases have been justified precisely because they are anti-majoritarian (and perhaps even anti-democratic).

None of this is at odds with the notion that the extant system is justified by its tendency to produce outcomes that, in a particular way, enhance the democratic legitimacy of law. The extant system works to preserve legal norms created by entities of greater democratic legitimacy over conflicting legal norms created by entities of lesser democratic legitimacy. In the end, even if unpopular, all parts of the Constitution are treated as emanating from We the People. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (“The constitution of the United States was ordained and established...as the preamble of the constitution declares, by the 'people of the United States'”). When a court strikes down a popular statute because in violation of an unpopular Bill of Rights provision, the implicit justification, as in any case of judicial review, is that the Bill of Rights emanates from We the People, while the conflicting statute emanates from Congress. See The FEDERALIST NO. 78, supra note 40, at 467; Baker, supra note 40, at 326-27. If anything, cases in which the Bill of Rights is used to strike down currently popular sub-constitutional norms highlights the limited and narrow way in which the extant system can claim to enhance the democratic legitimacy of law.
III. The Nature and Scope of the Problems Generated by the Extant System

Before turning to possible alternatives to the extant system, it is important to understand the nature and scope of the problems the extant system produces. An understanding of these shortcomings furthers our understanding of the nature of the extant system and provides a basis on which to build alternative systems. The problems fall into two main groupings. First, despite its democracy-reinforcing underpinnings, the extant system can produce outcomes that arguably degrade the democratic legitimacy of the law. Second, in cases where the extant system threatens to produce outcomes of suspect democratic legitimacy, it encourages unconscious and conscious bias, and even outright judicial dishonesty, with a consequent lack of transparency in judicial opinions.

A. Problem One: The Failure to Deliver Democracy-Reinforcing Results

As soon as we identify the democracy-reinforcing justification we can see it limitations. In many cases, the extant system will do an exceedingly poor job of achieving the democracy-enhancing ends that purportedly serve to justify its use and perpetuation. The nub of the problem lies in the following: The extant system preserves legal norms emanating from entities of relatively greater democratic legitimacy and nullifies conflicting norms emanating from entities of relatively lesser democratic legitimacy. The democratic legitimacy of a given norm-generating entity, however, is but one of many factors and considerations relevant to assessing the democratic legitimacy of individual legal norms. As a result, the extant system regularly produces outcomes that, all things considered, will be perceived as the very antithesis of democracy-enhancing or -preserving. It nullifies individual legal norms of perceived strong
democratic legitimacy and preserves individual legal norms of perceived suspect democratic legitimacy.

The evaluation of the democratic legitimacy of legal norms is contestable and complex. Does a particular legal norm boast greater democratic legitimacy than another because the first emanates from We the People while the second emanates from a legislature, an administrative agency, or a common law court? Or does a particular norm boast relatively greater democratic legitimacy than another because it better reflects current majoritarian sentiment (perhaps expressed in recent electoral contests) than some other norm, regardless of which entities created the two norms? Or does a legal norm boast strong democratic legitimacy when it closely approximates the policy that would be favored by a majority of the electorate if the electorate were well informed and could fully deliberate on the underlying policy issues? Or is it that one legal norm boasts relatively greater democratic legitimacy than another legal norm because the first conforms to core values on which society has maintained strong consensus for a generation, whereas the latter reflects nothing more than an incongruent, transient, and uninformed majority impulse that has not yet stood the test of time?

Competing conceptions of democratic legitimacy waft through our legal and political discourse. Different conceptions imply different admissible considerations for evaluating the democratic legitimacy of individual legal norms. The extant system, however, oversimplifies

\[\text{Disagreement on the meaning of democracy manifests itself with regularity. See, e.g., Christopher L. Eisgruber, Dimensions of Democracy, 71 Fordham L. Rev. 1725, 1723-33 (2003) (explaining and comparing the standard "one dimensional" conception of democracy based on majoritarianism and electoral results, the author's idea that democracy involves four elements apart from majoritarianism and elections, and Professor Rubenfeld's notion that democracy requires}\]
this complex question by fixating on one factor alone – the democratic legitimacy of the entities and institutions that create legal norms. By fixating on one factor the extant system hinders a rich and multifaceted evaluation of the democratic legitimacy of individual legal norms incorporating a range of relevant factors.

Due to its cramped focus on the entities that create legal norms, the extant system will, for example, preserve the statute serving narrow special interests and nullify the conflicting administrative regulation that ameliorates those special interest benefits and is more in line with current majority preferences. Similarly, the extant system will preserve the new special interest oriented statute, passed only because its was a rider to a larger bill or part of a legislative logroll, and nullify the conflicting preexisting public-regarding statute that had passed on its own merits with broad bi-partisan support and which still reflects majoritarian preferences.

The justification on both instances would be that where conflicts arise, the norms created by more democratically legitimate entities – either the legislature over the agency or the recent legislature over the long-retired legislature – should trump the norms created by entities of lesser democratic legitimacy. It is far from clear, however, that the special interest statute can rightly claim greater democratic legitimacy than the regulation aimed at minimizing special interest benefits. Likewise, it is far from clear that a new special interest oriented statute can rightly claim greater democratic legitimacy than a preexisting public-regarding statute. Entities of relatively high democratic legitimacy regularly generate legal norms of suspect democratic legitimacy. Likewise, entities of relatively low democratic legitimacy will regularly produce legal norms of strong democratic legitimacy. The extant system incorporates no mechanism to

(adherence to commitments over generations).
accommodate this reality.\textsuperscript{45} 

The system's fixation on the sources of legal norms and exclusion of other relevant considerations leaves it open to a series of "yes, but..." rejoinders. \textit{Yes}, legislatures are more democratically legitimate than administrative agencies. \textit{But} in this particular case the legislature has passed a special interest statute, while the agency has promulgated a regulation more in line with majoritarian preferences. Or \textit{yes}, today's legislature is more democratically legitimate than the legislature retired half a generation ago. \textit{But} in this particular case today's legislature has passed a statute at odds with current majoritarian preferences, while the long-retired legislature created a statute still sanctioned by broad public support. Or \textit{yes}, We the People are the more democratically legitimate source of legal norms than legislative bodies, administrative agencies, or courts. \textit{But} in many cases, statutes, agency regulations, or even common law norms more closely match current majoritarian sentiments, what would be majoritarian sentiment given sufficient information and public deliberation, or long held societal consensus, than do

\textsuperscript{45} Relatedly, the extant system incorporates no mechanism for dealing with the effect of time on the democratic legitimacy of legal norms. Even if, for example, a statute enjoyed unimpeachable democratic legitimacy from all perspectives when first passed, over time its democratic legitimacy may vanish. The majority coalition that favored the statute's policy may shatter. Law or social circumstances may move on and leave the stationary statute's policy out of step. A recently created administrative regulation may more closely approximate current majoritarian sentiment than does the antiquated statute. \textit{See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES} 1-7 (1982) (outlining dilemma of statutes that no longer command majoritarian support but which are not likely to be repealed). The extant system fixates on the democratic legitimacy of the sources of the conflicting norms alone and ignores the temporal element. As a result, the system will work to preserve the outmoded statute carrying a claim to democratic legitimacy that has long since expired, over a conflicting administrative regulation of recent vintage that is in line with current majority sentiment.
constitutional provisions sanctioned by We the People over two centuries ago.

There may be rational reasons for the extant system's strategy of fixating on the democratic legitimacy of the sources of legal norms. In other words, there may exist reasons for truncating a multifaceted evaluation of the democratic legitimacy of individual legal norms. It must be recognized, however, that fixating on the sources of legal norms exacts a price – the preservation of individual norms of relatively low democratic legitimacy and the concordant nullification of individual norms of relatively high democratic legitimacy. Moreover, the price exacted runs contrary to the very democracy-enhancing narratives that justify the use and perpetuation of the extant system for resolving cases of conflict between legal norms.

B. **Problem Two: The Incentive for Bias and Manipulation of Interpretive Discretion**

A second problem engendered by the extant system grows out of the first. The extant system regularly puts courts to a Hobson's choice: Either interpretive honesty with consequent degradation of the democratic legitimacy of law, or bias and dishonesty in interpretation allowing enhancement or preservation of the democratic legitimacy of law.

As already discussed, the extant system can nullify individual legal norms of strong democratic legitimacy and concordantly preserve norms of weak democratic legitimacy. Thus, where a new regulation of strong democratic legitimacy stands in conflict with a special interest oriented statute of weak democratic legitimacy, the extant system demands nullification of the
former and preservation of the latter.\textsuperscript{46}

The rigidity of the axiomatic meta-norms composing the extant system leaves a court facing such a case with two stark options, both of which are problematic: First, a court can straightforwardly and honestly admit that the two norms stand in irreconcilable conflict. Because the rigid and exceptionless axioms composing the extant system afford courts no discretion or flexibility, this path leads inexorably to a problematic outcome – nullification of the regulation, the norm of stronger democratic legitimacy. Second, aiming to avoid this problematic outcome, a court can use its interpretive discretion to preserve the regulation. In order to avoid the anti-democratic outcome, however, a court must resort to bias or outright judicial dishonesty in the interpretation of norms. The rigidity of the extant system denies courts a way to legitimately avoid the anti-democratic outcome, and thereby provokes courts to deploy bias and dishonesty in norm interpretation.\textsuperscript{47}

\textsuperscript{46} For the remainder of the Article I will rely heavily on examples involving statutes and regulations. Most of the points demonstrated using these examples also are applicable to conflicts involving other kinds of legal norms. Thus, just as a particular regulation may make a stronger claim to democratic legitimacy than a particular conflicting statute, so too might a particular statute make a stronger claim to democratic legitimacy than a particular conflicting constitutional norm. Similarly, a particular old regulation might make a stronger claim to democratic legitimacy than some new regulation.

\textsuperscript{47} Thus, when faced with the prospect of a special interest statute trumping a regulation of strong democratic legitimacy, no court can challenge the categoric axiom and the statute over conflicting regulation ordering. A court, however, can use and abuse its interpretive discretion to manipulate the meaning of the statute and regulation, whether the statute and regulation stand in conflict, and therefore whether the statute will trump the regulation. If a court interprets the norms such that the statute and regulation stand in conflict, the statute will trump the regulation. If a court interprets the norms such that the statute and regulation do not stand in conflict, the statute will not trump the regulation.
1. **An Illustrative Regulation**

In order to more clearly explicate the Hobson's choice, and the incentive for dishonest application of interpretive discretion, I will introduce a fictional but plausible chronicle of the birth and possible death of an administrative regulation. The fictional regulation is inspired by the FTC's 'do not call' registry regulations discussed in the introduction. See supra text accompanying notes 1-10.

Visualize the following scenario: Hoping to bolster the President's position leading into the next election cycle, the President's domestic advisors decide to pursue, among several other domestic initiatives, controls on unsolicited bulk commercial e-mail, commonly known as "spam" e-mail. While no election will turn on the spam issue, the President and his advisors correctly perceive that a new law substantially restricting spam e-mail would meet with very strong popular approval.

The legislative route appears uncertain. Congressional committees that have considered the spam e-mail issue have focused on an 'opt-out' policy similar to the national 'do not call' registry used to control unwanted telemarketing solicitations. The opt-out policy would permit the sending of spam e-mail unless the user of a particular e-mail address specifically opts-out of...

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48. See supra text accompanying notes 1-10.

49. Spam e-mail has been defined in various ways. See Bill Husted & Ann Hardie, *Spam Wars: Spam Q&A*, ATLANTA J. CONST., Dec.14, 2003, at A12 (pointing to different definitions of spam e-mail); Bob Sullivan, *Do Not Spam Lists Won't Work, FTC Says*, at http://www.msnbc.msn.com/id/5216554 (updated June 15, 2004, 2:01 p.m. ET) (on file with author) (providing various definitions of spam e-mail). In this Article I consider spam e-mail to be unsolicited commercial bulk e-mail.

50. The national 'do not call' registry is a product of FTC and FCC regulations. The regulations prohibit telemarketers from calling phone numbers placed on a national registry. See supra text accompanying notes 1-6 and notes 1-6.
spam e-mail by placing his or her e-mail address on a national registry. Most Internet analysts believe that the opt-out strategy would be far less effective in the spam context than in the telemarketing context and would produce only a minimal reduction in the volume of spam e-mail. Not only would such a statute be ineffective, it could also preempt more effective state laws regulating spam e-mail and foreclose adoption of an effective federal statute for the foreseeable future.

51. See Saul Hansell, F.T.C. Rebuffs Plan to Create No-Spam List, N.Y. TIMES, June 16, 2004, at C1 (discussing the FTC recommendation against creating a do-not-e-mail registry); Sullivan, supra note 49, at http://www.msnbc.msn.com/id/5216554 (explaining that opt out list would actually exacerbate problem since it would give spammers list of valid e-mail addresses they could use to send more spam).


The CAN-SPAM Act creates civil and criminal sanctions for the sending of spam e-mail deceptive in source or content, and requires that spam e-mail include mechanisms allowing recipients to opt out of further spam e-mail communications from the sender. CAN-SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699, §§ 4-6 (2003) (codified in various sections of 15, 18 and 28 U.S.C.). The law authorizes enforcement by the FTC and other federal agencies, as well as by states and civil suits brought by Internet service providers. CAN-SPAM Act of 2003, 15 U.S.C. § 7707(b) (2003). Suits have already been brought under the Act. See Mylene Mangalindan, Web Firms File Spam Suit Under New Law, WALL ST. J., Mar. 11, 2004, at B4 (describing four major Internet service providers’ suits against spammers as first major legal action under CAN-SPAM); Mike Brunker, E-mail Giants Sue Alleged Spam Sender, at http://www.msnbc.msn.com/id/4496759, (updated Mar. 10, 2004, 4:56 p.m. ET) (on file with author) (detailing lawsuits by major Internet service providers against alleged violators of CAN-SPAM).

Most commentators believe that the CAN-SPAM Act regulatory
Influenced by Internet advertising lobbyists, key congressional committee chairs have stalled efforts to consider federal anti-spam legislation. Seeing the legislative path blocked, the President's advisors focus on the administrative level, where they have more influence and are less likely to lose control of the process. Without delay, administration officials begin pushing the FTC to promulgate a new regulation adopting a comprehensive regulatory framework.

The comprehensive framework includes three elements. First, it incorporates an 'opt-in' policy. Under an opt-in regulatory scheme, spam e-mail may not be sent to an e-mail address unless the user of the e-mail address has specifically and knowingly opted in or consented to receipt of spam e-mail communications from a particular sender. Consent may be secured by mail, telephone, or face-to-face communications. Those who send spam e-mail without securing consent are subject to fines and civil damage suits. Second, the comprehensive approach institutes a very small fee to be paid on a per recipient basis by any sender of commercial e-mail to 1,000 or more non-consenting e-mail addresses. Because only a tiny fraction of spam e-mails approach will prove ineffective. See Mangalindan, supra, at B4 ("independent analysts say there is little evidence yet that the tough new federal law reduces spam volumes"); Jennifer Wolcott, Will Spam Be Totally Canned?, CHRISTIAN SCIENCE MONITOR, Jan. 2, 2004, at 13 ("Critics of the CAN-SPAM act say it's not tough enough, as the law doesn't actually make it illegal to send spam"); Editorial, Why Federal Anti-Spam Legislation Will Fall Short: It's Up to Consumers to Press Lawmakers, SAN JOSE MERCURY NEWS, Dec. 15, 2003, at Op.1; Brad Stone, Soaking in Spam, NEWSWEEK, Nov. 24, 2003, at 66, 69 ("Almost everyone involved with the spam debate admits CAN-SPAM will do little"); Declan McCullagh, Spam Keeps Cookin' – Despite New Laws, at http://www.msn-cnet.com/com/2100-1024-5160.html?part=msn-cnet&subj=ns_5160503&tag=tg_home, (last updated Feb.17, 2004, 4:35pm PST) (on file with author) (FTC attorney stating that “Can-Spam is not going to solve the problem”). One worrisome sign that CAN-SPAM will be ineffectual is that industry lobbyists supported its passage while consumer groups had hoped Congress would do nothing. See Editorial, Congressional Spam Filter, N.Y.
result in economic benefit to the seller, the fee would make most spam e-mail communications
economically non-viable. Finally, the comprehensive approach provides financial incentives to
Internet access providers that apply technological solutions to the spam e-mail problem. The
comprehensive approach would produce a far more substantial reduction in the flow of spam e-
mail than would the opt-out policy under consideration in Congress.

As three of the five FTC board members were appointed by the President and are of the
same political party, the agency responds accordingly. After an accelerated rule making process,
a comprehensive new anti-spam regulatory scheme incorporating the opt-in strategy, fees, and
financial incentives is published in the Federal Register. Upon promulgation the regulation
proves both effective and wildly popular. All is well across the land.

All is well, that is, until an e-mail marketing industry group sues the FTC seeking to have
the anti-spam e-mail regulations declared null and void. The suit is based on a 12 year old statute

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53. As the fee would only apply when unsolicited commercial bulk e-mails are sent to
a large number of recipients, it would not discourage the legitimate and ordinary
use of e-mail communications. It would, however, make spam e-mail
commercially non-viable. See Stone, supra note 52, at 66, 69 (discussing micro-
payment strategy); Kevin DeMarrais, Updating the War on Spam: E-mail Skeptic
(discussing the results of CAN-SPAM and other possible ways to combat spam
including a postage method proposed by Microsoft); Stephan Parks, Editorial,
What Spam Costs, WASH. POST, Nov. 29, 2003, at A22 (editorial discussing the
possibility of a postage stamp system for e-mail).

54. An opt-in policy alone would be ineffective. See J. Trevor. Hughes, Sen. Test.,
2003 WL 11718270 (May 21, 2003) (testimony by president of Network
Advertisers Initiative before Senate Commerce, Science, and Transportation
Committee explaining various methods for combating spam). A multifaceted
approach including legislation and technological tools would be most effective.
Id.
passed at the behest of the telemarketing industry. The statute prohibits all but very limited regulation of commercial communications transmitted over phone lines or other wires. Like spam e-mail, telemarketing has always been unpopular with the public. The telemarketing industry, however, used access to key legislators, plus a healthy dose of congressional campaign contributions, to facilitate passage of protective legislation. Strategically well placed campaign contributions to key committee gatekeepers over the years have inoculated the statute against amendments allowing more vigorous regulation.

The statute states that “The Commission [FTC] shall not issue regulations pertaining to unsolicited commercial communications over telephone and other wires, except that the Commission may issue regulations pertaining to intimidating unsolicited commercial communications and to abusive unsolicited commercial communications.”

Though passed long before e-mail communication existed in any meaningful commercial form, and passed with telemarketing in mind, the text of the statute is broad enough to prohibit almost all regulation of spam e-mail. Like telemarketing communications, spam e-mail travels “over telephone and other wires.”

The record of legislative history demonstrates that Congress uniformly understood the statutory permission to regulate “abusive” communications as granting only the power to regulate acts such as the number of telemarketing calls in a given time period or the hours at which such

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55 The fictional statute is comparable to the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, which grants the FTC power to promulgate rules prohibiting “deceptive” or “abusive” telemarketing practices. See supra note 10.

56 RON WHITE, HOW COMPUTERS WORK 344 (1999) (explaining that data commonly travels over the Internet through a modem connected to a phone line or cable connection to a network).
calls could be made. The permission to regulate "intimidating" communication was understood as permitting regulations aimed at controlling the use of the language associated with overzealous debt collection agencies. All other forms of regulation, and in particular regulations constituting blanket prohibitions, were uniformly understood to be impermissible.

In its suit against the FTC, the e-mail industry marketing group argues that the statute permits only regulation of "intimidating" and/or "abusive" communications. The anti-spam e-mail regulations fall well outside these narrow categories because they do not seek to regulate the time, quantity, or content of the communications. Instead, the regulations set up a pervasive prohibition on simply engaging in commercial bulk e-mail communications. In other words, even if not "abusive" in terms of the number of communications sent to a particular recipient or other similar factors, the regulations would both forbid and impose cost prohibitive fees on most unsolicited e-mail communications.

2. The Hobson's Choice: Anti-Democratic Outcomes and Incentives for Bias and Manipulation of Interpretive Discretion

How would a court respond to the suit? The answer illustrates the Hobson's choice precipitated by the extant system governing adjudication of conflicting legal norms. If, as appears to be the case, the statute and regulation stand in irreconcilable conflict, straightforward application of the extant system leads to nullification of the regulation. When two legal norms stand in conflict, the norm belonging to the superordinate legal category trumps the norm belonging to the subordinate legal category. The rigidity of the axioms leaves the judge facing
conflicting legal norms no wiggle room, no flexibility, no opening for judicial discretion.\textsuperscript{57}

This outcome, however, creates a problem. Though promulgated by an agency, the anti-spam regulation, as an individual legal norm, makes a strong claim to democratic legitimacy based on its coincidence with current majoritarian sentiments. Simply stated, the public has wanted meaningful curbs on spam e-mail for some time.\textsuperscript{58} The regulation responds to that public consensus and has proved wildly popular. But for the obstructionism of a few congressional committee gatekeepers, an effective anti-spam statute could very foreseeably have been enacted as a statute.

The case for the democratic legitimacy of the statute as an individual legal norm is

\textsuperscript{57} A court might also nullify the regulation by finding that it violates the First Amendment. Current commercial speech doctrine offers enough leeway to plausibly find either that the regulation is or is not an unconstitutional restriction on First Amendment free speech rights. The key issue would center on whether the regulation would constitute a "reasonably tailored means" of curbing unsolicited commercial bulk e-mail. \textit{See} Edenfield v. Fane, 507 U.S. 761 (1993) (applying intermediate scrutiny to hold ban on personal solicitation as applied to CPAs unconstitutional under the First Amendment because not directly linked to objective of protecting consumers from fraud and conflicts of interests); Cent. Hudson Gas v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (applying intermediate scrutiny to hold that law prohibiting advertising by utilities violated First Amendment because not directly related to the substantial government interest of energy conservation). The national 'do not call' registry has been held constitutional. Mainstream Mktg. Servs., Inc., 358 F.3d 1228, 1246 (10th Cir. 2003). Unlike the opt-out strategy of the national 'do not call' registry, however, the anti-spam regulation would prohibit the initiation of e-mail commercial communications unless recipients opt-in to the receipt of such communications. It also would place a fee on spam e-mail communications. It is unclear whether such a regulatory approach would pass constitutional muster.

\textsuperscript{58} \textit{See} Dana H. Schultz, \textit{CAN-SPAM Really Be Stopped?}, CAL. BAR JOURNAL, July 2004, at 1 (citing study finding that 83 percent of respondents dislike spam e-mail); Reuters, \textit{Survey: Americans Support 'Do-Not-Spam' Registry}, CHI. TRIB., Oct. 16, 2003, at 4 (stating that three fourths of those surveyed supported Senator Schumer's plan for a do not spam registry),
comparatively weak. To the extent that the statute prohibits meaningful regulation of spam e-mail, it goes against clear public preferences. Moreover, initial passage of the statute and subsequent insulation from amendment have been the result of special interest politics. The mere fact that the statute was created by Congress, rather than an administrative agency, hardly counterbalances these considerations.

If the statute trumps the regulation, the norm of substantially stronger democratic legitimacy will have been nullified. Most courts will not have missed the trick. Regardless of the entities that created the statute and regulation, courts understand that preservation and extension of the special interest statute, and concordant nullification of the popular anti-spam regulation, in a very real way degrade rather than enhance the democratic legitimacy of law. They also understand that a judicial decision to nullify the popular regulation would be met with public bewilderment. Why, the public would wonder, has an unelected judge annulled such a popular new law?

Yet there are ways around this unhappy result. Though the regulation would seem to stand in clear conflict with the applicable statute, a bit of judicial prevarication would allow a court to avoid striking down the popular anti-spam regulation. Given the rigidity of the axioms, a court will have to find that the statute and regulation do not stand in conflict. If not in conflict, the axiomatic meta-norms (and their fixation on the democratic legitimacy of the sources of legal norms) do not come into play, and the regulation will remain intact.

In order to find that the statute and regulation do not stand in conflict, the court must find that the sending of spam e-mail without an opt-in by the recipient constitutes an “abusive”
communication and therefore is subject to regulation under the statute. Only a judicial sleight of hand at a crucial juncture, however, would enable this interpretation of the word “abusive.” The dishonesty does not involve the court's interpretation of the word “abusive” per se. A spam e-mail communication without pre-approval by the recipient could plausibly be construed as an “abusive” communication. The dishonesty instead lies in the inescapable deception needed to avoid the evidence of legislative intent demonstrating that the word “abusive” in the statute means something far narrower.

Recall that by allowing regulation of “abusive” and/or “intimidating” communications over telephone and other wires, Congress intended only to permit regulations pertaining to the timing, frequency, and content of commercial communications. Congress decidedly did not intend to allow regulations prohibiting the initiation of communications altogether. The anti-spam regulation, however, does just that. The opt-in feature, in particular, prohibits the initiation of unsolicited commercial bulk e-mail communications to most potential recipients. In addition, the fee on spam e-mail constitutes a de facto prohibition. If the court consults evidence of legislative intent, it will have to find that the regulations conflict with the statute and in turn will

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59. The national 'do not call' registry cases dealt with a very similar issue. See supra text accompanying notes 1-6. The FTC used its authority under the Telemarketing Act to regulate “abusive” telemarketing communications to promulgate amended regulations creating the national 'do not call' registry and prohibiting calls to numbers listed on the registry. Supra note 10; see also Mainstream Mktg. Servs., Inc. v. F.T.C., 283 F. Supp. 2d. 1151,1155-56 (D. Colo 2003) (explaining history of ‘do not call’ registry regulations). Litigation challenged the FTC authority to promulgate these regulations. See supra text accompanying notes 1-6.

60. In fact the intent was the opposite. Congress intended to protect commercial communications against prohibitions and almost all limitations. See supra text accompanying notes 56-57.
be forced to nullify the popular regulations.

The key, therefore, is to avoid reference to legislative history.\textsuperscript{61} A well-worn interpretive rule provides that courts may not refer to legislative history when the text of a statute is unambiguous.\textsuperscript{62} In order to avoid reference to legislative history, therefore, all the court need do is cite the interpretive principle and then find that the text of the statute – the meaning of the word “abusive” – is unambiguous.\textsuperscript{63}

\textsuperscript{61} Avoidance of legislative history would be easy for the handful of federal judges who maintain that the record of legislative history is never or almost never a legitimate resource when interpreting statutes. Justice Scalia is the most vocal and prominent advocate of this approach to statutory interpretation. See Chisom v. Roemer, 501 U.S. 380, 404-17 (1991) (Scalia, J., dissenting) (stating that the text of the statute should be the main inquiry of a statutory interpretation case); see also ANTONIN SCALIA, A MATTER OF INTERPRETATION 3-47 (1997) (offering a defense of textualism).


\textsuperscript{62} See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (declining to assess legislative history because statute is unambiguous); Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) (“we do not resort to legislative history to cloud statutory text that is clear”); Barnhill v. Johnson, 503 U.S. 393, 401 (1992) (“[A]ppeals to statutory history are well taken only to resolve ‘statutory ambiguity’”); Toibb v. Radloff, 501 U.S. 157, 162 (1991) (“The language of § 109 is not unclear. Thus, although a court appropriately may refer to a statute’s legislative history to resolve statutory ambiguity, there is no need to do so here”).

\textsuperscript{63} This may have been exactly what happened in the litigation over the national ‘do
This last maneuver, of course, is the inescapable deception. The term "abusive" in the statute is undeniably subject to multiple plausible interpretations. It might reasonably take on the broad meaning advanced by the court's interpretation. But it might also take on the narrower meaning suggested by legislative intent. Only by indulging the fiction that the term "abusive" is free of ambiguity, and then selecting one of several plausible readings, can the court avoid reference to legislative intent and thereby preserve the anti-spam regulation.64

The approach is doubly dishonest in that the opinion no doubt will be written as opinions are almost always written – as if the conclusion were determined by neutral rules of legal interpretation and not by an exercise of judicial discretion aided by manipulation of interpretive principles.65 The court, in other words, will not (and indeed cannot) admit that the court has

64. Courts regularly avoid reference to legislative history with a questionable determination that the text of a statute is unambiguous. See, e.g., Sutton v. United Airlines, 527 U.S. 471, 482, 497-99 (1999) (adopting interpretation of ADA at odds with legislative intent and refusing to consult legislative intent on ground that statute was unambiguous despite patent ambiguity and fact that eight of nine circuit courts and three executive agencies had read statute contrary to supposedly unambiguous meaning adopted by Court). More generally, courts often find that a statute is unambiguous when in fact subject to more than one plausible meaning. See, e.g., Gen. Dynamics Land Systs., Inc. v. Cline, 124 S. Ct. 1236, 1248 (2004) (despite patently ambiguous statutory meaning and reasonable EEOC interpretation to the contrary, Court held that the ADEA does not prohibit favoring older workers over younger workers based on theory that statute was unambiguous).

65. On rare occasions courts will admit that legal norms are subject to multiple plausible interpretations and that factors beyond the substantive and interpretative law in question dictate which interpretation a court adopts. See, e.g., United States v. Marshall, 908 F.2d 1312, 1331 (7th Cir.1990) (Posner, J., dissenting) (admitting that meaning of ambiguous sentencing statute regarding sentencing for sale of LSD is not determined by the legal material but should be driven by pragmatic considerations of equal treatment). Such frank honesty, however, is the
chosen to adopt the broad meaning of “abusive.” To the untrained or careless eye, it appears as though the decision is rule driven rather than judicial discretion driven. In reality, however, the opinion is more opaque and obfuscatory than transparent and honest. The desire to avoid an anti-democratic outcome, not objective interpretive rules, motivates the outcome.

The possibility of judicial deception, coupled with the unappealing anti-democratic outcome that would result from straightforward application of the extant system, generates value conflict. On the one hand, courts profess (and presumably at some level actually desire) to decide cases in accord with applicable legal principles. On the other hand, courts know that straightforward application of the axiomatic meta-norms governing adjudication of conflicting legal norms will result in nullification of a legal norm that enjoys solid popular support. The dissonance between these competing considerations provokes the Hobson's choice – either honestly preserve the statute of dubious democratic legitimacy or dishonestly preserve the regulation of presumably stronger democratic legitimacy.

The straightforward and honest opinion would admit the statutory ambiguity, refer to the record of legislative intent, find the regulation in conflict with the statute, and then nullify the regulation. Many courts will stoically and straightforwardly apply the extant system to nullify the regulation and leave the anti-democratic outcome to be repaired by Congress. In a case like the anti-spam regulation illustration, however, congressional repair will not likely be forthcoming.66

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66. Congress is not even aware of many statutory interpretation decisions. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY 409 (3d ed. 2001) (discussing disappointing results of “Corrections Day” process in House of Representatives under which Congress may consider and correct...
Other courts, however, will choose the path of benign dishonesty. Flexible and often contradictory interpretive rules offer courts sufficient material from which to contrive an opinion which avoids nullification of the popular regulation. In cases where the extant system would instruct nullification of norms of strong democratic legitimacy, the temptation to exploit that flexible interpretive discretion grows strong. Rather than nullify a popular legal norm, a court can twist the meaning of norms and break interpretive rules in a benign dishonesty aimed at major judicial statutory interpretations); John Nagle, Corrections Day, 43 U.C.L.A. L. REV. 1267, 1281-82 (1996) ("[M]any admitted statutory mistakes remain uncorrected. Moreover, the corrections that do occur are often random, or conversely, dependent on who has the greatest access to Congress"); Abner J. Mikva, How Well Does Congress Support and Defend the Constitution?, 61 N.C. L. REV. 587, 609 (1983) (arguing that "most Supreme Court decisions never come to the attention of Congress"); Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit, 124 F.R.D. 241, 323-24 (1988) (arguing that congressional staff was unaware of most significant circuit court statutory interpretation decisions). But see William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 341-44 (1991) (presenting evidence suggesting that Congress monitors statutory interpretations). Even if aware of the decision, for a variety of reasons, Congress often does not overturn statutory interpretation decisions. Id. at 343-53 (presenting evidence showing that Congress does override Supreme Court statutory interpretation issues regularly, but also declines to override vast majority of such decisions). Finally, in this case, committee gatekeepers have already blocked efforts to enact statutes permitting regulation of spam e-mail. The same forces that produced this blockage would block any effort to respond to judicial pleas for congressional revision of the statute.

I do not posit courts as single-minded maximizers of the democratic legitimacy of the law. Many factors influence judicial decision-making, including the nature of the applicable legal rules and the social, political, and/or legal ideology of the judge (which may include attitudes about rule-following). See JEFFREY A. SEGAL & HOWARD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86-97 (2002) (leading publication supporting attitudinal model thesis that ideology is primary determinant in judicial decision making). I only argue that avoidance of anti-democratic outcomes is one of those factors. All other things being equal, many courts prefer not to nullify popular legal norms.
preserving the norm of high democratic legitimacy.\textsuperscript{68}

C. \textit{The Dimensions of the Problems: Big Issues in a Few Cases}

Most cases will present no real threat that a norm of low democratic legitimacy will end up trumping a norm of high democratic legitimacy. Most legal norms simply do not register one way or the other with the inattentive public.\textsuperscript{69} Even if the public or segments of the public are attentive, most often there will exist no obvious differentiation in the democratic legitimacy of two conflicting legal norms. One norm will be favored by one set of interest groups, and the other favored by another set of interest groups. No clear cut majority preference will emerge. In most cases, therefore, the extant system will produce neither decidedly anti-democratic outcomes, nor unusually strong incentives for judicial manipulation or bias in application of

\begin{quote}

\textsuperscript{68}\footnote{Conscious judicial dishonesty in the form of twisting or breaking interpretive rules constitutes one extreme end of a spectrum. Lesser forms of manipulation at different points on the spectrum, however, can have the same effects. The desire to avoid nullification of a norm of relatively high democratic legitimacy may produce conscious or unconscious biases in interpretation of possibly conflicting legal norms. Courts may emphasize certain interpretive principles and de-emphasize others in an attempt to preserve a preferred legal norm. On this scenario, the court need not actually twist or break standing interpretive rules. Instead, the varied arsenal of interpretive rules available to judges are applied selectively in order to reach some desired substantive outcome. One interpretive principle may be helpful to achieving the desired substantive outcome and another harmful. The desire to reach a certain substantive outcome consciously or unconsciously influences the court's selection of interpretive principles. The dishonesty lies in deploying the helpful interpretive rule while conveniently failing to apply or discuss the harmful interpretive rule.}


\end{quote}
interpretive discretion. In these cases, the extant system operates adequately. Where the public is ignorant and/or indifferent, or where potentially conflicting legal norms stand in a rough democratic legitimacy equilibrium, preservation of the norm created by the entity of greater democratic legitimacy is not an entirely unsatisfactory way to run the show.

When the prospect of a truly and decidedly anti-democratic outcome does present itself, however, the problems precipitated by the extant system are quite serious. As the anti-spam regulation illustrates, in these cases the extant system is most likely to produce the Hobson's choice between nullification of the more democratically legitimate legal norm and dishonest manipulation of interpretive discretion aimed at avoiding an anti-democratic outcome.

Moreover, because the extant system sometimes forces courts into a Hobson's choice between two extremes, it produces substantial unpredictability. For some judges rule-following will prevail over the desire to enhance or preserve the democratic legitimacy of law. Other judges place less value on rule-following and more on reaching the 'right' outcome, which in some cases will mean evading nullification of norms of relatively strong democratic legitimacy. These judges will take advantage of the flexible and frequently contradictory nature of interpretive rules. They will exercise a benign manipulation aimed at avoiding nullification of legal norms that, regardless of source, bear the marks of strong democratic legitimacy. Indeed, the same judge may vacillate between straightforward and honest norm interpretation and benign manipulation of interpretive discretion from one case to the next.70

70. It is not uncommon for judges to vacillate from one interpretive approach to another from case to case. F.D.A. v. Brown & Williamson, 529 U.S. 120 (2000), for example, reveals Justice Scalia joining an opinion driven exclusively by reliance on the record of legislative history and contradicted by clear statutory
The inevitable mix of approaches creates tremendous uncertainty. The problem is not only that the axioms encourage the judicial white lie, but also that benign judicial prevarication is applied in a haphazard and uneven manner. Consequently, the outcome of a case in which two legal norms may conflict will ultimately depend not on the axioms governing such cases, but rather on the attitude or approach of the judges deciding the case. Ex ante, the litigant can never really know whether a court will handle a case by straightforward application of the extant system, or by interpretive manipulation aimed at avoiding the discretion-denying rigidity of the extant system.

This is ironic. The very purpose of rigid axioms which offer no room for judicial discretion and no exceptions is to control judicial discretion. Yet the very discretion-denying rigidity of the axioms provokes courts to seize upon and manipulate their flexible interpretive discretion as a strategy aimed to frustrate and defeat the axioms. Why bother with the discretion-denying rigid formalism of the axiomatic meta-norms when judges are eternally free to apply text. Id. at 125-161. In most cases, however, Scalia is a committed textualist and vocal critic of reliance on legislative history. See, e.g., Chisom v. Roemer, 501 U.S. 380, 404-17 (1991) (Scalia, J., dissenting) (Scalia castigating Court's opinion for following indicia of legislative intent over contrary clear statutory text). Likewise, in Brown & Williamson, Justice Stevens joins a dissent that advocates interpretation of statute in accord with clear text and rejection of contrary legislative history. Brown & Williamson, 529 U.S. at 161-192. In other cases, however, Stevens frequently relies on legislative history when interpreting statutes. See, e.g., W. Va. Hosps. v. Casey, 499 U.S. 83, 108-111 (1991) (Stevens, J., dissenting) (dissenting opinion of Justice Stevens advocating interpretation of statute based on record of legislative history rather than text of statute).

open ended interpretive discretion circumventing the axioms' rigid formalism?

The failing of the extant system is not that it resolves the majority of cases in an unsatisfactory manner. The failing of the extant system is that when it matters most it performs at its worst. Ideally, the system governing adjudication of conflicts between legal norms would perform at least satisfactorily when performance really matters. A better system would allow courts to reach democracy-reinforcing outcomes in cases like the anti-spam regulation illustration without resort to obfuscatory manipulation of interpretive discretion and opacity in written opinions. What is needed is a set of rules for adjudicating cases involving conflicting legal norms without facing the Hobson's choice. What is needed is a set of rules that will allow courts to avoid nullification of individual norms of relatively strong democratic legitimacy within the rules rather than via interpretive manipulation aimed at subverting the rules.

IV. Alternative System for Mediating Conflicts Between Legal Norms

The fundamental features of the extant system governing adjudication of conflicting legal norms are deeply ingrained in the unconscious conceptions of practicing lawyers. Yet the extant system is nowhere written in stone. There is nothing sacrosanct or unalterable about the peculiar features of the extant system. Alternative systems are easily imaginable. Might a different system perform better than the extant system?

This Section discusses several alternatives to the extant system governing adjudication of

72. The Athenian legal system, for example, did not involve the kinds of divisions and hierarchies that modern legal systems employ. Notably, while Athenian law did come to include constitutional norms, the Athenian system did not treat them as a separate category of higher order norms. MOGENS HERMAN HANSEN, THE
cases involving conflicting legal norms. Some of the alternative systems are advanced primarily for the purpose of highlighting certain features of the extant system. Many of the proposed alternatives seek to ameliorate the extreme rigidity of the extant axiomatic meta-norms and/or broaden the narrow focus on the democratic legitimacy of the entities that create legal norms marking the extant system. Some of the alternatives would significantly alter traditional institutional roles and relationships.

As we will see, it is possible to construct systems for dealing with irreconcilable conflicts between legal norms that perform better than the extant system in terms of enhancement or preservation of the democratic legitimacy of law. It is also possible to construct systems which do not force courts into a Hobson's choice between democracy-enhancing outcomes and manipulation of interpretive discretion. It may even be possible to construct systems with both of these salutary features. All systems, however, entail both benefits and drawbacks. The optimal system will depend upon which benefits one wishes to maximize and which drawbacks one wishes to minimize.

A. Radical Departures from the Extant System

I begin with a trio of alternative systems that would work radical alterations to the extant system. Though it is hard to imagine adoption of these radical systems, they can teach us something about the extant system and what we might want from more probable alternatives.
1. The Purely Chronologic System

One possible alternative system would base adjudication of cases involving irreconcilably conflicting legal norms on a variant of the chronologic axiom. This system would eliminate the source, hierarchic, and categoric axioms. There would exist no practical differences between kinds of norms, no hierarchy of kinds of norms, and no trump of norms belonging to superordinate categories over norms belonging to subordinate categories. Under the purely chronologic system, whenever two norms are found in a posture of irreconcilable conflict, the norm created later in time would trump the norm created earlier in time.

The correlation between the democratic legitimacy of sources and the democratic legitimacy of the particular norms they create is often weak. If chronology is a more accurate indicator of democratic legitimacy than source, a purely chronologic system could do better at preserving norms of relatively strong democratic legitimacy than the extant source-centric system. The link between chronology and democratic legitimacy is often quite strong in cases

\[ \text{See supra note 26.} \]

\[ \text{In the anti-spam regulation illustration, for example, the recency of the norm better correlates with the democratic legitimacy of the norms involved than does the source which generated the norms. See supra text accompanying notes 48-59. Contrary to the extant system, a purely chronological system would demand preservation of the popular anti-spam regulation and nullification of the conflicting special interest oriented statute.} \]
involving conflicts between constitutional provisions and statutes. Recently passed statutes frequently manifest, from most perspectives, greater democratic legitimacy than do antiquated constitutional provisions. Because the purely chronologic alternative would incorporate no hierarchy of kinds of legal norms, it would work to preserve recent statutes and nullify (or modify) conflicting old constitutional provisions. In so doing, the purely chronologic system would, over the run of cases, tend to preserve norms of greater democratic legitimacy more often than does the source-centric extant system.

Consider the Commerce Clause and the countless federal statutes passed under its authority. Indulge the assumption for a moment that, as some scholars argue, the original Commerce Clause offered Congress a relatively restricted zone of legislative power. If this assumption is correct, much modern federal legislation stands in conflict with the original Commerce Clause. Under the extant source-centric system, vast swaths of statutory law created

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75 This phenomenon gives rise to the counter-majoritarian difficulty. See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (1962) (discussing counter-majoritarian nature of judicial review).

in recent decades establishing national policies on everything from economic, product, and workplace safety regulations, to environmental protection, stand at risk of nullification. The Commerce Clause emanated from We the People, while the statutes in question emanated from Congress, the legislative agent of the principal People. When in conflict, norms of superordinate kind trump norms of subordinate kind.

Abolition of these statutes would produce the classic anti-democratic dead hand of the past problem – ancient and no longer majoritarian constitutional norms frustrating modern statutes which better reflect current majority preference. The purely chronologic system would completely eliminate the dead hand of the past problem. Under such a system, recent statutes embodying current majoritarian preferences would trump conflicting and no longer majoritarian constitutional provisions, such as the original Commerce Clause. The will of the current generation, expressed in modern statutes, would trump that of a generation dead for over two centuries, expressed in ancient constitutional provisions.

Courts operating under the extant system, of course, have blunted the dead hand of the past problem via judicial revision of constitutional norms. Returning to the Commerce Clause, the Supreme Court in the 1930s could have straightforwardly applied the extant axiomatic meta-norms and continued striking down federal statutes as beyond the scope of narrow Commerce Clause powers. This path, however, would have entailed the democratically illegitimate

77. This is exactly what the Court did up until 1937. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 303-04 (1936) (striking down Bituminous Coal Conservation Act because regulation of coal mining not within scope of Commerce Clause powers); Schecter Poultry v. United States, 295 U.S. 495, 546 (1935) (holding regulation of poultry operation by National Recovery Industrial Act beyond scope of Commerce Clause powers); United States v. E.C. Knight, 156 U.S. 1, 12
prospect of an unelected Supreme Court nullifying statutes embodying policies endorsed by elected officials on the winning side of landslide elections in 1934 and 1936.\textsuperscript{78} Rather than continue the anti-democratic path, starting in 1937, the Court supplanted the narrow Commerce Clause with a spacious judicially reinvented Commerce Clause.\textsuperscript{79} In other words, rather than an outcome that would be perceived as anti-democratic, the Court eventually opted for the arguably lesser evil of judicial reformulation of a constitutional provision.\textsuperscript{80}

\textsuperscript{78} See Bruce Ackerman, \textit{We the People: Transformations} 289-90, 306-11 (1998) (explaining that landslide mid-term congressional elections of 1934 and presidential election of 1936 signaled overwhelming popular support for expanded regulatory powers of federal government and rejection of traditional constitutional limits on federal government power).

\textsuperscript{79} See Wickard v. Filburn, 317 U.S. 111, 120-28 (1942) (upholding Agricultural Adjustment Act on theory that Commerce Clause grants Congress power to regulate even negligible impacts on interstate commerce); United States v. Darby, 312 U.S. 100, 113-15 (1941) (upholding Fair Labor Standards Act on theory that Commerce Clause grants Congress power to regulate shipment of manufactured goods); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) (upholding National Labor Relations Act on theory that Commerce Clause grants Congress power to regulate activities burdening or obstructing commerce).

\textsuperscript{80} I make no statement on whether judicial reformulation constitutes a positive or negative, or a legitimate or illegitimate event. Given the apparent preferences of the electorate for a more energetic federal government, however, judicial reformulation of the Commerce Clause is certainly defensible. As Bruce Ackerman has argued, judicial reformulation of the Commerce Clause was not an instance of a loose canon court acting alone to alter the Constitution. It instead was the final step in an extended political process involving electoral processes and the political branches of government. The judicial reformulation of the Commerce Clause was more an instance of the Court lagging behind the electorate and the political branches. See Ackerman, \textit{supra} note 78, at 279-382 (defending judicial reformulation of Commerce Clause by arguing that judicial revision was part of larger multi-step pattern involving other branches of government).
The final outcome obtained under the extant system was no different, and no less in conformity with the will of the then current generation, than that which would have resulted under a purely chronologic system. The purely chronologic system, however, would not have required resort to judicial modification of the original Commerce Clause. A Supreme Court operating under the purely chronologic system could have admitted that New Deal statutes stood in conflict with the narrow Commerce Clause, but held that the recently passed statutes (which better reflected modern majoritarian sentiment than the narrow Commerce Clause) trumped the narrow and outdated Commerce Clause. The Commerce Clause, for all intents and purposes, would have been modified by the passage of statutes, or in other words, by legislative action. Certainly this is unorthodox. On the other hand, as history played out, and as it often plays out, the modification was effectuated via Supreme Court reinvention of the meaning of the commerce Clause.

Between alteration of constitutional norms by legislative action or by judicial government and electoral processes which demonstrated that We the People sanctioned such revision).

Of course it must be recognized that under any system the pre-1937 Supreme Court may very well have sought to manipulate its interpretive discretion in order to perpetuate a narrow reading of the Commerce Clause. The majority of the Court, in other words, may have been more motivated by a desire to effectuate certain federalism and congressional power policies than any desire to either enforce the original Commerce Clause or bend the law to fit the popular will of the time. See Erwin Chemerinsky, Constitutional Law: Principles and Policy 243 (2d ed. 2002) (observing that pre-1937 Commerce Clause decisions were produced by justices committed to laissez-faire economic theory and opposed to government economic regulation). If correct, the purely chronologic system might not have stopped the Court from perpetuating a narrow Commerce Clause.

The Supreme Court's alteration of the Commerce Clause is not unique. Constitutional change via judicial reinterpretation is far more common than constitutional change via formal Article V amendment. David A. Strauss, The

http://law.bepress.com/rutgersnewarklwps/art7
reformulation, the former may be more palatable.  

The Commerce Clause example underscores the possibility that a purely chronologic system might (1) do better at promoting outcomes perceived as democratically legitimate than the extant system, and (2) might in turn reduce the need or incentive for dishonest judicial manipulation aimed at avoiding anti-democratic outcomes. Despite these possibilities, several caveats apply.

In the first instance, the chronologic system would at best make marginal improvements on the extant system. The purely chronologic system, like the extant system, fixates on only one indicator of the democratic legitimacy of legal norms. The extant system fixates on the sources of legal norms. The purely chronologic system fixates on the chronology in which norms are created. Any system which fixates on only one indicator is bound to produce abundant false positives – instances where the indicator wrongly indicates that a given legal norm possesses greater democratic legitimacy than some conflicting legal norm. Whether chronology or source is a better indicator of the democratic legitimacy of legal norms is an empirical question to which there exists no definitive answer. If chronology is better, it is only marginally better. Both are

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*Irrelevance of Constitutional Amendments*, 114 Harv. L. Rev. 1457, 1459-62 (2001) (arguing that Constitution has been informally amended by Supreme Court decisions more than by formal Article V processes).

83. See Katyal, *supra* note 33, at 1358-94 (advocating enhanced congressional power to interpret constitutional norms).

84. The extant system ends up privileging, for example, an outdated or a special interest statute contrary to current popular will over a regulation that happens to reflect current majoritarian sentiment. Likewise, the chronologic system would end up privileging, for example, the new special interest statute contrary to current popular will over an old constitutional norm which, despite its age, coincides with current majoritarian preferences.
exceedingly crude instruments by which to assess a puzzle as complex and multifaceted as the
democratic legitimacy of individual legal norms. Both the entity that created a given legal norm,
and the chronology of its creation, plus a host of other factors, usually will be germane.
Reduction of such a complex question to any single metric is thus bound to produce frequent
false positives.

Relatedly, a shift to a chronologic system would at best work a minor reduction in the
incentive for dishonest judicial bias and manipulation. The purely chronologic alternative would
be every bit as rigid and exceptionless as the extant system. Just as under the extant system,
courts placing comparatively low value on rule-following would resort to dishonest manipulation
of interpretive discretion as a safety valve against nullification of norms of relatively strong
democratic legitimacy.

A chronology-based system, for example, would call for preservation of a recently created
special interest oriented regulation and corresponding nullification of an old, but still
majoritarian, conflicting statutory norm. Dishonest manipulation of flexible interpretive
discretion would be the only way to avoid such an outcome. At least some courts would strive
mightily to pick and choose among available interpretive rules, or to subtly and covertly
manipulate interpretive rules, in order to find that the more democratically legitimate statute does
not stand in conflict with the new special interest driven regulation. In other words, the Hobson's
choice between interpretive honesty and democracy-reinforcing outcomes would still present
itself at regular intervals.

Another possibly problematic feature of a purely chronologic system relates to stability of
existing law. One feature of the extant system is that it makes alteration or abolition of existing
law relatively difficult. It accomplishes this by permitting alteration or abolition of existing legal norms only by the entities that created those norms or by superordinate entities. For example, a statute can be altered or abolished only by the passage of a conflicting statute by Congress or the ratification of a conflicting constitutional amendment by We the People. An administrative agency, in contrast, may not alter an existing statute by promulgating a new conflicting regulation.\textsuperscript{85}

The purely chronologic system, in contrast, would permit any norm-generating entity to alter or abolish existing law simply by creating a new conflicting legal norm. Congress could alter a constitutional norm by passage of a new statute. An agency could abolish an existing statute by promulgation of a new conflicting regulation. By allowing all norm-generating entities to alter all kinds of legal norms, the purely chronologic system would make alteration of existing law far easier than is currently the case. Multiple avenues would be open to any interest group wishing for change in the state of the law.\textsuperscript{86} Those seeking change in the law would seek the

\textsuperscript{85}. Of course, existing statutes, or other forms of existing law, can always be altered via judicial manipulation or reinterpretation. This method of alteration, however, operates not as part of or within the extant meta-norms, but as a way to subvert them.

\textsuperscript{86}. Thus, in a world governed by a purely chronologic system, a change in existing statutory law would not require running the gauntlet of the legislative process, but rather prompting an administrative agency to promulgate a new conflicting regulation or a court to issue a new common law rule.

To some extent such prompting already occurs under the extant system. Rather than seek a statutory amendment, for example, an interest group seeking to alter existing statutory law may try to convince a court to issue a new and more favorable interpretation of the existing statute. Or the interest group may pursue the promulgation of a new favorable regulation that is based on a new administrative reinterpretation of the statute. Still, there are limits as to how far the bounds of judicial or administrative reinterpretation of existing statutes can or will be stretched. Under a purely chronologic system there would be no such
path of least resistance by focusing their efforts on the entity most likely to respond to a plea for change. The end result would be an accelerated pace of legal change, and far less stability than prevails under the extant system.

Moreover, the dynamic of creating and changing law would be completely altered in a way that would systematically favor entities that can most easily create new legal norms. There seems to be a reverse correlation between the democratic legitimacy of a norm-generating entity and the ease with which that entity may create new legal norms. At the top of the hierarchy, it is nearly impossible for We the People to ratify new constitutional norms. At the bottom of the hierarchy, creation of a new common law rule is as easy as announcing it in a judicial opinion. In the middle range of the hierarchy, passing statutes and promulgating new regulations is easier than ratifying constitutional amendments but harder than announcing new common law rules. Moreover, assuming an equal institutional will to create a new legal rule, it is usually easier to push a new regulation through the rule making process than it is to push a new statute through the gauntlet of multiple committees, both chambers of Congress, and Chief Executive approval.

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87. Thousands of amendments have been proposed. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995, at 362 (1996) (appendix listing number of proposed constitutional amendments by decade). Only twenty-seven, however, have become part of the Constitution. U.S. CONST. amends. I-XXVII.

88. Whether a newly created common law rule spreads to other jurisdictions, however, is another question. While an appellate court can easily establish a new common law rule within its own jurisdiction, it will have no power over whether that new rule becomes dominant via adoption in most other jurisdictions.

89. See ESKRIDGE ET. AL., supra note 66, at 66-67 (discussing legislative process as series of vetogates and hurdles).
Thus, under the purely chronologic system, Congress, with its cumbersome processes, would suddenly operate at a tremendous disadvantage against agencies and the courts. Given the relative ease in the promulgation of new regulations and announcement of new common law rules, more often than not it would be relatively easy for agencies and courts to impose their policy preferences over those of Congress. Congress, however, would find it comparatively difficult to overrule the regulations and common law rules created by agencies and courts.\textsuperscript{90}

Given the above discussed considerations, the risk-benefit calculus disfavors the purely chronologic system. The benefits of greater more outcomes that enhance or preserve the democratic legitimacy law, and reduced incentives for judicial manipulation of interpretive discretion, are both uncertain and minimal. The risks inherent in unstable law and disturbance of the dynamics of legal change are considerable. Nonetheless, consideration of the purely chronologic system has yielded some important insights. First, the extant system is not the only system that will preserve legal norms of lesser democratic legitimacy and nullify conflicting legal norms of greater democratic legitimacy. Any system which relies on overly simplistic metrics for assessing the democratic legitimacy of legal norms will suffer this weakness. Second, though

\textsuperscript{90} If passing new statutes were not substantially more difficult than promulgating new regulations or establishing new common law norms, the purely chronologic system might produce another disturbing phenomenon – a never ending cycling of legal rules. An agency could freely alter an existing statute by promulgating a new conflicting regulation. Congress could then overrule the new regulation by passing a new conflicting statute reimposing the original rule. The courts could then overrule the statute by announcing a new and conflicting common law rule. Because any norm-generating entity would be empowered to alter any kind of existing legal norm, there would be little to stop a constant battle between Congress, agencies, and the courts over the composition of the law. The extant system's limits on avenues for alteration of existing law works to discourage the emergence of the cycling scenario.
preservation of the democratic legitimacy of law constitutes the centerpiece of the extant system, a measure of legal stability counts as an important side benefit. Any viable alternative to the extant system must do a better job of enhancing the democratic legitimacy of the law than the extant system. In addition, any viable alternative should maintain an appropriate degree of legal stability and avoid undue disturbances in the dynamics of legal change.

2. **The Inverted System**

So far I have spoken of the extant set of axiomatic meta-norms governing adjudication of conflicting legal norms as justified by its (imperfect) tendency to enhance or at least preserve the democratic legitimacy of law. The extant system, however, does have a secondary purpose and rationale: enforcement of separation of powers values. This Section introduces a second alternative system aimed at explicating the separation of powers effect, and demonstrating that enforcement of separation of powers is only of secondary import to the extant system.

a. **How the Extant System Enforces Separation of Powers**

Before turning to the second alternative, I must clarify exactly how the extant system enforces separation of powers values. At its most basic level, separation of powers requires that different parts of government be responsible for different tasks or functions.91 We the People

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ratify constitutional norms.\textsuperscript{92} Legislatures pass statutes.\textsuperscript{93} Agencies promulgate regulations.\textsuperscript{94} Courts announce common law doctrinal rules.\textsuperscript{95} Taken together, the source, hierarchic, and categoric axioms have the effect of protecting the separation of powers boundary lines which separate the four principal norm-generating entities.

The way that the extant system safeguards separation of powers boundary lines is a bit more subtle than it may first appear. Legal norms created by different norm-generating entities are treated as different in kind or category.\textsuperscript{96} Formal distinctions between kinds of legal norms, however, are not enough to safeguard separation of powers boundary lines. In order for these boundary lines to have any real consequence \textit{the kinds of norms that each norm-generating entity creates must differ in meaningful practical ways}. This is exactly the effect that the extant system produces and exactly how it protects separation of powers values.

To see the point, return to the purely chronologic system, which quite obviously does not protect separation of powers boundary lines.\textsuperscript{97} Under that system, there would be no meaningful

\textsuperscript{92} U.S. Const. pmbl.; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 324 (1816) ("The Constitution of the United States was ordained and established...as the preamble of the constitution declares, by 'the people of the United States.'").

\textsuperscript{93} U.S. Const. art. I, § 1.

\textsuperscript{94} See Lieberman, supra note 91, at 31 (explaining that administrative agencies promulgate regulations with the force and effect of law); Cornelius M. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy 4 (1994) (explaining that agencies make rules).

\textsuperscript{95} U.S. Const. art. III, § 1.

\textsuperscript{96} This is the result of the source axiom. See supra text accompanying note 25.

\textsuperscript{97} For those who view separation of powers as an independent value, this feature will count as another strike against the purely chronologic alternative.
difference between each of the four formally distinct kinds of legal norms. We could give the
norms created by the four norm-generating entities different names – constitutional, statutory,
regulatory, and common law. Beyond nomenclature, however, all four would have the exact
same practical consequence. All would have the power to trump any conflicting preexisting legal
norm regardless of source.

Accordingly, there would be no meaningful division of norm-generating tasks among
norm-generating entities. We the People, Congress, administrative agencies, and the Federal
Courts would all be assigned the task of creating what, for all practical intents and purposes,
would constitute a single kind of legal norm. An administrative agency, for example, which
promulgates a legal rule labeled a regulation would be doing something essentially
indistinguishable from a legislature which passes a legal rule called a statute. Both would be
creating a legal norm with the power to trump any and all preexisting conflicting legal norms.
Any talk of assigning Congress the task of passing statutes, or assigning administrative agencies
the task of ratifying constitutional provisions, would be completely void of substantive practical
difference or consequence.

Working in conjunction, the extant system's four axioms produce the exact opposite
effect. The extant system preserves separation of powers boundary lines by ensuring that each of
the four principal kinds of legal norms differ not only formally, but also in terms of their practical
consequences. This, in turn, makes the assignment of different norm-generating tasks to
different norm-generating entities a phenomenon with real, tangible, and practical (as opposed to
merely nominal) consequences. The extant system accomplishes this by granting norms a trump
only over conflicting norms that are subordinate in kind or of the same kind. Stated more
generally, the extant system differentiates norms by ensuring that norms possess *dissimilar trumping powers*. The statutory norm differs from the regulatory norm, for example, in that the former will trump conflicting regulations, common law rules, and preexisting statutes, while the latter will only trump conflicting common law rules and preexisting regulations.

By enabling dissimilar trumping powers, and thereby creating real as opposed to merely nominal differences between types of norms, the extant system ensures real differences in the norm-generating tasks of each of the four norm-generating entities. Thus, an administrative agency which promulgates something called a regulation does something very different than a legislature which passes something called a statute. The agency creates a legal norm capable of trumping conflicting common law norms and preexisting regulations. The legislature, in contrast, creates a legal norm capable of trumping not only conflicting common law norms and regulations, but also preexisting statutes.

The end result of the extant system is that any given norm-generating entity creates something genuinely different from that which all other norm-generating entities create. We the People are assigned the task of ratifying the norms that trump all other conflicting norms. Congress is assigned the task of passing the norms that trump regulations and common law rules. Administrative agencies are assigned the task of promulgating the norms that trump conflicting common law rules. The Federal Courts are assigned the task of announcing common law rules that trump no other kind of legal norm.

Obliterate the difference in practical impacts of legal norms, and you will have obliterated the separation of powers assignment of distinct norm-generating tasks to distinct norm-generating entities. This is what the purely chronologic system would do. Create some
mechanism for preserving meaningful practical differences in the consequences of different kinds of norms, and you will have preserved a separation of powers that goes beyond empty formality. This is what the extant system does.

b. *The Secondary Importance of Separation of Powers Elements*

Though unmistakably present, the separation of powers protecting elements of the extant system are of secondary importance. The (imperfect) democracy-reinforcing tendencies serve as the paramount justification for use and perpetuation of the extant system. A second alternative system will demonstrate the primacy of democratic legitimacy over separation of powers enforcing ends.

This second alternative, which I will call the inverted system, would make only one minor modification to the extant system. This small modification, however, would produce radically unconventional outcomes. The extant system's hierarchic axiom ranks the different categories of legal norms in a rigid hierarchy corresponding with the democratic legitimacy of the entities that generate legal norms.98 The norms sanctioned by the entity of greatest relative democratic legitimacy – We the People – sit at the top of the ordering. Statutes, regulations, and common law rules, each generated by entities of decreasing democratic legitimacy, occupy descending positions in the ordering.

Under the inverted system this ordering would be reversed. Common law rules would sit at the top of the hierarchy and trump all other kinds of conflicting legal norms. Regulations would occupy the second rung and would trump conflicting statutes and constitutional norms.
Statutes would come next and would trump conflicting constitutional norms. Constitutional norms would come to rest at the bottom of the hierarchy and trump no other kind of legal norms. Other than this single modification, the inverted system would work exactly the same as the extant system.

Obviously, the inverted system is utterly unacceptable. The reasons that it is unacceptable, however, is the interesting information. First, there is nothing awry in the inverted system's treatment of separation of powers boundary lines. Just as much as the extant system, the inverted system would protect the assignment of different norm-generating tasks to different norm-generating entities. Just like the extant system, the inverted system would give each kind or category of legal norms different trumping powers. And, just as under the extant system, each norm-generating entity would be charged with the task of creating, in very real and practical terms, different kinds of legal norms. In short, as far as protecting separation of powers boundary lines is concerned, the inverted system is the equal of the extant system.

The problem with the inverted system lies not in any failure to protect separation of powers. The problem is that it would be indefensible in terms of democratic legitimacy. A legal system worthy of respect offers losing interests defensible reasons for outcomes and decisions. Consider the consolation offered to losing interests under the extant system in the anti-spam regulation illustration. A court which straightforwardly and without interpretive manipulation applies the extant system will strike down the popular anti-spam regulation.

The losing interest – the public – will not be pleased with the outcome. At least,

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See supra text accompanying note 25.

Supra pp. 31-38.
however, the court operating under the extant system can offer a reasonable justification. The justification begins along separation of powers lines: Legislatures make statutes. Agencies make regulations. When in conflict the former trumps the latter. If regulations could trump statutes, agencies would be empowered to create norms that are in essence no different than the norms created by Congress.\(^{100}\) The justification then takes a democracy-reinforcing turn: Statutes trump conflicting regulations because statutes are created by the elected (relatively strong democratic legitimacy) Congress, while regulations are created by unelected (relatively weak democratic legitimacy) agencies. In a case like the anti-spam regulation illustration, the more democratically legitimate norm (the popular regulation) will be been nullified. At least, however, when refusing to strike down or modify popular or problematic statutes courts regularly evoke the separation of powers rationale. See, e.g., Lamie v. U. S. Trustee, 124 S. Ct. 1023, 1034 (2004) (when interpreting statutes “[i]t is beyond our province to...provide for what we might think...is the preferred result.’ [citation omitted]. This allows both of our branches to adhere to our respected and respective, constitutional roles”); United States v. Locke, 471 U.S. 84, 95 (1985) (refusing to correct apparent statutory drafting error on grounds that Court may not “soften the clear import of Congress’ chosen words whenever a court believes those words lead to a harsh result”); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1980) (stating that statute did not make for “a sensible means of conserving energy” but refusing to invalidate or alter statute because “it is up the legislatures, not courts, to decide on the wisdom and utility of legislation”); T.V.A. v. Hill, 437 U.S. 153, 194-95 (1978) (enforcing statute requiring halt of construction of multi-million dollar dam to save snail darter on grounds that “in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with ’common sense and the public weal.’”); Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 626 (1978) (arguing that though Court could do a better job than statute Court cannot alter statute because Court has no authority to substitute its views for the view of Congress expressed in statute); United States v. Cooper Corp., 312 U.S. 600, 605 (1941) (“[I]t is not our [the Court’s] function to engraft on a statute additions which we think the legislature logically might or should have made”); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507-08 (9th Cir. 2002) (stating that courts cannot legislate additional
the more democratically legitimate entity – Congress – has prevailed. While not ideal, the losing interests are offered a justification of plausible persuasive power.

Compare the wholly unsatisfactory justification that would be offered by a court operating under the inverted system. Reverse the polarity of the anti-spam regulation illustration, and assume that Congress acts in accord with majoritarian sentiment while the agency is responsive to anti-majoritarian special interests. Prompted by strong majoritarian desires and resisting special interest lobbying, Congress passes a new statute requiring the FTC to promulgate comprehensive anti-spam regulations. Captured by Internet advertising special interests, however, the FTC promulgates a watered-down set of regulations that end up protecting spammers by imposing trivial fines, disallowing private suits for money damages, and denying private causes of actions no matter how good a policy choice it may be).

The democracy-reinforcing aspect of the justification is almost always implicit and understood. Sometimes, however, courts spell it out. See, e.g., Parham v. Hughes, 441 U.S. 347, 351 (1979) (“[A] court is not free...to substitute its judgment for the will of the people...as expressed in the laws passed by their popularly elected legislatures”); Falvo v. Owasso Indep. Sch. Dist., 233 F.3d 1203, 1213 (10th Cir. 2000) (when interpreting statutes “the court weighs the words of elected legislators to resolve their meaning. This court must go wherever the language and intent of the statute take us. Should our interpretation cause public discomfort or impose undesired burdens, it is to the source of the enactment, Congress, that those who are discomforted or burdened must turn for relief”); In re Asbestos Litig., 829 F.2d 1233, 1240 (3d Cir. 1987) (recognizing that statutes overrule common law precedent because “in a democracy the legislature may be the more appropriate branch to draw classifications based on public policy. As a popularly elected body, the legislature is in a position to tap the thinking of its constituency and has the resources to secure data generally not available to the courts”); Planned Parenthood Fed’n of Am. v. Bowen, 680 F. Supp. 1465, 1473 (D. Colo. 1988) (holding that agency interpretation in conflict with statute must be nullified because “value judgments which amount to changes in a statute, which are what the new regulations represent, should be made by the elected, accountable Congress and not by the Executive branch”).
all but token agency enforcement resources. The regulations stand in conflict with the statute. A court operating under the inverted system will (if acting straightforwardly and without interpretive manipulation) nullify the popular and democratically legitimate anti-spam statute and preserve the unpopular special interest-favoring regulations.

Again, the losing interest – the public – would not be pleased with the outcome. Worse than under the extant system, however, the rationale would offer no meaningful consolation. The justification would rely solely on separation of powers arguments and would lack the democracy-reinforcing turn that underlies the extant system: Agencies make regulations. Legislatures make statutes. The laws that agencies make trump conflicting laws made by legislatures (or at least they do in the anti-matter world governed by the inverted system). In short, the rules are the rules. Deal with it. There is no democracy-reinforcing rationale, not even an imperfect one, to justify the regulation over statute ordering.

When it comes to justifying outcomes in individual cases involving conflicting legal norms, the separation of powers argument only goes so far. The argument that a statute must trump a conflicting regulation because Congress is superior to administrative agencies really does not work as a satisfactory justification. It is closer to a restatement of the statute over regulation rule than a satisfactory justification for that rule. The notion that a statute must trump a conflicting regulation because Congress, the creator of the statute, possesses greater democratic legitimacy than the agency, the creator of the regulation, begins to sound like a viable justification. The extant system works to advance both separation of powers and democracy-reinforcing ends. The inverted system would be its equal in terms of enforcing separation of powers but would completely lack the democracy-reinforcing ingredient. Comparison of the two

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systems demonstrates that the democracy-enforcing element, rather than the separation of powers protecting feature, is what really does the work of justifying the outcomes produced by the extant system.

No doubt, the extant system is structured to protect separation of powers boundary lines. It, in other words, is structured so that different norm-generating entities create norms of different trumping powers. More importantly, however, the extant system is structured so that the norm-generating entities of greatest democratic legitimacy are charged with creating the norms of greatest trumping powers, and vice versa. This crucial feature, and not the separation of powers feature, does the work of justifying the outcomes the extant system produces. The extant system's tendency to enhance or at least preserve the democratic legitimacy of law is highly imperfect. As the inverted system shows, however, an imperfect democracy-reinforcing justification is much better than no democracy-reinforcing justification at all.

3. **The Multi-Factor System**

Though different in many ways, the extant system and each of the two alternatives discussed so far are rule-based systems. This Section introduces an alternative system which

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102. Because rules are over- and under-inclusive relative to their purposes, rule-based decision making periodically produces outcomes at odds with underlying purposes. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE 31-34 (1991). Resolution of conflicts between legal norms in a way that enhances or preserves the democratic legitimacy of the law is the primary goal of the extant system. The extant system's rules, however, regularly produce outcomes which do the exact opposite. One way to improve the performance of rule-based decision making is to refine the rules with an eye towards minimizing their over- and under-inclusiveness relative to their purposes. Another strategy involves
would depart from the rule-based tack by sweeping aside the axiomatic meta-norms. Rather than adjudicating conflicting legal norms under a set of axiomatic rules, this alternative would call on courts to adjudicate such cases by directly assessing the democratic legitimacy of individual conflicting legal norms. Courts would perform this assessment with the assistance of a list of relevant factors or considerations.\textsuperscript{103} As is usually the case with multi-factor analysis, the list of factors would serve as a guide rather than a narrowly constraining command. While courts would be obliged to consider the entire list of factors, no specific formula or method for applying the factors would exist. The norm judged to possess greater democratic legitimacy would be preserved and the norm judged to be of lesser democratic legitimacy would be nullified.

One obvious charge against the multi-factor alternative is that, like the purely chronologic and inverted alternatives, it would fail to protect separation of powers boundary lines. Under the multi-factor system the trumping powers of constitutional, statutory, administrative, and common law norms would not differ in any meaningful way. A regulation of high democratic legitimacy, discarding rule-based decision making altogether.

\textsuperscript{103} This assessment would open up an entirely new form of legal discourse. Under the extant system legal discourse revolves exclusively around norm interpretation and whether two norms do or do not stand in a posture of irreconcilable conflict. Once a court interprets norms and finds them to stand in a posture of irreconcilable conflict, the four axiomatic meta-norms produce conclusive and unquestionable results. There can be no argument over whether a norm of superordinate kind trumps a norm of subordinate kind, or whether a newer norm trumps an older norm of the same kind.

Under the multi-factor alternative, however, courts would entertain two distinct lines of argumentation. As always, courts would be charged with determining whether two legal norms stand in conflict. Once two norms are determined to stand in conflict, however, the absence of the four axioms would force courts to decide which of the two norms ought to prevail. Under the extant system the four axiomatic meta-norms conclusively resolve this issue.
for example, could trump a statute of low democratic legitimacy (and vice versa). As such, the norm-generating tasks assigned to each of the four norm-generating entities would also be undifferentiable. Each entity would create legal norms possessing equivalent trumping powers.

A second objection to the multi-factor alternative is that it would fail to constrain judicial discretion in any meaningful way. As with any pliable multi-factor analysis, willful courts could back into pre-selected outcomes by stressing certain factors and soft-pedaling others. Ultimately, this objection may not substantially differentiate the multi-factor alternative from the extant system. The multi-factor alternative would not tightly constrain judicial discretion. The extant system, however, also fails to constrain judicial discretion.104 Rigid, formalistic, and rule-based as it may be, there is little to prevent a court operating under the extant system from controlling substantive outcomes via manipulation of flexible interpretive discretion.105 On this score, the

104. Though neither the extant system nor the multi-factor alternative can constrain courts from exercising discretion aimed at selecting substantive outcomes, the multi-factor system would channel legal discourse in useful ways. Courts operating under the multi-factor alternative would be forced to publicly address and apply the factors relevant to assessing the democratic legitimacy of competing legal norms. Under the extant system, in contrast, when a purposeful court seeks to manipulate the substantive outcome, it does so under the cover of neutral legal interpretation. In its public justification a court need not reveal its thinking on the democratic legitimacy of the norms involved.

105. As we have seen, courts that so wish often can use their ample interpretive discretion to evade the discretion-denying rigidity of the extant system. In some cases, of course, legal norms may be too tightly drawn to permit judicial interpretive manipulation. Yet a similar phenomenon would prevail under the multi-factor alternative. In some cases, courts operating under the multi-factor alternative would find it exceedingly difficult to back into outcomes via manipulation of the relevant factors. Where one of two conflicting legal norms obviously possesses far greater democratic legitimacy than the other, a judicial ruling to the contrary would be easily detected and revealed as judicial manipulation.
multi-factor alternative would not be significantly inferior to the extant system. 106

Beyond the separation of powers and judicial discretion issues, would the multi-factor alternative perform better than the extant system? Would it, in other words, more consistently and more often than the extant system prevent norms of suspect democratic legitimacy from trumping norms of solid democratic legitimacy? The multi-factor alternative would not strap courts with a rigid and simplistic rule-based approach. It would instead offer courts a flexible set of factors they could use on a case-by-case basis to pick and choose norms of relatively strong democratic legitimacy for preservation. For this reason, the multi-factor alternative holds out the promise of superior performance. However, a closer look substantially clouds the picture. In the end, the drawbacks of the multi-factor system probably outweigh any advantages it might have over the extant system.

The principal problems with the multi-factor alternative grow out of the difficulties that

106. Perhaps the most significant difference would lie in the location of exercises of judicial discretion. Under the extant system courts exercise discretion only in the interpretation of legal norms. In the context of the anti-spam regulation illustration, the purposeful court wishing to preserve the popular regulation simply interprets the statute and/or the regulation such that they do not stand in conflict.

Judicial manipulation under the multi-factor alternative would work in a different way. First, as under the extant system, courts could manipulate the meaning of legal norms and whether two norms stand in conflict. Indeed, because courts always must determine whether two legal norms stand in conflict, almost any imaginable system for dealing with conflicting legal norms will be subject to judicial manipulation. Second, however, courts could manipulate the factors guiding assessment of the democratic legitimacy of conflicting legal norms. Turning again to the anti-spam regulation illustration, a court ideologically opposed to government regulation might wish to nullify the anti-spam regulation. To reach this result, it could place greater emphasis on certain factors and less on others to find that the regulation does not possess greater democratic legitimacy than the statute.
courts would face in determining which of two legal norms possesses greater democratic legitimacy. The multi-factor alternative would require courts to engage in a form of analysis that lies outside their traditional areas of expertise. Courts are expert in interpreting and applying legal norms. They possess no special expertise in evaluating the democratic legitimacy of individual legal norms.

There is something to this problem, but not as much as one might think. First, pointing to the imperfections or limitations of courts is but half of the analysis. The relevant question is not whether courts are good or bad at evaluating the democratic legitimacy of individual legal norms. The relevant question is whether they are better at that task than the crude source-centric metric used by the extant system. Courts may not possess any special expertise in evaluating the democratic legitimacy of legal norms. In many cases, however, special expertise is probably not needed to outdo the extant system.

Second, courts are institutionally well positioned to make comparatively impartial evaluations of the democratic legitimacy of legal norms. Conventional wisdom maintains that the entities closer to an electoral connection are better at detecting majoritarian sentiment than the unelected federal courts.107 Often, however, Congress and agencies lack incentives to reform

107. See, e.g., Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 718 (1980) (Marshall, J., dissenting) (acknowledging that non-delegation doctrine is based on idea that “the most fundamental decisions will be made by Congress, the elected representatives of the people, rather than by administrators”); Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 258 (1970) (Black, J., dissenting) (“It is the Congress, not this Court, that responds to the pressures of political groups, pressures entirely proper in a free society. It is Congress, not this Court, that has the capacity to investigate the divergent considerations involved in the management of a complex national labor policy. And it is Congress, not this Court, that is elected by the people. This Court should, therefore, interject itself
legal norms of suspect democratic legitimacy or even the ability to identify norms of suspect democratic legitimacy. Legislators often have little incentive to alter or repeal special interest statutes that may benefit their reelection. Agencies that have been captured by the subjects within their regulatory jurisdiction are also not likely to modify regulations favoring narrow interests. Similar problems affect non-governmental institutional actors. Organized public interests opposing extant constitutional, statutory, and regulatory norms have a strong incentive to point out the suspect democratic legitimacy of the norms they oppose. Because they are organized interests, however, their assertions may be viewed as untrustworthy and can easily be painted as efforts to advance their own narrow anti-democratic interests. The same logic applies as little as possible into the law-making and law-changing process”); CBS Inc. v. Prime Time 24 Joint Venture, 245 F.3d 1217, 1227 (11th Cir. 2001) (arguing for adherence to text of a statute over legislative history because “[w]hen a statute is passed by Congress, it is the text of the statute...that has been voted on and approved by the people's elected representatives for inclusion in our country's laws”); Allman v. Eastern Co., 849 F.2d 608 [table], No. 87-3322, 1988 WL 60729, at *5 (6th Cir. 1988) (“policy questions of this sort are not to be decided, under our form of government, by an unelected judiciary. Our task is to apply the laws that the people's elected representatives have actually adopted; we are not here to pass laws that Congress has failed to pass”); Turpin v. Mailet, 579 F.2d 152, 184 (2d Cir. 1978) (“Congress is the elected voice of the people” and "presumptively has popular authority for the value judgment it makes").


to political parties that point to the anti-democratic nature of legal norms that run contrary to the party line. Only the federal courts are sufficiently independent to engage in disinterested evaluations of the democratic legitimacy of legal norms.  

Third, courts are very familiar with multi-factor analysis. Whether in common law, statutory, or constitutional areas, courts are constantly required to apply multi-factor tests. Uneven or unintentional misapplication of a multi-factor test for assessing the relative democratic legitimacy of individual legal norms is no more problematic than it is when courts apply multi-factor tests in other contexts.

Admittedly, the analysis required of courts by the multi-factor approach would pose unique challenges. In most instances where courts perform multi-factor analysis, courts must make determinations and judgments that are legalistic in nature. The factors courts would

110. To say that courts are better positioned to evaluate the democratic legitimacy of legal norms than other available institutional actors is not to say that courts would perform that task perfectly. As always, idiosyncratic ideological biases, uneven assessments of legal norms, and even manipulation of discretion would affect their judgement. These problems, however, will exist under any alternative and already exist under the extant system. There is nothing in the multi-factor system that would exacerbate these issues.

111. See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 964-65, 971-72 (1987) (arguing that constitutional law has become dominated by balancing tests).

112. Federal Rule of Civil Procedure 23, which governs certification of class actions, is typical. It asks courts to weigh legalistic factors such as whether the class representative's claims are typical of the class members' claims, and whether individual litigations would create a risk of inconsistent outcomes. Fed. R. Civ. P. 23. On the other hand, when applying multi-factor or balancing tests, courts are sometimes asked to weigh factors that are not legalistic in nature. The well-known Matthews v. Eldridge balancing test for determining whether sufficient administrative process has been afforded, for example, asks courts to consider the fiscal cost of additional procedural safeguards. 424 U.S. 319, 334-35 (1976).
apply under the multi-factor alternative, in contrast, lie outside the legal realm. Courts may be familiar with multi-factor analysis. But are they equipped to adequately perform this particular kind of multi-factor analysis? I would suggest that the answer is ‘yes,’ but only sometimes.

In order to address the issue in greater depth, we will need to get more specific about the configuration of the multi-factor alternative. Throughout the Article I have hinted at various factors relevant to assessing the democratic legitimacy of legal norms. I do not envision these factors as anything approaching an exhaustive enumeration of the factors that might be part of a multi-factor system.\(^{113}\) We can use them, however, to get a sense of the sorts of judgments that courts operating under a multi-factor system would have to make. The factors are summarized below:

1. The popularity or current majoritarian support (or lack thereof) for a given legal norm or for the policy effectuated by a legal norm.\(^{114}\)

\(^{113}\) Devising such an enumeration is not a goal of this Article. The extant system is so crude that even a highly imperfect multi-factor system could yield vast improvements. Courts do not need to know with great precision exactly what it means for a particular legal norm to possess or lack democratic legitimacy, or exactly which factors are relevant to assessing the democratic legitimacy of individual legal norms. All they need is a set of factors that allows them to make a more precise estimation than is possible under the highly imprecise extant system.

\(^{114}\) In assessing majoritarian support, it may be permissible to consider only the portion of the public that has formed an opinion. A very large portion of the electorate is aware of and has formed an opinion on certain issues, such as spam e-mail. Schultz, *supra* note 58, at 1 (citing study finding that 83 percent of respondents dislike spam e-mail). On other issues, however, only small portions or constituencies of the electorate may be affected and only that portion will form any opinion.
2. What most likely would be the majoritarian sentiment for a given legal norm or for the policy effectuated by a legal norm given sufficient information and public rumination and discourse.\textsuperscript{115}

3. The compatibility of a particular legal norm and the policies it effectuates with the consensus values and views of the current generation.

4. The democratic legitimacy of the entity that created a particular legal norm.\textsuperscript{116}

Are courts equipped to evenly and accurately predict and determine the current majority position regarding particular legal norms, or even more difficult, what the majority sentiment would be given sufficient information and public discourse? Are they prepared to identify the social consensus of the current generation?

In truth, courts are already somewhat familiar with these kinds of non-legal issues. Courts are not blind to factors beyond formal legal rules. Most courts are attuned to a variety of extra legal factors, including possible public perceptions of their rulings.\textsuperscript{117} When they come up

\textsuperscript{115} This factor could be relevant when there is no discernable majoritarian position on a given law or the policy it effectuates, or when there is a discernable majoritarian position but where that majoritarian position results from limited public information and/or discourse.

\textsuperscript{116} In isolation this factor is a crude predictor of the democratic legitimacy of individual legal norms. Nonetheless, it is relevant and useful.

\textsuperscript{117} See Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich. L. Rev. 2596, 2606-09 (2003) (reviewing empirical data indicating that courts tend to reflect public opinion and that “mood swings in the general public are mirrored in the output of the Supreme Court”); Michael J. Gerhardt, *The End of Theory*, 96 Nw. U. L. Rev. 283, 311, n.137 (2001) (mentioning concept that “federal courts often track majoritarian sentiments” and asserting that “some Justices have even acknowledged the relevance of consulting majoritarian sentiments in interpreting
against a legal norm of suspect democratic legitimacy – a special interest statute or a no longer popular constitutional provision – they will usually recognize the problem. Courts employ a seat of the pants, informal, unregulated judgment regarding the democratic legitimacy of individual legal norms in such cases. In a sense, therefore, the multi-factor alternative would merely formalize and regularize an informal and concealed multi-factor analysis that at least some courts already perform.118

That courts may be already be familiar with (informally) assessing the democratic legitimacy of legal norms, however, does not necessarily mean that they perform that task well. Ultimately, whether courts could competently apply a multi-factor system depends more on the nature of the cases at issue than the nature of judicial abilities.

Cases in which legal norms stand in conflict are divisible into two principal groups. First, there are the easy cases. By easy cases I do not mean cases where the meanings of the legal norms are easily discernable and beyond reasonable dispute. I instead mean cases in which it is easy to discern a marked difference in the democratic legitimacy of the norms involved. The anti-spam regulation illustration presents the paradigmatic easy case. The statute was enacted and perpetuated at the behest of narrow special interests. If honestly and straightforwardly interpreted, the statute prohibits not only very popular telemarketing regulations, but also popular anti-spam regulations. The anti-spam regulation, in contrast, is immensely popular with a strong

the Constitution”).

Moreover, even if courts currently lack special expertise in evaluating the democratic legitimacy of legal norms, it is at most a short term transition problem. Once operating under the multi-factor alternative, courts would work their way up the learning curve and develop the necessary expertise.

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majority of the public.

At the other extreme lie the hard cases. By hard cases I do not mean cases in which the meaning of the legal norms involved is difficult to discern or stands open to reasonable disagreement. I instead am referring to the cases in which it is difficult to discern any significant discrepancy or difference in the democratic legitimacy of the legal norms involved. Whether a case involving two conflicting legal norms is an easy case or a hard case (as I use those terms) is the key factor determining whether courts would competently and evenly apply a multi-factor alternative, and more broadly whether the multi-factor alternative would perform better than the extant system.

The extant system performs at its worst in easy cases, such as the anti-spam regulation illustration. As demonstrated by the anti-spam regulation illustration, in the easy cases the extant system regularly calls for nullification of the all-things-considered more democratically legitimate legal norm. Foreknowledge of this possibility provokes biased and manipulative interpretive strategies. In order to avoid the anti-democratic outcome, many courts will twist interpretative rules, often beyond the breaking point, with the aim of finding that no conflict is present. The easy cases, in other words, are most likely to produce the Hobson's choice between interpretive honesty and nullification of the more democratically legitimate norm.

The multi-factor alternative, in contrast, could perform quite well in easy cases. It would permit judges to apply a comparatively subtle analysis (almost any list of factors would be more subtle than the extant system) permitting preservation of norms of relatively strong democratic legitimacy. Most courts facing the anti-spam regulation illustration would be more than capable of applying a multi-factor analysis to rightly determine that the regulation possesses substantially
stronger democratic legitimacy than the conflicting statute.

Moreover, because courts could legitimately perpetuate norms of strong relative
democratic legitimacy, the multi-factor alternative would generate minimal incentive for
dishonest judicial manipulation. The artifice and opacity encouraged by the extant system would
be unnecessary. Judgment on whether the two legal norms stand in conflict would not be colored
by extraneous factors and considerations. Judicial opinions would include frank and direct
factor-by-factor analysis of the relative democratic legitimacy of the norms in question.

In cases where it is hard to differentiate conflicting norms in terms of degrees of
democratic legitimacy, the performance of the two systems is reversed. Asking courts to apply a
multi-factor analysis to evaluate the democratic legitimacy of legal norms in the hard cases is
asking for trouble. Some cases are hard cases because they offer no clear answers to the
questions presented by the enumerated factors. Thus, in many instances the public will not have
formed any discernible will regarding particular legal norms or the policies they embody, and
there will be no way of confidently predicting majoritarian preferences given adequate
information and public discourse. In these cases two conflicting legal norms do not really
register one way or another on any measure of relative democratic legitimacy. Any attempt to
appraise or compare degrees of democratic legitimacy makes little sense. Use of the multi-factor
system would force courts to concoct distinctions in degrees of democratic legitimacy where
none exist.

Other cases are hard cases because the two conflicting norms at issue present roughly
equal claims to democratic legitimacy. What should a court operating under the multi-factor
alternative do when two factors suggest that one norm is of greater democratic legitimacy, while
the other two factors suggest the opposite? The multi-factor approach offers no clear solution. Where the relative democratic legitimacy of two conflicting legal norms boils down to an all-things-considered toss-up, the multi-factor approach would produce an unacceptable level of unpredictability and uneven adjudication. One court would decide that one conflicting norm possesses (slightly) greater democratic legitimacy, while the next court would find that the other conflicting norm possesses (slightly) greater democratic legitimacy.

Under either hard case scenario the multi-factor approach is problematic. Judicial inability to deal well with the hard cases, however, would not stem from any lack of special expertise or training. It would instead stem from the reality that in hard cases neither norm can make a substantially stronger claim to democratic legitimacy than the other. Courts are quite competent to apply a multi-factor approach and to usually get the ‘correct’ result in the easy cases. At the very least, courts operating under the multi-factor alternative would do a better job with the easy cases than they can under the extant system. The problem for the multi-factor alternative is that most cases are hard cases, at least in terms of figuring out which norm possesses greater democratic legitimacy. Thus, in most cases of conflicting legal norms the multi-factor alternative would produce great uncertainty and instability of outcomes.

The extant system remains problematic. It is least problematic, however, in the hard cases where it is difficult to discern any meaningful difference in the democratic legitimacy of two conflicting norms. It is least problematic in these cases because the threat of an anti-democratic outcome is minimal. The possible outcomes in these cases could be classified as democratic legitimacy neutral. Though overly simplistic and uni-dimensional, the source-centric extant system cannot work too much damage. Indeed, where two conflicting norms make
roughly equal claims to democratic legitimacy, it makes sense to resolve the conflict by preferring the norm created by the more democratically legitimate entity.

In discussing the multi-factor alternative, the main objective has been to present the polar opposite of the extant system. Where the extant system is built on extremely rigid and formalistic rules, the polar opposite multi-factor system is based on open-ended standards. Comparison of the two systems presents the age old rules versus standards debate in its starkest form. Both extremes imply certain drawbacks and benefits. The extreme rule-based extant system (purportedly) denies courts discretion and thereby produces both sub-optimal outcomes and an incentive to avoid sub-optimal outcomes via dishonest manipulation of open-ended interpretive discretion. The extreme standards-based system would breed unpredictable and uneven application in many cases or would simply not make much sense in an entire range of hard cases. Criticism of the multi-factor approach does not suggest that courts cannot play a

119. See Sullivan, supra note 71, at 57-70 (discussing the rules versus standards debate).

120. See id. at 58 (“A legal directive is ‘rule’-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere...the rule’s force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result”).

121. See id. at 58-59, 62 (“A legal directive is ‘standard’-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules.... The argument that rules are fairer than standards is that rules require decisionmakers to act consistently, treating like cases alike. On this view, rules reduce the danger of official arbitrariness or bias by preventing decisionmakers from factoring the parties’ particular attractive or unattractive qualities into the decisionmaking calculus”).
productive role in weeding out anti-democratic legal norms. However, asking courts to do so by a straight out judgement on the relative democratic legitimacy of two conflicting legal norms, even if assisted by a defined set of relevant factors, is asking for trouble.

B. *Moderate Modifications to the Extant System*

This Section introduces alternatives to the extant system that retain many or most of the features of the extant system but make key modifications. Most of the modifications are aimed at improving the ability to resolve conflicts between legal norms in ways that enhance or at least preserve the democratic legitimacy of law. The ancillary considerations – protection of separation of powers values, stability and predictability, and sound performance in both easy and hard cases – will be addressed as well.

As we have seen, rigidity and uni-dimensional focus on the democratic legitimacy of the sources of legal norms hamper the extant system. Swinging to the opposite extreme of great flexibility, multi-factor analysis of the relative democratic legitimacy of legal norms offers no panacea. The alternatives discussed in this Section are all attempts to balance the various values at play. Relatively moderate adjustments to the extant system may bring significant improvement in terms of outcomes that enhance or preserve the democratic legitimacy of law without significantly degrading separation of powers, stability and predictability, and performance in both hard and easy cases.

1. *The Presumption System*

One promising alternative, which I will call the presumption system, would combine the
extant system, the multi-factor system, and a pair of rebuttable presumptions. Under the categoric axiom, when two conflicting norms belong to different legal categories, the norm from the higher order category always and unconditionally trumps the norm from the lower order category. Likewise, under the chronologic axiom, when two conflicting norms belong to the same legal category, the newer norm always and unconditionally trumps the older norm.

Under the presumption system, however, rebuttable presumptions would modify the chronologic and categoric axioms. When two conflicting norms belong to different legal categories, the presumption would be that the norm from the higher order category would trump the norm from the lower order category. Likewise, when two conflicting norms belong to the same legal category, the presumption would be that the newer norm would trump the older norm. Upon a sufficient evidentiary showing, however, these presumptions could be rebutted. Courts would use multi-factor analysis similar to that discussed in the immediately previous Section to determine whether the presumptions have been rebutted. When rebutted, courts would nullify the legal norms determined to possess relatively weaker claims to democratic legitimacy.

To see how the presumption alternative might work in practice, return to the anti-spam regulation illustration. Upon determining that the regulation and statute stand in conflict, a court would assess the democratic legitimacy of both norms. The assessment would include the taking of evidence relevant to an inventory of predetermined factors for assessing the democratic legitimacy of legal norms. If a court were to find that the regulation and statute both make solid claims to democratic legitimacy, the court would resolve the conflict between the two under the standard categoric axiom. The superordinate statute would trump the subordinate regulation.

If, however, a court were to find that the regulation possesses a substantially stronger
claim to democratic legitimacy than the statute, the court could rule that the normal presumption that statutes trump conflicting regulations has been rebutted. Once the categoric axiom and its statute over regulation ordering has been rebutted, the court would be free to uphold the regulation and nullify that portion of the statute that stands in conflict with the regulation. A similar process would be used with conflicting norms of the same kind. Thus, if a new and a preexisting statute stand in irreconcilable conflict, and the preexisting statute possesses a substantially stronger claim to democratic legitimacy than the new statute, the court could hold that the presumption in favor of application of the chronologic axiom has been rebutted and nullify the newer statute.

The presumption alternative blends the best of the extant system with the best of the multi-factor system. The extant system would operate unchanged in cases where the presumptions in favor of the categoric and chronologic axioms are not rebutted, or in other words, in cases where the discrepancy in the democratic legitimacy of the conflicting norms is not substantial. In the cases where the discrepancy in the democratic legitimacy of the conflicting norms is substantial, however, the presumptions would be rebutted, and multi-factor analysis would govern which of two conflicting norms shall survive. The presumption system promises democracy-enhancing or -preserving outcomes at a higher rate than that produced by the extant system, and a consequent reduced incentive for judicial dishonesty, artifice, and opaque reasoning in written opinions. Moreover, unlike both the extant system and the multi-factor alternative, the presumption system would perform well in cases where it is easy to determine which of two conflicting norms possesses greater democratic legitimacy, as well as those where such determinations are quite difficult.
The potential gains in terms of democracy-enhancing or preserving outcomes would be realized in cases such as the anti-spam regulation illustration, where it is fairly obvious that a lower order norm exhibits greater democratic legitimacy than a conflicting higher order norm. The extant system performs at its worst in these cases. Its rigidity locks courts into the Hobson's choice between honest and straightforward application of the extant axioms versus benign dishonesty aimed at avoiding anti-democratic outcomes. When courts opt for honest and straightforward norm interpretation, the extant system nullifies the norm of stronger democratic legitimacy.

In cases similar to the anti-spam regulation illustration, however, courts operating under the presumption system could preserve norms of strong democratic legitimacy without resort to interpretive artifice. Manipulation of meaning and whether two legal norms stand in conflict would be unnecessary. Instead, in appropriate cases courts would consult the relevant factors for assessing the democratic legitimacy of two legal norms and hold that the normal categoric and chronologic presumptions have been rebutted. This possibility, in turn, would dissipate much of the impetus for interpretive bias and subterfuge engendered by the extant system's discretion-denying rigidity.

The presumption alternative would also produce a salutary effect on legal discourse and justification. Under the extant system an informal and sub rosa evaluation of the democratic legitimacy of competing legal norms can bias norm interpretation. Yet the surface of legal discourse does not reflect this evaluation. The presumption alternative would force courts to make a threshold determination on whether a substantial disparity in the democratic legitimacy of two conflicting legal norms is present. In attempting to convince a court that the categoric and
chronologic axiom presumptions should or should not be rebutted, litigants would brief and argue the various factors relevant to assessing the democratic legitimacy of individual norms. Hidden motives and artifice in judicial opinions would be replaced with open and public analysis on the democratic legitimacy of conflicting legal norms. This may be the most important benefit of the presumption alternative.  

The potential benefits of the presumption alternative – reduction in anti-democratic outcomes, reduction in incentives for dishonest judicial manipulation, and enhanced transparency in judicial opinions – are no different than the potential benefits of the multi-factor alternative. Unlike the multi-factor alternative, however, the presumption system would not run into problems when dealing with cases where it is hard to differentiate the democratic legitimacy of two conflicting legal norms. In cases where neither conflicting legal norm clearly possesses greater democratic legitimacy than the other, the multi-factor alternative would force courts into hair-splitting exercises. In cases where norms simply do not register one way or another on the democratic legitimacy scale, the multi-factor alternative would force courts to conjure up differentiations in relative democratic legitimacy where none exist.  

Thus, the real difference between the extant and presumption systems might lie not in outcomes, but rather in the stated reasoning behind outcomes. The benign dishonesty used to circumvent the rigidity of the extant system pushes many of the considerations truly motivating judicial decisions out of written opinions and legal discourse. Courts operating under the extant system write opinions as though neutral and objective interpretive rules both dictate the meaning of legal norms and determine whether those norms stand in conflict. Beneath the surface, however, an unstated desire to reach a certain substantive outcome – avoiding anti-democratic outcomes – biases judicial choice, use, and misuse of interpretive rules.

See supra pp. 81-83.
in contrast, would deal well with both kinds of hard cases because in the hard cases the categoric and chronologic axiom presumptions would not be rebutted and would therefore operate exactly as the extant system operates. In hard cases default to the chronologic and categoric axioms constitutes a reasonably satisfactory solution consistent with democracy-reinforcing ends.

So far the presumption alternative looks like a system with no real drawback. It promises more democracy-enhancing outcomes, less impetus for dishonest judicial manipulation or bias, greater transparency in legal reasoning, and an ability to deal well with both hard and easy cases. There are, however, several caveats.

One area of concern relates to predictability of outcomes in individual cases and stability of existing law. The flexibility of rebuttable presumptions may constitute an invitation to judicial manipulation or at least a recipe for unintentional but nonetheless radically uneven judicial application. One court might freely allow rebuttal of the chronologic axioms, while the next court might permit rebuttal of the presumption only in the most extreme cases. This unpredictability could lead to an erosion of the stability of existing law. If some courts generously permit rebuttal of the categoric and chronologic axiom presumptions, subordinate norm-generating entities would have incentives to create new norms that conflict with preexisting norms created by superordinate entities.

124. As we have already seen, negative effects on the predictability and stability of law could plague the purely chronologic and multi-factor alternatives. See supra pp. 57-60, 82.

125. Using the anti-spam regulation illustration, the administrative agency would recognize the inconsistency of court decisions on rebuttal of presumptions favoring the axioms. The possibility that a new regulation in conflict with the existing statute might land in a court that frequently rebuts the presumption in favor of the categoric axiom may prompt the agency to promulgate such a
On the other hand, any concern over an erosion of predictability and stability under a presumption alternative ought not be overinflated. First, under the extant system the unpredictability of outcomes already may erode the stability of existing law. Just as courts operating under the presumption alternative might unevenly apply the presumptions or even manipulate them, courts operating under the extant system may be uneven and manipulative in their application of interpretative rules.\textsuperscript{126} It is not at all clear that outcomes would be much less predictable or that law would be much less stable under the presumption alternative than they now are under the extant system.

Moreover, even if the presumption alternative would diminish predictability and stability, this may be a positive development. Do we really want a system that perpetuates predictability of anti-democratic outcomes and stability of anti-democratic legal norms? Because the categoric and chronologic axiom presumptions would be rebutted only in cases where it is easy to detect a marked difference in the democratic legitimacy of two norms, the presumption alternative would weed out only existing legal norms that are comparatively very weak in terms of democratic legitimacy. In all other cases – the hard cases – the categoric and chronologic axioms would operate exactly as they do under the extant system, and predictability and stability would remain unchanged.

\textsuperscript{126} Using the anti-spam regulation illustration, the agency is aware that, despite the clear meaning of the statute's text and legislative intent, a court may use its broad interpretive discretion to find that the regulation and statute do not stand in conflict. The agency, therefore, may promulgate the new regulation in the hope that it will be tested in a court willing to use interpretive subterfuge to uphold it against an arguably conflicting statute.
Another caveat relates to separation of powers values. In the easy cases the presumption system would permit norms belonging to nominally subordinate categories to take on the same trumping powers as norms belonging to nominally superordinate legal categories. What this means for separation of powers is that a normally subordinate norm-generating entity may create norms with trumping powers ordinarily associated with the norms created by a superordinate norm-generating entity. Again, consider a regulation and statute example. If the presumption in favor of the categoric axiom is rebutted, a regulation will take on the trumping powers normally associated with statutes – the power to trump common law and regulatory norms as well as existing statutes. Under the extant system only Congress creates norms with the power to trump nothing more and nothing less than conflicting common law rules, regulations, and preexisting statutes. Under the presumption system agencies also would create norms with the power, at least in the easy cases, to trump conflicting common law rules, regulations, and preexisting statutes. Permitting an agency to create norms with the trumping powers ordinarily associated with statutes blurs the sharp separation of powers boundary lines maintained by the extant system.

Similar to concerns over predictability and stability, however, concerns over blurring of separation of powers boundary lines ought not be overstated. First, in hard cases the extant

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127 As we have seen, the extant system protects separation of powers boundary lines by insuring that the different kinds of norms possess different trumping powers. See supra pp. 61-65. This insures that each of the four principal norm-generating entities are charged with creating norms that differ in terms of substantive trumping powers. The purely chronologic and multi-factor alternative would all but erase separation of powers boundary lines. Under those alternatives, whether labeled constitutional, statutory, administrative, or common law norms, all legal norms would possess the same trumping powers.
system would operate as normal and there would be no blurring of separation of powers boundary lines. This differentiates the presumption alternative from the purely chronologic alternative. Second, even in the easy cases any blurring of separation of powers boundary lines would not be so different from what already informally occurs under the extant system. Indeed, subordinate norm-generating entities operating under the extant system already find ways to informally trump the norms created by nominally superior entities.

To see the point, imagine a case involving a constitutional norm that has been given a settled doctrinal reading but can no longer make a credible claim to strong democratic legitimacy. Further, imagine that Congress passes a new statute of strong democratic legitimacy which, in the eyes of most expert observers, stands in conflict with the settled doctrinal reading of the constitutional norm. A straightforward and honest interpretive approach under the extant system would result in nullification of the statute. It would surprise absolutely no one, however, if a court facing such a scenario were to save the statute from nullification by reshaping the contours of the constitutional norm more narrowly (or with more exceptions and/or more expansive exceptions) than had previously been the case. This strategy would avoid any conflict between the statutory and constitutional norms and thereby preserve the statute.

In this kind of case, the practical difference between constitutional amendment via Article

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128. Similarly, posit an older statute that from most perspectives boasts high democratic legitimacy and a recently passed statute that alters the older statute, but which reeks of special interest politics. No one would be surprised if a court operating under the extant system were to strive mightily to narrowly construe the more recent statute, thereby limiting the impact of the anti-democratic legal norm. Indeed, if the newer statute did not contain specific language requiring partial repeal of the preexisting statute, it would come as no surprise if a court were to find that the older and newer statute did not conflict at all.
V and legislative and judicial collaboration to reshape the contours of extant constitutional provisions is less than might be imagined.\textsuperscript{129} Under the extant system, congressional passage of a statute in conflict with the extant doctrinal construction of a constitutional provision operates as an informal legislative request for judicial reshaping of that constitutional provision. When the federal courts respond to that request by altering the contours of the constitutional norm to accommodate the new statute, the Constitution, for all intents and purposes, has been modified. Prior to passage of the statute the constitutional provision in question meant one thing. After passage of the statute and judicial consideration the constitutional provision is reshaped to mean something different. The formal distinctions between the law creating tasks assigned to We the People, Congress, and the federal courts remain intact. Passage of the statute, coupled with judicial reshaping of the constitutional norm, amounts to a legislative and judicial collaboration to engage in an informal law creating task formally assigned to We the People – alteration of the Constitution.\textsuperscript{130}

\textsuperscript{129}. See Strauss, supra note 82, at 1459-62 (arguing that Constitution has been informally amended by Supreme Court decisions more than by formal Article V processes).]

\textsuperscript{130}. A similar informal blurring of the boundary lines between legislatures and agencies takes place when an agency promulgates a new regulation that contradicts and replaces a preexisting regulation. A court could strike down the new regulation as arbitrary and capricious. See \textit{e.g.}, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto., 463 U.S. 29, 56 (1983) (striking down new regulation replacing preexisting regulation because agency failed to sufficiently explain the change with “reasoned analysis”). If, however, a court upholds the new regulation, the end effect is an agency and court informally cooperating to alter the contours of existing law. See, \textit{e.g.}, N.A.A.C.P. v. F.C.C., 652 F.2d 993, 998-1004 (D.C. Cir. 1982) (holding that new regulation properly replaces conflicting preexisting regulation); Meriden Cmty. Action Agency v. Shalala, 880 F. Supp. 882, 886-88 (D.D.C. 1995) (same). Though statutory law remains formally unchanged, the effect on regulated entities is no different than if
Under the presumption alternative the same outcome would be achieved by more open and honest means. Passage of a statute in conflict with a no longer democratically legitimate constitutional norm would cause a court to directly and publicly evaluate the democratic legitimacy of the statutory and constitutional norms in question. If the court were to determine that the statute makes a substantially stronger claim to democratic legitimacy than the conflicting constitutional norm, the court would (1) find that the presumption in favor of the categoric axiom has been rebutted and (2) would accordingly trim back the contours of the constitutional norm in order to preserve the statute fully intact.

In short, a shift to the presumption system may do little more than place an imprimatur of legitimacy and formality on the irregular and informal blurring of separation of powers boundary lines that already occurs under the extant system. Still, formal appearances matter. The formally legitimized transgressions of separation of powers boundary lines permitted by the presumption system would constitute a considerable impediment to its adoption. Some may be willing to admit that an informal erosion of separation of powers boundary lines already occurs under the extant system, yet may also be hesitant to endorse a formal legitimization and institutionalization of that erosion under the presumption alternative.131

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131. Moreover, there is some risk that the difference between the extant and presumption systems would go beyond apparent or psychological impact and bring about a substantial change in substantive outcomes. Transgressions of separation of powers boundary lines may fall under the category of things that operate best if not formally or officially acknowledged. Under the extant system subordinate norm-generating entities may find ways to formally respect but
Though not touching on separation of powers values, a similar caveat applies to cases involving conflicting norms created by the same entity. Rebuttal of the presumption in favor of the chronologic axiom would permit older legal norms to trump newer legal norms of the same kind. In a case involving two statutes, for example, the preexisting statute (and the long-retired Congress that passed it) would trump the new statute (and the current or more recent Congress that passed it).

As with cases of conflicting norms of different kinds, something very similar already occurs in cases involving norm of the same kind under the extant system. Consider a new statute providing special interest benefits and a preexisting statute that, despite its age, is public regarding and still boasts strong democratic legitimacy. Faced with these two norms, a court operating under the extant system will surprise no one if it gives the narrowest possible construction to a new special interest statute, thereby avoiding any possible conflict with the preexisting statute of high democratic legitimacy. Though the older statute does not formally informally subvert separation of powers boundary lines. So long as formal violations of those boundary lines remain verboten, however, the informal violations are kept to a minimum. Allowing formalized and legitimized violations of separation of powers boundary lines under the presumption alternative, in contrast, might lead to far more frequent transgressions of the boundary lines than currently occurs. Once formally legitimized by adoption of the presumption alternative, courts might be emboldened to permit norms of subordinate kind to trump norms of superordinate kind at a far higher rate than what they permit informally under the extant system's nominal prohibition on such phenomenon. In short, keeping the phenomenon informal and extra-legal may hold back the flood waters. Formal recognition and legality, in contrast, might rupture the dyke.

Thus, a court concerned about full or partial repeal of the preexisting statute of high democratic legitimacy might be particularly demanding in requiring an unequivocally clear statement of intent to repeal in the new statute. See Petroski, supra note 39, at 497 (pointing out that courts will adopt strained statutory interpretations in order to give effect to older statutes that seemingly stand in
trump the newer statute, the practical effect is as though it had done just that. \textsuperscript{133} The presence of the preexisting statute of high democratic legitimacy prompts the court to shape the contours of the new special interest statute more narrowly than it would if not facing possible nullification of a statute of high democratic legitimacy.

A shift to the presumption alternative would yield the same outcome via a different path. Rather than acting to bias norm interpretation, a substantial disparity in the democratic legitimacy of the old and new statutes would lead to a rebuttal of the chronologic axiom. In the end, the practical trumping power of newer and older norms probably would not differ all that greatly under the extant and presumption systems. Whether prompting a court to narrowly shape the contours of the new norm (subversion of extant system) or formally trumping the new norm (presumption system), the older norm has the ultimate effect of eclipsing the new norm. \textsuperscript{134}


\textsuperscript{134} As with rebuttal of the categoric axiom and separation of powers issues, formal recognition and legitimization of inversions of the new norm over old norm axiom constitutes a considerable impediment to implementation of the presumption alternative. Realizing that older norms can prompt courts to emasculate new norms to the point where the new norms are, for all intents and purposes, fully or partially nullified is one thing. Granting old norms the formally legitimized power to trump new norms is altogether different, if not in terms of outcomes, then certainly in terms of psychological impact.

Moreover, as with rebuttal of the categoric axiom, it is possible that the extant system suppresses the frequency of informal inversions of the chronologic principle. The formally legitimizied inversions of the chronologic axiom permitted by the presumption alternative might embolden courts and result in a much higher rate of older norms trumping newer norms than now occurs. See supra note 131.
A final caveat relates to judicial competence. The presumption alternative, like the multi-factor system, would require courts to analyze the democratic legitimacy of individual legal norms. As with the multi-factor alternative, there will be concern that courts are not well equipped to perform this task. One key advantage of the presumption system, however, is that it makes this task as simple as possible. Unlike the multi-factor system, the presumption alternative would require a dispositive judicial determination on the democratic legitimacy of legal norms in only the easy cases, or in other words, in the cases where the difference in democratic legitimacy between two conflicting legal norms is substantial. The hard cases would be adjudicated under the categoric and chronologic axioms. Courts operating under the presumption alternative would never have to make the fine-grained distinctions regarding the democratic legitimacy of conflicting legal norms that would be required by the multi-factor alternative. Instead, they would be called on only to engage in a simple comparative analysis: Does one norm possess substantially greater democratic legitimacy than another? Comparative analysis between significantly incommensurate objects is far easier and less conducive to error than the sort of fine-grained analysis required by the multi-factor alternative.

Though the presumption alternative greatly simplifies the task, courts will still make errors. The important question, however, is whether judicial evaluations under the presumption system are more likely to get the democratic legitimacy question right than the extant or the multi-factor systems. In the cases where conflicting norms are hard to differentiate in terms of democratic legitimacy, the extant system performs acceptably and so too would the presumption system. The multi-factor system, in contrast, would perform poorly in the hard cases. In cases of

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135. See supra-pp 74-83.
clear and substantial imbalance in the democratic legitimacy of two conflicting legal norms, on the other hand, it would not be hard for courts operating under the presumption system to outdo the performance of the extant system. 136

The chief advantage of the presumption system is that it would work well in both easy and hard cases. In cases like the anti-spam regulation illustration, the presumption alternative would allow a more subtle and multi-faceted analysis of the relative democratic legitimacy than is currently possible. The potential gains include fewer anti-democratic outcomes, less incentive for judicial dishonesty or bias, and more transparency in judicial opinions. In cases where the relative democratic legitimacy of legal norms is a closer call, however, the presumption system would work exactly as does the extant system. This feature avoids the pitfalls of the multi-factor alternative.

Against these substantial advantages weigh the various caveats. Perhaps most importantly, many reasonable minds will conclude that the presumption alternative would greatly enhance the power of the judiciary, of subordinate norms and norm-generating entities, and older

136. Moreover, any judicial evaluation of the democratic legitimacy of individual legal norms would be embedded in a larger process involving other norm-generating entities. The presumption alternative does not envision courts as open-ended inquisitorial boards unilaterally plucking norms from the sky to pass judgment on their democratic legitimacy. Courts would be asked to evaluate the democratic legitimacy of legal norms only when two legal norms stand in conflict. This means that only the action of a coordinate norm-generating entity would open the door to judicial evaluation of the democratic legitimacy of legal norms. For example, in order for a court to determine that a new regulation possesses substantially greater democratic legitimacy than a preexisting conflicting statute, an agency must have first determined that the statute was of suspect democratic legitimacy and have promulgated the new regulation.
norms and long-retired norm-generating entities. My own judgment, however, is that a shift to the presumption alternative would not radically transform the practical power of subordinate or older norms and norm-generating entities; in particular it would not substantially amplify the power of the courts.

The reason for this is simple. Both the extant and presumption systems afford courts

\[\text{\footnotesize\textsuperscript{137}}\]

If this line of thinking is correct, the caveats are of great weight. However, for those who believe that the presumption alternative grants subordinate norms, preexisting norms, and courts too much power, the system could be configured to provide additional safeguards against frequent rebuttals of the presumptions in favor of the categoric and chronologic axioms. One possibility would be to grant the categoric and chronologic axioms super-strong presumptions of applicability. Another possibility would be to require more than a substantial disparity in the democratic legitimacy of two conflicting legal norms. Rebuttal of the categoric and chronologic axioms might also require a showing that the norms of superordinate category or the newer norm makes an exceedingly weak claim to democratic legitimacy. These additional requirements would limit rebuttals of the two axioms to those cases where their ordinary application would result in an flagrantly anti-democratic outcome.

Of course, the additional requirements would come at the cost of a higher rate of anti-democratic outcomes and a stronger incentive for resort to judicial manipulation aimed at avoiding anti-democratic outcomes than would otherwise be the case. There exists a value trade off between preservation of separation of powers boundary lines and achieving outcomes that enhance or preserve the democratic legitimacy of law. The harder it is to rebut the presumptions in favor of application of the categoric and chronologic axioms, the more likely that norms of relatively superior democratic legitimacy will be nullified by norms of relatively low democratic legitimacy.

The extant system in effect operates with an irrebuttable presumption that norms belonging to higher order categories and newer norms are more democratically legitimate than norms belonging to lower order categories and older norms. It always insures that separation of powers boundary lines remain at least formally intact. In so doing, however, the extant system is forever condemned to produce a relatively high rate of anti-democratic outcomes – instances, for example, where a norm of relatively high perceived democratic legitimacy belonging to a lower order legal category is nullified by a conflicting norm of relatively low democratic legitimacy belonging to a higher order legal category.
broad discretion. Under the extant system judicial discretion is channeled through biased and manipulated application of free-ranging interpretive discretion. Under the presumption alternative, in contrast, discretion would be channeled (at least in the easy cases) through factors for assessing the democratic legitimacy of conflicting legal norms. Though the locus of judicial discretion is different, the presumption alternative would not give courts substantially more discretion than courts operating under the extant system already exercise. In other words, the presumption alternative would grant courts, subordinate norms and the entities that create them, and older norms and the entities that create them, certain powers that they do not now formally possess. Often, however, these powers already may be expressed in informal and irregular ways under the extant system.

Though outcomes and judicial power might not differ substantially under the two systems, the presumption alternative likely would engender greater judicial honesty and more openness of reasoning in judicial opinions than does the extant system. Under the extant system, courts that seek to avoid nullification of norms of relatively strong democratic legitimacy via benign interpretive dishonesty or interpretive biases leave important reasons motivating outcomes out of written opinions. Courts operating under the presumption alternative, in contrast, would have reason to state, confront, and publicly discuss the democratic legitimacy concerns motivating outcomes in their written opinions. Honesty and openness in the justification of judicial decisions is always to be preferred over opaque obfuscation.

This honesty, however, comes at a price. Formally legitimized transgressions of separation of powers boundary lines, inversions of chronologic orderings, and exercises of judicial power make for formidable psychological impediments to adoption. It is hard to imagine
courts proclaiming for themselves a formal power to trump regulations and statutes that they find
democratically suspect. It is equally hard to imagine Congress seeking a formally recognized
power to alter the Constitution without recourse to We the People.\textsuperscript{138} Though informal practices
may not be so different, the unorthodox features of subordinate norms trumping superordinate
norms, older norms trumping newer norms, and judicial power determining when these events
take place, almost certainly would provoke concentrated opposition.

2. \textit{The Institution Prompting System}

The previous Section suggested that a legislature may informally invite courts to reshape
a constitutional norm by passing a statute at odds with the standing doctrinal meaning of a
constitutional norm.\textsuperscript{139} Sometimes, however, the tables are turned. Courts may informally invite
legislative reformulation or even repeal of a statute. In these cases, a court will enforce a statute
despite troubling features, but include in the text of an opinion a written plea for legislative
reconsideration.\textsuperscript{140} This informal judicial signaling appears to have provoked legislative reform
in at least some cases.\textsuperscript{141} A second alternative system retaining most features of the extant

\textsuperscript{138} A constitutional amendment would be needed for Congress to exercise such a
formally recognized power. \textit{See} Dickerson v. United States, 530 U.S. 428, 427
(2000) (holding that Congress does not have the power to alter procedural rules
required by the Constitution).

\textsuperscript{139} \textit{See supra} pp. 93-94.

\textsuperscript{140} \textit{See, e.g.,} Aetna Health Inc. v. Davila, 124 S. Ct. 2488, 2503 (2004) (Ginsburg, J.,
concurring) (concurring with holding that federal ERISA statute preempts claims
allowed by state law but encouraging Congress to “revisit what is an unjust and
increasingly tangled ERISA regime”).

\textsuperscript{141} \textit{See} Eskridge, \textit{supra} note 66, at 337-38, (presenting evidence suggesting that
system would regularize and expand this informal judicial practice.

Under what I will call the institution prompting alternative, courts adjudicating cases involving conflicting legal norms would identify norms of suspect democratic legitimacy and would formally invite or even compel reconsideration of those norms by the entities that created them. The system responds to the notion that the presumption system would grant too much power to subordinate norms, older norms, and the federal courts.

The key to the institution prompting alternative lies in a formal process for notifying coordinate norm-generating entities that a court has identified a situation where the extant system will produce nullification of a norm of relatively strong democratic legitimacy. Once provided formal notice, the entity that created the suspect norm would have a full and open opportunity to do one of two things. First, it could eliminate any conflict between the two norms by altering or abolishing the norm of suspect democratic legitimacy. Second, it could leave the suspect norm unchanged.

Offering the entity that created the norm of suspect democratic legitimacy the chance to alter or abolish the norm, or to leave the norm unchanged, would recast the roles of the various institutional players. First, unlike what would occur under the presumption system, courts would be relieved of unilateral or monopoly power to determine when the categoric or chronologic axioms should be discarded. Instead, courts would function primarily as identifiers of norms of suspect democratic legitimacy and as signalers to coordinate norm-generating entities. Second and relatedly, the institution prompting alternative would give the norm-generating entities that created norms of suspect democratic legitimacy a substantial role in the resolution of conflicts. Congress sometimes alters statutes in response to Supreme Court constructions).
between legal norms.

Consider how the system would operate in the context of the anti-spam regulation illustration. Faced with a difficult to avoid conflict between the popular regulation and the special interest statute, a court would first apply multi-factor analysis to assess the relative democratic legitimacy of the two legal norms. If the court finds that the disparity in democratic legitimacy between the statute and the regulation is not too pronounced, the court would apply the categoric axiom to nullify the regulation. If, however, the court finds the disparity in democratic legitimacy between the subordinate regulation and the superordinate statute sufficiently substantial, it would refrain from applying the categoric axiom.

At this point, the presumption system would permit a court to simply uphold the regulation and nullify the suspect statute. Under the institution prompting alternative, however, the court would be required to formally inform Congress, the entity that created the statute of suspect democratic legitimacy, that the court has identified a situation in which a statute of apparently questionable democratic legitimacy stands in conflict with a regulation of solid democratic legitimacy.¹⁴²

Upon receipt of formal notice, Congress could amend or repeal the suspect statute in order to preserve the regulation, or could elect to leave the statute unchanged, thereby nullifying

¹⁴² The formal notice envisioned would take the form of an official judicial decree and would be transmitted to appropriate personnel within the entity that created the norm of suspect democratic legitimacy. In this case, for example, the system might require that formal notice be delivered to the chairperson and ranking minority member of the House and Senate legislative committees responsible for passage of the statute of suspect democratic legitimacy.
the regulation. Either way, the ultimate responsibility for resolution of the statute-regulation conflict would lie not with a court, but rather with the entity that created the norm identified as suspect in terms of democratic legitimacy. The judicial role would shift from ultimate decider to that of signaler and prompter.

Notice the altered dynamic that would prevail under the institution prompting alternative. Under the extant system a legal norm of suspect democratic legitimacy can be formally altered only by the entity that created the norm or a superordinate entity, or informally altered by a court willing to deploy interpretive manipulation. This state of affairs leaves many legal norms of suspect democratic legitimacy invulnerable to elimination or alteration. The same special interests that achieved passage of a special interest statute, for example, can often prevent its alteration. Moreover, courts may be either unable or unwilling to deploy interpretive

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143 Presumably, acceptance of the new regulation and consequent full or partial repeal of the conflicting statute would require approval of both chambers of Congress as well as approval by the Chief Executive. Any other formula would require a Constitutional amendment or modification in the doctrinal interpretation of the Bicameralism and Presentment Clauses. See I.N.S. v. Chada, 462 U.S. 919 (1983) (holding that bicameralism and presentment must be satisfied to create new statutory law).

144 I have so far discussed the institution prompting system within the context of statutes and regulations. The system could be adapted to apply to cases involving other types of legal norms as well. Consider cases involving conflicts between statutes and constitutional norms. Thus, an agency or Congress could create legal norms in conflict with a constitutional norm. If the Federal Courts were convinced that the new regulation or statute possesses substantially greater democratic legitimacy than the constitutional norm, the issue could somehow be referred to We the People. One possibility would be to refer the new regulation or statute to Congress for compulsory consideration of a constitutional amendment that would eliminate any conflict between the Constitution and the regulation or statute.

145 Even without the intervention of special interests, legislative inertia may result in
manipulation aimed at eviscerating the special interest statute. Facing these realities, an agency may be hesitant to expend time and resources promulgating a new regulation at odds with the special interest statute.

The institution prompting alternative offers a set of institutional arrangements that could break this logjam. It offers courts a device for provoking congressional reconsideration of the suspect special interest statute. Even if reconsideration does not result in repeal or alteration of the special interest statute, the system would obligate Congress to face the issue and therefore accept ultimate responsibility for the result. The possibility that Congress could be forced to confront the special interest statute that it created would encourage an administrative agency to promulgate a public-regarding regulation in conflict with the special interest statute.

Moreover, the institution prompting alternative would generate less incentive for judicial manipulation of interpretive discretion than does the extant system. Courts operating under the extant system know that in some cases, but for interpretive manipulation, norms of suspect democratic legitimacy will nullify norms of strong democratic legitimacy. Under an institution prompting alternative, in contrast, courts will know that partial or even full responsibility for an anti-democratic outcome will fall to a coordinate norm-generating entity. By offering courts an aboveboard option for dealing with norms of suspect democratic legitimacy, the institution prompting alternative reduces the temptation to resort to interpretive subterfuge and manipulation.

An institution prompting alternative could be configured in several different ways. At

the perpetuation of the special interest oriented statute.
one extreme the system could involve nothing more than a compulsory formal judicial notice requesting reconsideration of a norm of suspect democratic legitimacy by the entity that created the norm. The entity that created the norm, however, would not be required to respond in any official way to the formal notice. If configured in this fashion, the system would closely resemble current informal practices. The key difference, of course, would be the compulsory requirement that courts undertake a signaling function by issuing formal notice. Any informal judicial signaling that now occurs is irregular and haphazard. Some courts may be highly attuned to the democratic legitimacy of conflicting legal norms, while others may completely tune out the issue. Some courts may habitually include an informal plea for reconsideration of norms of suspect democratic legitimacy in their written opinions. Other courts may never use informal signaling. Institution of a formalized notice requirement would substantially reduce, if not eliminate, this inconsistency. It would direct all courts to be cognizant of norms of suspect democratic legitimacy and require that they signal coordinate norm-generating entities in appropriate cases.

Moreover, a shift from informal to formal signaling would ensure that the intended recipients pick up the signal. Any informal signaling that now takes place depends upon the active surveillance of judicial opinions by Congress, regulatory agencies, and interest groups. The formal notice process envisioned by the institution prompting alternative, in contrast, demands no action on the part of norm-generating entities or interest groups. The notice would be directed to key persons within norm-generating entities and therefore could not be missed.

146 See Eskridge, supra note 66, at 341-43 (discussing congressional monitoring of statutory interpretation decisions).
Perhaps most importantly, a shift from informal to formally required judicial signaling would alter the atmospherics surrounding norms of suspect democratic legitimacy. Any informal signaling that courts currently undertake comes in the form of dicta and is therefore easy to ignore. Issuance of a formal notice, however, would be a far more serious matter, perhaps similar in gravity to the exercise of judicial review. Though recipient entities would not be required to respond, the fact that a court has taken the serious step of issuing such a notice would make ignoring the matter more difficult than is now the case.

At the other extreme the institution prompting system could be configured to require any norm-generating entity receiving a formal notice to respond in some official way. Such a requirement might demand a specific determination from the recipient entity on whether the suspect norm should remain unchanged, or should be repealed or altered. Alternatively, the system could require merely that the recipient entity explain why it ought not reconsider the suspect norm. If the recipient entity were to respond by offering reasons why reform or abolition of the suspect norm is not needed, it will have extended its blessing to judicial determination of the issue in accord with the extant axiomatic meta-norms. On the other hand, if the recipient entity were to respond by directly addressing the suspect norm – by nullifying or modifying the suspect norm or by specifically rejecting the need for nullification or modification – the court will have been relieved of sole power and responsibility for the ultimate outcome.

Either way, the effect would be to shift more of the ultimate responsibility for the outcome of cases involving conflicting legal norms away from courts and onto superordinate norm-generating entities. Whatever action the superordinate entity might ultimately take, the judicial role would be limited to identifying the likely anti-democratic outcome and prompting
another norm-generating entity to address the problem. Those other norm-generating entities, in contrast, would take on either full or partial responsibility for ultimately determining which of two conflicting norms ought to prevail. Under the extant system the courts often end up as the only entity practically capable of preventing the nullification of a norm of relatively strong democratic legitimacy. Under the institution prompting alternative, courts could shift that burden onto coordinate and superordinate norm-generating entities.

Another variable in configuring an institution prompting system relates to the impact of inaction by the entity that created a norm identified by a court as suspect in terms of democratic legitimacy.\(^{147}\) When a court has decided that it must issue a formal notice to a coordinate norm-generating entity and the recipient entity fails to take any official action, what should the institution prompting system permit a court to do?

One option would be to require a court to apply the categoric or chronologic axiom. This configuration works minimal change to the extant system because, as under the extant system, the court would be denied formal power to disregard the categoric and chronologic axioms.\(^{148}\) The other option, of course, would be to permit courts to disregard the categoric and chronologic

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\(^{147}\) In cases where a court issues notice to a coordinate norm-generating entity, and the recipient entity takes some official action, that action would determine the issue. Thus, in the context of the anti-spam regulation illustration, if a court were to issue a formal notice and finding to Congress claiming that the statute is of suspect democratic legitimacy, and if Congress were to officially decide to leave the statute unchanged, the statute would trump the regulation. Conversely, if Congress were to decide that the statute should be repealed or amended to eliminate any conflict with the regulation, the regulation would survive.

\(^{148}\) Thus, in the context of the anti-spam regulation illustration, if Congress were to completely ignore a formal judicial notice, the court would be required to rule that the statute trumps the conflicting regulation.
axioms. Under this configuration, a court could disregard the categoric axiom and provisionally nullify the suspect statute, for example, if it were to find that a popular regulation possesses substantially greater democratic legitimacy than a special interest statute. The court would then formally notify Congress that it has found the statute problematic in terms of democratic legitimacy and that it has provisionally nullified the statute. Congress would then have the opportunity to reaffirm the suspect statute and thereby reverse the court’s provisional nullification of the statute. If, however, Congress were to fail to respond to the notice, the provisional judicial ruling would stand and the suspect statute would be nullified.

The key difference between these two options lies in the consequences of inaction by the entity that has created the norm identified as suspect in terms of its democratic legitimacy. Under the first configuration, inaction leaves the suspect norm in place. At least, however, the process creates an opportunity for a court to formally identify a norm as suspect and a mechanism that pressures the entity that created the suspect norm to address the issue. Under the second configuration, inaction results in judicial nullification of the suspect norm. The judicial nullification, however, occurs in an environment where the entity that created the suspect legal norm is given formal notice and an opportunity to “correct” or reverse the preliminary judicial nullification of that norm.149

Regardless of the different configuration options, the essence of the institution prompting alternative lies in assigning courts two roles. First, courts would take on an active role in

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149 Another configuration question centers on which courts would be granted the power to issue formal notice to coordinate norm-generating entities. One option would empower any federal court to issue formal notice. Another option would limit the notice power to appellate courts, or even the Supreme Court, with district
designating norms as suspect or lacking in terms of democratic legitimacy. Second, courts would play a role in prodding coordinate norm-generating entities to face and/or address the norms of suspect democratic legitimacy that they have created or allowed to persist. Unlike the presumption system, however, the institution prompting alternative would not grant courts a formally legitimized monopoly power to determine when the categoric or chronologic axiom should be ignored. Instead, it would set in motion a process under which courts, coupled with

courts limited to a fact finding role.

150. As with the multi-factor and presumption alternatives, the institution prompting alternative would cast courts in a new role. Rather than merely interpreters of legal norms and deciders of individual cases, courts operating under the institution prompting alternative would also be assessors of the democratic legitimacy of legal norms. All of the pros and cons associated with this new role covered in the discussions of the multi-factor and presumption alternatives applies to the institution prompting alternative as well. See supra pp. 74-83, 97-98.

The institution prompting alternative, however, would be less problematic on this front than are the multi-factor and presumption alternatives. Any erroneous judicial determinations would be of lesser consequence under the institution prompting alternative than under the multi-factor and presumption alternatives. Rather than inversions of the categoric axiom and reversals of the chronologic axiom by judicial fiat, under the institution prompting alternative misguided judicial assessments of the democratic legitimacy of individual legal norms would merely result in issuance of formal notices to coordinate norm-generating entities. The coordinate norm-generating entities would bear all or most of the ultimate responsibility for the nullification or preservation of legal norms identified by courts (rightly or wrongly) as suspect in terms of democratic legitimacy.

151. Even if configured so that inaction would permit a court to disregard the axioms, the court alone does not have the power to ignore the axioms. First, it could only act in cases involving conflicting norms. This means that some other norm-generating entity must have created a norm of substantially greater democratic legitimacy than the suspect norm in question. See supra note 136. Second, the court could ignore the categoric and chronologic axiom if the entity that created the suspect norm fails to act and thereby gives a tacit consent to judicial resolution.
subordinate norm-generating entities, could stimulate superordinate norm-generating entities to address the norms of suspect democratic legitimacy that they have created.

Thus, against the persistence of a statute of suspect democratic legitimacy that Congress has failed to amend or repeal, a court and an administrative agency could cooperate to spur congressional action. First, an administrative agency would promulgate a regulation of solid democratic legitimacy designed to stand in conflict with the statute. Next, the courts enter the process. If a court were to find the statute and regulation in conflict, but also find that the disparity in democratic legitimacy between the statute and the regulation is not too substantial, the court would simply apply the categoric axiom. In short, if the court does not agree with the agency, the subordinate regulation would be nullified by the superordinate statute, as under the extant system. If, however, the court were to agree with the agency and find that the regulation makes a substantially stronger claim to democratic legitimacy than the suspect statute, the court would issue a formal notice memorializing its finding to Congress. The important point is that only concurrence by two subordinate norm-generating entities – the agency and the court – could result in judicial notice aimed at stimulating action by the superordinate entity – Congress.¹⁵²

The institution prompting alternative promises many of the advantages of the presumption system but offers greater protection for separation of powers boundary lines and an automatic

¹⁵² A similar sequence would play out in cases involving old and new norms of the same kind. Consider a new special interest statute in conflict with a preexisting statute of solid democratic legitimacy. If the disparity in democratic legitimacy between the new and the old statute were not too substantial, the court would apply the chronologic axiom, and the new statute would fully or partially repeal the old statute. If, however, the court were to find the disparity between the democratic legitimacy of the old and new statutes sufficiently substantial, the court would issue formal notice of the finding to Congress.
check on judicial power. Recall that the presumption alternative could result in a blurring of the separation of powers boundary lines maintained under the extant system. In cases where a court determines that the presumption in favor of application of the categoric axiom is rebutted, a subordinate norm takes on the trumping powers possessed by a superordinate norm. The new regulation of solid democratic legitimacy, for example, is permitted to trump the conflicting statute of suspect democratic legitimacy.

The same blurring of separation of powers boundary lines scenario would also be possible under the institution prompting alternative. Any blurring, however, would hinge not exclusively on a judicial determination, but rather on a judicial determination followed by explicit or implicit (depending on the configuration chosen) consent by the entity charged with creating the norm of superordinate kind. In the regulation-statute context, the regulation could trump the conflicting statute, but only if Congress has explicitly or implicitly acquiesced to such an outcome. In short, many of the concerns over separation of powers values implicated by the presumption system are allayed by the fact that the institution prompting alternative would not give courts the last word.

153. Under the multi-factor and presumption alternatives any legal norm would have the potential to trump any other legal norm. An administrative regulation, for example, could trump a conflicting statute whenever a court finds that the former possesses greater (multi-factor alternative) or substantially greater (presumption alternative) democratic legitimacy than the latter. Under the institution prompting alternative all four kinds of norms would retain distinct trumping powers. The regulation would never have the power to trump a conflicting statute. At most, the entity that created the statute would have the power to alter the statute so that it does not nullify a conflicting regulation, and the power to explicitly or implicitly consent to nullification of the statute by a regulation of substantially stronger democratic legitimacy. There is a huge difference between permitting a regulation to trump a statute and permitting Congress to consent to permitting a regulation to trump a statute. In the former case, the regulation itself possesses the power to trump the statute. In the latter case the regulation possesses no such power. The
The institution prompting alternative is not without limitations and drawbacks. First and foremost, it would not always save norms of relatively strong democratic legitimacy from nullification by conflicting norms of suspect democratic legitimacy. The addition of formal mechanisms aimed at forcing norm-generating entities to confront the suspect norms they created or allowed to persist cannot force those entities to abolish or amend those norms. In many instances, therefore, the special interest statute would still nullify the popular public-regarding regulation.

Moreover, there may exist incentives deterring subordinate norm-generating entities from even setting the wheels of an institution prompting alternative in motion. Consider incentives facing an agency operating under powers delegated by a special interest oriented statute. Under the institution prompting alternative, the agency could promulgate a conflicting public-regarding regulation. Such a regulation could cause a court to issue formal notice to Congress finding the statute to be of suspect democratic legitimacy. Before setting these wheels in motion, however, the agency would have to consider the realities of its institutional place and the realities of congressional oversight. If the agency were to promulgate such a regulation, Congress might retaliate by limiting growth of the agency's budget or even by stripping the agency of jurisdiction over certain matters.\footnote{See Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, Administrative Law and Process § 3.1, at 42-43 (3d ed. 1999) (discussing congressional oversight of agencies).} In at least some instances, the balance of incentives would deter the agency from promulgating a public-regarding regulation designed to prompt congressional reexamination of a special interest statute.

Of course, these limitations do not mean that the institution prompting alternative would be without merit or consequence. The institution prompting alternative would not force entities to reform the norms of suspect democratic legitimacy that they have created. In many cases, however, it would create the opportunity and therefore the possibility of reform, and in other cases actually prompt such reform. No doubt subordinate entities would refrain from setting the wheels of the institution prompting alternative in motion under certain circumstances. Still, in other circumstances, subordinate entities would set those wheels in motion.

No system could results that enhance or preserve the democratic legitimacy of law in all cases. The question, however, is one of comparison. Considering all of the above factors, would the institution prompting alternative operate better than the extant system, the presumption alternative, or the other alternatives? Ultimately the answer may depend upon one's preferences. For those inclined to place high value on eradication of norms of suspect democratic legitimacy, the presumption alternative may work best. For those inclined to favor eradication of norms of suspect democratic legitimacy, but also concerned about granting courts too much formal power, the institution prompting alternative may function best. For those who place less value on eradication of norms of suspect democratic legitimacy, but high value on simplicity, continuity, and maintenance of traditional institutional roles, the extant system may suffice.

C. Minor Modifications to the Extant System

The final two alternative systems are aimed at addressing the problems of anti-democratic outcomes and the Hobson's choice produced by the extant system, while simultaneously minimizing disruption to traditional institutional roles. The first of these final two alternatives
modifies the institution prompting alternative discussed in the previous Section. The second would leave the extant system unchanged but would add a pair of norm interpretation canons to assist courts facing norms that might be read as standing in irreconcilable conflict.

1. The Institution Option System

The institution prompting alternative permits two subordinate norm-generating entities to collaborate in prompting a superordinate entity to reconsider legal norms of suspect democratic legitimacy. One possible concern with this arrangement is that it would unsettle traditional institutional roles and upset the primacy of superordinate entities over subordinate entities.155 Sticking with the regulation and statute illustrations, though offering Congress the last word, the institution prompting alternative gives subordinate courts and agencies license to provoke congressional action. Rather than merelyappers and interpreters of legislative commands, agencies and courts would become legitimized critics of legislative output.156

The next alternative responds to this concern by changing the timing and authority to decide whether institution prompting steps may be undertaken. Under what I will call the ‘institution option’ alternative, the power to decide whether institution prompting processes may

155. See supra pp. 91-92 and text accompanying note 137.

156. The same sort of difficulty arises in cases involving norms other than statutes and in cases in which the norms in question are of the same kind. For example, where a new special interest statute stands in conflict with a preexisting statute of strong democratic legitimacy, the institution prompting alternative would permit what amounts to a collaboration between the congress that passed the preexisting statute and a court that would prompt the current congress to reconsider the more recently created statute. This arrangement upsets the normal primacy of today's congress over long-retired congresses.
occur would be taken away from subordinate entities and place it in the hands of superordinate entities. Moreover, the timing of that decision would be shifted from some point after a given legal norm has been in force to the time that a given norm is created.

Under the institution option alternative, when creating a given legal norm entities would either grant or deny pre-consent to application of institution prompting processes to that legal norm. For example, when passing a statute Congress would have the option of including a clause expressly permitting an appropriate agency to promulgate regulations in conflict with the statute. The express permission could include limiting requirements, such as a requirement that the agency make specific findings establishing that the statute lacks a solid claim of democratic legitimacy, or findings establishing that the new regulation makes a substantially stronger claim to democratic legitimacy than the statute.

Assuming that Congress has pre-consented, the institution option system would operate just as would the institution prompting alternative. Thus, if an agency has promulgated a regulation in conflict with a statute of suspect democratic legitimacy, a court would then make an independent assessment of the democratic legitimacy of the statute and the regulation. If the court were to determine that, despite the agency finding, the new regulation does not possess

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157. Clearly, adoption of this system would necessitate a constitutional amendment or modification of existing separation of powers doctrine. See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that Congress may not delegate legislative powers); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (same).

158. Similarly, a constitutional amendment could include a clause permitting future modifications to the amendment via legislation, or a new regulation could include a clause permitting judicial modification, if it appears that the amendment or regulation no longer can make a strong claim to democratic legitimacy.
substantially greater democratic legitimacy than the statute, the regulation would be vacated and
the statute would continue unchanged. If, however, the court were to agree with the agency
determination, the court would then issue a formal notice to Congress of its finding, thus
providing Congress with an automatic opportunity to reconsider the statute. As under the
institution prompting alternative, Congress could then either accept or reject the new
regulation.  

The key point is that the institution option alternative would give norm-generating entities
greater control over the norms they create than would the institution prompting alternative. The
in institution prompting alternative would give subordinate norm-generating entities unfettered
authority to undertake an institution prompting process. Under the institution option alternative,
in contrast, subordinate norm-generating entities could undertake institution prompting activities

159 All of the configuration permutations at play with the institution prompting alternative are also possible for the institution option alternative. See supra pp. 106-110. Thus, the institution option alternative could either permit or require a response when an entity is formally notified that a norm of its creation has been identified as suspect in terms of democratic legitimacy. Also, the effect of no response could be either that the standard categoric and chronologic axioms will govern the case or that the axioms may be ignored.

In addition, however, another important configuration choice arises. On one configuration, subordinate norm-generating entities would be prohibited from undertaking actions provoking reconsideration of legal norms by the entities that created them unless the entity that created the norm had explicitly so consented. Thus, where Congress creates a statute that does not specify whether subordinate entities are permitted to undertake institution prompting activities, agencies and courts would be forbidden to undertake those activities. On the other configuration, the default rule could be set in the opposite direction. Subordinate norm-generating entities would be permitted to undertake actions provoking reconsideration of legal norms unless the entity that created a norm explicitly so prohibits. Thus, where Congress creates a statute and does not specify whether subordinate entities are permitted to undertake institution prompting activities, agencies and courts would be permitted to undertake those activities.
only when a superordinate entity has pre-consented. Simply stated, the institution prompting alternative would give superordinate entities the last word, while the institution choice alternative would give them both the first and the last word regarding the fate of legal norms of arguably suspect democratic legitimacy.

The pre-consent feature should defuse criticism that some might level against the institution prompting alternative. If, for example, Congress has pre-consented to a process under which agencies and courts can take steps to provoke congressional reconsideration of statutes of suspect democratic legitimacy, concerns over unsettling the primacy of Congress over agencies and courts are diminished. Similarly, reservations over whether courts are up to the task of evaluating the democratic legitimacy of legal norms would be ameliorated by the pre-consent feature. If Congress were to offer pre-consent, presumably the thinking would be that courts (and also agencies) are capable of assessing the democratic legitimacy of the particular norm in question.

The institution option alternative, however, may throw the baby out with the bath water. In an effort to minimize and cabin any unorthodox role for courts and other subordinate norm-generating entities, much of the potential for improvement on the performance of the extant system might be lost. In the first instance, pre-consent may be a rare occurrence. One would expect that in the vast majority of situations norm creating entities would prefer that the norms they create not be subjected to institution prompting scrutiny by subordinate norm-generating entities. Usually, those pushing for the creation of a new legal norm prefer to entrench the norm as much as possible against future nullification or revision. Pre-consenting to institution prompting actions works against entrenchment because it permits subordinate norm-generating
entities to unleash a process that may prompt alteration or nullification of the norm in question.

In the legislative context, for example, assembling a minimum winning coalition and navigating the legislative labyrinth to secure passage of a new statute is usually extremely difficult.\textsuperscript{160} Those pushing for passage of a new statute would usually prefer to entrench the statute against alteration. Pre-consent to formally legitimized agency and court questioning of the democratic legitimacy of the statute, however, exposes that statute to alteration by coordinate branches of government. The same logic holds for constitutional and administrative norms. In most cases, therefore, pre-consent to institution prompting actions would be denied, and conflicts between legal norms would be adjudicated under the extant axioms. Most of the problems of anti-democratic outcomes, incentives for bias and dishonest judicial manipulation, and opacity in judicial opinions, would remain.

Still, the institution option alternative could constitute an improvement over the extant system. The extant system offers no options. When a norm-generating entity creates a legal norm it knows that it can be formally altered only by that same entity or by a superordinate entity. The institution option alternative, in contrast, would at least offer a choice. In some instances norm-generating entities would choose to subject the norms they create to formally legitimized scrutiny by subordinate entities. For example, Congress sometimes might actually prefer pre-consent to institution prompting processes over the probable alternative – informal judicial and agency manipulation. The former allows subordinate entities to merely pressure Congress to reconsider its own norms when they are of suspect democratic legitimacy. Congress, however,

\textsuperscript{160} ESKRIDGE ET. AL., \textit{supra} note 66, at 66-67 (discussing legislative process as series of vetogates and hurdles).
retains the last word. The latter results in subordinate entities manipulating and reshaping legal norms when they are of suspect democratic legitimacy.\textsuperscript{161} In other instances, inclusion of pre-consent to institution prompting alternatives might be needed to assemble a minimum winning coalition in Congress for passage of a statute. Fence sitting legislators might be persuaded to vote for a bill only if courts and agencies are authorized to prompt a legislative reexamination of the statute at some future date. Provisions pre-consenting to institution prompting might also become a chip deployed in legislative bargains and logrolls. For example, in exchange for a legislator’s support on one bill, the legislator might demand the inclusion of a pre-consent provision in another bill.\textsuperscript{162}

In the end, the institution alternative probably promises less improvement on the performance of the extant system than some of the other alternatives. On the other hand, it would not unsettle the primacy of superordinate norm-generating entities over subordinate norm-

\textsuperscript{161}. It is also possible that pre-consent to institution prompting will lessen incentives for judicial manipulation of the meaning of legal norms. Under the extant system courts recognize that they alone can prevent nullification of a norm of relatively strong democratic legitimacy via manipulation of interpretive discretion. This creates a strong incentive for resort to interpretative manipulation. Where pre-consent to institution prompting has been extended, in contrast, courts will know that ultimate responsibility will lie with a superordinate norm-generating entity. This may lessen the incentive for resort to interpretive manipulation.

generating entities as much as some of the other alternatives. Whether one finds the institution option alternative appealing will depend on the strength of one’s preferences for improved performance versus tolerance for novel and unorthodox institutional relationships.

2. The Interpretive Canon Alternative

A final alternative would leave all four extant axioms completely unchanged but would add two related canons of interpretation. One canon would instruct courts to interpret norms, when possible, to avoid conflict if conflict would result in nullification of the norm of substantially greater democratic legitimacy. A second canon would instruct courts to interpret norms, when possible, to embrace conflict if conflict would result in nullification of the norm of substantially lesser democratic legitimacy.163 The first canon would signal courts to identify and protect norms of strong democratic legitimacy and to use their interpretive discretion to ensure that norms of strong democratic legitimacy are not nullified. The second canon would signal courts to identify and destroy norms of suspect democratic legitimacy and to use their interpretive discretion to ensure that norms of weak democratic legitimacy are nullified. The proposed canons may be reduced or simplified to a presumption against norm interpretations that would substantially diminish the democratic legitimacy of law.

For the most part, the proposed canons of interpretation would not stand out as oddities among the existing stock of norm interpretation rules. We already have dozens of interpretive

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163. Courts could be required to apply a predetermined multi-factor analysis similar to that discussed previously when determining whether a norm of strong democratic legitimacy stands at risk of nullification by a legal norm of substantially lesser democratic legitimacy. See supra Section IV.A.3.
canons that, for one reason or another, instruct courts to adopt norm interpretations that diverge from the most natural textual meaning and/or most probable legislative intent. The well known rule of lenity, for example, instructs courts to interpret ambiguous criminal law statutes with a bias that favors criminal defendants. A lesser known substantive canon instructs courts to interpret ambiguous statutes with a bias favoring the rights of Native Americans. These are just two of many interpretive rules that ask courts to favor particular substantive outcomes over the most natural meaning and most probable intent when interpreting legal norms.

The proposed canons even bear a striking likeness to existing coherence-oriented interpretive rules and canons. One such canon instructs courts to avoid conflicts between statutes. Even where the most natural reading of the text and/or intent of two statutes would suggest a conflict, courts are instructed to select plausible interpretations that avoid the conflict. Another canon instructs courts to avoid reading legal norms in a way that would

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166. Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

167. ESKRIDGE ET. AL, supra note 66, at appendix B 21-23 (listing substantive canons of statutory construction).

168. This is the well known rule of statutory construction which imposes a rebuttable presumption against full or partial repeal of the preexisting statute by a new statute. Morton v. Mancari, 417 U.S. 535 (1974) (most cited federal case for presumption against implied repeals).
result in conflict with a constitutional norm. Thus, rather than read a given statute in accord with its most natural textual meaning or most probable legislative intent, the so called avoidance canon instructs courts to adopt an interpretation that avoids conflict with the Constitution. A third analogous principle, the *Chevron* doctrine, instructs courts to find no conflict between statutes and regulations so long as the regulation adopts a plausible interpretation of the statute. Consider how the proposed canons would work in a case involving a new special interest statute (suspect democratic legitimacy) and preexisting public-regarding regulations (strong democratic legitimacy). Assume that the preexisting regulations establish product safety standards of broad public benefit. The record of legislative history, however, indicates that in passing the new statute Congress intended to provide special interest benefits by exempting certain manufacturers from the regulations. The text of the statute is open textured and compatible with contradictory interpretations. It could plausibly be read as congruous with the intended exemptions, but also could plausibly be read as *not* permitting any exemptions from the public regarding safety regulations.

On this scenario, the proposed canons of construction would instruct a court to bend the meaning of the norms to avoid conflict between statutes and regulations, thereby preserving the public regarding regulations. To achieve this end a court would ignore the record of legislative history and seize upon a plausible reading of the statutory text that would not permit any

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169. *Eskridge et al.*, *supra* note 66, at appendix B 20-21 (listing “continuity in law” canons of statutory construction and other canons such as canon calling for interpretation of same terms in similar way).

exemptions to the public-regarding regulations. This exercise would not differ in essence from what courts often do when applying the rule against implied repeal of statutes, the avoidance canon, or the *Chevron* doctrine rule requiring courts to uphold reasonable agency interpretations of statutes. In all instances, courts embrace not the most natural textual or most likely intended interpretations of legal norms, but instead embrace the interpretations that *avoid conflicts* between norms. Courts do this even if the chosen interpretation is located on or even beyond the outer edges of plausible meaning.\(^{171}\)

In other cases, however, the proposed canons of interpretation would call on courts to do something that the existing 'coherence' rules do not dictate – bend the meaning of legal norms to *embrace conflicts* between legal norms. To see the point, reverse the polarity of the previous example. Assume that an agency captured by the industry it regulates has issued a set of weak product safety regulations. The regulations fail to provide meaningful protection to the public and instead provide substantial benefits to the regulated industry. If aware of the lax nature of the regulations and the benefits to the regulated industry, the public would surely disapprove. Concerned legislators introduce a new bill in Congress that would stand in conflict with the

existing regulations.

If passed as introduced, the statute would force the agency to promulgate a new set of more rigorous and public-regarding regulations, and the special interest benefits to the regulated industry would be eradicated. Legislators under the influence of lobbyists and campaign contributions from the affected industry, however, advance amendments rendering key provisions of the bill vague and ineffectual. In order to secure passage through the maze of committees, sub-committees, and both chambers of Congress, proponents of the bill must accede to many of the amendments. Because the statute's text ends up ambiguous, the captured agency is able to adopt a new set of regulations that only minimally diminish the special interest benefits, and which nonetheless are compatible with a reasonable reading of the new statute. Under normal *Chevron* doctrine interpretive rules a court upholds the regulations. At the end of the process, the bulk of the special interest benefits remain intact.

The proposed canons of construction, however, would counsel courts to read the norms in question not to avoid conflict (as does the *Chevron* doctrine), but rather to *embrace* conflict if conflict would result in nullification of the norm of substantially lesser democratic legitimacy. By interpreting the open textured statute so that it stands in maximal conflict with the special interest benefitting regulations, the regulations will be nullified and the special interest benefits

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172. *See* *Chevron*, 467 U.S. at 843-44 (holding that courts must uphold agency statutory interpretation if reasonable).

173. This outcome assumes that a court would not manipulate the *Chevron* doctrine, would find that the agency interpretation is not reasonable, and would thereby strike down the special interest regarding legislation. It certainly is possible, however, that a court operating under the extant system might manipulate the *Chevron* doctrine to find that the regulations do not constitute a reasonable interpretation of the new statute. *See supra* note 171.
eliminated or at least minimized.

Like the multi-factor, presumption, institution promptly, and institution choice alternatives, the interpretive canon alternative would ask courts to do something that is at least formally new and unfamiliar – evaluate the democratic legitimacy of individual legal norms.\(^{174}\)

However, as already mentioned, since many courts already informally assess the democratic legitimacy of individual legal norms and bend (and sometimes even break) the meaning of legal norms in order to avoid anti-democratic outcomes, the novelty and any transition period difficulty would be minimal.\(^{175}\) Like some of the other alternative systems, the proposed canons constitute one way of formalizing, legitimizing, and regularizing something that courts already informally do, to varying degrees, under the guise of interpretive discretion.

The benefits of the proposed interpretive canons are plain. First, formal adoption of the proposed canons would homogenize to some degree judicial interpretation in cases involving norms that potentially stand in conflict. Some courts may currently be too hesitant to use their flexible interpretive discretion to avoid anti-democratic outcomes. The proposed canons would signal courts these courts that they need not be hesitant. Unlike the extant system, the interpretive canon alternative would minimize the Hobson's choice between interpretive

\(^{174}\) The consequences of such judicial evaluations, however, would differ sharply under the various alternative systems. Under the multi-factor alternative, for example, the consequence would be that a court would uphold whichever legal norm it finds to possess greater democratic legitimacy. Under the institution prompting alternative, the consequence would be judicial issuance of a formal notice to the entity that created a norm of suspect democratic legitimacy. Under the interpretive canon alternative, the consequence would be application of one of the two proposed canons giving the court license to bend the meaning of legal norms to avoid what would otherwise be an anti-democratic outcome.

\(^{175}\) *Supra* text accompanying note 118.
manipulation and anti-democratic outcomes. The anti-rule of law stigma of interpretive manipulation would be removed (and indeed legitimized). As for courts currently too willing to dishonestly twist interpretive rules in order to avoid anti-democratic outcomes, the proposed canons would signal that there are limits to such practices. The proposed canons do not endorse outright judicial dishonesty or the adoption of interpretations that do not find plausible support in the text or intent of legal norms. They only endorse bending the meaning of legal norms within the range of plausible meanings. Adoption of the interpretive canons would not render courts fully identical or interchangeable in their treatment of cases involving potentially conflicting legal norms. It could, however, narrow the band of inconsistency.

A second possible benefit of the interpretive canon alternative is that, like some of the other alternatives, it could enhance transparency in judicial opinions. In order to determine whether either of the canons are applicable, courts would be forced to analyze, compare, and discuss the democratic legitimacy of conflicting legal norms. Any informal weighing of such considerations currently employed must be camouflaged, only to be expressed through biases and manipulation in the interpretation of legal norms. The democratic legitimacy concerns that may drive judicial decisions would be brought out into the open, would become a legitimate part of legal argument, and would be expressed on the face of the written opinion. Again, openness is always to be preferred over opacity.

Beneficial shifts in the incentives facing norm-generating entities offer a third possible benefit. Superordinate norm-generating entities would have less incentive to create legal norms of suspect democratic legitimacy. The payoff for creation of a special interest oriented statute,
for example, is far less when courts are instructed to interpret with a bias aimed at diminishing such norms than when they interpret without this substantive bias.

Moreover, the costs of securing special interest statutory policy against dilution by subordinate norm-generating entities would increase. Only exceedingly precise and specific statutory language would immunize the special interest oriented statute from dilution by courts and agencies wielding the proposed canons of interpretation. In the face of a special interest oriented statute of ambiguous or open textured wording, an agency could promulgate a regulation that removes or dilutes the special interest favors. Courts armed with the suggested canons of interpretation would have a powerful tool that would permit them to legitimately uphold the agency regulation as consistent with the statute.

In addition, the suggested canons would create powerful incentives for subordinate entities to create norms of strong democratic legitimacy. When an agency, for example, promulgates a regulation of strong democratic legitimacy, it will know that courts will strive to protect that regulation by reading any statutes of suspect democratic legitimacy as not in conflict with the regulation. The creation of such a regulation would have the effect of narrowing the impact of statutes of suspect democratic legitimacy.177

176. See supra note 104 and p. 88.

177. Thus, an agency could create a new regulation that would conflict with the already established and most natural interpretation of some statute. If that statute is of suspect democratic legitimacy and the regulation is of strong democratic legitimacy, the agency can depend on a court to reshape the statute in order to eliminate any possible conflict and accommodate the regulation. Similarly, if Congress passes a statute of strong democratic legitimacy, it will know that courts will strive to interpret that statute and any subsequent agency created regulation that is of weak democratic legitimacy to preserve the statute and nullify such regulations.
A practical advantage of the interpretive canon alternative is that it stands a much better chance of adoption than any of the previously discussed alternative systems. Legal change usually occurs both incrementally and using existing and therefore known templates. Not only does the interpretive canon alternative work no change in the extant axioms, it also builds on the well known template of existing substantive interpretive norms. Courts dealing with possibly conflicting legal norms would merely read those norms with a certain substantive bias.

Alternative systems ranging from the multi-factor system to the institutional option system, in contrast, would erect new formal processes and institutional arrangements. Even though the new processes and institutional arrangements might largely formalize and legitimize what already informally may occur under the guise of interpretive discretion, they would work far more substantial changes than would the interpretive canon alternative.\(^{178}\)

The interpretive canon alternative, like all possible systems, has its potential drawbacks. First and foremost, it would not improve on the performance of the extant system in the most important cases. Return to the anti-spam regulation illustration. In that case, the only way to avoid nullification of the popular regulation was to go beyond bending the meaning of the norms to actually break interpretive rules and to engage in dishonest interpretation. The proposed canons would not sanction that kind of judicial behavior. Courts facing cases in which no plausible and honest interpretation of the norms in question could avoid an anti-democratic outcome would still face the Hobson's choice between dishonest interpretation and anti-
democratic outcomes.

Second, the interpretive canon alternative would continue to grant courts primary control over the outcomes in cases in which norms of strong democratic legitimacy potentially stand in conflict with norms of suspect democratic legitimacy. Unlike the institution prompting alternative, for example, the interpretive canon alternative includes no formal mechanism for incorporating the input of coordinate norm-generating entities.

Third, the proposed canons would (like the last several alternatives) call on courts to evaluate the democratic legitimacy of individual legal norms. This turns out to be a central issue. Rather than ask courts to engage in any evaluation of the democratic legitimacy of legal norms, the extant system tries to keep courts out of this activity. It instead uses a simple metric – the democratic legitimacy of norm-generating entities. One bottom line question is whether courts are better at assessing the democratic legitimacy of legal norms than this simplistic metric. At least in the easy cases – easy because there exists a substantial disparity in the democratic legitimacy of two norms – courts employing the proposed canons probably would do a better job than the extant system. Moreover, in the easy cases many courts already informally do what the canons would endorse.

Finally, the interpretive canon alternative would fail to resolve a central dilemma of the extant system. Why bother with the rigid, discretion-denying axioms if courts are offered enough flexibility in interpreting legal norms to select outcomes in spite of the rigid, discretion-denying formalism of the axioms? Because the interpretive canon alternative does nothing to alter the rigid nature of the axioms, it does nothing to address this basic dilemma. All it really does is
formally sanction the broad interpretive discretion already used to undermine the rigidity of the extant axiomatic meta-norms.

If the problem is that the rigid axioms produce too many unsatisfactory outcomes, it may be best to introduce a bit of flexibility into the axioms themselves. This is what alternatives ranging from the multi-factor system to the institution option alternative would do. The interpretive canon alternative, in contrast, expects courts to apply the unchanged axioms, but instructs courts to bend the meaning of legal norms when failure to do so would, under the axioms, lead to an anti-democratic outcome. If we are willing to add new interpretive rules that would, in effect, legitimize and regularize judicial bias and manipulation in the interpretation of legal norms, we might as well avoid the gamesmanship and simply alter the axioms themselves.

V. Conclusion

A key difference between the extant system and most of the alternative systems offered in this Article relates to the publicly enunciated content of judicial opinions. Several of the alternative systems encourage courts to directly and publicly grapple with the issue of democratic legitimacy. Courts operating under the multi-factor, presumption, institution prompting, institution option, and interpretive canon alternative systems would have to incorporate into written opinions analyses of the democratic legitimacy of individual legal norms.

The extant system, in contrast, discourages public analysis of the democratic legitimacy of individual legal norms two ways. First, it reduces the democratic legitimacy issue to the overly simplistic metric of the democratic legitimacy of the entities that create norms. In so doing, it makes it all too easy for rule-following courts to decide cases in accord with the
axiomatic meta-norms, and to sidestep any examination of the democratic legitimacy of the individual norms involved. This can lead to outcomes that are, in all but a formalistic sense, anti-democratic, such as a special interest-favoring statute trumping a public-regarding and popular regulation.

Second, the extant system denies courts a way to publicly admit and explain how and when the democratic legitimacy of individual legal norms influences their decisions. Many courts will bend over backwards to avoid judicial nullification of norms of high democratic legitimacy. The rigidly formalistic and source-centric extant system forces these courts into interpretive gamesmanship. Courts that are unwilling to nullify norms of strong democratic legitimacy are forced to rationalize their rulings with the obfuscatory language of neutral rules of norm interpretation. While the desire to avoid an anti-democratic outcome may be a prime factor motivating outcomes, the reasoning offered in judicial opinion to explain outcomes avoid discussion of the issue and mention only of rules of legal interpretation.

Most of the alternative systems, in contrast, would encourage courts to publicly justify their decisions by explaining the democratic legitimacy related factors that actually influence their decisions. In cases where courts see special interest statutes of dubious democratic legitimacy in conflict with more public regarding regulations, for example, the alternative systems would require courts to discuss and explain how this circumstance influences whether the court decides to nullify the public regarding regulation. Return to the Tenth Circuit’s treatment of the ‘do not call’ regulations discussed in the Introduction. 179 Though we can never know for sure, it is very possible that the strong negative public reaction against lower court
opinions nullifying the ‘do not call’ regulations was a key factor motivating the Tenth Circuit to uphold the regulations. The extant system governing conflicts between legal norms did not give the Tenth Circuit a legitimate way to admit and discuss how the strong democratic legitimacy of the regulations might have factored into its ruling. Most of the alternative systems, in contrast, would have required that the Tenth Circuit directly and publicly grapple with this issue. At the very least, we are left with the question of whether the popularity of the ‘do not call’ regulation influenced the Tenth Circuit’s decision. We are probably better off with systems that would allow courts to directly, openly, and publicly discuss the factors that influence outcomes, than a system which forces courts into interpretive gamesmanship and leaves one wondering what really drives outcomes.

The crux of the problem with the extant system lies in the following: The extant system's rigid formalism seeks to deny courts discretion over the democratic legitimacy of individual legal norms. At the same time, however, the flexible and open-ended discretion afforded courts when interpreting norms permits courts to surreptitiously factor the democratic legitimacy of legal norms into their decisions. This coupling of rigid formalism with open-ended anti-formalism is the worst of all worlds.

Some will maintain that courts simply are not equipped to assess the democratic legitimacy of individual legal norms and that courts should not allow such factors to influence their decisions. The realities, however, are that such factors do influence judicial decision making, and flexible rules of legal interpretation do permit such factors to influence judicial decisions. For those who believe that the extant system is right to attempt to keep courts out of

See supra text at notes 1-8.
the business of assessing the democratic legitimacy of individual legal norms, the policy
prescription will call for less judicial discretion in interpreting legal norms. In short, if courts are
using the back door of flexible interpretive discretion to do what the extant system tries to
prohibit them from doing through the front door, then the back door in flexible interpretive
discretion should be shut.

To my mind, however, the opposite path should be explored. Allowing courts a
legitimized role in assessing the democratic legitimacy of individual legal norms would, over the
run of cases, produce more outcomes that enhance or preserve the democratic legitimacy of law
than does the extant system. Moreover, we should structure the systems governing conflicts
between legal norms in ways that encourage courts to publicly enunciate exactly how the
democratic legitimacy question influences their decisions. Courts will use judicial discretion
whenever, and in whatever form, it is made available. Because courts are offered flexible
interpretive discretion, the rigid axiomatic meta-norms governing conflicts between legal norms
fails to stop courts from exercising discretion on the democratic legitimacy issue. When a public
regarding regulation runs up against a special interest statute, courts can and do use their flexible
interpretative discretion to save the regulation from nullification by reading the norms in ways
that avoid any conflict. If courts are going to exercise interpretive discretion, we are better off
encouraging them to publicly explain the factors motivating their decisions, than forcing them to
operate through the back door of flexible interpretive discretion. This is what many of the
alternative systems offered in this Article would do.