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Discussion

A Dynamic Judicial Approach to Diachronic Legislative Integrity

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Courts are committed to promoting the integrity of legislative bodies through time, whether or not the latter are devoted to it. Such commitment materializes through theories of statutory interpretation that assume the law forms a consistent, coherent and complete whole. Courts assume that legislative bodies already—and have always—abided by "diachronic integrity" which is defined here as a commitment to consistency and coherence over a series of legislative decisions.

However, contrary to this assumption, the law is rarely wholly complete, consistent and coherent. One reason is that legislative bodies may change their mind over time and yet they seem to commit to attaining consistency and coherence. In this paper, I wish to explore the challenges such a state of affairs raises for courts. What are the consequences for courts of a legislative body's expressed commitment to diachronic integrity while the law is not yet consistent and coherent? How should courts take into account a legislative body's ambition for diachronic integrity when aggregating the characteristics of a body of relevant statutes, given that that legislative body may have changed its mind through the passage of time?

I argue that a realistic respect for diachronic legislative integrity should account for the dynamism of legislative activity. Whereas a "static" account assumes that legislative bodies have reached some sort of reflective equilibrium where each piece of legislation is consistent and coherent with the others, a "dynamic" account understands that legislative bodies are instead in an ongoing process of building this consistency and coherence and revising their judgments and principles upon learning new information, discovering undesirable outcomes and changing decision makers. I present this argument in two parts. In Part I, I expose the inadequacy of the current static judicial understanding of diachronic legislative integrity. In Part II, I explain how a dynamic account of diachronic legislative integrity may improve current theories of statutory interpretation.

I. The Problem: Current Judicial Understanding of Diachronic Legislative Integrity

Theories of statutory interpretation generally assume that the law is consistent, coherent and complete. When confronted with a "gap in the law" or a "hard case"

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involving statutory interpretation—depending on one's account of the concept of law—those theories invite judges to look for a normative response that would be consistent and coherent with current legislation. Such consistency and coherence operate on three levels.[1] Internally, inside a legislative text, each legal norm is understood to be consistent and coherent with other legal norms and principles that are contained in that legislative text. Horizontally, each legal norm is understood to be consistent and coherent with other statutes if it originates from a statute, or with other regulations if it originates from a regulation. Vertically, a legal norm is understood to be consistent and coherent with hierarchically superior legal norms, such as its authorizing statute, if applicable. In sum, these theories of statutory interpretation command that the law ought to be understood as a *complete* logical system.

An interpretative method relying on consistency and coherence assumes that legislative assemblies and regulatory agencies (herein "legislative bodies") abide by the notion of "diachronic integrity." Here, the term "integrity" designates consistency and coherence in the Dworkinian sense,[2] although legislators never were Ronald Dworkin's main focus.[3] The adjective "diachronic" describes "a string of decisions made by [a] group over time," in opposition to "synchronic integrity," which refers to "the integration of different views held by members of a decision-making group with regard to a single decision."[4] Such an interpretative method assumes diachronic integrity in that it implies that a legislative body adopts norms in a manner that is consistent and coherent with previous decisions.

In order to couch a legal interpretation in line with diachronic legislative integrity, courts have to identify a logical connection between a prospective legal interpretation and relevant current legislative material. In other words, courts must identify some sort of principle at play in existing legislation and apply it to the case at hand. Imagine that a court interpreting statute L is considering prospective interpretation I_1 that is a combination of principles A and B, I_2 combining principles B and C, and I_3 combining principles B and D. Hoping to honour the legislative ambition for diachronic integrity, the court turns its attention to statutes M and N seeking a coherent principle helpful to its interpretative enterprise. The court identifies in M principles A, C and E; and, in N, the principles A, D and F. Because principle A is constant among the relevant statutes and it is also present in interpretation I_1, the court can thus conclude that A is the logical connection. Hence, as a result of A being the consistent principle and hence that which is adhered to, the court will favour interpretation I_1.

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1. Pierre-André Côté with the collaboration of Stéphane Beaulac & Mathieu Devinat, *Interprétation des lois*, 4th ed (Thémis, 2009) 351-53 at para 1152; Pierre-André Côté with the collaboration of Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Carswell, 2011) at para 1152.

2. As used in Lewis A Kornhauser & Lawrence G Sager, "The Many as One: Integrity and Group Choice in Paradoxical Cases" (2004) 32:3 Philosophy & Public Affairs 249; Christian List & Philip Pettit, "On the Many as One: A Reply to Kornhauser and Sager" (2005) 33:4 Philosophy & Public Affairs 377.

3. Kornhauser & Sager, *supra* note 2 at 255.

4. List & Pettit, *supra* note 2 at 253.

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Each theory of statutory interpretation proposes a distinct definition of what constitutes a logical connection. A Dworkinian theory, for instance, would seek a connection between the substantive outcomes of legal norms.[5] In our example, principle A thus concerns the characteristic of an outcome that fits with the outcomes produced by the current legislative material. Comparatively, a reason-based approach to legislative integrity through time[6] will produce a theory of statutory interpretation requiring courts to identify similar reasons behind relevant legal material and to adopt the interpretation fitting those reasons. Principle A would, in that case, be a set of reasons unifying statutes L, M, and N to which a court would have to give force. For the purpose of my argument, I do not need to commit to a specific definition of what constitutes a logical connection, because I address the structure of that inquiry rather than its substance.

A judicial commitment to living up to a legislative body's ambition for diachronic integrity thus reduces the pool of prospective judicial responses to a "legal gap" or a "hard case" to responses that are consistent and coherent with the rest of the law. In our example, the universe of possibilities shrinks from I_1, I_2, and I_3 down to I_1 when a court commits itself to honouring legislative diachronic integrity. A reduction of possible judicial responses to coherent ones entails a reduction of the impact of the courts on the state of the law because they will provide responses fitting within it rather than troubling its stability. This is desirable for two main reasons.

First, a minimal judicial impact on the law leaves more room for the expression of a legislative body's will, which is valuable in a democratic polity. In democratic systems, courts are usually understood as not having the legitimacy to make significant legal changes. Thus, the more a court's normative response fits the legislative body's expressed will by being coherent with all of its relevant statutes, the more it is likely to honour citizens' expectations and to retain its legitimacy. A legal reasoning assuming diachronic legislative integrity thus arguably helps protect the people's will and a judicial institution's authority.

Second, a judicial commitment to responding to "legal gaps" or "hard cases" with a view to promoting diachronic legislative integrity facilitates law-abiding legal subjects' planning of their lives. When confronted with a "gap" or a "hard case," a legal subject will have a better idea of how to conform to the law for she will know to seek a legal norm that is consistent and coherent with current legislation. Uncertainty regarding the legal norm would obviously remain, but to a lesser degree.

However sound courts' commitment to legislative diachronic integrity may be, our current understanding of legislative diachronic integrity is problematic. Current models assume continuity across time without specifying any time range or accounting for the possibility that a legislative body changes its mind. Lewis A. Kornhauser and Lawrence G. Sager identify this problem in their discussion on reason-based diachronic legislative integrity theories.[7] They ask what a

5. *Ibid*.
6. As exemplified in *ibid* at 270-71.

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legislative body, committed to its diachronic integrity with previously enacted statutes, ought to do when considering a bill under the following scenario:

> Suppose that [statute] L is proposed in to Congress at time t, M to Congress at time t + 1 and N to Congress at time t + 2. Suppose further that L is enacted. When Congress considers M at time t + 1 does it consider the merits of M alone? Or must it consider its impact on L? Specifically, does the enactment of M implicitly repeal L because it rejects the premise A necessary for the adoption of L?[8]

In their response to Kornhauser and Sager, Christian List and Philip Pettit acknowledge that, "if a group seeks to achieve integrity in its judgments over time, these judgments may be path dependent, that is, dependent on the order in which propositions are considered."[9] Hence, the passage of time complicates the picture: Is a legislative body committed to diachronic integrity bound by its previous decisions or, conversely, is the body under an obligation to revisit its previous decisions in conformity with its most recent or prospective one?

The purpose of this paper is to ask the question from the point of view of the courts: Given that courts wish to live up to legislative bodies' ambition to commit to diachronic integrity, how should they account for the passage of time in aggregating the characteristics of a body of relevant statutes? Imagine that prospective interpretations of statute N adopted at time t fits either principle A or principle B. Imagine further that the legislative assembly adopted statute M at time t − 1 in accordance with principles C and B, and statute L at time t − 2 in accordance with principles C and A. We can conclude from this that the legislative body clearly adhered to C, but this does not tell us how to interpret statute N. Should a court use its discretion to adjudicate between principles A and B? Should it favour principle A since it is one of the first principles the legislative body committed to when adopting statute L? This would imply that M is irregular insofar as it would be understood to depart from this commitment to A. Or, conversely, should a court prefer principle B since it is the most recent principle adhered to, hence arguably the most likely to represent the legislative body's will? The main theories of legislative interpretation offer no response and ignore this temporal element.

In summary, courts' commitment to honouring diachronic legislative integrity is desirable and yet our current understanding of legislative integrity is insensitive to the fact that a legislative body may change its mind over time. Current theories of statutory interpretation take the law as a whole, scavenging from it principles that could give the law a sense of consistency and coherence. Such an approach does not differentiate between the principles a legislative body is the most committed to and the ones it has neglected or rejected. Traces of neglected and rejected principles may still be visible in the law, causing the risk that courts will

7. *Ibid* at 272.
8. *Ibid*.
9. List & Pettit, *supra* note 2 at 383 n 16.

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give a voice to them instead of prioritizing the principles to which the legislative body is most committed.

A recent judgment from the Court of Appeal of Québec offers a good example of such risk. Note that the first chapter of the *Civil Code of Québec* on parenthood status is entitled "Filiation by Blood."[10] This seems to suggest that there is a legal principle that parental status ought to be attributed to genetic progenitors. However, the primary means to determine parental status under this title are not related to the genetic profile of children and parents. On the contrary, legal articles provide for a determination of parental status that is based on social facts (one's behaviour while acting as a parent, one's voluntary acknowledgment of parenthood or one's marital status with the mother) and on an institutional fact (the name of the parents on the child's Act of Birth).[11] The *Code* even prohibits any attempt to undermine one's parental status through genetic testing when one's name is written on the Act of Birth and one has acted as a parent for a substantial period of time.[12] The old principle equating parental status to blood seems to have been brushed away by the National Assembly of Québec in favour of a determination of parenthood focused on social and institutional facts. And yet, courts still have a hard time making sense of this chapter title, as some judges believe that it suggests the old principle still survives.

This complication is illustrated by a recent decision in which the dissenting judge is tempering social reality in favour of genetic conformity. She acknowledges that parenthood is usually determined by social facts, but she opines that, since the issue is about "filiation by blood," the primary principle is that, "as its name indicates, this type of filiation unites in principle a child to those who spawned him" [my translation].[13] She thus seems to believe that two principles are at play, and that the principle of genetic parenthood trumps the principle of social parenthood.

However, a sensibility to the evolution of the National Assembly's views on legal parenthood over time would yield a different judicial opinion, one recognizing the assembly's current commitment to a social and institutional definition of parenthood. Such a sensibility would discard the chapter title as the residue of a principle that the National Assembly is no longer committed to. Such judicial opinion would be one like the majority decision, which reasserted that "the filiation by blood . . . does not focus on the genetic connection between a child and a parent" [my translation].[14] Unfortunately for legal theorists, the majority did not justify on what theoretical ground it casted away the principle of genetic

10. Arts 523-37 CCQ.
11. *Ibid*, arts 523-29; *Droit de la famille—20572*, 2020 QCCA 585 at paras 23-27.
12. Art 530 CCQ; *Droit de la famille—181478*, 2018 QCCA 1120 at paras 54-59.
13. *Ibid* at para 124 ("Son nom l'indique, ce type de filiation unit en principe un enfant à ceux qui l'ont engender [reference omitted]"). See also paras 123-26 (seeing biological determination of parental status as the default position).
14. *Ibid* at para 54 ("La filiation par le sang, ce dont il est question ici, ne vise pas le lien génétique unissant l'enfant et le parent. Selon les articles 523 et 524 du *Code civil du Québec*, la « filiation par le sang » se prouve par l'acte de naissance ou encore par la possession constante d'état" [reference omitted]).

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parenthood, but this decision seems to result from an implicit recognition that the National Assembly has departed from a biology-centered view of parenthood.

A judicial approach to diachronic legislative integrity perceiving the law *as a whole* is unrepresentative of the very changes in the law that a legislative body is trying to make. It gives normative traction to some minor residues of the past—such as the "Filiation by Blood" title—ignoring the fact that the legislative body is clearly moving away from the old principles these residues refer to. Such an approach yields judicial responses inconsistent with the legislative body's will, and arguably with the people's will, a result that is undesirable in a democratic system. Courts need a more nuanced interpretative framework able to account for the passage of time.

II. A Proposed Solution: A Dynamic Approach to Diachronic Legislative Integrity

In order to meet the challenges a judicial commitment to diachronic legislative integrity poses to statutory interpretation, I argue for the adoption of a "dynamic approach" to legislative integrity. A dynamic approach recognizes that legislative bodies are in a constant process of making up their minds. This dynamism is mostly due to the ongoing discovery of new information, the necessity to overcome unexpected undesirable legislative outcomes, and the inevitable change of decision makers. As a consequence, a legislative body may change direction as time goes by. Acknowledging this fact, a dynamic approach to integrity favours consistency and coherence not with the entirety of a legislative body's decisions but with the principles it is most committed to.

To better explain my point, I propose to consider legislating as a search for reflective equilibrium. This deliberative method, in a nutshell, is characterized by a back and forth between one's considered judgments (which operate at all levels of generality, from the morality of a particular situation to that of multiple similar situations of the same type)[15] and one's principles, revising any of those with a view to attaining an "acceptable coherence" between them, an end-point called "reflective equilibrium."[16] This process is useful to our discussion on integrity because "the dominant understanding of the method of reflective equilibrium seems to be one on which it is a kind of ... coherence theory."[17] Anyone engaged in a search for reflective equilibrium strives for coherence, but may have only partly found it. I contend that the same process is going on with legislative bodies. Indeed, they are striving for consistency and coherence between their

15. Thomas Kelly & Sarah McGrath, "Is Reflective Equilibrium Enough?" (2010) 24 Philosophical Perspectives 325, 334 (citing John Rawls); Thomas M Scanlon, "Rawls on Justification" in Samuel Freeman, ed, *The Cambridge Companion to Rawls* (Cambridge University Press, 2002) 141.

16. Norman Daniels, "Reflective Equilibrium" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Research Lab, 2018) 2.

17. Kelly & McGrath, *supra* note 15 at 332.

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judgments of what ought to be and their general principles, or at least that is the ambition assumed by theories of statutory interpretation.

A *dynamic* approach to diachronic integrity recognizes that legislative bodies are in this ongoing process of searching for coherence and have only partly found it so far. By contrast, a *static* account of integrity postulates that a legislative body has already reached reflective equilibrium, and thus that consistency and coherence have spread over the entirety of the law—the assumption made by current theories of statutory interpretation. Before discussing the mechanics of a dynamic approach, let us see in more detail how the method of reflective equilibrium fits legislative practice.

The method of reflective equilibrium, Thomas M. Scanlon explains, proceeds in three stages.[18] First, one starts "by identifying a set of considered judgments about justice."[19] Second, one "tr[ies] to formulate principles that would 'account for' these judgments."[20] Third, one brings into play the notion of coherence to deal with the inconsistencies between these considered judgments and principles. These inconsistencies are almost inevitable. Some judgments will yield general principles that are incompatible with each other; some broad principles will, when applied to new situations, produce inferences that are contradictory with some particular considered judgments. One must then modify some principles to account for one's judgments, and modify some of one's judgments to account for newly discovered principles, "working back and forth between principles and judgments, until one reaches a set of principles and a set of judgments between which there is no conflict."[21] As Nelson Goodman puts it, "[a] rule is amended if it yields an inference we are unwilling to accept; an inference is rejected if it violates a rule we are unwilling to amend."[22] Revision operates at every level.[23] For the dominant view of reflective equilibrium, coherence between one's beliefs is the ultimate purpose.

Legislative bodies engage in a similar process. The first two steps have already been reached, although imperfectly. A legislative body has a set of judgments and a set of principles to work with. Most statutes and regulations are the crystallization of those broadly applicable principles. Some of the more particular statutes might be the mere codification of some judgments. Most judgments held by the legislative body's members will remain uncodified but will influence their legislative decisions.

In sum, legislative bodies are stuck in the third step. They adopt and amend statutes in an attempt to best account for their judgments and reflect their principles. Those judgments and principles evolve through the discovery of new information, the revelation by everyday legal enforcement of unexpected undesirable effects, and the election or nomination of new legislators or

18. Scanlon, *supra* note 15 at 140-41.
19. *Ibid* at 140.
20. *Ibid*.
21. *Ibid* at 141.
22. As cited in Kelly & McGrath, *supra* note 15 at 329.
23. Daniels, *supra* note 16 at 3; Kelly & McGrath, *supra* note 15 at 334 (citing John Rawls).

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regulators. Let us point out that some of those judgments and principles may have already been on the legislative agenda of a body for quite some time but they were held by an insufficient number of members or the legislative body did not have a chance to act upon them yet. Sometimes, a legislative body does not amend a legal norm and instead tempers its judgments, either voluntarily because it holds dear that legal norm or involuntarily because it is unable to agree on how to amend it. Other times, the legislative body is forced to revise inconsistent legal norms, especially when such inconsistencies are pointed out by a court. A legislative body can do so by amending the legal norms, or by accepting the court's reconciled interpretation or declaration of unconstitutionality by not undertaking any action. Ultimately, a legislative body tries to build a coherent body of statutes representative of its beliefs, which may themselves not be entirely consistent or coherent yet.

When used by legislative bodies, the method of reflective equilibrium progresses slowly. This is so for three reasons. First, whereas it could take a few minutes for philosophers to adjust their principles, the heaviness of a legislative body's procedure may lead it to take months or even years to adjust its legal norms.

Second, the revision of a legislative body's commitment to a judgment or a principle through a change of decision makers provoked by elections or nominations further slows down the process. Indeed, newly elected or nominated members may hold different views than their predecessors. This is desirable to ensure that the progress towards reflective equilibrium remains democratic: a people may express its revision of a judgment or of a principle by electing officials representative of their change of mind; and, *mutantis mutandis*, an executive may express its revision by nominating new regulatory officials.[24] This is the desired democratic component of a legislative body's search for reflective equilibrium, but it has the corollary effect of slowing down the process.

Third, a legislative body may operate on problematical judgments that do not fit the definition of "considered" judgments. As Thomas Kelly and Sarah McGrath explain, a "considered" judgment must be arrived at without distraction and partiality, held with confidence and stable:

> Not everything that one believes or judges true, even on reflection, qualifies as a considered judgment. Rather, considered judgments are judgments of which one is confident (as opposed to uncertain or hesitant), that are issued when one is able to concentrate without distraction on the question at hand (as opposed to when one is 'upset or frightened') and with respect to which one does not stand to gain or lose

24. Changes of decision makers may also be said to defeat the "No Contact with Reality" objection to the method of reflective equilibrium according to which "an individual might maintain a perfectly coherent set of beliefs while being completely unresponsive to relevant and easily perceptive changes in his or her environment." See Kelly & McGrath, *supra* note 15 at 333. The perspective of a change of decision makers is a hanging Sword of Damocles compelling the decision makers to stay in touch with reality, or at least the reality of the ones who elect or nominate them.

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> depending on how the question is answered. In addition, such judgments must be stable over time.[25]

Evidently, not all judgments held by members of a legislative body may be regarded as "considered" (perhaps barely a few). A substantial number of judgments rely on incomplete information or prejudices or are made in the heat of the moment. This complicates the picture because such judgments are unreliable and cannot stand in a philosophical application of the method of reflective equilibrium.[26] However, it does not affect my argument that legislative bodies are engaged in this method: they may have flawed judgments, but they still try to reach an optimal level of acceptable coherence, and we can deduce a theory of statutory interpretation from this observation. We must recognize that these flawed judgments further slow the process down because the legislative body will have to purge those judgments as it is presented with complete information or as emotions temper.

In order to take the dynamism of legislating into account, I suggest courts may focus on honouring the principles to which a given legislative body is the most committed. Those principles could be ones recently adhered to as part of the last steps taken towards reflective equilibrium. They could also be old principles a legislative body was unwaveringly committed to all along its journey towards reflective equilibrium. The intensity of commitment is more important than the timing of such commitment.[27] Giving precedence to the most committed to principles is more respectful of the legislating process than having a broad look at the entirety of the law, which runs the risk of overemphasizing neglected principles or even resurrecting forsaken principles. Indeed, a principle may have been disregarded or abandoned through the process of working out a reflective equilibrium and still leave noticeable traces throughout statutory law, as shown in my previous example of "Filiation by Blood."

By assigning a higher value to the most committed to principles, a dynamic approach to diachronic integrity may prevent neglected and abandoned principles from creeping into statutory interpretation. By contrast, a static approach to diachronic integrity would grant equal value to every principle as if reflective equilibrium had been reached. The value of rejected principles should obviously be zero, as they have been abandoned. The treatment of neglected principles might be more complicated for a dynamic theory of diachronic integrity, which would need to be able to measure the extent to which such a principle is

25. Kelly & McGrath, *supra* note 15 at 335.
26. Scanlon, *supra* note 15 at 145.
27. This statement should not be understood as an opinion on American constitutional originalism. My point concerns the intensity versus the timing of a commitment to a principle. Originalism could be seen as such a principle. Both recent as well as intense acts of a legislative body could confirm commitment to originalism. Besides this clarification, one may wonder whether diachronic legislative integrity applies between a legislative body (such as Congress) and the body amending a constitution when this body is not the same (such as two-thirds of Congress and either the legislatures of three-quarters of the states or a state ratifying conventions in three-quarters of the states).

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neglected. Laying down such a formula exceeds the scope of this paper, which addresses the implication of a commitment to diachronic legislative integrity for courts rather than proposing a new theory of statutory interpretation. Nevertheless, the intricacies of the dynamic approach do not, in my view, weaken my argument that a dynamic approach is more representative of legislative practice than a static one.

Furthermore, a dynamic approach to diachronic legislative integrity is also preferable to a static approach because it is more respectful of democracy. It is more respectful in two ways. First, a dynamic approach prevents misreadings of legislative integrity. Looking at the entirety of the law may give rise to the impression that a legislative body is moving incoherently, when in fact an assessment focused on its most committed to principles shows that a coherent path has been taken which departs from previously held principles. It might also be the case that a look at the entirety of the law gives a sense of coherence that is actually inconsistent with the sense of coherence emanating from a legislative body's now most committed to principles. Adhering to the former sense of coherence may lead to a statutory interpretation at tension with the legislative body's current will. Second, the dynamic approach is reflective of democratic sovereignty. It recognizes that a people are in the constant process of making up their mind, updating normative commitments through time. A dynamic approach takes into account the power of a legislative body to break with its past ways of dealing with a given issue by giving priority, at the time of delivering a judicial decision, to the principles a legislative body is currently giving priority to.

Lastly, I should emphasize that I am not claiming that legislative bodies necessarily use the method of reflective equilibrium to arrive at a "morally justified" set of principles. Moral justification could be a legislative body's concern, but it does not have to be for my argument to hold. In fact, it is quite unsure, from the perspective of reflective equilibrium methodology, whether a legislative body could reach a morally justified reflective equilibrium given the fact that its initial judgments may be flawed rather than "considered."[28] However, I am not concerned with that for the purpose of this paper. I am merely describing that the process of legislating is similar to the method of reflective equilibrium in that legislative bodies work to iron out inconsistencies, which brings them to temper judgments and principles. Courts ought to take account of that process during statutory interpretation.

Conclusion

Current theories of statutory interpretation adopt a static approach to diachronic legislative integrity. They take the law as a consistent, coherent and complete system. However, I have argued that the law does not form a whole, for legislative bodies are still in the process of working out a system of norms representative

28. *Ibid* at 145-46.

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of democratic will. They are in a process similar to the method of reflective equilibrium in that they are trying to find a balance between their judgments and their principles, an enterprise of balancing that percolates slowly in that system of norms. Thus, legislative bodies sometimes abandon or neglect some principles that leave traces in the law, and sometimes they commit themselves strongly to other principles. I argued, in this paper, that theories of statutory interpretation ought to reflect that dynamism of adopting and rejecting principles. This is desirable in a democratic polity because, by honouring the principles legislative bodies are the most committed to, courts would arguably be more likely to honour the will of the people.

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