SHOULD COMMON LAW DOCTRINES DYNAMICALLY GUIDE THE INTERPRETATION OF STATUTES?

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Abstract

Common law and statute have a complex relationship. Some literature has examined if statutory developments should influence common law doctrines; however, the literature has not examined if and how common law doctrines should influence the interpretation of statutes. Dynamic guidance is one approach to the relationship between common law and statute. Dynamic guidance has two limbs: first, it allows common law doctrines to influence the interpretation of statutes, and second, it allows courts to update interpretations if common law doctrines change. However, the normative validity of dynamic guidance is unclear. This article considers if dynamic guidance is valid. This article argues that dynamic guidance is valid; and thus, that common law doctrines should dynamically guide the interpretation of statutes.

Keywords

Coherence, dynamic interpretation, vague words

A. INTRODUCTION

Common law legal systems have two equally important types of law: judge-made law and statute law. Whereas all law in civil law systems derives from the legislature, in common law systems, legal doctrines can derive from both the legislature and from judges. Further, whereas legislation in civil law systems aims to be precise and limit the interpretive role of judges, legislation in common law systems is often intentionally 'vague' and allows judges to give meaning to legislation.

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But, this common law system creates conflict; similar conduct can be governed by both judge made ('common law') doctrines and 'vague' statute law to which courts must give meaning. This induces a live issue in common law systems: how do common law doctrines interact with statutory doctrines; and, more importantly, can courts use the principles that underlay judge-made doctrines to guide their interpretation of statutory doctrines?

The relationship between common law and statute law is unclear. While some literature examines if statutes should influence common law doctrines,[1] the issue remains unresolved. Further, it is unclear if developments in common law doctrines should influence the interpretation of statutes. Therefore, it remains uncertain if developments in common law doctrines can guide the development of the interpretation of statutes. This article examines one particular relationship between common law and statute: Dynamic guidance. Dynamic guidance holds that changes in common law doctrines can influence statutory interpretations if it is appropriate for the particular statute.

Common law rules and statutory rules may govern similar conduct. Sometimes the legislature clearly indicates that the statute imposes a new regime and that the statute departs from the common law. However, sometimes the legislature uses vague words. These vague words are capable of myriad meanings. In this situation, courts and commentators variously and inconsistently reject guidance from the common law, allow some limited guidance,[2] or blindly follow the common law even if the common law rule is inappropriate.[3] Thus, there is no consensus on whether the common law can guide the interpretation of statutes.

Dynamic guidance is one way of resolving the interaction between common law and statute in vague statutes. It has two aspects. First, it allows common law doctrines to guide the interpretation of statutes. Second, it allows courts to change the meaning of statutes over time if the common law doctrine changes. However,

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[1] See for example: P Finn, "Statutes and the Common Law: The Continuing Story", in S Corcoran and S Bottomley (eds), *Interpreting Statutes* (Sydney, Federation Press, 2005); P S Atiyah, "Common Law and Statute Law" (1985) 48 Modern Law Review, 1; J Beatson, "Has the Common Law a Future?" (1997) 56 Cambridge Law Journal, 291; id, "The Role of Statute in Common Law Doctrine" (2001) 117 Law Quarterly Review, 247; P Finn, "Statutes and the Common Law" (1992) 22 University of Western Australia Law Review, 7; R Pound, "Common Law and Legislation" (1908) 21 Harvard Law Review, 383.

[2] O Dixon, "The Common Law as an Ultimate Constitutional Foundation", in S Woinarski (ed), *Jesting Pilate* (Sydney, Law Book Co, 1965), 212-13; *Theophanous v Herald & Weekly Times Ltd* [1994], 182 CLR 104 (High Court of Australia) (Mason J); G F K Santow, "Aspects of Judicial Restraint" (1995) 13 Australian Bar Review, 116, 141.

[3] See analysis in R J Traynor, "Statutes Revolving in Common Law Orbits" (1968) 17 Catholic University of America Law Review, 401, 403.

it is unclear if this relationship is systemically and textually justified.[4] Systemically, it is unclear if the common law and statute should cohere with one-another. Textually, dynamic guidance arguably invalidly evolves the meaning of words over time. Therefore, it is unclear if dynamic guidance is justified.

Courts face two issues: The first (general) issue is if common law doctrines can guide any statute in general. However, this article acknowledges that common law doctrines should not guide all statutes. Thus, the second (specific) issue is if common law doctrines can guide this statute in specific. This article considers the first issue: whether dynamic guidance is ever justified.

The balance of this article proceeds as follows. Section B examines the requirements for dynamic guidance to be justified. Section C considers whether dynamic guidance is justified by determining whether it would undermine the textual integrity of statutes. Section 4 concludes that common law and statue should form a coherent whole, and dynamic guidance would not unjustifiably change the meaning of vague words.

B. WHAT IS DYNAMIC GUIDANCE AND WHEN IS IT JUSTIFIED?

Dynamic guidance holds that changes in common law doctrines should influence statutory interpretations. This involves a degree of 'coherence' between common law and statute. Coherence can operate at a weak level and at a strong level.[5] At the weak level, dynamic guidance minimally holds that common law and statute exist in harmonious, autonomous spheres that do not conflict with one-another. The weak level does not mandate any interaction between common law and statue. At the strong level, dynamic guidance holds that common law and statute must be interdependent and that developments in common law influence

[4] *X v APRA* [2007] HCA 4 (High Court of Australia) (Kirby J); *R v Wilson; Ex parte Kisch* [1934] 52 CLR 234 (High Court of Australia), 244; *Blue Metal Industries v Dilley* [1969] 117 CLR 651 (High Court of Australia); *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* [1981] 147 CLR 297 (High Court of Australia), 304; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] 157 CLR 309 (High Court of Australia), 315; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] 187 CLR 384 (High Court of Australia), 408; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] CLR 335 (1998) 194 CLR 335 (High Court of Australia), para 69; *Ferdinands v Commissioner for Public Employment* (2006) 224 ALR 238 (High Court of Australia) (Kirby J); P P Frickey, "Structuring Purposive Statutory Interpretation: An American Perspective" (2006) 80 Australian Law Journal, 849; K Goodall, "Comparative Statutory Interpretation in the British Isles" (2000) 13 Ratio Juris, 364, 366-67; D N MacCormick, "Argumentation and Interpretation in Law" (1993) 6 Ratio Juris, 6; J Spigelman, "Principle of legality and the clear statement principle" (2005) 79 Australian Bar Review, 769, 722; J Steyn, "The Intractable Problem of The Interpretation of Legal Texts" (2003) 25 Sydney Law Review, 5, 6.

[5] See V Rodriguez-Blanco, "A Revision of the Constitutive and Epistemic Coherence Theories in Law" (2001) 14 Ratio Juris, 212.

developments in statutory interpretations. While there is some support for broader theories of legal coherence,[6] this support is not universal.[7] Dynamic guidance holds that common law doctrines can influence statutory interpretations. Thus, it involves strong-for coherence. Thus, the issue is if strong-form coherence is desirable.

The main argument for coherence is theoretical. Dynamic guidance holds that common law doctrines can influence the interpretation of statutes if it is appropriate for that particular statute. By contrast, the autonomous approach argues that common law doctrines cannot influence statutory interpretations. But this begs the question; why can common law doctrines not influence statutory interpretations? There are two possible reasons. The first is that common law and statute have different labels; and thus, cannot influence each-other. The more rational argument is that common law doctrines are qualitatively different from statutes are qualitatively different from statutes; and thus, cannot influence the interpretation of statutes. By parity of reasoning, if a particular common law doctrine is *not* qualitatively different from a statute, then it should be able to influence the interpretation of the statute. Thus, the issue is if common law doctrines are qualitatively different

This background induces the testable hypothesis: common law doctrines cannot dynamically guide the interpretation of statutes if they are qualitatively distinct from statutes. Further, common law doctrines are distinct, if allowing them to influence the interpretation of statutes undermines the textual integrity of the statute. Thus, dynamic guidance is justified if and only if allowing common law doctrines to dynamically influence the interpretation of statutes preserves the textual integrity of the statute. Thus, Section C examines whether dynamic guidance would undermine the textual integrity of statutes.

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[6] See support for a "principled taxonomy" P Birks, *Unjust Enrichment* (Oxford University Press, 2nd edn, 2005); A Burrows, *Remedies for Torts and Breach of Contract* (Oxford University Press, 2004); A Burrows, "Remedial Coherence and Punitive Damages in Equity", in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, LawBook Co, 2005); P Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 University of Western Australia Law Review, 1; id, "Equity, Conscience and Unjust Enrichment" (1999) 23 Melbourne University Law Review, 1; id, "The Law of Restitution at the End of an Epoch" (1999) 28 University of Western Australia Law Review, 13; id, "Rights, Wrongs and Remedies" (2000) 20 Oxford Journal of Legal Studies, 1; id, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 University of Western Australia Law Review, 1; A Burrows, "We Do This at Common Law But That in Equity" (2002) 22 Oxford Journal of Legal Studies, 1; G Samuel, "English Private Law: Old and New Thinking in the Taxonomy Debate" (2004) 24 Oxford Journal of Legal Studies, 335. See also: A Duggan, "Is Equity Efficient?" (1997) 113 Law Quarterly Review, 601.

[7] *Felton v Mulligan* [1971] 124 CLR 367 (High Court of Australia), 392 (Windeyer J); *O'Rourke v Hoeven* [1974] 1 NSWLR 80 (New South Wales Supreme Court), 99 (Meagher J); *Pilmer v Duke Group Ltd (in liq)* [2001] 207 CLR 165 (High Court of Australia), 201-02; P Cane, "Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law" (2005) 25 Oxford Journal of Legal Studies, 393, 412.

C. IS DYNAMIC GUIDANCE JUSTIFIED?

Dynamic guidance holds that changes in common law doctrines can influence statutory interpretations if it is appropriate for the particular statute. Common law doctrines evolve over time. Thus, dynamic guidance holds that statutory interpretations can evolve over time. However, it is unclear if this form of dynamism would undermine statutes' textual integrity. Specifically, it is unclear if dynamic guidance permissibly evolves the denotation of ordinary words, quadrates with the principle of statutory stare decisis, and upholds the statutory 'doctrine of legality'.

Doctrines of statutory interpretation determine if this dynamism is textually justified.[8] An interpretation is textually justified only if it is 'reasonably open' on the words of the legislation.[9] An interpretation is such if it is consistent with the both ordinary meaning of the words, and the legislature's 'objectively' evinced

[8] *R v Young* [1999] 46 NSWLR 681 (New South Wales Supreme Court), paras 17-22 (Spigelman CJ) citing *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)*. See also: *Allen v Emmerson* [1944] KB 362 (King's Bench); *Quazi v Quazi* [1980] AC 744 (HL), 807-08 (Diplock LJ); *Stewart v Lizars* [1965] VR 210 (Supreme Court of Victoria); *Archbishop of Canterbury's* Case (1596) 2 Co Rep 46a; *Anthony Horden and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* [1932] 47 CLR 1 (High Court of Australia), 7 (Gavan Duffy CJ and Dixon J); *R v Neal, Regos & Morgan* [1947] 74 CLR 613 (High Court of Australia), 624 (Latham CJ); *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* [1949] 78 CLR 529 (High Court of Australia) (Dixon J); *Plummer v Needham* [1954] 56 WALR 1 (Western Australia Supreme Court); *Lake Macquarie Shire Council v Ades* [1977] 1 NSWLR 126 (New South Wales Supreme Court); *Leon Fink Holdings Pty Ltd v Australian Film Commission* [1979] 141 CLR 672 (High Court of Australia), 678 (Mason J); *David Grant & Co Pty Ltd v Westpac Banking Corp* [1985] 184 CLR 265 (High Court of Australia), 276 (Gummow J); *John v Federal Commissioner of Taxation* [1988] 166 CLR 417 (High Court of Australia), 434; *Tokyo Mart Pty Ltd v Campbell* [1988] 15 NSWLR 275 (New South Wales Supreme Court), 283 (Mahoney JA); *Downey v Trans Waste Pty Ltd* [1991] 172 CLR 167 (High Court of Australia), 180-81 (Dawson J); *Saraswati v R* [1991] 172 CLR 1 (High Court of Australia), 23-24 (McHugh J); *Field v Gent* [1996] 67 SASR 122 (South Australian Supreme Court); *Human Rights and Equal Opportunity Commission v Secretary, Department of Immigration and Multicultural Affairs* [1996] 67 FCR 83 (Federal Court of Australia), 95; *Bermingham v Corrective Services Commission of New South Wales* [1998] 15 NSWLR 292 (New South Wales Supreme Court), 299D, 300C; *Marks v GIO Australia Holdings* [1998] 196 CLR 494 (High Court of Australia); *Henville v Walker* [2001] 206 CLR 459 (High Court of Australia) (Gleeson CJ, Gaudron, McHugh and Hayne JJ); *Deputy Commissioner of Taxation v Clark* [2003] 57 NSWLR 113 (New South Wales Supreme Court), 143 (Spigelman CJ); *HTW Valuers v Astonland* [2004] 217 CLR 640 (High Court of Australia); *Murphy v Overton Investments* [2004] 216 CLR 388 (High Court of Australia), 407.

[9] *CIC Insurance Ltd v Bankstown Football Club Ltd* 408 (McHugh J); *IW v City of Perth* [1997] 146 ALR 696 (High Court of Australia), 702 (Brennan CJ); *Newcastle City Council v GIO General Ltd* [1997] 191 CLR 85 (High Court of Australia), 642 (McHugh J); *R v Young*, 687-88 (Spigelman CJ); *Director of Public Prosecutions (Cth) v Chan* [2001] 183 ALR 575 (High Court of Australia), 588-89; *Trust Co of Australia Ltd v Commissioner of State Revenue* (Q) [2003] 197 ALR 297 (High Court of Australia) 310; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] 218 CLR 271 (High Court of Australia), para 87; J Spigelman, "Statutory Interpretation: Identifying the Linguistic Register" (1994) 4 Newcastle Law Review, 1.

intentions.[10] The objective intentions are the legislature's intentions as indicated by their actions, rather than their subjectively held beliefs. Thus, the interpretation of a statute draws upon the whole text, purpose and context of the legislation.[11]

This article finds that if dynamic guidance is appropriate for the specific statute, then it does permit a principled evolution of meaning: It allows the valid textual evolution, interacts properly with the doctrine of statutory stare decisis and permissibly influences the doctrine of legality.

1. Does Dynamic Guidance Promote Principled Evolution of Ordinary Words?

Dynamic guidance promotes the principled evolution of words. Common law doctrines change over time. Dynamic guidance operates only if the legislature did not clearly intend to impose a new regime that departs from the common law. This most often occurs because the legislation contains vague words (word that are capable of a range of meanings),[12] or ambiguous words (words capable of two or more discrete meanings).[13] However, when changing the meaning of a word, dynamic guidance only changes a word's denotation (the meaning in a particular situation or at a particular time), but not a word's connotation (the essential

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[10] *McKinnon v Secretary, Department of Treasury* [2006] HCA 45 (High Court of Australia), para 52 (Hayne J, considering the definition of "reasonable grounds"); Frickey, "Structuring Purposive Statutory Interpretation: An American Perspective", supra, n 4.

[11] H Hart and A Sacks, "A Suggested Restatement on the Use of Legislative History", in W N Eskridge and P P Frickey (eds), *The Legal Process: Basic Problems in the Making and Application of Law* (New York, Foundation Press, 1994), 1253-54; *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 (HL), 641; *Blue Metal Industries v Dilley; Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)*; *Bropho v Western Australia* [1990] 171 CLR 1 (High Court of Australia), 20; *Mills v Meeking* [1990] 169 CLR 214 (High Court of Australia); *CIC Insurance Ltd v Bankstown Football Club Ltd*; *Newcastle City Council v GIO General Ltd*; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] CLR 335, 641; *Al-Kateb v Godwin* [2004] 219 CLR 562 (High Court of Australia) (Kirby J, in dissent); *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] 214 ALR 24 (High Court of Australia); *Palgo Holdings v Gowans* [2005] 221 CLR 249 (High Court of Australia), para 35 (Kirby J, in dissent); *R v Lavender* [2005] 218 ALR 521 (High Court of Australia), para 97 (Kirby J); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] 221 ALR 448 (High Court of Australia); Frickey, "Structuring Purposive Statutory Interpretation: An American Perspective", supra, n 4.

[12] R N Graham, *Statutory Interpretation: Theory and Practice* (Toronto, Edmond Montgomery, 2001); R Dickerson, "The Diseases of Legislative Language" (1964) 1 Harvard Journal on Legislation, 5, 10; R N Graham, "Good Intentions" (2000) 12 Supreme Court Law Review, 147; R N Graham, "A Unified Theory of Statutory Interpretation" (2002) 23 Statute Law Review, 91, 118; R N Graham, "Right Theory, Wrong Reasons: Dynamic Interpretation, the Charter and 'Fundamental Laws'" (2006) 34 Supreme Court Law Review, 1.

[13] Applying Graham, *Statutory Interpretation: Theory and Practice*, supra, n 12, 116 to the terminology in: *CIC Insurance Ltd v Bankstown Football Club Ltd* 408; *Newcastle City Council v GIO General Ltd* (McHugh J); *R v Young* (Spigelman CJ).

features). Thus, the issue is if it is permissible for the denotation of these unclear words to evolve over time. This article finds that for five reasons, evolution is permissible.

First, legislators may use vague language because they cannot foresee all future circumstances and intend legislation to remain flexible and adaptable. Legislators cannot subjectively intend an interpretation *vis-a-vis* unforeseen circumstances.[14] However, legislators still intend to implement a legislative purpose.[15] At its most general, this purpose is the effective regulation of some aspect of modern society. However, regulation is effective only if it is suitable to the current context.[16] Dynamic guidance promotes this since it allows legislation to evolve over time to match context-driven changes in the common law.

Second, legislators may use vague words because they intend to delegate interpretation to the body that applies those words (the court), which is more able to apply it in the present social-context.[17] The legislature may do this if the consequences of an interpretation depend upon the context in the court applies the legislation,[18] and legislators recognize that courts have expertise in adapting legislation to the current context.[19] Dynamic guidance allows this by allowing courts to update the meaning of statutes if the common law context changes.

Third, legislators may use vague words to implement a complex bargain; and thus, delegate interpretation to the courts to evolve the statute's meaning, as the

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[14] P A Cote, *The Interpretation of Legislation in Canada* (Cowansville, Les Editions Yvon Blais, 2nd edn, 1992), 4; G Williams, *Learning the Law* (London, Stevens, 11th edn, 1982), 99.

[15] F Bennion, *Statutory Interpretation* (London, Butterworths, 3rd edn, 1997), 375; E Brunken, "Interpretation of the Written Law" (1915) 25 Yale Law Journal, 129; F H Easterbrook, "The Role of Original Intent in Statutory Construction" (1988) 11 Harvard Journal of Law and Public Policy, 59; K Mason, "The Intent of Legislators: How Judges Discern It and What They Do If They Find It" (2006) 27 Australian Bar Review, 253; L P Millett, "Construing Statutes" (1990) 20 Statute Law Review, 107, 108; J Spigelman, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 Australian Bar Review, 224, 225; id, "Principle of Legality and the Clear Statement Principle", supra, n 4; Hart and Sacks, "A Suggested Restatement", supra, n 11.

[16] See eg, F Bennion, *Statute Law* (London, Oyez Publishing, 1980); E Driedger, *The Composition of Legislation*, (Ottawa, Queen's Printer and Controller of Stationery, 1957), 161; G MacCallum, "Legislative Intent" (1966) 75 Yale Law Journal, 754, 781; Graham, *Statutory Interpretation: Theory and Practice*, supra, n 12, 123. See also F Bennion, "Jaguars and Donkeys: Distinguishing Judgment and Discretion" (2000) 31 University of West Lost Angeles Law Review, 1 (agreeing with outcome, disagreeing that it is due to legislative intent).

[17] F de Sloovere, "Preliminary Questions in Statutory Interpretation" (1932) 9 New York University Law Quarterly Review, 407, 415; Graham, *Statutory Interpretation: Theory and Practice*, supra, n 12, 123. See for example: *R v Ireland*; *R v Burstow* [1997] 4 All ER 225 (HL), 233 (Steyn LJ), 240 (Hope LJ); *Vigolo v Bostin* [2005] 221 CLR 191 (High Court of Australia); Bennion, *Statute Law*, supra, n 16.

[18] *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705 (HL).

[19] *Vigolo v Bostin*; Dickerson, "The Diseases of Legislative Language", supra, n 12, 11; Graham, *Statutory Interpretation: Theory and Practice*, supra, n 12, 123.

circumstances require.[20] Thus, the issues are (a) does vague language indicate compromise, and (b) does this indicate that the meaning of words should evolve?

Vague language can indicate compromise for three key reasons. (a) The legislature may use vague language for political convenience.[21] This is because legislation passes parliament only if it has majority support.[22] If the majority supports the legislation's broad policies, but not its specific details, then the legislation is more likely to pass parliament if it only covers broad policies and does so in vague terms.[23] (b) Legislators may act self-interestedly.[24] This process involves negotiating the removal of specific provisions that the legislator does not support.[25] (c) Legislators may take submissions from lobby groups, and these can influence the final legislation.[26] This process can involve compromising between myriad special-interest-groups; and thus, imposing vague legislation that has wide support.

The compromise allows courts to evolve legislation for two reasons: Public good reasons, and textual contract reasons. Public good theory indicates that a compromise allows courts to evolve legislation to facilitate modern interactions.[27] Public good theory states that legislators are rational. Rational people act to

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[20] S Bottomley, "A Framework for Understanding the Interpretation of Corporate Law in Australia", in Corcoran and Bottomley, *Interpreting Statutes*, supra, n 1, 159-60; W N Eskridge and P P Frickey, "Legislation Scholarship and Pedagogy in the Post-Legal Process Era" (1987) 48 University of Pittsburgh Law Review, 691; Frickey, "Structuring Purposive Statutory Interpretation", supra, n 4.

[21] S Corcoran, "Theories of Statutory Interpretation", in Corcoran and Bottomley, *Interpreting Statutes*, supra, n 1; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [21] (Gleeson, Hayne, Callinan and Heydon JJ); Spigelman, "Principle of Legality and the Clear Statement Principle", supra, n 4; Graham, *Statutory Interpretation: Theory and Practice*, supra, n 12; Millett, "Construing Statues", supra, n 15, 109; Spigelman, "The Poet's Rich Resource: Issues in Statutory Interpretation", supra, n 15, 225.

[22] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* 476 (McHugh J); *SEC v Collier* 76 F 2d 939, 941 (2d Cir) (Hand J).

[23] On the legislative process see Q Johnstone, "Evaluation of the Rules of Statutory Interpretation" (1955) 3 University of Kansas Law Review, 1, 15; H Evans, *Odgers' Australian Senate Practice* (Canberra, Department of the Senate, 11th edn, 2001), 2; I C Harris, B C Wright, and P E Fowler, *House of Representatives Practice* (Canberra, Department of the House of Representatives, 5th edn, 2005); Department of the Prime Minister and Cabinet, *Cabinet Handbook* (Canberra, Department of the Prime Minister and Cabinet, 5th edn, 2004).

[24] Department of the Prime Minister and Cabinet, *Legislation Handbook* (Canberra, Department of the Prime Minister and Cabinet, 1999); J Macey, "Public Choice: The Theory of the Firm and the Theory of Market Exchange" (1988) 74 Cornell Law Review, 43.

[25] See for example the Australian Liberal Party's rejection of a luxury car tax.

[26] See eg D A Farber and P P Frickey, "Jurisprudence of Public Choice" (1987) 65 Texas Law Review, 873, 878; Evans, *Odgers' Australian Senate Practice*, supra, n 23.

[27] Reformulation of the argument in Harris, ea, *House of Representatives Practice*, supra, n 23, purporting to follow the argument in P Schanck, "The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction and Legislative Histories" (1990) 38 University of Kansas Law Review, 815.

promote the public good. If legislators act self-interestedly, they do not promote the public good. But, legislators *are* rational; therefore, presumptively cannot legislate self-interestedly, and must legislate to promote the public good. The current social context defines the public good. Thus, interpretations must reflect the present social-context. Arguably, assuming that legislators always act in the public good is optimistic[28] because legislators may deal with interest groups or act self-interestedly. However, the better view is that this bargaining-process can promote the public good by mediating between diffuse members of society.[29] Further, public good theory is democratically sound[30] since it upholds the publicly enunciated policies on which people vote, which ordinarily purport to promote the public good.[31] Thus, if an interpretation promotes the public good, then it promotes democracy.[32] Therefore, courts should interpret legislation to uphold the public good.[33] Thus, the interpretation of legislation should change over time to facilitate modern social interactions.

Compromise allows temporal evolution for textual and contract reasons.[34] If legislation intends to implement a compromise, then legislators subjectively intend to implement a policy balance.[35] However, legislators' subjective intentions are both inscrutable[36] and irrelevant.[37] Only objectively evinced

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[28] Hart and Sacks, "A Suggested Restatement on the Use of Legislative History", supra, n 11.

[29] W D Popkin, "The Collaborative Model of Statutory Interpretation" (1988) 61 Southern California Law Review, 541, 567; M Seidenfeld, "A Civic Republican Justification for the Bureaucratic State" (1992) 105 Harvard Law Review, 1511, 1532.

[30] Argument based upon: R Shiller, *Irrational Exuberance* (Melbourne, Scribe Publications, 2000); W N Eskridge, "Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation" (1988) 74 Virginia Law Review, 275; J Macey, "Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model" (1986) 86 Columbia Law Review, 223.

[31] G Staszewski, "Avoiding Absurdity" (2006) 81 Indiana Law Journal, 1001; C R Sunstein, "Beyond the Republican Revival" (1988) 97 Yale Law Journal, 1539.

[32] See eg Faber and Frickey, "Jurisprudence of Public Choice", supra, n 26, 908.

[33] See support in Eskridge and Frickey, "Legislation Scholarship and Pedagogy in the Post-Legal Process Era", supra, n 20, 694-701; M Gleeson, "Judicial Legitimacy" (2000) 20 Australian Bar Review, 4, 6; M McHugh, "The Strengths of the Weakest Arm" (2004) 25 Australian Bar Review, 181; *Marbury v Madison*, 5 US (1 Cranch) 137, 169.

[34] As in *George Hudson Ltd v Australian Timber Workers' Union* [1923] 32 CLR 423 (High Court of Australia); *Rola Co (Australia) Pty Ltd v Commonwealth* [1944] 69 CLR 185 (High Court of Australia), 203; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [21] (Gleeson, Hayne, Callinan and Heydon JJ); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* 476 (McHugh J).

[35] Frickey, "Structuring Purposive Statutory Interpretation: An American Perspective", supra, n 4, 857.

[36] F H Easterbrook, "'Statutes' Domain" (1983) 50 University of Chicago Law Review, 533, 544-46; id, "The Supreme Court, 1983 Term – Foreword: The Court and the Economic System" (1984) 98 Harvard Law Review, 4, 14-15; W Landes and R Posner, "The Independent Judiciary in an Interest-Group Perspective" (1975) 18 Journal of Law and Economics, 875, 879. Discussed in: Macey,

intentions are scrutable. The objective-intentions resemble a contract. Implementing a contract involves implementing its text.[38] The current context can dictate the text's meaning. Thus, the current context can influence courts' interpretations of legislation.

Fourth, legislators legislate knowing that courts will change their interpretations to match the current social context. The legislature's context influences its legislation and the meaning that it intends.[39] The legislature's context includes established doctrines of statutory interpretation.[40] These include the interpretative approach of adapting legislation to its present context.[41] Thus, legislators implicitly intend adaption to the present context.[42]

Fifth, irrespective of the reason for vagueness, courts cannot avoid evolving legislation because: (a) a person's context necessarily influences his/her interpretation of a text; and thus, the court's interpretation of legislation.[43] (b) Courts apply legislation to present facts. They can do this only if they adapt

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"Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model", supra, n 30.

[37] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* 476; Schanack, "The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction and Legislative Histories", supra, n 27.

[38] See eg Schanck, "The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction and Legislative Histories", supra, n 27, 849; Easterbrook, "The Role of Original Intent in Statutory Construction" supra, n 15, 64; Easterbrook, "'Statutes' Domain", supra, n 36; *Public Service Board of NSW v Osmond* [1986] 159 CLR 656 (High Court of Australia), 689; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [21] (Gleeson, Hayne, Callinan and Heydon JJ); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* 476 (McHugh J); *United States v Medico Industries Inc*, 784 F 2d 840, 844 (7th Cir, 1986); *Rodriguez v United States*, 107 S Ct 1391, 1393 (1987).

[39] *Theophanous v Herald & Weekly Times Ltd* 196; *In Re Ericson*, 815 F 2d 1090, 1094 (7th Cir, 1987); *Shell Oil Co v Iowa Department of Revenue*, 109 S Ct 278, 281.

[40] J Bell and S G Engle, *Cross on Statutory Interpretation* (London, Butterworths, 3rd edn, 1995), 165-66; S Fish, "Change" (1987) 86 South Atlantic Quarterly, 423; *NLRB v Federbush Co*, 121 F 2d 954, 957 (2nd Cir); Schanck, "The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction and Legislative Histories", supra, n 27, 835.

[41] See eg *Theophanous v Herald & Weekly Times Ltd* 196; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [21] (Gleeson, Hayne, Callinan and Heydon JJ); *Stevens v Kabushiki Kaisha Sony Computer Entertainment* 476 (McHugh J).

[42] Follows *George Hudson Ltd v Australian Timber Workers' Union* .

[43] S Fish, "Anti-Foundationalism, Theory Hope, and the Teaching of Composition", in S Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, Duke University Press, 1989), 344; T A Aleinikoff, "Updating Statutory Interpretation" (1988) 87 Michigan Law Review, 20; W N Eskridge, "Public Values in Statutory Interpretation" (1989) 137 University of Pennsylvania Law Review, 1007; L L Fuller, "The Case of the Speluncean Explorers" (1949) 62 Harvard Law Review, 616, 625-26.

legislations to the present context. Therefore, courts cannot avoid adopting words,[44] and intellectual honesty demands that this receives explicit recognition.[45]

Overall, legislators intend that courts evolve legislation over time in order to reflect contemporary society. Similarly, common law doctrines evolve in order to facilitate contemporary society. Therefore, allowing changes in common law doctrines to influence the meaning of statutes does not evolve the meaning of statutes in an impermissible manner.

2. Does Dynamic Guidance Respect Statutory Stare Decisis?

Dynamic guidance is permissible only if it respects the encrustation of interpretations that develops around old statutes. Legislation contains words. Courts interpret these words. Common law doctrines can influence these interpretations. However, dynamic guidance holds that if the common law doctrine changes, then the interpretation of the statute should change. But, this is permissible only if it quadrates with the notion of statutory stare decisis and the proper approach to prior statutory interpretations.[46] Statutory stare decisis holds that courts should follow prior interpretations unless they are clearly wrong.[47]

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[44] Cote, *The Interpretation of Legislation in Canada*, supra, n 14, 16.

[45] Graham, "Good Intentions", supra, n 12, 100; Eskridge and Frickey, "Legislation Scholarship and Pedagogy in the Post-Legal Process Era", supra, n 20.

[46] F Bennion, *Statutory Interpretation: Supplement* (London, LexisNexis, 2005), S162; W Gummow, *Change and Continuity: Statute, Equity, and Federalism* (New York, Oxford University Press, 1999), 1; *R v Secretary of State for the Home Department, Ex parte Pierson* [1998] AC 539 (HL); Finn, "Statutes and the Common Law: The Continuing Story", in Corcoran and Bottomley (eds), *Interpreting Statutes*, supra, n 1, 53.

[47] *National Westminster Bank plc v Spectrum Plus Ltd* [2005] AC 680 (HL) [64] (Hope LJ); *Babaniaris v Lutony Fashions Pty Ltd* [1987] 163 CLR 1 (High Court of Australia), 13-14 (Mason J); *Takapana Investments Pty Ltd v Teco Information Systems Co Ltd* [1988] 82 FCR 25 (Federal Court of Australia), 32 (Goldberg J); *Esso Australia Resources Ltd v FCT* [1997] 150 ALR 117 (High Court of Australia), 121; *Towney v Minister for Land and Water Conservation for New South Wales* [1997] 147 ALR 402 (High Court of Australia); *Nettlefold Advertising Pty Ltd v Nettlefold Signs Pty Ltd* [1998] 90 FCR 453 (Federal Court of Australia), 470; *Telstra Corp Ltd v Treloar* [2000] 102 FCR 595 (Federal Court of Australia), 603 (Branson and Finkelstein JJ); *Algama v Minister for Immigration and Multicultural Affairs* [2001] 115 FCR 253 (Federal Court of Australia), 263-64 (Whitlam and Katz JJ); *Repatriation Commission v Gorton* [2001] 110 FCR 321 (Federal Court of Australia), 327-41 (Heerey J), 333 (Emmett J), 334-45 (Allsop J); *Federal Commissioner of Taxation v Energy Resources of Australia Ltd* [2003] 204 ALR 487 (High Court of Australia), 492-93 (Ryan and Finkelstein JJ); *NATB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] 133 FCR 506 (Federal Court of Australia), 519; *Jones v Daniel* [2004] 212 ALR 588 (High Court of Australia), 594 (Moore J); *Minister for Immigration and Multicultural and Indigenous Affairs v Hicks* [2004] 138 FCR 475 (Federal Court of Australia), 477 (Hill J); *SOK v Minister for Immigration and Indigenous Affairs* [2005] 85 ALD 323 (Administrative Appeals Tribunal), 329 (Branson J), 331 (Marshall J); *Vigolo v Bostin* [25] (Gleeson CJ); W N Eskridge, "Overriding Supreme Court Statutory Interpretation Decisions" (1991) 101 Yale Law Journal, 331, 397; E Levi, "An Introduction to Legal Reasoning" (1948) 15 University of Chicago Law Review, 501, 540; *Burnet v Coronado Oil & Gas Co* 285 US

Thus, the issue is if dynamic guidance upholds the five important values that underlay statutory stare decisis.

Dynamic guidance upholds the stare decisis value[48] of efficiency. Efficiency obtains if courts conserve resources. Courts conserve resources if they do not re-consider rules in every dispute; and thus, ordinarily obtains if courts follow precedent.[49] Arguably, dynamic guidance undermines efficiency since it holds that if common law doctrines change, then the denotation of words in the statute changes. And, if courts change the interpretation of statutes, then people must spend money re-litigating heretofore decided rules.[50] However, the better view is that dynamic guidance promotes efficiency by drawing upon common law experiences and relieving the legislature from updating legislation.

Dynamic guidance promotes efficiency by drawing upon the common law experiences. Experience is costly. If the court's interpretation is sub-optimal, then it has costs. These costs include the cost of social and commercial confusion,[51]

393, 405-07; *Erie RR Co v Tompkins*, 304 US 64, 77-78; *Apex Hosiery Co v Leader*, 310 US 469, 488-89; *Cleveland v United States*, 329 US 14, 18.

[48] H Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, HMSO, 1995); *Queensland v J L Holdings Pty Ltd* [1997] 189 CLR 146 (High Court of Australia); *Bright v Femcare Ltd* [2002] 195 ALR 574 (High Court of Australia), 605-06 (Finkelstein J); J Spigelman, "Case Management in New South Wales" (Speech delivered at the Annual Judges Conference, Kuala Lumpur, 22 August 2006); Justice J Spigelman, "Just, Quick and Cheap: A New Standard for Civil Procedure" (2000) 38 Law Society Journal, 24; R Ackland, "Lawyers in Limbo as Bar Raised", *Sydney Morning Herald* (Sydney), 10 March 2000, 17.

[49] *Telstra Corp Ltd v Treloar* 602 (Branson and Finkelstein JJ); R A Heiner, "Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules" (1986) 15 Journal of Legal Studies, 227; H Monaghan, "Stare Decisis and Constitutional Adjudication" (1988) 88 Columbia Law Review, 723, 744-46; R Pierce, "Reconciling Chevron and Stare Decisis" (1997) 85 Georgetown Law Journal, 2225; F Schauer, "Precedent" (1987) 39 Stanford Law Review, 571, 599; R von Moschzisker, "Stare Decisis in Courts of Last Resort" (1924) 37 Harvard Law Review, 409, 410; *Morange v State Marine Lines Inc*, 398 US 375, 403 (Harlan J), 405; Eskridge, "Overriding Supreme Court Statutory Interpretation Decisions", supra, n 47, 401.

[50] C Nelson, "Stare Decisis and Demonstrably Erroneous Precedents" (2001) 87 Virginia Law Review, 1, 63.

[51] Follows: *Lake Macquarie Shire Council v Aberdare County Council* [1970] 123 CLR 327 (High Court of Australia), 331 (Barwick CJ); *Street v Queensland Bar Association* [1989] 168 CLR 461 (High Court of Australia), 537 (Dawson J); *McGinty v Western Australia* [1996] 186 CLR 140 (High Court of Australia); *Singh v Commonwealth* [2004] 209 ALR 355 (High Court of Australia) (McHugh J); J Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 Federal Law Review, 1. Follows discussion on obtaining the correct interpretation in: P Margulies, "Judging Terror in the 'Zone of Twilight': Exigency, Institutional Equity, and Procedure After September 11" (2004) 84 Boston University Law Review, 383; L C Marshall, "'Let Congress Do It': The Case for An Absolute Rule of Statutory Stare Decisis" (1989) 88 Michigan Law Review, 177, 199; T H Maynard, "The Uniform Limited Offering Exemption: How 'Uniform' is 'Uniform'? - An Evaluation and Critique of the ULOE" (1987) 36 Emory Law Journal, 357, 400. Implicit in: M P Healy, "Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law" (2001) 43 William and

litigating to overturn interpretations,[52] and legislating to rectify wrong interpretations.[53] However, courts can reduce these costs if they use prior experience to avoid sub-optimal interpretations. Common law doctrines can provide pre-existing experience, in which people already resolved commercial uncertainty and litigated *vis-à-vis* the rule. Therefore, if courts allow common law doctrines to influence statutory interpretations, they can save resources.

Dynamic guidance promotes efficiency by relieving the legislature from updating statutes. If an interpretation is outdated, and the court does not update it to match contemporary society, then the legislature must update the statute.[54] However, the legislative-approach is inefficient, impracticable and arguably unconstitutional. It is inefficient for two reasons, (a) it is costly and time-consuming for the legislature,[55] and (b) legislative inertia means that outdated interpretations elicit a legislative response only if they are palpably inappropriate,[56] and thus, the law may remain outdated for a long time,[57] which is socially inefficient.[58] The legislative-approach is impracticable since the legislature cannot monitor all interpretations to ensure that they quadrate with contemporary society. The theory is unconstitutional since it has the unstated premise that courts should interpret statutes in order to elicit a legislative-

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Mary Law Review, 539, 622; S F Ross and D Tranen, "The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation" (1998) 87 Georgetown Law Journal, 195.

[52] See discussion of litigation and discovery costs in the context of interpretation in: *Queensland v Commonwealth (Second Territory Senators Case)* [1977] 139 CLR 585 (High Court of Australia) (Gibbs J); *John v Federal Commissioner of Taxation*, 438-39 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ); C S Diver, "Statutory Interpretation in the Administrative State" (1985) 133 University of Pennsylvania Law Review, 549, 572.

[53] Ross and Tranen, "The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation", supra, n 51; Diver, "Statutory Interpretation in the Administrative State", supra, n 52, 572.

[54] Supported in: D Bogan, "Generally Applicable Laws and the First Amendment" (1997) 26 Southwestern University Law Review, 201, 236.

[55] Ross and Tranen, "The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation", supra, n 51. Conceded in: A L Tyler, "Continuity, Coherence, and the Canons" (2005) 99 Northwestern University Law Review, 1389, 1409-10; Eskridge, "Legislation Scholarship and Pedagogy in the Post-Legal Process Era", supra, n 20, 1525; Marshall, "'Let Congress Do It': The Case for An Absolute Rule of Statutory Stare Decisis", supra, n 51, 197-200.

[56] E Elhauge, "Preference-Eliciting Statutory Default Rules" (2002) 102 Columbia Law Review, 2162; E Elhauge, "Preference-Estimating Statutory Default Rules" (2002) 102 Columbia Law Review, 2027, 2087.

[57] W N Eskridge, "Dynamic Statutory Interpretation" (1986-7) 135 University of Pennsylvania Law Review, 1525.

[58] Follows: Tyler, "Continuity, Coherence, and the Canons", supra, n 55, 1408-09.

response.[59] However, if courts do this, then they involve themselves the legislative process. If courts involve themselves in the legislative process, then they blur the separation of powers. Blurring the separation of powers is unconstitutional. Therefore, the legislative-approach is sub-optimal and inefficient.

Dynamic guidance promotes the goal of encouraging legislative foresight for both negative and positive reasons. The negative reason rebuts the argument that if courts allow common law doctrines to influence interpretations, then legislators can rely on the common law to 'fill gaps' in statutes, and if they do this, then they do not exercise foresight. However, this argument holds only if courts will use common law doctrines to fill gaps in legislation. Courts have held that they will not fill gaps in general, and will not use the common law to fill gaps in specific.[60] Thus, the argument that dynamic guidance undermines legislative foresight is faulty.

The positive argument holds that dynamic guidance actively promotes legislative foresight. The legislature can legislate with foresight only if it can predict both (a) judicial and (b) practical consequences of interpretations.[61] Judicial-consequences are predictable if courts adopt a consistent pattern of drawing upon existing law. Practical consequences are predictable the legislature can predict the commercial implications of an interpretation. If the interpretation draws upon extant common law doctrines, then the legislature can predict its consequences based upon the consequences of the common law. Therefore, allowing common law doctrines to influence the interpretation of statutes does promote legislative foresight.

Dynamic guidance promotes the value[62] of public confidence in the courts for three reasons. First, dynamic guidance enables a coherent and non-contradictory

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[59] Following R B Stewart, "Beyond Delegation Doctrine" (1987) 36 American University Law Review, 323, 331; Tyler, "Continuity, Coherence, and the Canons", supra, n 55, 1408-09.

[60] See eg *Thompson v Goold & Co* [1910] AC 409 (HL), 420; *Wentworth Securities Ltd v Jones* [1980] AC 74 (HL), 302 (McHugh JA); *Marshall v Watson* [1972] 124 CLR 640 (High Court of Australia), 649 (Stephen J); *Kingston v Keprose Pty Ltd* [1987] 11 NSWLR 404 (New South Wales Supreme Court), 423 (McHugh JA); *Bermingham v Corrective Services Commission of New South Wales*; D Auchie, "The Undignified Death of the Casus Omissus Rule" (2004) 25 Statute Law Review, 40.

[61] Pierce, "Reconciling Chevron and Stare Decisis", supra, n 49, 2238; Schauer, "Precedent", supra, n 49, 572-75.

[62] *Telstra Corp Ltd v Treloar* 602 (Branson and Finkelstein JJ); M Gleeson, "The State of the Judicature" (2002) 76 Australian Law Journal, 24, 29-30; S Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium" (1999) 25 Melbourne University Law Review, 209; M Kirby, "Precedent Law, Practice and Trends in Australia" (2007) 28 Australian Bar Review, 243; J Spigelman, "Negligence: The Last Outpost of the Welfare State" (2002) 76 Australian Law Journal, 432; McHugh, "The Strengths of the Weakest Arm", supra, n 33; Pierce, "Reconciling Chevron and Stare Decisis", supra, n 49, 2239.

legal system, whereas contradictory legal system harms public confidence in the legal system.[63] Second, dynamic guidance allows developments in common law doctrines to influence the meaning of statutes. Developments in common law doctrines reflect developments in society. Therefore, dynamic guidance allows developments in society to influence courts' decisions. While it is true that public confidence in courts diminishes if courts merely follow populist opinions,[64] public confidence does increase if courts' decisions are both reasoned and reflect contemporary society.[65] Therefore, if common law doctrines influence the interpretation of statutes, public confidence in the judiciary will increase. Third, public confidence diminishes more if courts depart from prior interpretations and do not justify the departure.[66] Dynamic guidance allows courts to depart from prior interpretations if common law doctrines change. However, if the common law doctrines change because of changes in society, then courts can justify departing from prior interpretations.

Dynamic guidance upholds the value of equity. Equity obtains if and only if courts treat like cases alike.[67] Equity involves temporal, geographic, and jurisdictional equity, and dynamic guidance supports all three. Dynamic guidance upholds temporal-equity. Temporal equity involves applying the same rule irrespective when a case arises.[68] Arguably, if changes in common law doctrines change the meaning of statutes, then different rules apply at different time-

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[63] Follows statements on following precedent in: *Geelong Harbor Trust Commissioners v Gibbs Bright & Co* [1974] 2 ALR 362 (High Court of Australia), 369-70 (Diplock LJ); *Morange v State Marine Lines Inc*, 403; Kirby, "Precedent Law, Practice and Trends in Australia", supra, n 62, 243; Pierce, "Reconciling Chevron and Stare Decisis", supra, n 49; Monaghan, "Stare Decisis and Constitutional Adjudication", supra, n 49, 752-54.

[64] McHugh, "The Strengths of the Weakest Arm", supra, n 33, 192; Kenny, "Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium", supra, n 62.

[65] Follows the discussions in: Monaghan, "Stare Decisis and Constitutional Adjudication", supra, n 49, 749-50; Pierce, "Reconciling Chevron and Stare Decisis", supra, n 49, 2241. See eg, *Theophanous v Herald & Weekly Times Ltd*, and reaction in: M Kingston, "Government Reversal on Free Speech", *Sydney Morning Herald* (Sydney), 2 October 1996, 1. See also *City of Akron v Akron Centre for Reproductive Health Inc*, 463 US 416, 419-20; *Webster v Reprodutive Health Services*, 492 US 490, 518-19; *Planned Parenthood v Casey*, 202 US 833, 845-69.

[66] Pierce, "Reconciling Chevron and Stare Decisis", supra, n 49, 2240-42.

[67] *Thompson v Byrne* [1999] 161 ALR 632 (High Court of Australia), 646 (McHugh J); L Alexander, "Constrained by Precedent" (1989) 63 Southern California Law Review, 1, 9-13; M Dan-Cohen, "Bureaucratic Organizations and the Theory of Adjudication" (1985) 85 Columbia Law Review, 1, 31; J McGruther, "Chevron vs. Stare Decisis" (2003) 81 Washington University Law Quarterly, 6, 612; A Miguel, "Equality before the Law and Precedent" (1997) 10 Ratio Juris, 372; A Scalia, "The Rule of Law as a Law of Rules" (1989) 56 University of Chicago Law Review, 1175, 1178; P Stephens, "The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis" (1998) 48 Syracuse Law Review, 1515; Graham, *Statutory Interpretation: Theory and Practice*, supra, n 12; Pierce, "Reconciling Chevron and Stare Decisis", supra, n 49, 2243.

[68] *Telstra Corp Ltd v Treloar* 602 (Branson and Finkelstein JJ); *Morange v State Marine Lines Inc*, 403 (Harlan J); Pierce, "Reconciling Chevron and Stare Decisis", supra, n 49.

periods. However, the better view is that the word's basic connotation is constant, and only the denotation changes. Thus, for example, the basic meaning of 'loss or damage' is constant; however, its precise definition changes as new ways of sustaining loss arise.

Dynamic guidance facilitates geographic-equity. Geographic equity obtains only if courts apply the same rule in all locations. Common law doctrines are the same in all locations within a federalised country, such as Australia.[69] Therefore, if common law doctrines influence statutory interpretations, something that is the same in all jurisdictions influences the meaning of statutes. Therefore, dynamic guidance facilitates geographic-equity.

Dynamic guidance ensures facilitates jurisdictional-equity. Jurisdictional-equity holds that if (and only if) cases are 'alike' then the same rule should apply in the cases.[70] This obtains only if courts apply the same rule to similar cases under both common law and statute. Dynamic guidance allows this by allowing common law doctrines to influence statutory interpretations if and only if it is appropriate in the particular statute (ie if and only if the common law and statute deal with the same issue). Thus, dynamic guidance facilitates jurisdictional-equity.

Dynamic guidance promotes the value[71] of predictable law. This value obtains only if courts (a) avoid departing from prior interpretations[72] and (b) if courts must depart from prior interpretations, they do so in predictable ways. Dynamic guidance upholds both. First, it does not encourage courts departure from prior interpretations since while it allows the common law to influence a word's denotation; the connotation (essential meaning) remains constant. Second, dynamic guidance promotes predictable law by allowing a doctrine with an established meaning to influence the denotation. Therefore, dynamic guidance promotes predictable law.

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[69] See eg D J Meltzer, "The Supreme Court's Judicial Passivity" (2002) Supreme Court Review, 343, 388; Tyler, "Continuity, Coherence, and the Canons", supra, n 55, 1408.

[70] P Young, "Equity, Contract and Conscience", in Degeling and Edelman, *Equity in Commercial Law*, supra, n 6, 512; *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (Court of Appeal of New Zealand) (Cooke P); M Tilbury, "Fallacy or Furphy? Fusion in a Judicature World" (2003) 26 University of New South Wales Law Journal, 357, 358; Burrows, "Remedial Coherence and Punitive Damages in Equity", in Degeling and Edelman (eds), *Equity in Commercial Law*, supra, n 6, 390; Burrows, "We Do This At Common Law But That in Equity", supra, n 6.

[71] *National Westminster Bank plc v Spectrum Plus Ltd* [62]-[63] (Hope LJ); *Babaniaris v Lutony Fashions Pty Ltd* 13-14 (Mason J); *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 All ER 673 (HL); Healey, "Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law", supra, n 51.

[72] *Telstra Corp Ltd v Treloar* 602 (Branson and Finkelstein JJ).

Overall, dynamic guidance promotes the five values that underlay stare decisis. Therefore, dynamic guidance upholds the principled evolution of legislation.

3. The Doctrine of Legality

Dynamic guidance is consistent with the doctrine of legality. The doctrine of legality is a fundamental principle of statutory interpretation. Under the doctrine of legality, courts presume that the legislature did not intend to undermine fundamental principles ('legality-principles').[73] The importance of a legality-principle determines the strength of the presumption.[74] However, the legislature can rebut the presumption if it evinces a clear intention to do so.[75] Dynamic guidance is valid only if it upholds the doctrine of legality. This article finds that dynamic guidance does so for four key reasons.

First, common law doctrines define the content of legality-principles. Legality-principles are broad principles such as 'acquisition of property on just terms', 'a hearing according to natural justice' or the 'presumption against indefinite detention'.[76] The doctrine of legality does not itself stipulate the legality principles content. Thus, it does not indicate the meaning of 'acquisition' and 'property', or 'natural justice' and 'hearing'. Instead, common law doctrines

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[73] *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 (New Zealand Court of Appeal) [82]; *R v Secretary of State for Home Department; Ex parte Simms* [2002] 2 AC 115 (HL), 131; *R v Secretary of State for the Home Department, Ex parte Pierson* 587 (Steyn LJ); *Simpson v Attorney-General* [1994] 3 NZLR 667 (Court of Appeal Wellington), 712; *Bropho v Western Australia* 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Plenty v Dillon* [1991] 171 CLR 648 (High Court of Australia) (Gaudron and McHugh JJ); *Coco v R* [1994] 179 CLR 427 (High Court of Australia), 437-38 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Durham Holdings Pty Ltd v New South Wales* [1999] 47 NSWLR 340 (New South Wales Supreme Court), 353 (Spigelman CJ); *Daniels Corp International Pty Ltd v ACCC* [2002] 213 CLR 543 (High Court of Australia); *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD of 2002* [2002] 125 FCR 429 (Federal Court of Australia), 269; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] 126 FCR 54 (Federal Court of Australia), 76-77; *Plaintiff S157/2002 v Commonwealth* [2003] 476 CLR (High Court of Australia) [30] (Gleeson CJ); *Al-Kateb v Godwin* 577; *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] 209 ALR 116 (High Court of Australia), 123-24; Spigelman, "Principle of Legality and the Clear Statement Principle", supra, n 4, 774-76.

[74] *Bropho v Western Australia* 23; *Malika Holdings v Stretton* [2001] 204 CLR 290 (High Court of Australia) [29]-[30]; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] 214 CLR 269 (High Court of Australia) [36]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [86]-[91]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* [19]; Spigelman, "Principle of Legality and the Clear Statement Principle", supra, n 4, 779-82.

[75] *B v DPP* [2000] 2 AC 423 (HL), 470.

[76] *Theophanous v Herald & Weekly Times Ltd*; Fish, "Change", supra, n 40; Bell, *Cross on Statutory Interpretation*, supra, n 40; Fish, "Anti-Foundationalism, Theory Hope, and the Teaching of Composition", supra, n 43.

define these precise terms.[77] Therefore, if common law doctrines change, the precise content of the legality-principles changes. And, if the content of legality-principles changes, the meaning of statutes changes. Therefore, if common law doctrines change, the meaning of statutes can validly change.

Second, the assertion that common law doctrines do not influence the principle of legality is internally inconsistent. Under the principle, courts presume that the legislature did not intend to undermine fundamental common law doctrines. Therefore, under the principle, fundamental common law doctrines influence statutory interpretations. Therefore, the assertion that common law doctrines should not influence the interpretation of statutes contradicts the assertion that the principle of legality influences those interpretations. Therefore, the assertion that dynamic guidance undermines the principle of legality is internally inconsistent.

Third, changes in society change the nature of legality-principles and common law doctrines are one way of detecting changes in society. The doctrine contains fundamental principles. The strength of these principles changes if the nature of society changes.[78] Common law doctrines also change if the nature of society changes. Therefore, changes in common law doctrines indicate changes in society. But changes in society influence the strength of the legality principles underlying the doctrine of legality. Therefore, if common law doctrines change, the doctrine of legality will change. And, the doctrine influences the meaning of statutes. Therefore, if common law doctrines change, the meaning of statutes should change.

Fourth, it is impossible to prevent changes in common law doctrines influencing the principle of legality and the legislature knows this. If courts apply the principle of legality, then the court's context necessarily influences its approach to the doctrines that underlay the principle of legality.[79] The court's context includes the current common law context. Therefore, the common law context must influence the principle of legality; and thus, statutory interpretations. This is valid because legislators legislate based upon their context at the time of

[77] Follows: *Al-Kateb v Godwin* [150] (Kirby J).

[78] *Bropho v Western Australia*; A Glass, "Reflections on Judging: Judging as Application" (2007) University of New South Wales Faculty of Law Research Series, 35 on the content of "natural justice"; M Wait, "The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited" (2001) 29 Federal Law Review, 57; M Zagor, "Uncertainty and Exclusion: Detention of Aliens and the High Court" (2006) 34 Federal Law Review, 127; Dixon, "The Common Law as an Ultimate Constitutional Foundation", supra, n 2.

[79] Fish, "Anti-Foundationalism, Theory Hope, and the Teaching of Composition", supra, n 43, 344; Eskridge, "Public Values in Statutory Interpretation", supra, n 43; Aleinikoff, "Updating Statutory Interpretation", supra, n 43; Gummow, *Change and Continuity: Statute, Equity, and Federalism*, supra, n 46, 13-14.

enactment,[80] which includes principles of statutory interpretation[81] such as the court's approach to doctrine of legality.[82] However, courts have held that if society changes, then the nature of legality-principles changes.[83]
Therefore, legislators legislate knowing that courts will allow changes in common law doctrines to influence legality-principles; and thus, the interpretation of statutes. Therefore, dynamic guidance is consistent with the doctrine of legality.

D. CONCLUSION

Common law doctrines should guide the interpretation of statutes. Dynamic guidance upholds the textual integrity of statutes: It promotes the principled evolution of ordinary words, supports statutory stare decisis and quadrates with the doctrine of legality. Thus, dynamic guidance will not cause impermissible changes in the meaning of statutes. Thus, if it is valid for the particular statute, then common law doctrines can dynamically guide the meaning of statutes.

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[80] *Theophanous v Herald & Weekly Times Ltd* 196; *NLRB v Federbush Co*, 957; *Shell Oil Co v Iowa Department of Revenue*, 281; F H Easterbrook, "Textualism and the Dead Hand" (1998) 66 George Washington Law Review, 1119-20; K M Gebbia-Pinneti, "Statutory Interpretation, Democratic Legitimacy and Legal-System Values" (1997) 21 Seton Hall Legislation Journal, 233, 276-78; *Jackson v Birmingham Board of Education*, 544 US 167, 195.

[81] *Theophanous v Herald & Weekly Times Ltd* 196; Bell, *Cross on Statutory Interpretation*, supra, n 40, 165-66.

[82] *Stradling v Morgan* [1560] 75 ER 305 315; *Bropho v Western Australia*, 21-22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Malika Holdings v Stretton* [30] (McHugh J); Spigelman, "Principle of Legality and the Clear Statement Principle", supra, n 4, 779.

[83] *Bropho v Western Australia* 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Malika Holdings v Stretton* [29] (McHugh J); *Regie National des Usines Renault SA v Zhang* [2002] 210 CLR 491 (High Court of Australia); *R v Janceski* [2005] 223 ALR 580 (High Court of Australia) [62] (Spigelman CJ).