THE ANTI-MESSINESS PRINCIPLE IN STATUTORY INTERPRETATION

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Many of the Supreme Court's statutory interpretation opinions reflect a jurisprudential aversion to interpreting statutes in a manner that will prove "messy" for implementing courts to administer. Yet the practice of construing statutes to avoid "messiness" has gone largely unnoticed in the statutory interpretation literature. This Article seeks to illuminate the Court's use of "anti-messiness" arguments to interpret statutes and to bring theoretical attention to the principle of "messiness" avoidance. The Article begins by defining the concept of anti-messiness and providing a typology of common anti-messiness arguments used by the Supreme Court. It then considers some dangers inherent in the Court's use of anti-messiness arguments to reject otherwise plausible statutory constructions. Last, the Article explores how the anti-messiness principle fits within existing theories of jurisprudence and statutory interpretation and discusses how attentiveness to anti-messiness might add greater texture to prominent theories of statutory interpretation.

Introduction

In its 2009 term opinion in *Hertz Corp. v. Friend*,[1] the Supreme Court unanimously adopted a presumption that the place where a corporation maintains its headquarters is its "principal place of business"[2] under the federal diversity jurisdiction statute.[3] In so ruling,

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1 130 S. Ct. 1181 (2010).

2 *Id.* at 1186.

the Court relied heavily upon "the need for judicial administration of a jurisdictional statute to remain as simple as possible."[4] The Court's opinion—and, indeed, the Justices' questions at oral argument[5]—displayed an overt preference for the statutory construction that would prove simplest to apply. A "headquarters" presumption was best, the Court argued, because it "points courts in a single direction" so they "do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other."[6] Other, more nuanced "principal place of business" tests were rejected as "difficult to apply" and criticized for their "growing complexity."[7] In layman's terms, the Court's primary justification for embracing the "headquarters" test reduced to the argument that: *Other tests are too messy! A presumption that a corporation's headquarters constitute its "principal place of business" is the best statutory reading because it is (relatively) simple and will keep implementing courts from having to engage in intricate, factually-difficult analyses.*

The Supreme Court's opinion in *Hertz* is intriguing in its own right, but particularly so because the preference for simplicity that it expresses is quietly familiar: Upon inspection, it turns out that a jurisprudential aversion to messy, complex statutory constructions—or, more accurately, to constructions that require messy factual determinations by implementing courts—can be found lurking in the background of several of the Court's statutory interpretation cases. In other words, when giving content to the words in a statute, the Court regularly eschews definitions, tests, and applications that require intricate factual assessments and favors interpretations that are relatively simple to implement.

This "anti-messiness" norm is not limited to the statutory context. It also shows up, in a slightly different form, in the Court's constitutional jurisprudence and it long has played a role in justifying the Court's overruling of troublesome precedents, despite stare decisis concerns. What is interesting about the Court's use of the principle in

3 28 U.S.C. § 1332 (2006).

4 *Hertz*, 130 S. Ct. at 1186.

5 *See, e.g.*, Transcript of Oral Argument, Nov. 10, 2009, Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010) at 7, ll. 8–14 [hereinafter "Tr."] (suggestion by Justice Ginsburg that when a corporation has "dispersed operations," then "you take the headquarters, because there's no way to pick among" other tests and "it certainly isn't worth the labor to try to do that"); Tr. at 27, ll. 1–4 (comment by Justice Kennedy that "[n]ot all diversity suits have major law firms in them and a lot of resources to spend in—in discovery to determine more complex tests"); Tr. at 38, ll. 21–24 (Justice Ginsburg: "[I]f it's got to be one place, why not just keep it simple and say presumptively it's the business headquarters, in a particular case you could show otherwise.").

6 *Hertz*, 130 S. Ct. at 1194.

7 *Id.* at 1191.

the statutory context, however, is that (i) the existence of this background norm has gone surprisingly unnoticed in the literature; and (ii) all of the debate surrounding specific invocations of the principle has focused on whether a particular interpretation in fact will prove messy to implement, not on the validity of the norm itself. Messiness avoidance seems to be widely accepted as a legitimate basis for rejecting a statutory construction. Indeed, those who oppose a construction that invokes anti-messiness arguments typically do not challenge the virtues of messiness avoidance. Instead, they tend to quarrel with the likelihood that the disfavored interpretation will be difficult, cumbersome, or untidy to implement. In most of the cases analyzed below, the opposing opinion, if there was one, responded to anti-messiness arguments with claims that the interpretation would not, in fact, result in the predicted messiness.[8] In other words, the jurisprudential battles tend to take place at the factual, rather than the theoretical, level.

At times, an opposing opinion even has argued that the interpretation chosen by the anti-messiness-invoking opinion will itself be messy to implement.[9] That is, the response to a challenge that one interpretation will prove unduly messy to implement is that the proposed alternative will prove at least as messy to implement as well. The fact that opposing opinions devote such energy to undermining anti-messiness-based criticisms of their preferred statutory construction and even take pains to cast the countervailing construction as

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8 For example, in *Bartlett v. Strickland*, a Voting Rights Act case centering on whether § 2 requires the creation of districts with the potential for crossover voting by white voters, much of the debate between the majority and dissenting opinions revolved around how difficult it would be for courts to evaluate a district's crossover potential. *See* Bartlett v. Strickland, 129 S. Ct. 1231, 1244–45, 1253–54 (2009); *see also* Allen v. Siebert, 552 U.S. 3, 8 (2007) (Stevens, J., dissenting) (arguing that the construction rejected by the majority would not prove messy to implement because the distinction that courts would be required to make was "obvious"); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 467–68 (2006) (Thomas, J., concurring in part and dissenting in part) (arguing that the majority "overstate[d] the difficulties of proof" necessitated by the rejected statutory construction, and that the means through which the fraud at issue was carried out rendered the damages more ascertainable than the majority acknowledged).

9 *See, e.g.*, *Bartlett*, 129 S. Ct. at 1257 ("[E]ven when the 50% threshold is satisfied, *a court will still have to engage in factually messy enquiries* about the 'potential' such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote-dilution under a totality of the circumstances.") (Souter, J., dissenting) (emphasis added); Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2357 (2009) (Stevens, J., dissenting) (arguing that the majority's construction would itself prove messy and difficult for lower courts to apply by "complicat[ing] every case in which a plaintiff raises both ADEA and Title VII claims").

equally messy is significant, and suggests that the background norm of messiness avoidance is deeply entrenched in statutory jurisprudence.

This Article seeks to illuminate the work that anti-messiness arguments perform in the Court's statutory jurisprudence, as well as to evaluate the dangers and theoretical implications of such arguments. The Article first aims to identify and organize the Court's articulation of anti-messiness arguments. Part I defines "anti-messiness" and describes how the principle is employed in statutory construction. It then discusses the background concerns that motivate the anti-messiness principle and provides a typology of anti-messiness arguments, discussing separately arguments based on: judicial inexpertness, practical difficulty, indeterminacy, and inconsistency. I offer several detailed examples, drawing on cases involving a wide range of statutes. Part I also explores how anti-messiness arguments interact with other interpretive norms, including stare decisis, the avoidance canon, and the presumption against extraterritoriality.

Part II considers some problems with the Court's use of anti-messiness arguments. Prominent among these problems are: (1) the looseness of the principle, which lends itself to inconsistent and subjective invocation; (2) judicial shirking; (3) the Court's use of the principle to reject nuanced constructions that may be necessary to avoid circumvention of a statute's purpose; and (4) the Court's use of anti-messiness arguments *anticipatorily* to reject plausible statutory constructions based on mere predictions. Part III then examines the theoretical implications of the anti-messiness principle. The first two sections of Part III discuss the anti-messiness principle's general jurisprudential underpinnings, identifying points of overlap between anti-messiness arguments and the concept of judicial minimalism, as well as parallels between the anti-messiness principle and the rules versus standards paradigm. The last few sections explore how anti-messiness arguments intersect with current theories of statutory interpretation, including: textualism, purposivism, and pragmatism.

I. What is "Anti-Messiness"?

My first goal is to define the principle of anti-messiness. A definition will enable readers to identify when the norm is being invoked as well as to compare use of the principle to the use of other interpretive tools and decisionmaking factors in a particular case. Once I have defined the norm, I will examine specific forms of anti-messiness arguments that the Supreme Court tends to make.

A. Definition

Anti-messiness refers to a background principle that favors the avoidance of inelegant, complex, indeterminate, impractical, confusing, or unworkable factual inquiries. More specifically, it is an interpretive principle that rejects statutory interpretations that will require implementing courts to engage in messy factual inquiries in the application. I chose the label "anti-messiness" because its antithesis, "messiness," seems best to capture the universe of interpretive problems that the Court seeks to avoid when it makes the arguments described in this Article. Dictionaries variously define the word "messy" to mean: 1. *untidy, disordered, dirty*; 2. *confused and difficult to deal with*; 3. *embarrassing, difficult, or unpleasant.*[10] Anti-messiness, then, refers to the Supreme Court's rejection of statutory constructions that require disorderly, untidy, unpleasant, or difficult factual inquiries or factual line-drawing by implementing courts. In other words, the anti-messiness principle reflects a judicial preference for simple, easy-to-administer interpretations.

A couple of points are worth noting before delving into the motivations and typology of anti-messiness arguments. First, judicial arguments based on the anti-messiness principle tend to perform one of two roles in the Court's statutory jurisprudence: (i) they can be used as an interpretive tool to assist the Court in deciphering a statute's meaning; or (ii) they can serve as a justification for the Court's adoption of a particular test or decisionmaking rule that will govern the implementation of the statute in future cases (like the Title VII burden-shifting test).[11] In the first role, anti-messiness arguments tend to be used as a "plus factor," or background norm supporting the selection of one construction over another, messier one. In this formulation, they sometimes are accompanied by legislative intent arguments opining that Congress could not or did not intend such messy interpretive consequences.[12] In the second role, the anti-messiness princi-

10 *See, e.g.*, THE NEW OXFORD AMERICAN DICTIONARY 1073 (2001); RANDOM HOUSE UNABRIDGED DICTIONARY 1206 (2d ed. 1993); WEBSTER'S NEW WORLD DICTIONARY 892 (2d Collegiate ed. 1982); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1418 (3d ed. 1993).

11 I am indebted to Abbe Gluck for illuminating this distinction.

12 *See, e.g.*, Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 2447 (2010) (refusing to read into Congress's recodification of statute an intent to produce messy, practically difficult judicial factual determinations or cumbersome carrier behavior that would ease these factual determinations); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 588 (2008) ("It strains credulity that Congress would have abandoned this predictable, workable framework for the uncertain and complex

ple is used not so much to interpret the statute as to assist the Court in selecting a test for implementing it.

Hertz is an example of the second form of anti-messiness argument. The Court's opinion in that case openly relied on the anti-messiness norm to justify its articulation of a presumption—i.e., an implementation test—dictating that a corporation's "principal place of business" should be the place where its "headquarters" are located.[13] That presumption self-consciously adopted the least messy, or "simplest to administer," of several possible tests for implementing the statute's "principal place of business" language.

By way of contrast, Justice Scalia's concurring opinion in *Negusie v. Holder* is a good example of the former, plus factor, use of the anti-messiness principle. The issue in *Negusie* was whether the Immigration and Nationality Act's "persecutor bar," which prohibits aliens who have participated in the persecution of another person from obtaining refugee status,[14] applies when the alien's participation in persecuting another was coerced, rather than voluntary. The Supreme Court held that the statute was ambiguous and remanded to the Bureau of Immigration Appeals (BIA) to interpret the statute in the first instance.[15] In a concurring opinion, Justice Scalia agreed that the case should be remanded to the BIA, but argued that there were good reasons for the agency to construe the statute not to contain an exception for coerced conduct. Among the reasons he voiced were concerns about the "overwhelming" and the "extremely difficult" questions of fact that immigration judges would be forced to adjudicate in order to determine whether an alien's acts of persecution were voluntary or coerced—classic anti-messiness arguments.[16] Justice

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accounting requirements that a cost-based rule would inflict on litigants, their attorneys, administrative agencies, and the courts.").

13 The Court in *Hertz* also justified its adoption of the "headquarters" presumption as consistent with the statute's text and legislative history. *See* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192–94 (2010).

14 The Act provides that, "The term 'refugee' does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act, § 101, 66 Stat. 166, as added by Refugee Act of 1980, § 201(a), 94 Stat. 102–03 (codified at 8 U.S.C. § 1101(a)(42)).

15 The Bureau of Immigration Appeals (BIA) had ruled, relying on Supreme Court precedent interpreting a different immigration statute, that the persecutor bar contained no exception for coerced conduct. On appeal, the Supreme Court held that the agency had misapplied its precedent to the INA and, accordingly, remanded the case to give the BIA an opportunity to exercise its *Chevron* discretion to interpret the statute in the first instance. *See* Negusie v. Holder, 555 U.S. 511, 520 (2009).

16 *See id.* at 527 (Scalia, J., concurring).

Scalia's anti-messiness arguments were used not to advocate selection of a particular test for implementing the "persecutor bar," but rather, to define the meaning and reach of that statutory provision.

Second, although I confine my discussion in this Article to the anti-messiness principle's operation and implications for statutory interpretation, judicial reliance on the anti-messiness principle is by no means limited to statutory interpretation cases. As noted earlier, a judicial aversion to messy jurisprudence shows up in other areas of the law as well—perhaps most prominently in the rules versus standards debates that are so prevalent in constitutional law.[17] The similarities and differences between bright line rules and the anti-messiness principle are discussed *infra* Part III.A. But two differences bear noting here. First, the anti-messiness principle often is applied in statutory contexts where there is no battle between a bright line rule versus a loose, amorphous standard. That is, anti-messiness arguments often are used to reject the application of a statute to a particular situation or to relieve courts from the obligation to engage in cumbersome factual inquiries, without establishing any clear-cut rules.[18] In fact, the Court sometimes uses anti-messiness arguments to reject the extension of a statute's reach to a new situation, while *employing* or *leaving intact* a loose, multi-factored standard governing such determinations.[19] In other words, the anti-messiness principle in statutory inter-

17 Scholars have, of course, debated the advantages and disadvantages of rules versus standards in numerous other areas of law as well, including property, torts, administrative law, law and economics, and election law. *See, e.g.*, Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181 (1996); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65 (2002); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101 (1997); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982); Book Note, *The Bureaucrats of Rules and Standards*, 106 HARV. L. REV. 1685 (1993).

18 *See, e.g.*, Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 2447 (2010) (using anti-messiness argument about practical difficulty of courts' determining precise location where damages to goods occurred, along with textual, statutory history, and purpose arguments, to justify statutory construction that the Carmack Amendment does not govern shipments originating overseas; alternative interpretation would have forced courts to make a factual determination about the location where damages to goods occurred, not to apply a standard).

19 *See, e.g.*, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1120–21 (2009) (applying complex predatory pricing standards to reject AT&T's price squeezing claim as inadequate and noting, in passing, anti-messiness concerns about the practical difficulty of requiring courts to police both wholesale and retail prices);

pretation is much more focused on preventing courts from engaging in intricate factual inquiries than it is on avoiding judicial balancing tests or the exercise of judicial discretion (both of which rules advocates care very much about). Second, even where there is substantial overlap between bright line rules and the anti-messiness principle—as in those cases where the Court uses anti-messiness arguments to advocate the overruling of statutory precedents—different concerns are implicated in the statutory versus constitutional and common law contexts because of the unique role that congressional intent plays in statutory interpretation. In other words, there may be good reasons why we may want the Court to apply the anti-messiness principle differently in statutory cases than it does bright line rules in constitutional or common law cases. By focusing a narrow lens on the Supreme Court's use of the anti-messiness principle in statutory construction, this Article seeks to address such particularized concerns.

B. A Typology

In my observation, there are five primary types of anti-messiness arguments that the Court employs in statutory cases: (1) *Judicial expertise arguments*—which posit that judges are unqualified to conduct the factual inquiries necessitated by a particular construction of the statute; (2) *Indeterminacy arguments*—which contend that the factual inquiries required by a particular construction are indeterminate, or unknowable, so that no one, including judges, can adequately implement the construction; (3) *Practical difficulty arguments*—which maintain that a particular construction of a statute will require implementing courts to engage in factual assessments that are too difficult, cumbersome, complicated, or involved; (4) *Inconsistency arguments*—which insist that a particular statutory construction is confusing or ambiguous and provides insufficient guidance to lower courts, so it will lead to unpredictable and inconsistent application; and (5) *Stare decisis defeating arguments*—which declare that a particular statutory construction, previously adopted by the Court, has proved "unworkable" for lower courts to implement and so should be abandoned. This Section gives examples of each type of anti-messi-

Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 459 (2006) (applying a standard-like proximate cause test to Ideal's RICO claims while noting that recognizing Ideal's claim would require courts to engage in a "complex assessment" "calculat[ing] the portion of National's price drop attributable to the alleged pattern of racketeering activity"; again, the Court's problem is with the factual determinations that would be required, not with the applicable standard).

ness argument and highlights some of the inconsistencies in the Court's invocation of this background norm.

1. Judicial Inexpertness

One common type of anti-messiness argument that the Supreme Court employs is the contention that courts lack the expertise necessary to engage in the factual determinations required by a particular statutory construction. This type of invocation of the anti-messiness norm characterizes the interpretation at issue as dependent on factual inquiries requiring specialized knowledge or skills, and casts the judiciary as "ill-equipped" to conduct such inquiries.

A recent example of a judicial-inexpertness-focused anti-messiness argument appears in *Bartlett v. Strickland*,[20] a Voting Rights Act (VRA) case. The Court in *Bartlett* relied on several interpretive tools—including Supreme Court precedent, statutory text, and the constitutional avoidance canon—to reach the conclusion that the VRA does not require the creation of "crossover" voting districts in which a substantial plurality of minority voters can combine with a small percentage of white voters to elect a candidate of the minority's choosing.[21] In addition to these other common interpretive tools, the opinion also placed significant weight on the anti-messiness norm, particularly to support its avoidance canon argument.

Specifically, the *Bartlett* opinion noted that a construction requiring crossover districts would force the judiciary to engage in messy factual determinations about whether potential districts could function as crossover districts and "would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions."[22] To illustrate, the Court provided a lengthy list of the thorny factual inquiries that lower courts would be forced to undertake if it construed Section 2 to require the creation of crossover districts:

> What percentage of white voters supported minority-preferred candidates in the past? How reliable would the crossover votes be in future elections? What types of candidates have white and minority voters supported together in the past and will those trends continue? Were past crossover votes based on incumbency and did that depend on race? What are the historical turnout rates among white and minority voters and will they stay the same?[23]

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20 129 S. Ct. 1231 (2009).

21 *Id.* at 1243–44 (precedent); *id.* at 1243 (text); *id.* at 1247 (avoidance canon).

22 *Id.* at 1244–45.

23 *Id.* at 1245.

This use of a litany of (virtually impossible) factual queries that a particular interpretation purportedly would force implementing courts to engage is a common method for articulating anti-messiness arguments. The litany beats the reader over the head with the untidiness and inelegance—i.e., the messiness—of the interpretation that the Court is rejecting. Indeed, it is almost as if the Court is arguing that the sheer volume of factual inquiries compelled by a particular statutory interpretation should render the interpretation inaccurate. The *Bartlett* Court followed up its litany of factual queries by insisting that judges "*are inherently ill-equipped* to make decisions based on highly political judgments of the sort that crossover-district claims would require."[24] There is, significantly, quite a bit of rhetorical declaration in the *Bartlett* majority's articulation of anti-messiness concerns, both in the litany of queries it sets forth and in its characterization of the judiciary's inexpertness. Such rhetoric is a common feature in the Court's anti-messiness arguments and deserves critical analysis in evaluating the benefits and disadvantages of reliance on this background norm.[25]

The *Bartlett* Court also used anti-messiness arguments to set the stage for a constitutional avoidance argument that performs significant work later in the opinion. The avoidance canon is an interpretive rule that holds that if a statute is susceptible of two or more reasonable constructions, one of which presents serious constitutional difficulties, then courts should choose the interpretation that avoids such difficulties.[26] The *Bartlett* Court argued that the factual inquiries necessitated by the crossover district construction would "require courts to make inquiries based on racial classifications and race-based predictions" and thus "raise[d] serious constitutional questions."[27] Given this, the avoidance canon dictated that the Court should reject the crossover district construction in favor of a constitutionally-safe reading of the statute. Anti-messiness arguments thus performed double work in *Bartlett*, operating both to cast the crossover district construction as untenable and to support the Court's use of the avoidance canon.

In *Pacific Bell Telephone Co. v. Linkline Communications*,[28] the Court similarly rejected a reading of Section 2 of the Sherman Antitrust Act

24 *Id.* (emphasis added).

25 *See* discussion *infra* Part II.A.

26 *See, e.g.*, Rapanos v. United States, 547 U.S. 719, 737–39 (2006); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); United States v. Delaware & Hudson, 213 U.S. 366, 408 (1909).

27 *Bartlett*, 129 S. Ct. at 1245.

28 129 S. Ct. 1109 (2009).

that would, it argued, require implementing courts to engage in complex economic inquiries exceeding the limits of judges' expertise. The *Pacific Bell* opinion did not lead with an anti-messiness argument, but it did buttress its chosen statutory construction with the observation that "institutional concerns" also "counsel against" recognizing AT&T's price squeezing claims because "[c]ourts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing."[29] To cement its point, the opinion quoted a litany of factual queries that implementing courts would have to confront to evaluate price-squeezing claims, borrowing from a First Circuit opinion criticizing such claims.[30]

The Court also criticized the price-squeezing construction of the statute on the ground that price squeeze claims would "require[ ] the court to assume the day-to-day controls characteristic of a regulatory agency"[31] because courts would be forced "simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed."[32] The Court noted that "antitrust courts normally avoid direct price administration, relying on rules and remedies . . . that *are easier to administer*."[33] *Pacific Bell* thus relied not only on the judiciary's lack of expertise with price administration and market management to make its anti-messiness point; it also invoked an underlying discomfort or background norm disfavoring excessive judicial involvement in the administration of a statute. Reading between the lines, the Court seemed to be saying that statutory constructions that require recurring judicial factual inquiries should be avoided, particularly if they involve technical matters with respect to which

29 *Id.* at 1120–21 (quoting Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

30 The litany reads as follows:

> [H]ow is a judge or jury to determine a 'fair price?' Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition 'would have set' were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price 'gap?' Must it be large enough for all independent competing firms to make a 'living profit,' no matter how inefficient they may be? . . . And how should the court respond when costs or demands change over time, as they inevitably will?

Id. at 1121 (quoting Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990)).

31 *Id.*

32 *Id.*

33 *Id.* (emphasis added).

judges lack expertise. In other words, courts should construe a statute and then get out of the game, not adopt interpretations that require a continuing fact-assessing role for the judiciary.

In a related vein, judicial deference to agency interpretations under the *Chevron* doctrine also can be viewed as a form of inexpertness-based messiness avoidance. The *Chevron* doctrine provides a standard for judicial review of agency interpretations, so it falls into the "decision-making rule" or "implementation test" category of anti-messiness arguments, rather than the "plus factor" category. The *Chevron* test helps lower courts avoid messy judicial inquiries in at least two ways. First, the *Chevron* test simplifies the judiciary's role in interpreting statutes by distilling the interpretive inquiry down to the basic question of whether Congress has spoken directly to the matter at issue; if it has, Congress's directive controls and the judicial inquiry ends. If Congress has not spoken directly to the interpretive question at issue, then the judicial inquiry is limited to assessing the "reasonableness" of the agency's interpretation—a deferential standard that almost always ends in rubber-stamping the agency's interpretation. Second, the *Chevron* doctrine shields courts from engaging in policy balancing and from becoming mired in the technical details of a statute's application to particular industries. From an anti-messiness perspective, the doctrine replaces judicial grappling over technical facts and policy considerations with forced deference to interpretations made by administrators who possess superior expertise. The language of the *Chevron* opinion is explicit about this trade-off, justifying deference to the agency based on the "detailed, technical, complex"[34] nature of the statutory scheme at issue and the observation that "[j]udges are not experts in the field."[35]

2. Practical Difficulty

I earlier described an example of an anti-messiness argument—in Justice Scalia's concurring opinion in *Negusie*—which advocated against a particular statutory construction based on the "extreme difficulty" and "overwhelming" nature of the task that the construction would force upon implementing courts.[36] This form of anti-messiness argument, resting on the practical difficulty of the factual determinations that an interpretation imposes on implementing courts, is per-

34 *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 848 (1984).

35 *Id.* at 865.

36 Negusie v. Holder, 555 U.S. 511, 526–28 (2009) (Scalia, J., concurring).

haps the most prevalent form of anti-messiness argument employed by the Supreme Court.

As such, it is worth examining the mechanics of this form of anti-messiness argument in some detail. Recall that in *Negusie*, the Court remanded the case to the BIA to determine whether the INA's "persecutor bar" contained an exception for asylum applicants who had been coerced into persecuting others. Justice Scalia's concurrence advised the BIA that, on remand, there were good reasons to construe the statute not to contain a coerced conduct exception, including that:

> Immigration judges already face the overwhelming task of attempting to recreate, by a limited number of witnesses speaking through (often poor-quality) translation, events that took place years ago in foreign, usually impoverished countries. Adding on top of that the burden of adjudicating claims of duress and coercion, which are extremely difficult to corroborate and necessarily pose questions of degree that require intensely fact-bound line-drawing, would increase the already inherently high risk of error.[37]

The structure of this argument bears noting. The argument proceeds in three steps: (1) The task faced by immigration judges implementing the INA already is overwhelming (asserts facts, presumably taking judicial notice thereof, to support this claim). (2) Construing the INA's persecutor bar to contain a coerced conduct exception would further exacerbate this task because of the difficulty of locating the necessary evidence and because of the inherent difficulty of evaluating duress and coercion claims. (3) Therefore, it would be best to construe the statute not to contain an exception for coerced persecution. This use of the anti-messiness norm is striking in its willingness to elevate administrative considerations above substantive rights. It is true that the voluntariness of a persecutor's conduct likely will be difficult to determine as a factual matter. But courts regularly make such difficult determinations in criminal cases involving intent or voluntariness requirements, as well as in contracts and wills cases involving claims of duress or undue influence. In other words, the anti-messiness principle as used in the *Negusie* concurrence would absolve implementing courts of a task that is common to the judicial enterprise, if complex and burdensome. Such use of the practical difficulty form of anti-messiness argument is no anomaly; in fact, the Court often invokes this type of argument to reject statutory interpretations that require factual determinations that are well within the realm of

37 *Id.*

judicial competence, though complicated and cumbersome to conduct.

Allen v. Siebert[38] is another such example. *Allen* involved the tolling provision of the Antiterrorism and Effective Death Penalty Act (AEDPA),[39] which suspends AEDPA's one-year statute of limitations on the filing of federal habeas petitions while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending."[40] At issue in *Allen* was a state postconviction petition that had been rejected by the state court as untimely. The Eleventh Circuit had ruled that the petition should be considered "properly filed" because the state court had rejected it based on a statute of limitations that operated as an affirmative defense, rather than as a jurisdictional statute of limitations.[41] The Supreme Court refused to adopt that construction, noting that "whether a time limit is jurisdictional or an affirmative defense is often a disputed question," and that "under the Court of Appeals' approach, federal habeas courts *would have to delve into the intricacies of state procedural law* in deciding whether a postconviction petition rejected by the state courts as untimely was nonetheless 'properly filed' " under AEDPA's tolling provision.[42] In other words, the Court concluded that given the detailed, messy inquiries federal judges would have to conduct to distinguish between state statutes of limitations that are jurisdictional and those that are affirmative defenses, it would be better not to distinguish at all and instead to impose a simple rule barring all untimely state court petitions.

The Court's avoidance of the messier statutory construction in *Allen* is particularly noteworthy because the inquiry it sought to avoid—i.e., "delv[ing] into the intricacies of state procedural law"[43]—is one that judges are uniquely qualified to undertake. State procedural law may not be the preferred bailiwick of federal courts, but federal judges certainly are capable of evaluating state statutes and state cases to determine whether a particular statute of limitations is jurisdictional or operates as an affirmative defense; indeed, they are trained to do so.

Richlin Security Service Co. v. Chertoff[44] made similar use of the practical difficulty form of the anti-messiness principle. At issue in *Richlin*

38 552 U.S. 3 (2007).
39 28 U.S.C. § 2244(d)(2) (2006).
40 *Id.*
41 *Allen*, 552 U.S. at 5.
42 *Id.* at 7 (emphasis added).
43 *Id.*
44 553 U.S. 571 (2008).

was whether a prevailing party entitled to recover attorney's fees, expenses, and costs pursuant to the Equal Access to Justice Act (EAJA) could recover paralegal's fees at the prevailing market rate, or only at the cost to the law firm of the paralegal's services. The Court unanimously construed the EAJA to allow prevailing parties to recover at the market rate for paralegal's fees. Although the bulk of the opinion focused on other tools of statutory construction—including text, legislative intent and history, prior case law, and other fee-shifting statutes—the opinion also relied, in passing, on the anti-messiness principle. In one of the opinion's last few paragraphs, the Court questioned the "practical feasibility" of the cost-to-the-law-firm construction, warning that such a construction would create difficult "accounting problems" for which "we do not believe that solutions are readily to be found."[45] The Court even used this anti-messiness argument as a guide to congressional intent, declaring that "[m]arket practice provides by far the more transparent basis for calculating a prevailing party's recovery" and that it "strains credulity that Congress would have abandoned this predictable, workable framework for the uncertain and complex accounting requirements that a cost-based rule would inflict on litigants, their attorneys, administrative agencies, and the courts."[46]

Again, the factual assessment that the Court sought to avoid is one that judges should be well-qualified to make: Judges regularly calculate reimbursable fees and costs under other fee-shifting statutes; determining the cost of paralegal services to a law firm should be no more difficult than those other inquiries. Moreover, judges and lawyers are in the same profession as law firms and should not be wholly unfamiliar with the concept of paralegal employ—thus, they should be well positioned to evaluate the evidence regarding costs presented by both sides and to settle on a fair figure.

The Court's messiness avoidance in *Negusie*, *Allen*, and *Richlin* demonstrates that there is more to the background norm disfavoring messy statutory constructions than a mere fear that judges will implement a statute incorrectly due to their lack of expertise. Indeed, under the practical difficulty form of the anti-messiness principle, the Court seems willing to reject statutory constructions that require cumbersome factual assessments as a matter of mere administrative convenience. Practical difficulty thus seems to focus very much on the judicial "administrability" of an interpretation or decisionmaking rule.

45 *Id.* at 588.

46 *Id.* at 588–89.

The troubling matter, as I will discuss in detail *infra*,[47] is the lack of an established baseline for determining when an interpretation crosses the inadministrability threshold and becomes too difficult, as a practical matter, to adopt.

3. Indeterminacy

Closely related to the practical difficulty form are indeterminacy-based anti-messiness arguments. Indeterminacy arguments focus on the inherent uncertainty or undiscoverability of the factual determinations that an interpretation forces lower courts to pursue. The Court's argument in such cases essentially is that the interpretation compels a set of factual queries that are impossible for anyone, including judges, to evaluate.

Holder v. Hall is an instructive example. There, the Court refused to construe Section 2 of the VRA to allow challenges to the size of a government body, based largely on indeterminacy-type anti-messiness concerns. Specifically, the Court cited the impossibility of finding "a reasonable alternative practice as a benchmark against which to measure the existing voting practice."[48] That is, the Court held that there was no way to measure what the optimal size of a government body should be, and therefore no way to evaluate whether the challenged government body was too big or too small.[49] "Respondents," the Court accused, "fail to explain where the search for reasonable alternative benchmarks should begin and end, and they provide no acceptable principles for deciding future cases."[50] Translation: A Section 2 cause of action against the size of a government body would prove impossibly messy and undefined to implement. Because the "wide range of possibilities [for benchmarks] makes the choice '*inherently standardless*,'" the Court concluded that it simply could not construe Section 2 to allow challenges to the size of a government body.[51]

In so construing the VRA, the *Holder* majority rejected the size benchmarks (and justifications for those benchmarks) offered by those seeking to use § 2 to challenge the size of a governing body.[52]

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47 *See* discussion *infra* Part II.A.

48 Holder v. Hall, 512 U.S. 874, 880 (1994).

49 *See id.* at 881 ("[T]he search for a benchmark is quite problematic when a § 2 dilution challenge is brought to the size of a government body. There is no principled reason why one size should be picked over another as the benchmark for comparison.").

50 *Id.* at 885.

51 *Id.* (emphasis added).

52 *Id.* at 881 (rejecting suggestion by challengers and the United States, as *amicus curiae*, that a five-member commission should serve as the benchmark for the § 2 chal-

This also was the case in *Bartlett* and *Pacific Bell*, where the Court rejected suggested benchmarks for evaluating a district's crossover potential[53] and price squeezing claims,[54] respectively, and then went on to conclude that the judiciary lacked the expertise to measure a district's crossover potential or the existence of a price squeeze. Dissenting opinions in two of these cases argued that the rejected statutory constructions were more consistent with the statute's purpose and advocated embracing the messiness-limiting benchmarks proffered by proponents of those constructions in order to fulfill the statute's objectives.[55] These cases highlight some potential problems with the Court's use of the anti-messiness norm in construing statutes: (1) judicial discretion to ignore messiness-reducing limits on an otherwise indeterminable factual inquiry and to decide how much messiness is too much in a given context, and (2) the possibility that reliance on the anti-messiness norm might lead to a statutory construction that defeats congressional intent. These potential problems are discussed in greater detail in Part II below.[56]

A second example of the indeterminacy form of anti-messiness argument appears in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*,[57]

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lenge at issue because, *inter alia*, five-member commissions were the most common form of governing authority in the State and because the state legislature had authorized the relevant county to adopt a five-member commission if it so chose).

53 The Court ignored record evidence, relied upon by the dissent, suggesting that a thirty-nine percent minority voting population could be used as a reliable benchmark for evaluating a district's crossover potential, based on past election results. *See* Bartlett v. Strickland, 556 U.S. 1, 8–10 (2009) (Souter, J., dissenting).

54 *See* Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 454–57 (2009) (rejecting "transfer price test" suggested by *amici* for identifying an unlawful price squeeze).

55 *See* Bartlett v. Strickland, 556 U.S. 1, 8–10 & n.5 (2009) (Souter, J., dissenting) (advocating looking to recent election results suggesting a thirty-nine percent minority population as a workable benchmark for crossover district potential, arguing that crossover districts better fulfill the VRA's ideals than the existing majority-minority model, and explaining that failure to read VRA to require crossover districts could lead to deliberate circumvention of VRA's core prohibition against vote dilution); Holder v. Hall, 512 U.S. 874, 947, 951–52 (1994) (Blackmun, J., dissenting) (describing VRA's broad "remedial purpose," accusing the majority of undermining this purpose, and maintaining that "the proposed five-member Bleckley County Commission presents a reasonable, workable benchmark against which to measure" plaintiffs' § 2 vote-dilution claim). Because of a concession by one of the parties, there was no dissenting opinion in *Pacific Bell*, but the concurring opinion in that case suggested that recognizing price squeezing claims could be necessary to fulfill the Sherman Act's anti-monopoly purposes. *See Pacific Bell*, 555 U.S. at 457–58 (2009) (Breyer, J., concurring).

56 *See infra* Part II.A, C.

57 130 S. Ct. 2433 (2010).

in which the Court refused to construe a statute called the Carmack Amendment to apply to the inland domestic segment of an overseas shipment. *Kawasaki* involved the interaction of two statutes, the Carriage of Goods by Sea Act (COGSA),[58] which governs contracts issued by ocean carriers engaged in foreign trade, and the Carmack Amendment,[59] which governs contracts issued by domestic rail carriers.[60] The Court relied on text,[61] precedent,[62] statutory history,[63] and purpose-based[64] arguments to conclude that the Carmack Amendment did not apply to the inland portion of a shipment originating overseas, and this time used anti-messiness arguments to *support* its purpose-based arguments. The Court first noted that Carmack's purpose was to relieve cargo owners "of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an interstate shipment of goods,"[65] and that Carmack achieved this purpose by imposing liability for damage caused during the rail route on both receiving and delivering rail carriers, regardless of which carrier caused the damage. It then observed that:

> If Carmack applied to an inland segment of a shipment from overseas under a through bill, then one set of liability and venue rules would apply when cargo is damaged at sea (COGSA) and another almost always would apply when the damage occurs on land (Carmack). Rather than making claims by cargo owners easier to resolve, a court would have to decide where the damage occurred to determine which law applied. *As a practical matter, this requirement often could not be met*; for damage to the content of containers can occur when the contents are damaged by rough handling, seepage, or theft, at some unknown point.[66]

In other words, the Court based its statutory construction, in part, on a fear that the reading it rejected would force judges to engage in indeterminable factual inquiries about the nature and point in the

58 46 U.S.C. § 30701 (2006).

59 46 U.S.C. § 11706 (2006).

60 The specific dispute at issue involved damage to cargo that had been shipped from a port in China to California, where it was transferred to a domestic rail carrier; the damage allegedly occurred during the domestic rail portion of the transport. The applicability or inapplicability of the Carmack Amendment to the parties' transportation contract determined the forum in which the damages suit could be brought. *See Kawasaki*, 130 S. Ct. at 2441–42.

61 *Id.* at 2442–43.

62 *Id.* at 2443.

63 *Id.* at 2446–47.

64 *Id.* at 2447.

65 *Id.* at 2441 (quoting Reider v. Thompson, 339 U.S. 113, 119 (1950)).

66 *Id.* at 2447 (emphasis added).

journey during which cargo damage occurred—inquiries which often would contain no discernable answer. Moreover, it explained that such unanswerable factual inquiries would undermine Carmack's purpose of eliminating the burden on cargo owners to uncover which of several carriers damaged their goods.

The dichotomy between the purpose-fulfilling application of anti-messiness arguments in *Kawasaki* versus the (at least allegedly) purpose-defeating use of such arguments in *Holder*, *Bartlett*, and *Pacific Bell* suggests a potentially significant dividing line for application of the anti-messiness principle: use of the principle to decide jurisdictional issues as opposed to issues that go to the heart of a statute's substantive objectives. The statutory construction at issue in *Kawasaki* ultimately was about jurisdictional matters—specifically, the forum in which the cargo owner's damages suit could be brought and which statute, Carmack or COGSA, would govern the carrier's liability. The constructions at issue in *Holder*, *Bartlett*, and *Pacific Bell*, by contrast, went to the heart of establishing what kinds of voting and price discrimination claims would be covered under the VRA and the Sherman Act. In Part II of this Article, I discuss the implications of relying on the anti-messiness principle in each of these contexts and suggest that the principle is more defensible when applied to jurisdictional statutory constructions than to constructions that affect the substantive reach of a statute.[67]

4. Inconsistency

Anti-messiness arguments also may be phrased in the form of concerns that a particular statutory construction either has proved or will prove confusing, ambiguous, and therefore inconsistent for lower courts to implement. This was the form of argument at work in *Hertz*, which rejected the Courts of Appeals' "divergent and increasingly complex interpretations" of the phrase "principle place of business" in favor of a "comparatively" simplified presumption that the place where a corporation's headquarters are located ordinarily is its principle place of business.[68]

The *Hertz* opinion also referenced the statute's text[69] and legislative history[70] in support of its construction, but its emphasis was on the jurisprudential mess that lower courts had made thus far in interpreting the phrase "principal place of business." For example, the

67 *See infra* Part II.E.

68 Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192–93 (2010).

69 *Id.*

70 *Id.* at 1194.

Court noted the growing number of factors that lower courts were taking into consideration under various "principal place of business" tests and highlighted the inconsistencies in applying these factors across courts, sometimes even within the same Circuit.[71] The Court then explained that there is a particular need for clarity and predictability in jurisdictional statutes[72] and concluded that the "relatively easier to apply" headquarters presumption thus should replace existing tests for determining a corporation's "principal place of business."[73]

The Court's opinion in *Morrison v. National Australia Bank Ltd.*[74] similarly invoked inconsistency-based anti-messiness arguments to support its rejection of a longstanding lower court test for implementing § 10(b) of the Securities Exchange Act.[75] *Morrison* concerned whether, and under what circumstances, § 10(b) could be read to provide a cause of action for *foreign* plaintiffs suing *foreign* and American defendants for misconduct in connection with securities traded on *foreign* exchanges.[76] For nearly forty years, the Second Circuit and other Courts of Appeals following its lead had applied a multi-factor test to determine whether a § 10(b) claim involving foreign plaintiffs, foreign defendants, or a foreign exchange "had a substantial effect in the United States or upon United States citizens," or involved "wrongful conduct [that] occurred in the United States."[77] If the requisite effects or conduct could be found, then the § 10(b) claim could go forward.

The Supreme Court in *Morrison*, however, characterized the "effects" and "conduct" tests as an unfortunate departure from the basic interpretive presumption that laws enacted by Congress are not meant to have extraterritorial effect.[78] It then employed anti-messiness arguments to hold that the Second Circuit's nuanced test should be abandoned and § 10(b) held inapplicable to securities transactions involving foreign actors or exchanges. Specifically, the Court noted that the "effects" and "conduct" tests "were not easy to administer" and that they led to different results depending on numerous fact-specific inquiries such as whether the harmed investors were Ameri-

71 *Id.* at 1191–92.

72 *Id.* at 1193.

73 *Id.* at 1194.

74 130 S. Ct. 2869 (2010).

75 15 U.S.C. § 78j(b) (2006).

76 *Morrison*, 130 S. Ct. at 2873.

77 *See id.* at 2878–79 (quoting SEC v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003)).

78 *Id.* at 2877–78.

can citizens or foreigners, and whether the United States was a "base" for fraudulent activities in other countries.[79] The result, the Court lamented, was "a proliferation of vaguely related variations on the 'conduct' and 'effects' tests"[80] throughout the different circuits and difficulty for district courts attempting to apply "such vague formulations."[81] In light of this doctrinal confusion, the Court opted to reinstate the presumption against extraterritorial application of § 10(b) claims to any claims involving foreign plaintiffs, defendants, or exchanges.

In both *Hertz* and *Morrison*, the Court applied the inconsistency form of the anti-messiness argument to reject statutory constructions that lower courts had followed for years, but this is not the only context in which this form of argument can be invoked. In *Roell v. Withrow*,[82] for example, the dissenting opinion similarly used the inconsistency form to argue that the construction adopted by the majority would be impossible to implement. *Roell* raised the question whether the Federal Magistrate Act[83] requires explicit consent from the parties before a magistrate judge may conduct a case, or whether consent can be inferred from a party's conduct during litigation.[84] The majority opinion relied on text,[85] "pragmatic reasons,"[86] and the statute's purpose[87] to conclude that the parties' consent could be implied where "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge."[88] Justice Thomas, joined by three other justices, roundly criticized this reading on both textual and anti-messiness grounds.[89] The dissent complained that "the majority's test for determining whether a party has given adequate implied consent . . . is rife with ambiguities"[90] and launched into a litany of factual inquiries illustrating the potential morass of questions that lower courts would have to explore in order to evaluate whether the parties' actions sufficed to provide implied consent.[91] The dissent

79 *Id.* at 2879.
80 *Id.* at 2880.
81 *Id.* at 2879.
82 538 U.S. 580 (2003).
83 28 U.S.C. § 636(c)(1) (2006).
84 *See Roell*, 538 U.S. at 582.
85 *Id.* at 587.
86 *Id.* at 588.
87 *Id.* at 588–89.
88 *Id.* at 590.
89 *Id.* at 592–94 (Thomas, J., dissenting).
90 *Id.* at 595–96.
91 The litany of factual inquiries reads as follows:

also criticized the majority for trading the "clarity and predictability" of an explicit consent construction in favor of a construction that would force lower courts "to study the record of a proceeding on a case-by-case basis, searching for patterns in the parties' behavior that would provide sufficient indicia of voluntariness" to constitute implied consent.[92]

In other words, the *Roell* dissenters worried, like the majority in *Hertz* and *Morrison*, that the construction at issue would prove too confusing and vague for lower courts to implement in a consistent manner. This focus on actual lower court confusion over a statutory construction, or predictions of future lower court confusion over a newly articulated construction, is a different species of anti-messiness argument than those discussed earlier in this Part. The inconsistency form quarrels with the messiness engendered by the Court's lack of clarity as to which factual determinations matter, and to what degree—rather than on the messiness produced by judicial grappling with the factual determinations themselves. That is, a Court invoking the inconsistency form of the anti-messiness principle is not concerned that it will be practically difficult or impossible to determine where a corporation's officers are located or where most of its sales occur. Rather, the Court is concerned that even once those facts have been determined, it will remain unclear where the corporation's principal place of business is and, worse, that two different courts asking the same questions could come up with two different principal places of business because of the vagueness of the decisionmaking rule.

C. Anti-Messiness and Stare Decisis

A form of anti-messiness principle also has been long at work in the stare decisis context, as a justification for overruling precedents that have proved "confusing" or "unworkable" to implement.[93] In this

> How are the courts to determine whether the litigant *or* counsel "was made aware of the need to consent and the right to refuse it"? Are courts required to search beyond the record and inquire into whether a clerk of the court informed either a litigant or his counsel of the litigant's rights and provided them with requisite forms to sign? Can courts rely, if applicable, on the parties' participation in other unrelated proceedings before a magistrate judge?

Id. at 596.

92 *Id.*

93 *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989) ("Another traditional justification for overruling a prior case is that a precedent may be a positive detriment to coherence and consistency in the law . . . because of inherent confusion created by an unworkable decision . . . .") (citing Continental T.V., Inc. v. GTE Sylvania, Inc. 433 U.S. 36, 47–48 (1977); Swift & Co. v. Wickham, 382 U.S. 111, 124–25 (1965)).

form, the anti-messiness principle is used to trump the rule of stare decisis, which ordinarily obligates judges to follow the decisional rules established in prior cases. This use of the messiness avoidance norm is of course common in contexts beyond statutory interpretation.[94] But as with the other forms of anti-messiness arguments examined in this Article, this Part limits its discussion of how anti-messiness arguments are used to override stare decisis to the statutory context—both in the interest of space and because the relevance of congressional intent in statutory interpretation presents unique considerations worthy of independent analysis.

In *Swift & Co. v. Wickham*,[95] for example, the Court overturned a complicated implementation test that it previously had adopted for determining when a three-judge district court panel was required to review lawsuits seeking to enjoin a state statute as unconstitutional.[96] In so doing, the Court overruled a prior precedent, *Kesler v. Department of Public Safety*,[97] observing that:

> We are now convinced that the *Kesler* rule, distinguishing between cases in which substantial statutory construction is required and those in which the constitutional issue is "immediately" apparent, is in practice *unworkable*. Not only has it been uniformly criticized by commentators, but lower courts have quite evidently sought to avoid dealing with its application or have interpreted it with *uncertainty*.[98]

In other words, the *Kesler* precedent had proved confusing and impracticable to implement. In a much-quoted formulation, *Swift* explained that under such circumstances, stare decisis must give way to the need for clear jurisdictional rules:

> Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of

94 *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 305–06 (2004) (discussing and rejecting an unworkable standard for adjudicating partisan gerrymandering claims); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (discussing unworkability of *Roe*); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (rejecting the "traditional government functions test" as unworkable).

95 382 U.S. 111 (1965).

96 The implementation test, which had been established in *Kesler v. Dep't of Pub. Safety*, 369 U.S. 153 (1962) (overruled in part by Perez v. Campbell, 402 U.S. 637 (1971)), dictated that when the basis for enjoining the state statute was an alleged conflict with or preemption by a federal statute—rather than a substantive constitutional problem—the three-judge panel was required "only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated." *Swift*, 382 U.S. at 115.

97 369 U.S. 153 (1962).

98 *Swift*, 382 U.S. at 124 (emphasis added) (footnotes omitted).

stare decisis once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.[99]

In place of the *Kesler* rule, the Court adopted a "more practicable" construction that simplified the basis for three-judge review, allowing it only where substantive constitutional issues were the basis for challenge to a state statute.[100]

The Court in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*[101] similarly abandoned two precedents on the grounds that they were "hopelessly unworkable in operation."[102] *Gulfstream*, like *Swift*, involved the construction of a jurisdictional statute—governing the circumstances under which a district court order denying a motion to stay or dismiss an action is immediately appealable.[103] The Court held that no immediate appeal was available in the present case and in the process overruled two longstanding precedents, *Enelow v. New York Life Insurance Co.*[104] and *Ettelson v. Metropolitan Life Insurance Co.*,[105] which held that orders granting or denying stays of "legal" proceedings on "equitable" grounds were immediately appealable injunctions. *Gulfstream* catalogued the difficulties that lower courts had experienced in applying the *Enelow-Ettelson* precedents over the years, particularly once the historical distinction between law and equity had disappeared,[106] and criticized the precedents' "tendency to produce incongruous results."[107] Again, the confusion, inconsistency, and lower court inability to implement the prior precedents' constructions overrode stare decisis concerns in the Court's view.

In a similar vein is *Moragne v. States Marine Lines, Inc.*,[108] which overruled a longstanding precedent called *The Harrisburg*.[109] *The Har-*

99 *Id.* at 116.

100 The Court justified this construction based on the history and purpose of the three-judge panel statute. *Id.* at 125–26.

101 485 U.S. 271 (1988).

102 *Id.* at 284.

103 28 U.S.C. § 1292(a)(1) (2006).

104 293 U.S. 379 (1935).

105 317 U.S. 188 (1942).

106 *Gulfstream*, 485 U.S. at 279–88. "Experience since the merger of law and equity, however, has shown that both questions are frequently difficult and sometimes insoluble. Suits that involve diverse claims and request diverse forms of relief often are not easily categorized as equitable or legal. As one Court of Appeals complained in handling such a suit, '*Enelow-Ettelson* is virtually impossible to apply to a complaint.'" *Id.* at 284 (citation omitted).

107 *Id.* at 282.

108 398 U.S. 375 (1970).

109 119 U.S. 199 (1886).

risburg held that maritime law did not afford a cause of action for wrongful death. Among the reasons the *Moragne* Court gave for overruling the precedent was that, along with a related case, it "has produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions."[110] *Moragne* went on to state that "[t]o supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication."[111] Again, the jurisprudential mess produced by the prior precedent justified the abandonment of stare decisis.

A striking theme among these older stare-decisis-defeating anti-messiness cases is that they all involved jurisdictional statutes. More recent examples in which the Court has allowed—or several members of the Court have argued in favor of allowing—anti-messiness considerations to trump stare decisis exist as well, but they involve the construction of nonjurisdictional statutes. In *Altria Group v. Good*,[112] for example, the Court was called upon to construe the preemption provision of the Federal Cigarette Labeling and Advertising Act (FCLAA).[113] Plaintiffs had brought state law claims for fraudulent misrepresentation against cigarette manufacturers, and the Court had to decide whether such claims were preempted by the FCLAA.[114] The majority opinion, which concluded that plaintiffs' fraudulent misrepresentation claims were not preempted, relied heavily on a prior precedent, *Cipollone v. Liggett Group*.[115] The *Altria* majority opinion expressly acknowledged that the *Cipollone* test for evaluating state law claims for preemption "may lack 'theoretical elegance'" but applied the test anyway out of respect for stare decisis and because, in its view, the test fulfilled Congress's purpose.[116]

By contrast, Justice Thomas's dissenting opinion, joined by Justices Scalia, Roberts, and Alito, severely criticized the *Cipollone* predicate-duty test as unduly messy and intricate, and called for its overruling. Justice Thomas's dissent observed that "the *lower courts have consistently expressed frustration at the difficulty in applying the* Cipollone *plurality's test*."[117] The dissent cited several lower court opinions

110 *Moragne*, 398 U.S. at 404.

111 *Id.* at 405.

112 555 U.S. 70 (2008).

113 15 U.S.C. § 1334(b) (2006).

114 *Altria*, 555 U.S. at 81–82.

115 *Cipollone* directed implementing courts to examine each state law claim individually and to ask whether the claim was predicated "on a duty 'based on smoking and health.'" 505 U.S. 504, 528 (1992).

116 *Altria*, 555 U.S. at 84 (quoting *Cipollone*, 505 U.S. at 529–30).

117 *Id.* at 92 (Thomas, J., dissenting) (emphasis added).

complaining about the complexity of the *Cipollone* test and charged that "*Cipollone*'s distinctions, though clear in theory, *defy clear application*."[118] The dissent then argued, citing *Swift*, that "[t]he Court should not retain an interpretive test that has proved incapable of implementation."[119] "Stare decisis considerations carry little weight," the dissent argued, "when an erroneous 'governing decision' has created an 'unworkable legal' regime."[120] For the dissenters, the jurisprudential messiness of the *Cipollone* test should have spelled its doom, particularly given that *Cipollone* was a plurality opinion.[121]

Another recent case in which the Court used the anti-messiness principle to reject the application of a relevant, though not quite controlling, precedent is *Gross v. FBL Financial Services*.[122] *Gross* concerned whether the Age Discrimination in Employment Act (ADEA)[123] permits age discrimination to be proved—or at least the burden of proof shifted to the employer—if the plaintiff introduces evidence showing that age was a "motivating factor" in the employer's decision. The ADEA's anti-discrimination provisions were modeled on Title VII of the Civil Rights Act,[124] and a plurality of the Supreme Court previously held, in *Price Waterhouse v. Hopkins*, that "motivating factor" or "mixed motives" evidence sufficed to show discrimination under Title VII.[125] Although the plurality opinion was not initially considered controlling,[126] the 1991 Civil Rights Act essentially codified the "motivating factor" approach for Title VII cases a few years later.[127]

Despite the parity between the ADEA and Title VII, a majority of the Court refused, in *Gross*, to apply the motivating factor construction to the ADEA. *Gross* distinguished the ADEA from Title VII, arguing, *inter alia*, that the burden of persuasion is different for the ADEA

118 *Id.* at 97 (emphasis added) (quoting Altria Grp. v. Good, 436 F. Supp. 2d 132, 142 (Me. 2006)).

119 *Id.* at 97 (citing Swift & Co. v. Wickham, 382 U.S. 111 (1985)).

120 *Id.* at 98 (citation omitted).

121 *Id.* at 96.

122 129 S. Ct. 2343 (2009).

123 29 U.S.C. § 621 (2006).

124 490 U.S.C. § 228 (2006).

125 490 U.S. 228, 258 (1989).

126 Justice O'Connor's concurring opinion, which provided the fifth vote in the case, generally was considered the controlling opinion in *Price Waterhouse*. *See, e.g.*, Fakete v. Aetna, Inc., 308 F.3d 335, 337 n.2 (3d Cir. 2002). Justice O'Connor's concurrence interpreted Title VII to require a plaintiff to show "direct" evidence that a discriminatory motive played a "substantial" role in the employer's decision. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

127 42 U.S.C. §§ 2000–2002(m) (2006).

than it is for Title VII and that Congress had treated the two statutes differently when it expressly endorsed the *Price Waterhouse* plurality's acceptance of "motivating factor" evidence in its 1991 amendments to Title VII, without simultaneously amending the ADEA in the same manner.[128] *Gross* then turned to anti-messiness arguments, declaring that "it has become evident in the years since [*Price Waterhouse*] was decided that *its burden-shifting framework is difficult to apply*. For example, in cases tried to a jury, *courts have found it particularly difficult* to craft an instruction to explain its burden-shifting framework."[129] Given the problems experienced in applying *Price Waterhouse*'s framework, the majority argued, it made no sense to extend that framework to the ADEA.

Justice Stevens's dissenting opinion in *Gross* insisted that *Price Waterhouse* directly governed construction of the ADEA and lamented the majority's "utter disregard of our precedent and Congress's intent."[130] The dissent dismissed the majority's anti-messiness concerns on the ground that Congress's express endorsement of the "motivating factor" framework in its 1991 amendments to Title VII should trump any anti-messiness objections regarding that construction.[131]

Although both *Altria* and *Gross* involved the overruling (or advocated overruling) of plurality opinions rather than more firmly entrenched precedents, when viewed along with *Swift*, *Gulfstream*, and *Moragne*, they demonstrate the established role that anti-messiness concerns play in the reconsideration of prior precedents. The background norm is powerful enough that it can justify setting aside rule of law concerns—or, put differently, it is on a par with rule of law concerns and can trump the concern for stability of legal rules. Two things bear noting here. First, every stare-decisis-defeating application of the anti-messiness principle discussed in this Section involved an implementation test rather than an ordinary "what does X phrase mean?" interpretation of a statute. This makes sense; it may well be easier, and involve less embarrassing back-pedaling, for the Supreme

128 *Gross*, 129 S. Ct. at 2349.

129 *Id.* at 2352 (emphasis added).

130 *Id.* at 2353–54 (Stevens, J., dissenting) ("That the Court is construing the ADEA rather than Title VII does not justify this departure from precedent. The relevant language in the two statutes is identical, and we have long recognized that our interpretations of Title VII's language apply 'with equal force in the context of age discrimination, for the substantive provisions of the ADEA were derived *in haec verba* from Title VII.'" (internal citations and quotations omitted)).

131 *Id.* at 2356–57 ("Because Congress has codified a mixed-motives framework for Title VII cases—the vast majority of antidiscrimination lawsuits—the Court's concerns about that framework are of no moment.").

Court to overturn its own rules for implementing a statute than for it to overturn its previous conclusions about what a statutory phrase or word means. This is particularly so given that Congress's silence in response to the Supreme Court's statutory pronouncements generally is taken as a sign of legislative acquiescence in the Court's interpretation. Indeed it may be much more difficult, politically and institutionally, for the Court to declare, "No, no, no—the statute does not really mean what we said it means, even though Congress has not corrected our interpretation," than it is for the Court to state, "The test we created for implementing this statute is proving impossible for lower courts to apply, so even though Congress has not noticed the judicial confusion, it is time that we step in and fix it." In other words, the meaning of a statute is Congress's creation, with courts stepping in as Congress's agents to clarify that meaning when necessary. Consequently, judicial back-and-forth on statutory meaning runs the risk of resembling illegitimate judicial policymaking, in lieu of respect for Congress's enactments. Tests for implementing statutes, by contrast, more arguably can be said to fall to the judiciary to define, so that even if Congress has not noticed how such tests are faring in the lower courts, the Supreme Court has the authority to tweak them.

Second, there is a notable distinction between the older cases discussed in this Section—*Swift*, *Gulfstream*, and *Moragne*—and the two recent Roberts Court cases, *Altria* and *Gross*. As highlighted earlier, the former, older cases involved jurisdictional statutes and garnered widespread judicial support for the overturning of longstanding precedents based on anti-messiness concerns,[132] whereas the latter, more recent cases were ones in which the Court split down the middle over the appropriateness of overturning less stable (i.e., plurality) precedents involving substantive statutory matters (the availability of state tort claims and the ADEA). Part II.E below explores this distinction and suggests that there may be good reasons for limiting application of the anti-messiness principle to jurisdictional statutes—or at least for assigning the principle different weight in different statutory contexts.

II. Some Problems with "Anti-Messiness"

The jurisprudential appeal of the anti-messiness principle is easy to understand. Clarity, simplicity, and predictability are important rule of law values, and efficient judicial administration is a natural

132 *Gulfstream* and *Moragne* were decided unanimously; *Swift* was a 6-3 decision. *See* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Swift v. Wickham, 382 U.S. 111 (1965).

concern of courts articulating decisional rules for future application. Moreover, the idea of avoiding complex, difficult-to-administer statutory interpretations is intuitively compelling. But there are also significant dangers associated with judicial reliance on the anti-messiness principle to construe statutes. First is the principle's conceptual looseness. At least as presently employed by the Supreme Court, the principle lacks clear definition or limits and tends to be invoked in an ad hoc manner, with little weighing of systemic countervailing concerns. Second, and related to the first, is a judicial shirking problem: the Court sometimes invokes the anti-messiness principle to discard statutory constructions that it is perfectly capable of implementing, simply because they are inelegant. Third, reliance on the principle can lead to statutory constructions that prohibit only the most explicit violations of a statutory provision, allowing sophisticated actors to engage in more subtle manipulations that violate the purpose, though perhaps not the simplest reading, of the statute. Fourth, all of these potential problems are amplified by the fact that the anti-messiness principle often leads courts to reject a plausible statutory construction anticipatorily, based on ex ante predictions that it will prove difficult, indeterminate, inconsistent, or otherwise problematic to implement.

This Part discusses each of the above dangers in turn. The last Section posits that the identified dangers may be mitigated in the case of jurisdictional statutes, or statutes involving threshold questions, and suggests guiding principles for evaluating whether a particular statutory application of the anti-messiness principle is appropriate.

A. Looseness

The most prominent danger presented by the anti-messiness principle is that "messiness" is an amorphous concept, one that defies precise definition and invites subjectivity. Perhaps as a result, the Court's invocation of anti-messiness arguments has been, at least thus far, doctrinally unmoored. The Court has no established criteria for when the principle can or should be invoked, and it tends to articulate its anti-messiness arguments in an ad hoc manner, with *ipse dixit* declarations that a construction will prove difficult, beyond judicial expertise, indeterminate, or confusing often substituting for careful or rigorous analysis.

In this sense, the anti-messiness principle parallels the absurd results canon, which holds that courts may deviate from even the clearest statutory text when a given interpretation otherwise would

produce "absurd" results.[133] One problem with the absurd results canon is that whether a result is absurd often ends up being a judgment call, leaving significant discretion and room for disagreement among judges.[134] As John Manning has explained, the absurd results doctrine permits judges to decide cases "based on vaguely defined social values," rather than on sources or interpretive tools that are more immediately linked to the legislative process.[135] A similar problem seems to exist with the anti-messiness principle. Like absurdity, messiness seems to be a loose concept, based on individual jurists' gut instincts and vaguely defined notions of complexity, indeterminacy, unwieldiness, and the like.

As a result, there is a lot of rhetorical declaration in the Court's articulations of anti-messiness arguments, and little principled discussion or weighing of competing concerns. Indeed, the most common, consistent feature in the Court's articulation of anti-messiness arguments seems to be the litany-of-factual-queries device, which tends to substitute rhetorical cleverness—beating the reader over the head with a series of questions—for analytic rigor or actual evidence of messiness. The Court simply announces that an interpretation will prove messy to implement (or has proved messy to implement, in certain cases) and so should be rejected—but in so doing, it does not provide the reader with any baseline for determining when a statutory interpretation crosses the inadministrability threshold and becomes too practically difficult, indeterminate, or confusing to adopt. Without such a baseline, there is no way for the public, legislature, or other actors to keep the Court honest, or to check its invocation of the principle. We are simply supposed to defer to the Court's judgment that an interpretation has crossed the line, even when the members of the Court themselves disagree about this and even when the Court declares this in one sentence with no further explanation.

133 *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 986 (1995). For examples of cases in which courts have applied the absurd results canon to avoid otherwise clear statutory text, see Clinton v. City of New York, 524 U.S. 417, 429 (1998); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454–55 (1989); Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731, 735 (1967); United States v. Brown, 333 U.S. 18, 27 (1948); Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 333 (1938); Sorrells v. United States, 287 U.S. 435, 447–49 (1932); United States v. Katz, 271 U.S. 354, 362 (1926); Hawaii v. Mankichl, 190 U.S. 197, 213–14 (1903); Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1892); United States v. Kirby, 74 U.S. 482 (1868).

134 *See, e.g.*, Manning, *supra* note 133, at 2443 (characterizing as "openly legislative" the "nature of the discretion" the doctrine confers on judges). R

135 *Id.* at 2392.

To some extent, looseness is a problem from which all interpretive canons based on background norms suffer. That is, almost all background-norm-based canons leave significant room for judicial policymaking and selectivity about when to invoke the norm, while providing little in the way of guidelines to restrain judges. They are, as Justice Scalia has noted, akin to placing a "thumb of indeterminate weight" on one side of the balance.[136] On the one hand, given that the looseness problem is so endemic, one might conclude that perhaps we should not worry about it any more in the context of the anti-messiness principle than we do when considering other background norm-based presumptions. On the other hand, however, the looseness and lack of rigor attendant to the anti-messiness principle are compounded by the fact that the Court, when invoking anti-messiness arguments, does so with an air of definitiveness and neutrality. While most other background norms are avowedly policy oriented—e.g., the rule of lenity,[137] the rule that remedial statutes are to be liberally construed,[138] or the rule that statutes dealing with Native Americans' rights are to be resolved in favor of Native Americans[139]—the Court's anti-messiness arguments come cloaked with the imprimatur of administrative necessity and impartiality. Moreover, the Court's decisions about when to invoke the anti-messiness principle in its statutory constructions—and about how thoroughly to explain the need for messiness avoidance in a particular context—seem much more variable than does its reliance on other background norms.

B. Judicial Competence

As some of the cases discussed earlier demonstrate, the Court sometimes uses anti-messiness arguments to reject statutory constructions that require factual inquiries which judges are well equipped to conduct. In *Richlin*, *Allen*, and *Negusie*,[140] for example, the Court (or concurrence, in *Negusie*) used the anti-messiness principle to reject statutory readings that would have entailed factual inquiries of a kind which lower courts regularly engage in under other statutes and in

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136 *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION 28 (1997).

137 The rule holds that any ambiguities in a criminal statute must be resolved in favor of the defendant. *See, e.g.*, United States v. Hayes, 555 U.S. 415 (2009); United States v. Santos, 553 U.S. 507 (2008); McNally v. United States, 483 U.S. 350 (1987); United States v. Bass, 404 U.S. 336, 347–49 (1971).

138 *See, e.g.*, Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

139 *See, e.g.*, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766–68 (1985).

140 *See supra* Part I.B.2.

other areas of the law. Such use of the principle is a little disconcerting, as courts—particularly lower courts—are supposed to be fact-finders. Indeed, if the factual inquiries necessitated by a particular construction are clearly laid out, and the litigants do their job in marshaling evidence, then it seems very much within the judiciary's prescribed role to make the necessary factual determinations. No one said judging was supposed to be a cakewalk.

Indeed, the Court's readiness to dismiss plausible statutory constructions based on the presumed difficulty that lower courts will have in implementing them smacks a bit of judicial abdication. This is particularly so when the Court's opinion makes no effort to balance the benefits of messiness avoidance against the countervailing costs that result from its rejection of a particular construction. If the Court were to come out and state, for example, that "We think the administrative efficiency of our preferred construction is worth the tradeoff in reduced litigation fees that prevailing parties will be able to recover, or outweighs the possibility that some refugees who might otherwise have been eligible for asylum now will be categorically barred," then at least it would be openly discussing the consequences of its messiness avoidance, instead of simply announcing such avoidance as an unqualified necessity. There are thus two problems with the Court's current use of the practical difficulty form of anti-messiness argument: First, it is unclear that the benefit the Court obtains through this form of argument—i.e., avoidance of cumbersome factual determinations—is one that courts should be seeking irrespective of the costs. Second, and relatedly, the Court's use of this form of argument is unconstrained by any limiting principles, minimum showings, baselines, or obligation to balance countervailing considerations.

C. *Circumvention*

Another problem with the anti-messiness principle is that fact-specific, messy inquiries sometimes may be necessary to respond to regulatory arbitrage or sophisticated actors who know how to avoid the most obvious violations of statutory prohibitions. Such actors might engage in under-the-radar behavior that violates the statute but that will be discovered only if courts are willing to look beyond the surface of the statutory prohibition and engage in messy factual inquiries.[141]

The cases discussed in Part I provide ample illustration. In *Pacific Bell*,[142] for example, the Court's refusal to recognize price-squeezing

141 I thank Deborah Widiss for highlighting this problem.

142 Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009)

claims under the Sherman Act, based largely on anti-messiness concerns, ignored the possibility that sophisticated companies that know what they are doing may be able to avoid violating the simple version of the statute by eschewing typical monopolistic behavior, yet still use price squeezing to achieve the effect of monopoly power. In fact, the concurring opinion acknowledged as much, observing that the "means of illicit exclusion, like the means of legitimate competition, are myriad [and] may involve a 'course of dealing' that, even if profitable, indicates a 'willingness to forsake short-term profits to achieve an anticompetitive end' " and even explaining that "a 'price squeeze' may fall within that latter category."[143] Similarly, in *Bartlett v. Strickland*,[144] Justice Souter's dissenting opinion pointed out that the Court's refusal to read the VRA to require the creation of plausible crossover districts made it possible for states deliberately to break up naturally-occurring crossover districts and to submerge their sizeable black voting populations into majority-dominated districts, "without ever implicating . . . the VRA."[145] Likewise, in *Gross*, the majority's rejection of the mixed-motive construction of the ADEA ignored the fact that few employers these days engage in explicit, blatant age discrimination and that a more complicated implementation test therefore could be necessary to fulfill the statute's purpose.

Further, even absent sophisticated actors seeking to circumvent a statute's intended effect, the anti-messiness principle is likely, at least at times, to run counter to legislative intent. The legislative process necessarily involves rough accommodation, messiness, and compromise. Ignoring these drafting and enactment process realities and seeking to impose a simple, pristine statutory meaning at the interpretive stage therefore is a bit unrealistic. Indeed, in at least some cases, Congress may have intended the messier construction of a statute, or the messier construction may be more consistent with the statute's purpose, such that application of the anti-messiness principle would defeat Congress's intent or purpose. When the anti-messiness principle and legislative intent or purpose are thus in tension, it is doubtful that the anti-messiness principle necessarily should prevail every time. I suggest, in Part II.E below, that there might be good reason to adopt a presumption that for jurisdictional statutes and cases involving statutory implementation tests, the anti-messiness principle should carry greater weight, while for the ordinary interpretation of substantive

143 *Id.* at 458 (Breyer, J., concurring) (citations omitted).

144 129 S. Ct. 1231 (2009).

145 *Id.* at 1259 (Souter, J., dissenting).

statutory provisions, congressional intent should trump anti-messiness concerns.

D. Anticipatory Rejection

The above problems are compounded by the fact that the "anti-messiness" principle often leads the Court anticipatorily to tailor statutes and to reject plausible statutory constructions in order to avoid harms that are merely speculative. In many cases, the principle is invoked based on the Court's conclusory anticipation that a particular interpretation will prove unduly difficult to implement or will require factual inquiries that implementing courts will be unable to handle, rather than on any actual experience with implementing the construction.[146] This means that the mere possibility that a construction may prove complicated to implement is enough to derail it, even if there is nothing beyond judges' hypotheses or guesses to prove the supposed messiness.

This speculation problem is similar to one that scholars have identified with the avoidance canon. Recall that the avoidance canon instructs courts to avoid statutory interpretations that raise serious constitutional difficulties.[147] The canon has been criticized for giving judges wide rein to jettison plausible statutory constructions based on vague suppositions that a construction may come into tension with the Constitution.[148] Commentators have noted the amorphous manner

146 Such conclusory anticipation was at work, for example, in *Allen*, *Holder*, *Bartlett*, *Pacific Bell*, *Negusie*, *Richlin*, and *Kawasaki*, discussed above. *See supra* Part I.B.1–3. Other cases, not discussed in Part I.B., in which the Court invoked the anti-messiness principle to anticipatorily reject a statutory construction include Conkright v. Frommert, 130 S. Ct. 1640, 1649 (2010) (adopting a deferential standard of review for ERISA Plan Administrator's interpretation of company's retirement plan on remand after Administrator's first interpretation was rejected by the court as unreasonable, citing, *inter alia*, anti-messiness concerns including inexpertness); Anza v. Ideal Steel Co., 547 U.S. 451, 458–59 (2006) (applying practical difficulty form of anti-messiness argument to reject application of RICO based on a business competitor's tax fraud); City of Burlington v. Dague, 505 U.S. 557, 566–67 (1992) (relying, *inter alia*, on practical difficulty form of anti-messiness argument to conclude that fee-shifting statutes do not permit contingency enhancement of a fee award beyond the lodestar amount).

147 *See supra* Part I.B.1 & n.25.

148 *See, e.g.*, Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 88–90 (1996) (criticizing the canon because it "allows courts to alter drastically the legislation to protect phantom constitutional norms without ever stating that the Constitution demands the statute's rewriting"); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 83 (1995); *see also* HENRY V. FRIENDLY, BENCHMARKS 211–12 (1967) (worrying that use of the canon would become one of "evisceration and tergiversation"); RICHARD A. POSNER, THE FEDERAL COURTS 285 (1985); Harry H. Welling-

in which the Court invokes the avoidance canon, relying on it without concluding that the rejected construction necessarily would violate the Constitution.[149] In the avoidance context, critics worry about such vague, inchoate declarations of constitutional difficulty because the costs of applying the canon can be so great. That is, because the canon enables judges to rewrite clear statutory text in the name of avoiding alleged constitutional difficulties, scholars cry foul when the alleged difficulties seem overstated or insufficiently pressing. The anticipatory speculation problem in the anti-messiness context is slightly different, stemming not so much from a fear that the statutory text will be flouted without good reason,[150] but from the danger that the statute's intent or purpose will be undermined based on speculative concerns.

Some have argued that the avoidance canon should be invoked only in cases where the Court has engaged the constitutional issue and clearly determined that the rejected interpretation in fact would violate the Constitution.[151] One potential solution to the anticipatory rejection problem in the anti-messiness context would be to impose a similar limitation on application of the anti-messiness principle. For example, we might formulate the anti-messiness principle as follows: when a statute is susceptible to two or more plausible interpretations, and *it is highly probable,* (not merely possible) that one of the constructions *will prove (or has proved) unduly burdensome or impossible* for courts to implement, courts should choose the construction that avoids such undue burdens or impossibilities.

E. Jurisdictional v. Substantive Inquiries

The anti-messiness principle, as defined in this paper, is inherently concerned with judicial administration. All of the forms of anti-messiness arguments described in Part I.B are framed in terms of the difficulty that courts will have in implementing and administering a particular statutory construction. And the benefits gained through

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ton, Machinists v. Street*: Statutory Interpretation and the Avoidance of Constitutional Issues,* 1961 SUP. CT. REV. 49, 67–71 (1961).

149 *See, e.g.*, Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 400 (2005) (noting common criticism that the canon "allows a court, on the vague ground that a serious constitutional question exists, to rewrite statutes without clear limits on the revising role and without a clear demonstration that the Constitution compels rejecting the most natural interpretation of the law"); Kloppenberg, *supra* note 148, at 88–90. **R**

150 *See infra* Part III.B.

151 *See, e.g.*, FRIENDLY, *supra* note 148, at 211–12; Schauer, *supra* note 148. **R**

messiness avoidance—clarity, predictability, more efficient decision-making—are of the kind that enhance the judicial administration of statutes.[152] This focus suggests that reliance on the anti-messiness principle may be most justified, and perhaps least problematic, in construing jurisdictional statutes and addressing jurisdiction-related statutory questions. Jurisdictional statutes, after all, are designed to define the parameters of legal authority and to organize the administration of the law. Moreover, jurisdictional statutes typically deal with threshold questions, which must be answered before a court can get to the substantive issues that underlie the case. Messiness in the implementation of jurisdictional statutes thus can clog up the entire judicial system, leading to delays and confusion that interfere with the implementation of other statutes. Thus, the values served by the anti-messiness principle correspond to the purposes underlying jurisdictional statutes.

Perhaps for this reason, the Court's use of anti-messiness arguments has proved less controversial in cases involving jurisdictional statutes than it has in cases involving substantive, nonjurisdictional statutes. Of the cases discussed in Part I.B that involved jurisdictional statutes, many were decided unanimously; others were decided by wide margins even if not unanimously.[153] By contrast, cases discussed in Part I.B that involved substantive statutes were much more closely contested, with nearly two-thirds resulting in 5-4, 5-3, or plurality decisions.[154]

152 *See, e.g.*, Hertz Corp. v. Friend, 130 S. Ct. 1181, 1186 (2010) (explaining "the need for judicial administration of a jurisdictional statute to remain as simple as possible").

153 *Id.* at 1181 (reaching a unanimous decision); Morrison v. Nat'l Australia Bank, Ltd., 130 S. Ct. 2869 (2010) (reaching a 5-3-0 decision that was 5-1-2 on messiness); Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 2447 (2010) (reaching a 6-3 decision); Allen v. Siebert, 522 U.S. 3, 7 (2007) (reaching a 7-2 decision); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) (reaching a unanimous decision); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (same); Swift v. Wickham, 382 U.S. 111 (1965) (6-3). *But see* Roell v. Withrow, 538 U.S. 580 (2003) (reaching a 5-4 decision).

154 Conkright v. Frommert, 130 S. Ct. 1640 (2010) (reaching a 5-3 decision); Bartlett v. Strickland, 129 S. Ct. 1231 (2009) (reaching a 5-4 decision); Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109 (2009) (reaching a 5-4 decision); Altria Grp. v. Good, 129 S. Ct. 538 (2009) (reaching a 5-4 decision); Gross v. FBL Financial Servs., 129 S. Ct. 2343 (2009) (reaching a 5-4 decision); Negusie v. Holder, 555 U.S. 511 (2009) (Scalia, J., concurring) (reaching a 6-2-3 decision); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571 (2008) (reaching a 7-2-0 decision); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 466–68 (2006) (reaching a 7-2 decision) (invoking anti-messiness arguments to reject application of RICO to competitor's tax fraud; not discussed); Bd. of Cty. Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397 (1997) (reaching a 5-4 deci-

Further, the problems discussed in this Part seem amplified in the context of statutes involving substantive rights or prohibitions, because clarity and predictability are not the paramount concerns motivating such statutes and because messy compromises are particularly common in legislation that creates or protects substantive rights. In other words, tension is more likely to exist between anti-messiness concerns and a statute's underlying objectives when dealing with substantive statutes than with jurisdictional ones—because policy compromise, rather than judicial administration, is at the forefront of the legislature's thinking when drafting substantive statutes. Looseness, for example, is particularly problematic in the context of substantive statutes because it permits judges to interfere with the political compromises and policy judgments that underlie a statute in the name of an undefined simplicity norm. Because there are no established criteria for determining how much messiness should be fatal to a construction, let alone how messiness concerns should be balanced against other interpretive tools, intensely debated substantive statutory rights and prohibitions can be curtailed or expanded in an ad hoc manner by courts at the implementation stage, with little attention to the legislature's intent or purpose.

Judicial shirking of complex factual inquiries that courts are competent to handle also seems more problematic in the context of substantive, versus jurisdictional, statutes. If a court concludes that it is not worth expending extra judicial resources to engage in detailed factual inquiries to determine the threshold issue of which court can hear a particular claim, that seems less troubling—and less dismissive of congressional intent or individual rights—than when a court concludes that it is not worth expending extra judicial resources to determine whether a particular kind of voting or employment discrimination has been shown, or a particular kind of economic injury demonstrated. There is a difference between relying on anti-messiness concerns to decide the forum in which a litigant's claims will be heard versus to decide whether the litigants' rights are cognizable at all.

In addition, other interpretive rules and presumptions may be implicated in the context of substantive statutes that are not relevant in the construction of jurisdictional statutes—and these rules and presumptions may push in the opposite direction from anti-messiness concerns. Consider, for example, the interpretive rule that remedial

sion); Holder v. Hall, 512 U.S. 874 (1994) (reaching a 3-3-4 plurality decision); City of Burlington v. Dague, 505 U.S. 557 (1992) (reaching a 6-3 decision).

statutes are to be construed liberally[155] (ignored in *Gross*[156] and *Bartlett*[157]), the rule that ambiguities in statutes involving Indian rights should be construed in the Indians' favor,[158] the rule of lenity,[159] the rule that antitrust statutes are to be liberally construed[160] (ignored in *Pacific Bell*), or the rule that tax exemptions should be narrowly construed.[161] Such competing subject-matter-based considerations are more likely to surface in the interpretation of substantive statutes than in the interpretation of jurisdictional statutes, which are procedural in scope. To the extent that such subject-matter-based considerations point towards a statutory construction that might prove messy to implement, they caution in favor of greater prudence and balance in judicial application of anti-messiness arguments, particularly given the looseness, anticipatory rejection, and other problems identified above.

These differences between jurisdictional and nonjurisdictional statutes suggest that perhaps courts should apply the anti-messiness principle differently depending on the type of statute being interpreted. One possibility is to restrict the application of the anti-messiness principle to jurisdictional statutes, on the theory that the values served by the principle are more relevant, or more closely aligned, with the goals of such statutes. A second option might be to weigh the anti-messiness principle more heavily when applied to jurisdictional statutes, but to consider it a weaker concern—and perhaps one that ranks behind legislative intent and statutory purpose—when applied to substantive statutes.

III. THEORETICAL IMPLICATIONS

Although the use of anti-messiness arguments has gone unnoticed in the statutory interpretation literature, the principle reflects

155 *See, e.g.*, Atchison, Topeka & Santa Fe R.R. Co. v. Buell, 480 U.S. 557, 562 (1987); United States v. An Article of Drug . . . Bacto-Unidisk . . . , 394 U.S. 784, 798 (1969); Piedmont & N. Ry. Co. v. ICC, 286 U.S. 299, 311 (1932).

156 129 S. Ct. 2343 (2009).

157 129 S. Ct. 1231 (2009).

158 *See, e.g.*, Cty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766–68 (1985); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918).

159 *See, e.g.*, United States v. Hayes, 555 U.S. 415 (2009); Arthur Andersen LLP v. United States, 544 U.S. 696 (2005); Cleveland v. United States, 531 U.S. 12 (2000).

160 *See, e.g.*, Federal Mar. Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973); Perkins v. Standard Oil Co. of California, 395 U.S. 642, 646–47 (1969); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 316 (1956).

161 *See, e.g.*, United States v. Burke, 504 U.S. 229 (1992) (Souter, J., concurring); United States v. Wells Fargo Bank, 485 U.S. 351, 357 (1988).

jurisprudential concerns that are both intuitive and familiar. This Part seeks to situate the anti-messiness principle within theories of jurisprudence and statutory interpretation, identifying its theoretical corollaries as well as its points of dissonance from leading contemporary approaches. Section A discusses theoretical connections between the anti-messiness principle and general jurisprudential theories, including minimalism[162] and the rules versus standards paradigm. Chiefly, I conclude that while the anti-messiness principle has much in common with these rule-bound jurisprudential and interpretive approaches, it is less focused on eliminating judicial discretion than are such theories and does not go as far in limiting judicial balancing as these rule-bound theories would advocate. Section B explores the principle's implications for prominent theories of statutory interpretation.

A. Theories of Jurisprudence

1. Minimalism

Although messiness avoidance may seem at first to reflect a minimalist approach to judging, on closer inspection it is a distinctly maximalist,[163] rule-bound approach. Indeed, anti-messiness is conceptually opposed to the particularistic, incremental decisionmaking that minimalism champions. Minimalism advocates case-by-case adjudication and narrow decisionmaking on grounds that do not overstep the bounds of the instant case.[164] Minimalism aims not to achieve clear, certain legal rules but to avoid, or minimize, the risk of error that accompanies broad, categorical pronouncements.[165]

Minimalism thus would oppose the anti-messiness principle's rejection of statutory constructions that require fact-specific inquiries

162 Minimalism has been theorized most prominently by Cass Sunstein. *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME]; CASS R. SUNSTEIN, RADICALS IN ROBES 27–30 (2005) [hereinafter SUNSTEIN, RADICALS IN ROBES]; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) [hereinafter Sunstein, *Burkean Minimalism*]; Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) [hereinafter Sunstein, *Leaving Things Undecided*].

163 I use the term as Sunstein defines it, to refer to "those who seek to decide cases in a way that sets broad rules for the future" and who believe that "firm, clear rules, laid down in advance, are the best way" of ensuring predictability and of constraining judges. *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 162, at 9; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 49 (2004). R

164 *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 162, at 11; Sunstein, *Leaving Things Undecided*, *supra* note 162, at 90–92. R R

165 *See, e.g.*, SUNSTEIN, ONE CASE AT A TIME, *supra* note 162, at 4, 47, 49; SUNSTEIN, RADICALS IN ROBES, *supra* note 162, at 27–29. R R

and evaluations by implementing courts. It would accept the risk of potential error in the application of a statute to individual cases in exchange for the reduced risk of categorical error that could result from an absolutist construction that misses the mark.[166] Further, in contrast to the Court's application of the anti-messiness principle in cases like *Bartlett*, *Holder v. Hall*, *Gross*, and *Negusie*, minimalism would be especially committed to nuance and particularism where the statutory issue was highly controversial.[167]

Maximalism, by contrast, aspires to broad, clear, general rules.[168] It is conceptually opposed to particularism and unpredictability.[169] Maximalism would applaud the anti-messiness principle's rejection of statutory constructions that leave significant work to be performed by implementing courts, particularly where that work involves case-by-case evaluations and judicial discretion. It would second the anti-messiness principle's work in replacing unwieldy, unworkable statutory implementation tests with simpler, more predictable ones. Further, maximalism, like the anti-messiness principle, would trade the possibility of inequitable or inaccurate results in a particular case for greater systemic clarity and efficiency.[170]

But despite the theoretical consonance between the anti-messiness principle and maximalism, the anti-messiness principle often does not go as far as maximalism would advocate. This is because there is some mismatch between the focus (*bête noire*) of the anti-messiness principle and that of judicial maximalism. While the anti-messiness principle abhors and seeks to avoid layered, disorderly, complicated, time-consuming judicial fact-finding in statutory implementation, judicial maximalism abhors and seeks to minimize particularism and judicial discretion.[171] These two sets of concerns often overlap, but they are not identical.

166 *See, e.g.*, Sunstein, *Burkean Minimalism*, *supra* note 162, at 363–64; Sunstein, *Leaving Things Undecided*, *supra* note 162, at 18. R R

167 *See, e.g.*, SUNSTEIN, ONE CASE AT A TIME, *supra* note 162, at 5–6 (discussing virtues of minimalist decisionmaking when confronted with controversial issues on which the nation is divided). R

168 *See, e.g.*, SUNSTEIN, ONE CASE AT A TIME, *supra* note 162, at 9–11; Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 28 (2009); Sunstein, *Leaving Things Undecided*, *supra* note 162, at 15. R R

169 *See, e.g.*, SUNSTEIN, ONE CASE AT A TIME, *supra* note 162, at 210. R

170 *Cf. id.* at 11 (describing how maximalist Justices Scalia and Thomas push the Court to provide wide judgments and clear guidance).

171 *See, e.g.*, *id.* at 210 (describing maximalist Justice Scalia's distrust of particularism and focus on limiting judicial discretion); Sunstein, *Leaving Things Undecided*, *supra* note 162, at 15 n.48 (noting Justice Scalia's maximalist "effort to prevent highly particularistic, case-by-case judgments"). R

To illustrate, consider again the Court's opinions in *Holder v. Hall*. As we saw, the *Holder* plurality opinion invoked indeterminacy-based anti-messiness arguments to conclude that vote dilution claims based on the size of a governing body could not be brought under the VRA, because of the lack of an available benchmark for comparison. Justice Thomas's maximalist concurring opinion, joined by Justice Scalia, agreed with this construction, but would have gone much further to overrule a landmark VRA precedent, *Thornburg v. Gingles*,[172] which articulated the governing multi-factored "totality of the circumstances" test for establishing "vote dilution" claims.[173] Justice Thomas's opinion expressed great concern over the extraordinary power and discretion that courts exercise under *Gingles*'s reading of the VRA and sought categorically to eliminate vote dilution claims in order to remedy this perceived evil.[174] In other words, the anti-messiness-based plurality opinion focused on the factual determination that the proffered construction would require courts to make; whereas the maximalist concurring opinion focused on the judicial discretion produced by the Court's overarching test for implementing the VRA. Moreover, anti-messiness concerns stopped well short of where maximalism would have liked to push the law—refusing to eliminate all judicial discretion in favor of a firm, clear legal directive.

2. Rules v. Standards

The anti-messiness principle also has obvious theoretical parallels to the rules versus standards paradigm. That paradigm sets bright-line rules against flexible standards; a classic example is the choice between a rule that no one may drive over sixty-five miles per hour versus a standard that no one may drive at an excessive speed. Rules are absolute and straightforward, while standards are somewhat open ended and require further judicial evaluation in the implementation. Rules are predictable, clear, and categorical; standards require case-by-case analysis. Sunstein, who views the rules versus standards paradigm as a subset of minimalism, notes that rules operate as a "full or nearly full before-the-fact specification of legal outcomes."[175] Standards, by contrast, "leave[ ] a great deal of work to be done at the moment of application."[176] With rules, costs are incurred ex ante, in

172 478 U.S. 30 (1986).

173 Holder v. Hall, 512 U.S. 874, 944 (1994) (Thomas, J., concurring).

174 *See id.* at 913 (arguing that the current construction of the VRA treats the judiciary like "Platonic guardians" or a "centralized politburo").

175 *See* SUNSTEIN, ONE CASE AT A TIME, *supra* note 162, at 41. **R**

176 *Id.*

the setting of the legal imperative. Once a rule has been established, decisionmaking should be relatively rote. With standards, costs are incurred in the case-specific application.

The anti-messiness principle obviously has much in common with the rules side of this paradigm. It too is concerned with predictability and clarity. And it too seeks to avoid complicated, uncertain judicial analysis in the implementation of statutes. As with judicial maximalism, however, the anti-messiness principle differs in important ways from the jurisprudential preference for rules over standards. First, courts do not use the anti-messiness principle to establish clear before-the-fact specification of legal outcomes; they use it either as a "plus factor" to aid in determining the meaning of statutory words and phrases or as a reason for adopting easy-to-administer statutory implementation tests. In other words, the anti-messiness principle is concerned with simplifying the administration and implementation of statutes, not with laying down firm legal directives or eliminating case-by-case analysis.

Second, and related to the first, the anti-messiness principle sometimes is invoked to reject a messy, complicating construction *without* embracing a clear rule in its place. That is, unlike the rules versus standards paradigm, the anti-messiness principle does not necessarily involve a choice between a multi-factor test and a clear, simple one. Rather, invocation of the principle often results only in the refusal to apply a statute in a manner that will lead to complicated factual inquiries in the implementation.[177] Think again of *Holder v. Hall*, or *Bartlett v. Strickland*, in which the Court refused to interpret Section 2 of the VRA to create a cause of action based on the size of a governmental body or to require the creation of crossover districts, respectively, but in no way simplified the multi-factored, discretion-filled *Gingles* test for determining whether a voting discrimination claim has been proved.[178] The reason for this discrepancy is, again, that the anti-messiness principle is far more focused on preventing courts from engaging in intricate factual inquiries than it is on avoiding judicial balancing tests, the exercise of judicial discretion, or even

177 *See, e.g.*, Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 2447 (2010) (rejecting application of Carmack Amendment to inland portion of shipments originating overseas; no bright line rule adopted); Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009) (refusing to recognize price-squeezing claims under Sherman Act; leaving intact two-factor standard for evaluating price discrimination claims); Holder v. Hall, 512 U.S. 874 (1994) (rejecting application of VRA section 2 to size of governmental body but leaving intact standard-filled "totality of the circumstances" test for determining whether voting discrimination exists).

178 *See* Bartlett v. Strickland, 129 S. Ct. 1231 (2009); *Holder*, 512 U.S. at 874.

case-by-case analysis. The rules approach, by contrast, is highly concerned with the subjectivity of flexible standards and the discretion that such standards give implementing judges to import their own values into the decisionmaking process.[179] For example, a strict rule-bound approach would have little patience for the open-ended, standard-filled predatory pricing test applied by the Court in *Pacific Bell*; yet the *Pacific Bell* opinion applied that test without criticism, invoking anti-messiness arguments only to note that the rejected statutory reading would have required lower courts to monitor prices in both wholesale and retail markets and evaluate appropriate pricing levels—neither of which courts are qualified to do (a judicial inexpertness argument).[180]

In short, the anti-messiness principle is a less extreme decisional principle than either judicial maximalism or a rules-based approach to judging. In part, this may be because it operates as a background norm, rather than as an active, affirmative decisionmaking theory. But mostly, I think it is because anti-messiness is an implementation-focused concept concerned with the effects that particular statutory interpretations will have on the future administration of statutes, rather than an overarching philosophical approach that seeks to constrain judicial discretion.

B. *Theories of Statutory Interpretation*

Like any background norm or interpretive tool, the anti-messiness principle carries implications for statutory interpretation theory. This Part evaluates the principle in light of several prominent contemporary statutory interpretation theories. I conclude that the principle not only is a natural fit with textualism, but has the potential to augment that theoretical approach. Conversely, the anti-messiness principle is methodologically in tension with purposivism, and seems to have less appeal to purposivist than to textualist judges. Last, the anti-messiness principle is an example of pragmatic reasoning in practice, but one that may fail to live up to pragmatism's ideal vision of careful judicial balancing.

1. Textualism

Textualism is a formalist method of statutory interpretation that seeks answers from the official language of the statute and rejects judi-

179 *See, e.g.*, Overton, *supra* note 17, at 73–75; Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379, 400 (1985). R

180 *See Pac. Bell Tel. Co.*, 555 U.S. at 457.

cial inquiry into legislative history, intent, and statutory purpose.[181] It prizes clarity and predictability, both in the content of statutes and in the methodology used to interpret them. It is a rule-bound method, which aims to reduce the costs of decisionmaking so that the burden on courts and others of determining a statute's meaning is low.[182] In this sense, there is a natural consonance between textualism and the anti-messiness principle, which also serves, by eliminating difficult or uncertain judicial inquiries, to streamline statutory decisionmaking and to promote predictability.

Several common values seem to underlie both textualism and the anti-messiness principle. At the most basic level, both privilege simplicity and finiteness. Textualism aims to identify the plain meaning of a statute—i.e., the simple, basic, obvious meaning.[183] It is founded on a belief that most statutes have an easily identifiable meaning, and there is some evidence that textualist judges tend to find a plain meaning more often when interpreting statutes than do other judges.[184] Textualism also presumes that there is a correct, definitive answer to every interpretive question. It treats the interpretive process like a puzzle;[185] if the answer cannot be found through a plain reading of the text, then the dictionary, the statute's structure, and the Court's prior interpretations of the same word or phrase in other stat-

181 *See, e.g.*, SCALIA, *supra* note 136, at 25 ("*[O]f course* it's formalistic! The rule of law is *about* form."). **R**

182 *See, e.g.*, SUNSTEIN, ONE CASE AT A TIME, *supra* note 162, at 218. **R**

183 *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY 1087 (2d Collegiate ed. 1982) (listing the third meaning for the word "plain" as "clearly understood; evident; obvious" and the sixth meaning as "not complicated; simple").

184 *See, e.g.*, Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1233, 1266, 1275 & n.235 (1996) (noting that textualists believe they seldom need to defer to agency interpretations because they usually find clear meaning in the text); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) (calling himself "[o]ne who finds *more* often . . . that the meaning of a statute is apparent from its text and from its relationship with other laws"); *see also* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 250 tbl.2 (2010) (reporting empirical data showing higher rates of reference to plain meaning/text by textualist judges than by other judges during first three-and-a-half terms of the Roberts Court).

185 *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 354, 372 (1994) (describing how textualists' puzzle-solving approach often results in answers); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 779 (1995) (characterizing textualist interpretive process as analogous to solving a puzzle); *see also* Mank, *supra* note 184, at 1257 (noting textualists' conviction and certainty about their method). **R**

utes should be consulted to decipher the statute's meaning. Such bounded interpretive aids are trusted to lead the Court to the correct construction. The anti-messiness principle likewise proceeds from a presumption that statutory interpretation should be simple and straightforward, and seeks to achieve these goals by guiding the Court to avoid overly complex, cumbersome constructions and implementation tests. Further, the principle also seeks to impose finiteness on the interpretive process, rejecting statutory constructions that would force courts to engage in indeterminate, impossible, or overly confusing factual assessments to decide a statute's meaning.

On a more fundamental level, both textualism and the anti-messiness principle are motivated, in part, by a separation of powers, or institutional competence, concern with avoiding judicial lawmaking. Textualist judges and scholars regularly express concern about the judiciary's ability accurately to evaluate legislative intent and history or to identify a statute's true purpose, and argue that interpretive approaches that depend on such inquiries lend themselves far too readily to judicial lawmaking based on a judge's own sense of what the statute should mean.[186] Many of the Court's anti-messiness arguments similarly emphasize the judiciary's limitations as an Article III, rather than an Article I, actor—pointing out that judges lack the skills, authority, or capacity to make certain kinds of factual determinations and suggesting, between the lines, that it is inappropriate to delegate such determinations to them. This is most obvious with respect to the judicial inexpertness form of anti-messiness argument, but also true of the indeterminacy and the practical difficulty based anti-messiness arguments.[187]

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186 *See, e.g.*, SCALIA, *supra* note 136, at 17–18 ("The *practical* threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field."); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 89–117 (2006) (providing a deep analysis of how and why courts are institutionally prone to misreading legislative history and arguing that the better interpretive solution is deference to administrative agency interpretations); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1837–38 (1998) (arguing that Court's incompetence in evaluating legislative history in *Holy Trinity* should serve as a warning of judicial ineptness in using legislative history to interpret statutes generally). R

187 In *Bartlett*, for example, the Court clearly evinced a concern about the institutional inappropriateness of judges making "political judgments" determining how much crossover voting potential a district must possess in order to qualify for VRA protection; likewise, in *Pacific Bell*, the Court openly criticized the rejected statutory construction as one that would require judges to make economic policy judgments about when a company's terms of dealing had crossed the line into price squeezing.

Second, and related to the first, both textualism and the anti-messiness principle seem to reflect, on some level, a concern about excessive regulatory oversight. As Table 1 in Appendix A illustrates, judicial rates of reliance on the anti-messiness principle display a noticeable partisan divide, with anti-government/anti-regulation jurists more likely to embrace anti-messiness arguments and New Deal–favoring jurists more likely to reject such arguments.[188] Moreover, the Court often has invoked the anti-messiness principle to reject statutory readings that would require judicial policing of a regulated industry.[189] Textualism similarly tends to appeal to anti-government jurists and to be disfavored by New Deal–supporting jurists. Part of the reason for its appeal to anti-government jurists is that textualism can operate as a nondelegation doctrine of sorts.[190] Indeed, as Justice Scalia has noted, textualism is useful for defeating the sort of statutory ambiguity that gives agencies room to expand their regulatory author-

See Bartlett v. Strickland, 129 S. Ct. 1231, 1245 (2009); Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 440 (2009).

188 *See infra* Appendix A.

189 The Court's opinion in *Pacific Bell*, for example, decried the regulatory role that judges would be forced to play if it adopted a statutory construction recognizing price-squeezing claims under the Sherman Antitrust Act. Specifically, the Court observed that the price-squeezing construction would require judges "to act as central planners, identifying the proper price, quantity, and other terms of dealing" as well as "to police both the wholesale and retail prices to ensure that rival firms are not being squeezed." *Pac. Bell Tel. Co.*, 555 U.S. at 452–53 (internal quotations and citations omitted). Such price monitoring, the Court worried, effectively would put judges in the position of "assum[ing] the day-to-day controls characteristic of a regulatory agency." *Id.* at 453.

Similarly, in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), an anti-messiness case not discussed in Part I above, the Court had to decide whether the Racketeer Influenced and Corrupt Organizations Act (RICO) encompassed a cause of action by a business owner alleging that a competitor injured his business by failing to charge sales tax on its cash sales and using the windfall to reduce its prices. *See id.* at 455–56. The business owner argued that the competitor had submitted fraudulent state tax returns to conceal its tax fraud, and that the filing of these fraudulent returns constituted mail and wire fraud—both forms of "racketeering activity." A majority of the Court rejected this reading, arguing that proximate cause under the relevant statutory section requires "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 457. The majority justified the direct relation requirement itself by noting "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action" and warned that the RICO construction it rejected would have required courts to engage in complex market evaluations and make judgments about what portion of an injured firm's lost sales were the result of a competitor's price decrease, and what portion of the competitor's price decrease was attributable to the competitor's racketeering activity. *See id.* at 458–59.

190 *See* Lisa Schultz Bressman, Chevron*'s Mistake*, 58 DUKE L.J. 549, 611 (2009).

ity.[191] Notably, very few anti-messiness cases involve agency interpretations. I think this is because, in a sense, the anti-messiness principle checks lower courts' discretion to determine statutory meaning in application in much the same way that textualism checks administrative agencies' power to dictate how a statute will be implemented.

In practice, the cases discussed in Part I.B reveal that the synergies between textualism and the anti-messiness principle tend to play out in unexpected ways. That is, the Court tends to invoke anti-messiness arguments when the statutory text at issue is ambiguous, to help it determine whether a particular application falls within the statute's scope or to aid it in articulating a test for implementing the ambiguous word or phrase. This is not to suggest that the Court does not make anti-messiness and textual arguments alongside each other in some cases—it does—but the Court seems most inclined to invoke the anti-messiness arguments precisely when the text does not provide clear, definitive answers.[192] In other words, the Court seems to use the anti-messiness principle almost to augment, or supplement, textualism. What I mean by this is that the Court often employs anti-messiness arguments to achieve a relatively clear, simple statutory meaning even when the text lacks a plain meaning.[193] This makes sense because even when the statutory text cannot provide a clear and straightforward answer, the anti-messiness principle can—given the theoretical consonance described above—serve as a backup interpretive rule that steers the Court towards a clear and straightforward interpretation of the statute, and away from muddled, open-ended interpretations. Justice Scalia's concurring opinion in *Negusie* illustrates this backup potential well; although most of the justices concluded that the text of the INA's persecutor bar was ambiguous on the voluntariness point,[194] Justice Scalia was able, through anti-messiness

191 *See* Scalia, *supra* note 184, at 521. **R**

192 *See, e.g.*, Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 2447 (2010); Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010); Negusie v. Holder, 555 U.S. 511, 525 (2008) (Scalia, J., concurring); Roell v. Withrow, 538 U.S. 580 (2003); Holder v. Hall, 512 U.S. 874, 880 (1994).

193 *See, e.g.*, Bartlett v. Strickland, 129 S. Ct. 1231 (2009) (no crossover district requirement under the VRA); *Pac. Bell Tel. Co.*, 555 U.S. at 438 (no price squeezing claims under the Sherman Act); Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 580 (2008) (expenses and costs associated with paralegals' fees are to be recovered at the "prevailing market rate" for such fees).

194 Six of the nine justices agreed that the statutory text was ambiguous as to the applicability of the persecutor bar to persons who had been coerced into persecuting others in their home country. Justices Stevens and Breyer disagreed, arguing that the statute clearly contained an exception for coerced conduct; and Justice Thomas conversely argued that the statute unambiguously barred all persecutors, irrespective of

(and policy) arguments, to advocate for a clean, straightforward, and predictable reading of the provision.[195] The *Hertz* opinion also is illustrative: The plain meaning of the diversity jurisdiction statute's "principal place of business" language quite plausibly could be the place where a corporation's business activities take place; but it equally plausibly could be the place where the corporation's headquarters are located. Yet through application of the anti-messiness principle, the Court unanimously was able to resolve this textual ambiguity in favor of the simple, easy-to-administer headquarters reading of the statute.

Textualism has not yet acknowledged the assistance that it sometimes can receive from the anti-messiness principle. This is not terribly surprising, since the anti-messiness principle has, until now, operated in the background of the Court's interpretive practice. Indeed, given the ad hoc and doctrinally unstructured nature of the Court's anti-messiness arguments, textualists may not even be consciously aware of the subtle pull that this background norm has been exerting—or of the potential that it has to help them achieve their interpretive goals in cases where traditional textualist tools might fall short. Textualism thus could have much to gain from acknowledging the anti-messiness principle and from this Article's efforts to define and describe the principle's use.

2. Purposivism

Purposivism is an interpretive approach associated with the Legal Process movement.[196] In contrast to textualism, it advocates that jurists interpret the words of a statute by identifying the statute's purpose and then seeking the meaning that best fits with, or fulfills, that purpose.[197] Purposivism almost necessarily is inexact—because divining a statute's purpose often involves guesswork and inferences, as does choosing the interpretation that will best carry out that purpose.

Purposivism thus is likely to prove a messier approach, methodologically, than is textualism. It involves guesswork, judicial discretion, and potentially deep judicial inquiries into legislative history and other sources that might illuminate a statute's objectives. In this sense, it invites judicial determinations that are not unlike the messy

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the voluntariness or involuntariness of their conduct. *See Negusie*, 555 U.S. at 528 (Stevens, J., concurring in part and dissenting in part); *id.* at 538 (Thomas, J., dissenting).

195 *Id.* at 525 (Scalia, J., concurring).

196 *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693 (1987).

197 *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

factual inquiries rejected under the anti-messiness principle. Given purposivism's virtual embrace of messy methods to achieve its interpretive goals, messiness avoidance hardly seems a high priority for this interpretive approach. In fact, the anti-messiness principle's focus on clarity, predictability, and administrative efficiency seems to be in direct tension with purposivism's open-ended inquiry into a statute's motivating principles and its invitation to judicial speculation about the implications that such motivating principles have for the statute's meaning. Accordingly, one might expect purposivists to be less averse, jurisprudentially, to messiness-producing statutory interpretations than their textualist counterparts and correspondingly less inclined towards use of the anti-messiness principle to interpret statutes.

At the same time, however, purposivism is not *substantively* in tension with the anti-messiness principle. That is, purposivism's substantive focus on a statute's underlying objectives could well lead to a statutory construction that is straightforward and simple to administer. This was the case, for example, with some of the jurisdictional statutes discussed in Part I. Some statutes' purposes may readily be achieved through clean, uncomplicated constructions; others may require more nuanced interpretations to reach their full effect. If this is the case, then we should expect purposivist judges to embrace the messier construction in some cases and to reject it in others, as dictated by the particular statutory purpose at issue.

In practice, this halfway approach is in fact what we see. On the one hand, the theoretical dissonance between the anti-messiness principle and purposivism bears out to some extent. As Table 1 below shows, those Justices considered to be most purposivist in their approach to interpreting statutes—Justices Breyer, Stevens, and Ginsburg—also have voted to adopt messy statutory constructions more frequently than have their textualist colleagues. The Court's most textualist judges, by contrast, have embraced anti-messiness arguments in nearly every case studied in this Article. On the other hand, those jurists most committed to purposivism have, in a handful of cases, invoked or joined opinions that invoke anti-messiness arguments.[198]

198 *See infra* Table 1.

TABLE 1
ANTI-MESSINESS RELIANCE

Ratio of Anti-Messy to Messy Construction	*Kawasaki v. Regal-Beloit*	*City of Burlington v. Dague*	*Morrison v. National Australia Bank*	*Board of Comms'rs Bryan County v. Brown*	*Bartlett v. Strickland*	*Negusie v. Holder*	*Conkright v. Frommert*	Altria v. Good
Scalia (15:1)	**Anti-Messy**	**Anti-Messy**	**Anti-Messy**	Messy	**Anti-Messy**	**Anti-Messy**	**Anti-Messy**	Anti-Messy
Thomas (14:2)	**Anti-Messy**	**Anti-Messy**	**Anti-Messy**	Messy	**Anti-Messy**	**Anti-Messy**	**Anti-Messy**	Anti-Messy
Alito (12:0)	**Anti-Messy**	**N/A**	**Anti-Messy**	N/A	**Anti-Messy**	**Anti-Messy**	**Anti-Messy**	Anti-Messy
Roberts (11:0:1)	**Anti-Messy**	**N/A**	**Anti-Messy**	N/A	**Anti-Messy**	**Neither**	**Anti-Messy**	Anti-Messy
Kennedy (14:1:1)	**Anti-Messy**	**Anti-Messy**	**Anti-Messy**	Messy	**Anti-Messy**	**Neither**	**Anti-Messy**	Anti-Messy
Souter (5:6:1)	**N/A**	**Anti-Messy**	**N/A**	Anti-Messy	**Messy**	**Neither**	**N/A**	Messy
Ginsburg (4:10:1)	**Messy**	**N/A**	**Messy**	Anti-Messy	**Messy**	**Neither**	**Messy**	Messy
Breyer (5:8:1)	**Anti-Messy**	**N/A**	**Neither**	Anti-Messy	**Messy**	**Messy**	**Messy**	Messy
Stevens (5:11)	**Messy**	**Messy**	**Messy**	Anti-Messy	**Messy**	**Messy**	**Messy**	Messy
Rehnquist (2:2)	**N/A**	Anti-Messy	N/A	Messy	**N/A**	**N/A**	N/A	N/A
O'Connor (1:3)	**N/A**	**Messy**	N/A	Messy	**N/A**	N/A	N/A	N/A
Sotomayor (2:1)	**Messy**	**N/A**	N/A	**N/A**	**N/A**	**N/A**	**Messy**	**N/A**
Blackmun (0:2)	**N/A**	**Messy**	**N/A**	N/A	**N/A**	**N/A**	**N/A**	**N/A**
White (1:1)	**N/A**	Anti-Messy	**N/A**	N/A	**N/A**	**N/A**	**N/A**	**N/A**

TABLE 1 (CONTINUED)+

Ratio of Anti-Messy to Messy Constructions*	*Gross v. FBL*	Allen v. Siebert	Richlin v. Chertoff	*Anza v. Ideal Steel*	Holder v. Hall	Roell v. Withrow	Hertz v. Friend	Pacific Bell v. Linkline
Scalia (15:1)	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy
Thomas (14:2)	Anti-Messy	Anti-Messy	Anti-Messy	Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy
Alito (12:0)	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	N/A	N/A	Anti-Messy	Anti-Messy
Roberts (11:0:1)	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	N/A	N/A	Anti-Messy	Anti-Messy
Kennedy (14:1:1)	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy	Anti-Messy
Souter (5:6:1)	Messy	Anti-Messy	Anti-Messy	Anti-Messy	Messy	Messy	N/A	Messy
Ginsburg (4:10:1)	Messy	Messy	Anti-Messy	Anti-Messy	Messy	Messy	Anti-Messy	Messy
Breyer (6:7:1)	Messy	Anti-Messy	Anti-Messy	Anti-Messy	N/A	Messy	Anti-Messy	**Messy**
Stevens (5:11)	Messy	Messy	Anti-Messy	Anti-Messy	Messy	Anti-Messy	Anti-Messy	Messy
Rehnquist (2:2)	N/A	N/A	N/A	N/A	Anti-Messy	Messy	N/A	N/A
O'Connor (1:3)	N/A	N/A	N/A	N/A	Anti-Messy	Messy	N/A	N/A
Sotomayor (2:1)	N/A	N/A	**N/A**	**N/A**	N/A	**N/A**	Anti-Messy	N/A
Blackmun (0:2)	N/A	N/A	**N/A**	**N/A**	Messy	N/A	N/A	N/A
White (1:1)	N/A	N/A	**N/A**	**N/A**	Messy	N/A	N/A	N/A

+ This Table does not include *Swift*, *Gulfstream*, or *Moragne* because those three cases were decided when the membership of the Supreme Court was vastly different than for the other cases listed in the Table—making comparison of individual Justices' anti-messiness reliance across cases difficult.
* The third number in the ratio, where there is one, represents cases in which the Justice did not participate or in which he or she neither joined in an anti-messiness argument nor opted for a messy statutory construction.

At times, purposivists seem to appreciate the tension between their interpretive approach and anti-messiness arguments—though the appreciation remains vague.[199] Again, this is not surprising, given that the anti-messiness principle thus far has operated as an undefined background principle. In bringing the principle to light, this Article presents both a challenge and an opportunity for purposivism. The challenge lies in accounting for the anti-messiness principle's appeal to even the most ardent purposivists in at least some of the Court's statutory cases. As Table 1 shows, even those jurists most committed to purposivism have invoked or joined opinions that invoke anti-messiness arguments in a handful of cases.[200] Further, a few of these cases involved situations in which the statute's purpose arguably was undermined by the messiness-avoiding construction.[201] While a few anomalous cases hardly defeat purposivism's claim to authority, both the data and the theory raise important questions for purposivists regarding the costs and limits of purpose-based analysis. Purposivism could benefit from acknowledging the messiness sometimes inherent in purposive interpretation and either defining some limits on how far jurists should go in identifying and fulfilling a statute's purpose or, conversely, mounting a robust defense of messiness in statutory interpretation. The former approach might involve drawing a line between jurisdictional and substantive statutes, as this Arti-

199 *See, e.g.*, *supra* notes 130–31 and accompanying text. **R**

200 *See supra* Table 1.

201 *See supra* Table 1. In *Anza v. Ideal Steel*, for example, Justices Ginsburg, Souter, Breyer, and Stevens invoked or joined an opinion invoking anti-messiness arguments to interpret plaintiff's cause of action as falling outside of civil RICO's ambit, against Justice Thomas's argument that doing so undermined RICO's statutory purpose of "eliminat[ion] of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." *See* Anza v. Ideal Steel, 547 U.S. 451, 459–60, 474 (2006) (Thomas, J., concurring in part and dissenting in part) (quoting S. REP. NO. 91-617, at 76 (1969)). Justice Breyer's part-concurring, part-dissenting opinion explained this ruling as necessary to minimize the conflict between the purpose of RICO and the purpose of the antitrust laws, which also were implicated in the case—but the other Justices did not address the statute's purpose at all. *See id.* at 485–86 (Breyer, J., concurring in part and dissenting in part). *Compare* City of Burlington v. Dague, 505 U.S. 557, 566 (1992) (Souter, J., joining opinion that referenced anti-messiness arguments, among others, to conclude that fee-shifting statute at issue did not permit a contingency enhancement), *with id.* at 568–69 (Blackmun, J., dissenting) (citing Senate Reports to argue that majority's construction would undermine statute's purpose of enabling plaintiffs without resources to hire good attorneys). *See also* Roell v. Withrow, 538 U.S. 580, 588–89 (2003) (referencing statute's purpose in adopting messier construction); *id.* at 595–96 (Thomas, J., dissenting) (Stevens, J., joining in the dissenting opinion, invoking inconsistency form of anti-messiness argument to advocate adoption of a black-and-white explicit consent rule).

cle has suggested,[202] on the theory that anti-messiness concerns deserve greater weight in the construction of statutes designed to organize the judicial system than in other contexts. Or it might involve requiring that courts identify some basis in the statutory text or legislative history before they can allow statutory purpose to trump serious anti-messiness concerns. Conversely, purposivists might invoke the circumvention argument raised earlier in this Article[203] or provide other reasons why messiness avoidance *never* should be allowed to trump purpose-filling statutory constructions. Irrespective of how precisely purposivists respond to the practice of messiness avoidance, jurists and scholars alike stand to learn much from the conversation.

3. Pragmatism

Also referred to as public-values-based theories of statutory interpretation, pragmatic theories focus on the practical consequences and policy effects that an interpretation will have on society. One prominent pragmatist, Judge Richard Posner, has argued that the object of statutory interpretation should be to produce the best results for society, and that courts should seek to identify the best result through practical reasoning based on "facts and consequences rather than on conceptualisms and generalities."[204] Other pragmatists take slightly different approaches; Bill Eskridge, for example, argues that statutory interpreters should weigh multiple values and interpretive tools to arrive at the best reading and that statutes should be interpreted dynamically, to reflect their present societal, political, and legal contexts.[205] And Cass Sunstein has suggested a series of specific interpretive rules that courts should employ to ensure that outcomes in statutory cases reflect particular constitutional and normative principles.[206] Pragmatism lacks a clear or uniform methodology, but its vari-

202 *See supra* Part II.E.

203 *See supra* Part II.C.

204 RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73–74 (First Harvard University Press 1990); *see* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL & LEGAL THEORY 227 (1999).

205 *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); *see also* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 46 (1988) ("[S]tatutes ought to be responsive to today's world. They ought to be made to fit, as best they can, into the current legal landscape.").

206 *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV 405, 462–505 (1989).

ous strands are united—and distinguishable from textualism and purposivism—in their open emphasis on outcomes and practical consequences and their frank recognition that statutory interpretation involves a fair amount of creative policymaking by judges.

Pragmatism necessarily leaves significant discretion to judges to ascertain the best result under the circumstances of the case. Pragmatism does envision some checks upon judicial discretion—calling on judges to consider the systemic as well as the particular consequences of their decisions and to give due regard to institutional values such as impartiality and predictability.[207] In addition, pragmatists expect judges to pay attention to traditional interpretive sources such as statutory text and legislative history, along with the practical consequences of their constructions.[208]

The anti-messiness principle occupies an interesting space within pragmatism. On the one hand, it is a distinctly practical background norm, focusing on the difficulty, impossibility, indeterminacy, or inconsistency produced as a consequence of particular statutory constructions. On the other hand, the anti-messiness principle elevates one kind of practical consequence, and one public value—administrative efficiency—above all others. Traditional pragmatism, by contrast, balances many different consequences in determining the best statutory construction, including the current needs or values of society, equitable considerations, the statute's goals, and common sense, in addition to administrative concerns.[209] So while pragmatists would not object to the Court's reliance on anti-messiness concerns in interpreting statutes, they would, I think, prefer to see the principle invoked in conjunction with other practical considerations, and balanced against them—rather than treated as the sole, or most important practical consequence worth considering.

In other words, although the anti-messiness principle is itself a pragmatic, practical consequence-based interpretive tool, it is not one that bears any methodological consonance with pragmatism as an interpretive theory. On the contrary, the anti-messiness principle is

207 *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 61 (2003).

208 *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 253 (2008) (insisting that pragmatic judges usually do, and should, follow texts and precedents); Eskridge & Frickey, *supra* note 205, at 382, 384 (describing legislative history, precedent, reasoned commentary, and text as "constraining factors" that limit judicial discretion). **R**

209 *See, e.g.*, Aleinikoff, *supra* note 205, at 46; Eskridge, *supra* note 205, at 1479; Eskridge & Frickey, *supra* note 205, at 359 ("[S]tatutory interpretation will consider current values, such as ideas of fairness, related statutory policies, and (most important) constitutional values."). **R** **R**

efficiency-promoting and inquiry-limiting, whereas pragmatism is expansive and prioritizes judicial balancing over efficiency.

There may, however, be another way of understanding the anti-messiness principle's role within pragmatism. Elsewhere, I have argued that there is a distinct divide between the form of practical consequences to which different jurists give weight when interpreting statutes, and that this divide reflects a larger jurisprudential divide over the kind of coherence that different jurists prioritize in statutory interpretation.[210] Jurists who preference "legal landscape" coherence, for example, consider the primary goal of statutory interpretation to be to find the meaning that is most consistent with—and effects the least disruption in—the existing legal framework relating to the statute at issue.[211] By contrast, jurists who preference "statute-specific" coherence aim to ensure that the specific policy embodied in the individual statute is sensibly and consistently applied, both internally and over time.[212] This jurisprudential divide seems to translate into the following practical consequences divide: Legal landscape-coherence jurists seem to focus on administrability-type practical reasoning about how a particular interpretation will affect the legal system—e.g., whether it will waste judicial resources, whether it will prove impossible or burdensome to administer, and whether it will result in unclear or unpredictable rules.[213] Statute-specific coherence jurists, conversely, tend to focus on policy-constancy-type consequences, such as ensuring that the statute at issue is applied consistently over time and across like situations, that it is applied in a just manner, and that it is not given an interpretation that renders it meaningless or nonsensical.[214]

The anti-messiness principle is a classic "administrability-type" concern, emphasizing clarity, predictability, and minimal disruption of the legal system. Thus, it makes sense that the principle would appeal significantly to landscape-coherence-preferring justices like Justice Scalia and Justice Thomas.[215] Further, the fact that certain jurists tend to reference the anti-messiness principle more frequently than do others, combined with the practical consequences divide described above, suggests that pragmatism may require some tweaking as a theory. That is, pragmatism's grand vision of judges balancing and weighing multiple competing values may need to be modified to

210 *See* Krishnakumar, *supra* note 184, at 221. R
211 *Id.* at 225.
212 *Id.* at 226.
213 *Id.* at 226, 244–45.
214 *Id.* at 227, 245–46.
215 *See supra* Table 1.

take into account the practical reality that not all jurists view all practical consequences equally, and that different jurists tend to emphasize different kinds of practical concerns over others when engaging in pragmatic reasoning. What precisely this means for pragmatism is unclear—it could mean merely that pragmatism needs to acknowledge its susceptibility to this particular form of judicial policy-preference-based decision making. Or it could mean that pragmatism needs to specify, at least broadly, the kinds of practical concerns that jurists should weigh against one another when engaging in practical reasoning. Either way, the anti-messiness principle's widespread appeal both corroborates pragmatism's descriptive value and suggests that the interpretive approach operates a little less perfectly in practice than the theoretical ideal would have it.

Conclusion

The anti-messiness principle has played an undeniable and sometimes prominent role in many of the Supreme Court's statutory interpretation cases. Despite its prevalence as a background norm, however, the principle has gone unnoticed and unexamined until now. This Article has defined anti-messiness, categorized its most common forms, highlighted its potential dangers, and explored its fit with and implications for the most prominent statutory interpretation theories. It has suggested that the anti-messiness principle's appeal may depend, in part, on the jurisprudential philosophy of the jurist contemplating its application in a particular case, and that at least two of the leading statutory interpretation theories might benefit from expanding to account for the manner in which the principle is used. Throughout, this Article's primary aim has been to illuminate—so that lawyers, judges, and scholars can appreciate and evaluate the work that the anti-messiness principle performs in the Court's statutory interpretations.