The Collaborative Model of Statutory Interpretation

William D. Popkin

Indiana University Maurer School of Law, popkin@indiana.edu

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THE COLLABORATIVE MODEL OF STATUTORY INTERPRETATION

WILLIAM D. POPKIN*

The common law has been displaced by statutes, but the obsolete rhetoric of legislative will and judicial reason is still used to talk and think about the relationship between courts and statutes. We have come a long way from the time when the common law was considered superior to statutes because judge-made law embodied reason whereas statutes were considered "tyrants."1 Like the repentant sinner, however, we have switched allegiance, preferring legislative will to judicial reason. We have become heirs of the Progressive and New Deal eras, formulating the view that statutes express the enlightened scientific will of the people.2 This view fits comfortably within the traditional legislative will model of statutory interpretation. Under this view, all statutory meaning is traced either to a legislative mandate or to a legislative delegation of authority to courts to determine the statute's purpose and fill legislatively created gaps through reasoned elaboration. In the contemporary world, however, neither courts nor legislatures command sufficient respect for the claims of either judicial reason or legislative will to be accepted unreflectively as the source of statutory meaning. We need a new way to look at the relationship between courts and statutes.

This Article proposes a collaborative model of statutory interpretation. The groundwork for this model has been laid by two contemporary efforts to explain how readers approach texts. The first view is associated with tendencies within the critical legal studies movement which view all texts as dissolving into the reader's perspective.3 The second view is a

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1. See T. SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 273 (J. Pomeroy 2d ed. 1874). Sedgwick compares the common law to a "nursing father," although the irony in the original reference is apparently overlooked. The reference is to the Bible, where Moses asks God how he, as a nursing father, should deal with the afflictions God has visited upon the people. Numbers 11:12 (King James).


3. See generally Hoy, Interpreting the Law: Hermeneutical and Poststructuralist Perspectives, 58 S. CAL. L. REV. 136 (1985); Levinson, Law as Literature, 60 TEX. L. REV. 373 (1982); Comment,
constructive response to this radical critique and seeks a firm basis for the judge's interpretive role. The most complete example of the constructive response is found in Ronald Dworkin's work, which argues that judges, or at least the model judge—Hercules—can determine the right answer to interpretive problems by integrating judicial decisions into a community of principle, of which judges are the oracles.\(^4\)

The collaborative model draws on both efforts but adopts neither. It rejects the implication of the radical critique that all texts are essentially the same, subject to the reader's control. Interpretation of legal texts can be usefully compared to the interpretation of texts generally,\(^5\) but that is only the beginning of the analysis. Particular texts serve different functions, and the functions determine how the texts are interpreted while also providing the constraints within which the reader must operate. Legal and nonlegal materials are therefore interpreted differently, just as different legal documents are interpreted differently, depending on whether the document is a will, contract, treaty, constitution, or statute.\(^6\)

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5. The work of Bakhtin, stressing the dialogic nature of all speech, is especially apt. See generally BAKHTIN, ESSAYS AND DIALOGUES ON HIS WORK (G. Morson ed. 1986).

Observing similarities among different texts is not a recent phenomenon. See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 36 (1937) (similarity between the creative artist and judge); Frank, Words and Music: Some Remarks on Statutory Interpretation, 47 COLUM. L. REV. 1259, 1259-60 (1947) (same); see also Denneny, The Privilege of Ourselves: Hannah Arendt on Judgment, in HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 263 (M. Hill ed. 1979) (arguing that judicial and aesthetic decisions are so similar that, if Kant had been English, he would have observed the similarity between common law decisionmaking and aesthetic judgment); H. PITKIN, WITTGENSTEIN AND JUSTICE 232-35 (1972) (comparing political and aesthetic judgment).

6. The subjective intent of a testator, for example, is very important in interpreting a will. See Engle v. Siegel, 74 N.J. 287, 290, 377 A.2d 892, 893 (1977). But see Grey, The Hermeneutics File, 58 S. CAL. L. REV. 211 (1985). Contracts, however, are more often, though not always, interpreted by objective criteria. See E. FARNsworth, CONTRACTS, § 7.9 (1982). By contrast, interpreting a political document like a constitution requires attention to its evolving organic character. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819) ("[I]t is a constitution we are expounding.") (emphasis omitted). Whether a statute is more like a will, contract, or constitution is a major subject of this Article.

Treaties are a special problem, because it is unclear whether they are more like contracts or constitutions, compounded by the fact that they may be written in several languages. See Re Anglo-Polish Fishing: E.C. Comm'n v. United Kingdom [1985] 2 C.M.L.R. 199, 211 (the meaning of words
Science, for example, differs from law and aesthetics because facts are more of a check on the observer's conclusions. Law and aesthetics differ in that legal interpretation has a more immediate present and future political impact.

The special status of legal texts and the existence of interpretive constraints does not, however, mean that judges have the special expertise claimed by Hercules to determine the right answer based on principle. The collaborative model is more skeptical than is Dworkin's view. The judge is not a Hercules, as Dworkin would have it, but is more like Sisyphus, applying political values over and over again, without the confidence that the resulting decision reflects the right answer based on principle.

Detailed examination of how the collaborative model is applied is an important part of the argument for its adoption, because it purports to be both a good description and a normatively desirable account of reality. But we cannot start with an explanation of the collaborative model. The view that statutes are the product of legislative will is deeply ingrained in our way of thinking about statutory interpretation. It underlies such diverse perspectives on statutes as the view that statutes are a product of private interest, of private compromise, and of public deliberation. We cannot expect the collaborative model to replace the will model until we first evaluate the strengths and weaknesses of the different ways in which statutes are viewed as originating in legislative will.

Part I of this Article discusses how the idea of legislative will developed and how efforts to contrast judicial reason with legislative will fail in a treaty drafted in different languages clashed, so the court looked to the general scheme of the treaty); see generally COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, JUDICIAL AND ACADEMIC CONFERENCE (1976); Stevens, The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments: The Régime Linguistique in the Court of Justice of the European Communities, 62 NW. U.L. REV. 701 (1967) (brief review of language in international organizations).

7. Put another way, more conclusions are compatible with agreed upon facts in law and aesthetics than is usually true in science. But see Toulmin, The Construal of Reality: Criticism in Modern and Postmodern Science, in THE POLITICS OF INTERPRETATION 99, 101-06 (W. Mitchell ed. 1983) (the scientific observer's perspective affects what questions are asked and what facts look like); see also Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 209 (1970) (author is suspicious of comparing scientific and other judgments).

8. See Posner, Law and Literature: A Relation Reargued, 72 VA. L REV. 1351 (1986); cf. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 24-26 (1975) (criticizing the comparison of judge to artist); E. HIRSCH, VALIDITY IN INTERPRETATION 200-01 (1967) (law is more open-ended than literature because it applies to the future).

9. The distinction between principles and policies is criticized in Part IV. See infra notes 189-204 and accompanying text.
to justify judicial creativity. Two versions of the will model are then considered. Part II explains and criticizes both the private interest and private compromise manifestations of the concept of legislative will as private will. Part III considers an alternative to the private will concept, referred to as the public deliberation perspective on legislative will. Parts IV and V present a detailed explanation of the model and demonstrate how courts collaborate with legislatures in developing statutory law.

I. WILL, REASON, AND THE JUDICIAL ROLE

We are so accustomed to deferring to legislative will that we forget how complex the idea of "will" has been in Western thought. Individual will was discovered in the early Christian era to explain how an individual could exercise morally responsible choice. Over the centuries, debate centered on whether will is free, whether it follows or commands, how it interacts with reason and desire, and whether will, reason, and desire are different faculties. In contemporary thought, the idea of will has seemed much less problematic. For Hobbes and Locke, the modern thinkers who dominate our political philosophy, the role of will in individual choice is passive, driven by desires. The forcefulness of will, described by earlier writers, is now attributed to desire, presaging the collapse of will and desire into a simple uncomplicated concept.

In jurisprudence, a similar trend can be observed. In medieval thought, law originated in will, but there was disagreement about whether that will was rational. For Hobbes and Locke, law is will—for Hobbes it is the command of the sovereign and for Locke the decision of the majority. But the concept is not complex. The dispute is no longer about what will is like, but whose will prevails. For Hobbes, the sovereign's will prevails because of the need for law and order. For Locke, the primacy of majority will follow naturally from the primary role played by consent of the individual wills constituting the body politic. Reconciling the tension between sovereign or majority will and the will of the individual citizen was not a serious problem for Hobbes.

11. See id. passim; V. BOURKE, WILL IN WESTERN THOUGHT (1964).
14. V. BOURKE, supra note 11, at 173-79.
15. T. HOBBES, supra note 12, at 229.
because of his concern with law and order. Locke, for whom it should have been a problem, never satisfactorily resolved the conflict. This simplified view of political will reached its zenith in modern thought with Austin, for whom law was the will or command of the sovereign, indivisible and unrestrained.  

There are, of course, more complex views of political will, as exemplified by Rousseau's efforts to reconcile individual and general will. However, the more simplistic conception continues to dominate our political thought. It is unclear why that should be true in the United States, where the political tradition of separation of powers and constitutional limits makes it hard to view law as originating from an uncomplicated, willful source. Nonetheless, it is thought that willfulness describes the behavior of the one institution which comes closest to implementing popular sovereignty: the legislature.

This view of legislation has clouded efforts to understand and evaluate the judicial role in dealing with statutes. By characterizing legislation as willful and assuming that will is an uncomplicated concept, we have been forced to look for a sharply contrasting model of judicial behavior. The thought process is as follows: Legislatures act willfully; it is legitimate for them to do so because they are democratically accountable; courts cannot legitimately act this way, because they are not democratically accountable; something radically different from will must therefore justify judicial creativity. The answer provided for the judiciary is usually

19. J. Austin, The Province of Jurisprudence Determined 9-10, 15-16 (2d ed. 1970) (command as expression of desire); id. at 120, 131-39 (law comes from determined source); id. at 225-28 (sovereign incapable of legal limitation); see V. Bourke, supra note 11, at 183-84; Fiss, The Varieties of Positivism, 90 Yale L.J. 1007, 1012 (1981).

20. A. Maass, Congress and the Common Good 30 (1983); Canovan, Arendt, Rousseau, and Human Plurality in Politics, 45 J. Pol. 286, 290-92 (1983); see also H. Arendt, supra note 10, at 129-30, 160-61 (discussing the primacy of the will and Nietzsche's repudiation of the will); Cole, Introduction, J. Rousseau, The Social Contract and Discourses xlvi-I (1950) (discussing the meaning of the "general will").


"reason," but this answer always falls short because reason is not sufficiently constrained to justify judicial creativity.

An appeal is often made to community consensus to save us from the indeterminacy of reason. Different kinds of consensus are emphasized. Fiss posits agreements on rules which discipline how judges decide cases. Fish emphasizes a community of practices which underlie the rules and justify the practices. Calabresi expects courts to discern a deep community consensus or popular will, different from legislative will. It is unclear in some of these accounts whether the object of community consensus is the substantive law, the decisionmaking rules, or both. In any event, community consensus does not solve the problem. It merely provides sufficient constraints to counter the image of unbounded judicial arbitrariness. Judicial political choice, for example, is unlikely to produce either anarchy or unlimited judicial power, or to resemble the playful writer that some literary critics envision for readers of literary works. But there remains enough diversity in the community about which to reason that we must constantly return to the basic problem of trying to save judicial choice from political willfulness.


28. The fear is of "Humpty Dumptyism." L. Carroll, Through the Looking-Glass and What Alice Found There 124 (1925) (a word "means just what I choose it to mean . . . . The question is . . . which is to be master—that's all"); see also Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984) (view of legal reasoning as political rather than objective).


30. See Brest, Interpretation and Interest, 34 Stan. L. Rev. 765 (1982); Levinson, Law as Literature, 60 Tex. L. Rev. 373, 392-402 (1982).
Institutional constraints also preserve judging from being indeterminate. Life tenure, insulation from everyday politics, and collegial debate limit judicial choice. Yet, these institutional constraints still leave us uneasy. Judges at the state level, and trial judges generally, do not experience all of these constraints with the same force. In addition, the constraints of life tenure and insulation from politics could have a distinct political bias.\(^{31}\)

Skepticism about rational judicial choice is directly traceable to the Legal Realist movement of the 1920s and 1930s.\(^{32}\) Though not concerned primarily with statutes,\(^{33}\) the Legal Realists clearly perceived that courts would make political choices when interpreting statutes.\(^{34}\) The radical implications of this perception for the court’s role in statutory interpretation were soon muted, however, by the assumption that judicial choice involved only the filing of gaps created by the legislature.\(^{35}\) Statutes carried with them their own special form of constraint on judicial decision-making which was found in the words and context of each statute. Thus,

\footnotesize{31. Only collegial discussion may counteract political bias. Michelman, Self-Government, supra note 4, at 76-77; see also Minow, Justice Engendered, 101 Harv. L. Rev. 10, 70-95 (1987) (urging dialogue which recognizes multiple points of view).

32. See generally Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222 (1931) (legal reasoning is not based upon tangibles, facts, or objectivity); White, supra note 2 (replacement of sociological jurisprudence with trend toward legal realism in the early twentieth century); Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669 (1982) (discussing legal realism and critical legal scholarship theories and recommendations for alternative approaches to legal reasoning).

33. Radin was an exception. See generally Radin, A Case Study in Statutory Interpretation: Western Union Co. vs. Lenroot, 33 Calif. L. Rev. 219 (1945) (analysis of majority and dissenting opinions regarding statutory meaning) [hereinafter Radin, Case Study]; Radin, A Short Way with Statutes, 56 Harv. L. Rev. 388 (1942) (construction and interpretation of English and American statutes) [hereinafter Radin, Statutes]; Radin, Realism in Statutory Interpretation and Elsewhere, 23 Calif. L. Rev. 156 (1935) (discussion of statutory and lease interpretation); Radin, Statutory Interpretation, 43 Harv. L. Rev. 863 (1930) (history and methods of determining statutory intent) [hereinafter Radin, Statutory Interpretation]; see also K. Llewellyn, The Common Law Tradition 371-72, 521-35 (1960) (regarding methods of construing statutes); Horack, Statutory Interpretation—Light from Plowden’s Reports, 19 Ky. L.J. 211 (1931) (construing statutes according to equitable interpretation or legislative intent).

34. Radin, Case Study, supra note 33, at 227-29; Radin, Statutes, supra note 33, at 406-09; Radin, Statutory Interpretation, supra note 33, at 880-84; cf. Llewellyn, supra note 32, at 1242-43 (reader’s perspective inevitably shapes interpretation).


The nature of the gap determines the judicial role. Some delegations are very broad. The antitrust law is usually given as the prime example. Federal Hous. Admin. v. Darlington, Inc., 358 U.S.
the will model of legislation was preserved and judicial authority sanctioned. Legislative will authorized judicial choice, which picked up where the statute left off. The ideal of judicial rationality could even be salvaged, as it was in the Hart and Sacks Legal Process formulation, by assuming that judicial choice involved reasoned elaboration of legislative purpose. In this way, legislative will and judicial rationality coexisted peacefully.

This peaceful coexistence, however, did not last. The identification and filling of gaps proved to be as riddled with political choice as was the common law because the legislative will from which gaps originated.


Judge Learned Hand's image of the judge putting himself "in the place of those who uttered the words, and try[ing] to divine how they would have dealt with the unforeseen situation" should have called attention to the fact that something other than rationality was at work. Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944) (Hand, J., concurring) (emphasis added) *aff'd sub nom.* Gemso, Inc. v. Walling, 324 U.S. 244 (1945); see also Keifer & Keifer v. RFC, 306 U.S. 381, 389 (1939)(Frankfurter, J.) (intent not clear in statute's text and must be "divined").
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was too uncertain to define its own limits without judicial help. "Filling gaps" turned out to be a comforting image, resulting in a belief that judicial power was ultimately traceable to the gaps willfully created by the legislature. But courts created the gaps as well as filled them and the reasoning process by which legislative purpose was elaborated still required political choice. The soothing observation that there were constraints on judicial power in the form of words and context could not make the problem of judicial choice in dealing with statutes disappear any more than community consensus and institutional constraints could eliminate the problem in other settings. Judges have too much room to maneuver when interpreting statutes. For this reason, legislators have traditionally feared judicial interpretation.39

In summary, a simple notion of will is used to justify legislative action, leaving reason to justify judicial creativity. Once the inevitable political content of judicial reasoning is exposed, however, judicial creativity appears adrift without moorings, insufficiently limited by community consensus, institutional constraints, or statutory language and context. But the prospect of judicial reasoning "degenerating" into political choice is alarming only because our image of politics is that of unrestrained willfulness. A different image of politics would produce a less alarming image of judicial political choice. For this reason, it is important to begin consideration of the judicial role with a richer understanding of legislative will. We must consider the possibility that politics is not necessarily willful, at least not in the uncomplicated way to which we have become accustomed. Given this possibility, judicial escape from politics seems less urgent, and the possibility of a politics of judging in which courts and legislatures collaborate to produce statutory meaning can be seriously contemplated. There are, of course, differences between how legislatures and courts make choices. These differences are based on their respective abilities to make technically sound decisions,40 to apply fair rules that compensate for retroactive impact,41 to design institutions

39. J. MERRYMAN, THE CIVIL LAW TRADITION 7-8, 58-59 (2d ed. 1985) (Justinian and Napoleon feared commentators); Pound, Sources and Forms of Law, 22 NOTRE DAME LAW. 1, 72 (1946) (Frederick the Great required interpretations to be referred to a royal commission); see also Freund, Interpretation of Statutes, 65 U. Pa. L. REV. 207, 208-09 (1917) (historical trend of legislature to forbid judicial interpretation).
to enforce fair results,\textsuperscript{42} to draw lines,\textsuperscript{43} and to adapt to change,\textsuperscript{44} although these differences are often exaggerated.\textsuperscript{45} However, these differences have nothing to do with sharply contrasting mental capacities like will and reason.\textsuperscript{46} The "smell of the lamp" by which judges work and the "smoke-filled room" inhabited by politicians have more in common than we suppose.\textsuperscript{47}

In order to understand the judicial role in dealing with statutes, the shortcomings of the will model of legislation must be examined. Only then can a collaborative judicial role for determining statutory meaning be constructed. To do that, we must first consider the ways in which legislation might be willful and why these perspectives on legislation are faulty. We can then appreciate the more complex collaborative role played by courts in statutory interpretation.

\section*{II. LEGISLATIVE WILL AS PRIVATE WILL}

The phrase "legislative will" has two common meanings. The most common meaning, of which there are two versions, is that legislative will originates in private will. One version of this "private will" perspective is

\begin{itemize}
\item \textsuperscript{42} Id. at 84-86, 327 N.W.2d at 852-53; Fiss, \textit{The Supreme Court 1978 Term—Foreword: The Forms of Justice}, 93 Harv. L. Rev. 1, 54-58 (1979).
\item \textsuperscript{43} See Freund, \textit{Prolegomena to a Science of Legislation}, 13 Ill. L. Rev. 264, 269-70 (1918); \textit{see also} Friendly, \textit{Reactions of a Lawyer-Newly Become Judge}, 71 Yale L.J. 218, 225-28 (1961) (discussing line-drawing problems as applied to the nontaxability of money damages). In International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Hoosier Cardinal Corp., 383 U.S. 696, 701 (1966), the Court suggested that federal adoption of a specific statute of limitations period would be a bald "form of judicial innovation." However, in his dissent, Justice White was not troubled by courts drawing specific lines. \textit{Id.} at 712-14.
\item \textsuperscript{45} Legislatures do not always do such a good job of technical factfounding or fair rulemaking. \textit{See} Cohen, \textit{Towards Realism in Legisprudence}, 59 Yale L.J. 886, 889-94 (1950) (defects in legislative hearing process); Friendly, \textit{supra} note 44, at 801-02 (legislature has no time for "petty tinkering").
\item \textsuperscript{46} Blurring the line between will and reason in politics is analogous to blurring the line between subjective and objective truth. \textit{See} S. Cavell, \textit{MUST WE MEAN WHAT WE SAY?} 89-96 (1969); I. Kant, \textit{THE CRITIQUE OF JUDGMENT} 27-28, 30-31, 45-51, 74-77 (Haffner ed. 1951); K. Popper, \textit{OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH} 14-15, 106-22, 142-45, 192-93, 349-51 (1972).
\end{itemize}
that statutes are special interest legislation, serving only the private interests of a particular individual or group. The second version views statutes as the result of compromise among private interests. Under this view, a statute is in effect a contract negotiated publicly. In both versions, public law is private will, written in a public forum. These two versions are discussed in this Part under the headings "private interest" and "private compromise" as categories of the more general private will perspective.

The second meaning attributed to the phrase "legislative will" is that statutes are something more than an aggregation or equilibrium of private interests. Legislative will is viewed as the product of public deliberation, which is not the same thing as private compromise. Although the product of public deliberation can be described as willful, and is so described in traditions building on Rousseau's notion of "general will,\(^4\) the underlying process is not the reflection but the transformation of private will into public will. This "public deliberation perspective" of legislation is explained in Part III and provides a bridge to the collaborative model of statutory interpretation.

A. PRIVATE INTEREST

The statute which serves private interests without concern for its impact on others is the paradigm of willful legislation. It allows those with privileged access to the political process "to knock at the door of the legislature and ask that an exception be made in their particular cases, while others, less fortunate, may not be able to obtain the relief sought."\(^4\) This view of legislation is both a normative and descriptive distortion of the legislative process. Its normative value is negligible because both state and federal law discourage such statutes. Its descriptive value is limited to providing a historically accurate picture of a great deal of nineteenth Century legislation and of one type of contemporary statute, often referred to as "pork barrel legislation."\(^5\)

1. State Law

State constitutional provisions prohibiting private interest legislation were adopted in reaction to the prevalence of such statutes in the nineteenth century and to a growing belief that legislation should speak in general categories. Some state courts even applied natural law principles

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to prohibit these statutes.51 The most famous example of private interest legislation is reported in *Fletcher v. Peck*, 52 where members of the Georgia legislature were bribed to vote for a statute conveying government property to private parties.53 Even without illicit incentives, state legislatures often loaned public funds to private industry and otherwise legislated specially to provide private benefits to individuals and businesses.54 This was not the way government was supposed to work,55 however, and state constitutions were soon amended to include procedural requirements and substantive limitations to curb these practices. There was no clear distinction between the objectives of the procedural and substantive rules. Procedural requirements were expected to discourage private interest legislation as well as improve the deliberative process, and the substantive limits on private interest legislation were expected to improve legislative deliberation.56

State constitutional provisions concerning legislative procedure include various restrictions. For example, legislation has to be read three times,57 a bill cannot be passed until a specified number of days after

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52. 10 U.S. 87 (1810).
53. Id. at 130-31. Georgia declared the transfer null and void, but the Court held that the transfer was valid in an action between private parties.
54. See, e.g., Cities Serv. Co. v. Governor of Md., 290 Md. 553, 568, 431 A.2d 663, 672 (1981) (quoting Montague v. State, 54 Md. 481, 490 (1880): "In former times . . . Acts were frequently passed for the relief of named individuals, such as sureties upon official bonds, sheriffs, clerks, registrers, collectors and other public officers, releasing them sometimes absolutely, and sometimes conditionally from their debts and obligations to the State."). At one time, over half the Pennsylvania statutes took the form of "special legislation." B. Abernathy, *Constitutional Limitations on the Legislature* 47 (1959).
56. Brown v. Firestone, 382 So. 2d 654, 664 (Fla. 1980) (substantive law prohibited in appropriations bill to avoid clouding legislative mind); Dague v. Piper Aircraft Corp., 275 Ind. 520, 530-32, 418 N.E.2d 207, 213-15 (1981) (the court allowed the linking of a statute of limitations provision for product liability suits with a bill on court operations and jurisdiction, in part because the legislature was aware of what it was doing); Commonwealth v. Barnett, 199 Pa. 161, 172, 48 A. 976, 977 (1901) (the item veto discourages logrolling, which confuses and distracts the legislature); see also Ruud, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389, 391 (1958) (one subject rule meant to improve deliberative process).
57. 1 N. Singer, *Sutherland Statutory Construction*, § 10.03, at 281 (4th ed. 1985); see also McClellan v. Stein, 229 Mich. 203, 211, 201 N.W. 209, 212 (1924) (purpose of rule is to guard against hasty and impulsive legislation and encourage mature consideration of the wisdom of proposed bills).
distribution of printed copies to legislators;^{58} legislation cannot be incorporated by reference;^{59} and the title of the bill must describe its contents accurately.^{60} Interpretation of these provisions usually reflects their purpose, which is to discourage private interest legislation. For example, the prohibition on incorporating legislation by reference is interpreted to apply only when the referring statute is incomplete in itself or expressly extends another statute,^{61} not when the referring statute incorporates a well-known legal relationship established by another statute.^{62}

State constitutional provisions also limit the substantive content of statutes in order to discourage private interest legislation. These limitations include provisions prohibiting special legislation,^{63} government credit,^{64} government gifts,^{65} nonuniform taxation,^{66} and the requirement

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59. Read, Is Referential Legislation Worth While?, 25 MINN. L. REV. 261, 277 (1941). Two purposes of the rule are to prevent fraud and lack of deliberation in the legislative process.
60. Ruud, supra note 56, at 392. The purpose of the provision is to prevent smuggling a bill through the legislature with a deceptive title. See, e.g., McGuffey v. Hall, 557 S.W.2d 401, 406-07 (Ky. 1977) (law invalid when provision regarding peer review of doctors added to bill titled as dealing with health care insurance and claims); Lewis v. Captain's Quarters, Inc., 655 S.W.2d 26, 27-28 (Ky. App. 1983) (law invalid when provision regarding minimum wage for employees added to bill titled as dealing with Alcohol Beverage Control; purpose of accurate title rule is to prevent surreptitious legislation).
61. Read, supra note 59, at 278-79.
63. 2 N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION, § 40, at 179-335 (4th ed. 1986). The rules vary. A few states prohibit a special act if there is a general law on the subject. Id. at 195; Williams v. Mayor of Baltimore, 289 U.S. 36, 45 (1933). A majority of states prohibit a special law when a general law could be made applicable. See Cox v. State, 134 Neb. 751, 755, 279 N.W. 482, 485 (1938); Fairfield v. Huntington, 23 Ariz. 528, 532, 205 P. 814, 815 (1922); 2 N. SINGER, supra this note, at 195. Some constitutions also list subjects on which special laws are prohibited. See, e.g., 2 N. SINGER, supra this note, at 195.
In Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972), the court struck down a statute which helped plaintiffs injured by privately, but not publicly, owned vehicles because, unlike the equal protection clause, the prohibition of special legislation did not allow gradual extension of benefits. But see Anderson v. Wagner, 79 Ill. 2d 295, 402 N.E.2d 560 (1979) (legislative aid to medical malpractice defendants permitted).

It is more likely that special benefits will be struck down if the statute favors one competitor over another. See Cities Serv. Co. v. Governor of Md., 290 Md. 553, 569, 431 A.2d 663, 673 (1981).

The legislative articles of a state constitution usually contain a prohibition of special laws, although sometimes the state bill of rights provides a similar result. See, e.g., OR. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.").
that legislation be for a public purpose. Substantive limits, like procedural requirements, are interpreted to prevent the evils of private interest legislation. Thus, while government guarantees are prohibited by the

not usually treated as a loan of government credit because the government assumes no liability on the loan. Id. at 143-46.

65. Fairfield v. Huntington, 23 Ariz. 528, 539, 205 P. 814, 818 (1922) (upholding compensation to a named state employee injured on the job, notwithstanding provision prohibiting "donations"); Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35, 73, 161 A. 697, 709 (1932) (upholding welfare legislation for class of needy unemployed notwithstanding provision prohibiting "charitable, educational or benevolent" appropriations).


67. Examples of legislation upheld under the public purpose requirement include: Common Cause v. State, 455 A.2d 1, 16 n.17 (Me. 1983) (industrial revenue bonds); Ferch v. Housing Auth., 79 N.D. 764, 59 N.W.2d 849 (1953) (low income housing); Denver & R.G.R. Co. v. Grand County, 51 Utah 294, 170 P. 74 (1917) (aid to single mothers); see also In re Opinion of the Justices, 85 N.H. 562, 564-65, 154 A. 217, 221 (1931) (aid to all aged would not serve a public purpose; however, aid to the needy aged, as defined by property ownership, would serve a public purpose).

Examples where legislation was invalidated include: State ex rel. Walton v. Edmondson, 89 Ohio St. 351, 362, 106 N.E. 41, 44-45 (1914) (aid to the needy who are blind lacks a public purpose because a friend or relative might assist the blind person); Auditor of Lucas County v. State ex rel. Boyles, 75 Ohio St. 114, 134-35, 78 N.E. 955, 957 (1906) (aid to the needy blind serves a private rather than a public purpose).

The public purpose principle continues to limit governmental subsidization of the issuance of industrial revenue bonds. See Wilson v. Board of County Comm'rs, 273 Md. 30, 43-44, 327 A.2d 488, 495 (1974) (issuance of bonds upheld provided they were payable solely out of sources other than public funds); Kenedcott Copper Corp. v. Town of Hurley, 84 N.M. 743, 746, 507 P.2d 1074, 1077 (1973) (same); Stanley v. Dep't of Conservation & Dev., 284 N.C. 15, 28-35, 199 S.E.2d 641, 652-58 (1973) (prohibits granting tax-exempt status to private industrial revenue bonds).

The Supreme Court also flirted with a federal constitutional requirement that state spending legislation must be only for a public purpose. See Loan Ass'n v. Topeka, 87 U.S. 655, 663 (1875). However, this case has since been understood as an interpretation of state, not federal, constitutional law. See Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514 (1937); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 260 (1905) (Holmes, J., dissenting). Only in extreme cases will state expenditures fail to meet federal public purpose standards. See Carmichael, 301 U.S. at 515.

At one time, the Supreme Court adopted a public trust doctrine to prevent states from giving away state property for private benefit. See Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452-54 (1892). This doctrine was abandoned as a federal constitutional rule some years later. See Appleby v. City of New York, 271 U.S. 364, 393-95 (1926) (doctrine of Illinois Central is a statement of Illinois law).

The federal Constitution is, however, concerned with the state's public purpose when the state burdens a narrow group. Thus, when the state takes property under its eminent domain power, it must be for a public purpose, even if compensation is provided. A recent Supreme Court case suggests, however, a broad interpretation of public purpose, even when there is a taking. See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (property taken for redistribution to tenants as part of a land reform program served a public purpose). But see Price v. Philadelphia Parking Auth., 422 Pa. 317, 221 A.2d 138 (1966) (public financing of parking garage in a residential building violated the takings clause because it was primarily for building residents and not for a public purpose).
rules against government credit, direct government loans are not prohibited because only guarantees are thought to have a "seductive lure." The concept of public purpose has also evolved to include governmental subsidization of economic development, a policy which might not have been permitted in the 1870s when suspicion of such statutes was at its height. Similarly, welfare legislation for the needy is no longer an impermissible government gift, but instead is thought to implement a public purpose. Even special benefits for a railroad, once the most publicized beneficiaries of special interest legislation, now survive the prohibitions against special and nonuniform statutes, provided the railroad is of sufficient public importance.

Substantive limits on state legislation also discourage "logrolling"—the practice of building majority support through the aggregation of legislative votes for several private interest provisions. To discourage logrolling, state constitutions require that each bill address only one subject or object, that appropriations bills not contain substantive legislation, and that the governor have a veto over items in appropriations bills. The evil at which these rules are aimed is not compromise generally, but rather the pasting together of provisions which have nothing in common except their ability to build coalitions of private interests.

The interpretation of these rules reflects this concern. Thus, the governor can veto only an appropriation item, not a proviso limiting an appropriation, because vetoing a proviso is thought to allow the governor


69. See id. at 21.

70. See, e.g., Denver & R.G.R. Co. v. Grand County, 51 Utah 294, 294, 170 P. 74, 74 (1917); In re Opinion of the Justices, 85 N.H. at 564-65, 154 A. at 221 (government aid permitted if beneficiaries are truly needy, as defined by property ownership; however, aid to all the aged, not just the needy aged, would not serve a public purpose). States sometimes passed constitutional amendments in order to preempt constitutional objections. See, e.g., PA. CONST. art 3, § 29 (1874, amended 1933 & 1937) (permitting welfare benefits to needy single mothers with children, the blind, and the needy aged).

71. See Williams v. Mayor of Baltimore, 289 U.S. 36, 41-42, 45-47 (1933). The expansion of the public purpose doctrine has also relaxed the prohibition on government gifts. See, e.g., City of Phoenix v. Superior Court, 65 Ariz. 139, 145, 175 P.2d 811, 815 (1946) (public housing for war veterans permitted because there was a public purpose); Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35, 73-75, 161 A. 697, 710 (1932).

72. 1 N. SINGER, supra note 57, § 17.01, at 1; Ruud, supra note 56, at 390-91.


to spend unauthorized funds but not to discourage private interest legislation.\textsuperscript{75} Similarly, the rules against substantive legislation in appropriations bills are interpreted, not always intelligibly, to prohibit only provisions unrelated to the appropriation.\textsuperscript{76} Additionally, the one subject rule is usually liberally interpreted to allow programmatic legislation.\textsuperscript{77} Modern trends toward improvement of the state legislative

\textsuperscript{75} See Brown, 382 So. 2d at 664; Henry, 346 So. 2d at 157; State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 365, 524 P.2d 975, 981 (1974); Commonwealth v. Dodson, 176 Va. 281, 296, 11 S.E.2d 120, 127 (1940); see also Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1383-85 (Colo. 1985) (statute's specification of the revenue source for an expenditure cannot be vetoed).

An executive veto might also be struck down if it excised an integral portion of a program, even if the portion could be considered a separate appropriation item. Bengzon v. Secretary of Justice of the Philippine Islands, 299 U.S. 410, 414 (1937); Dodson, 176 Va. at 303, 11 S.E.2d at 130. The Dodson court seemed primarily concerned with the fact that the vetoed provision for a legislative director was intimately tied to other provisions.

Sometimes the veto power may be used to allow the governor to spend funds which the legislature did not explicitly appropriate. For example, opinions differ over whether the line item veto of a provision specifying how part of a larger appropriation must be spent must reduce the larger appropriation or can strike out the smaller amount, leaving the total unscathed. See Karcher v. Kean, 97 N.J. 483, 498-99; 479 A.2d 411-12 (1984), rev'd 190 N.J. Super. 197, 229, 462 A.2d 1273, 1290 (1983); see also State ex rel. Kleczka v. Conta, 82 Wis. 2d 679, 685, 708-15, 264 N.W.2d 539, 541, 550-55 (1978) The court in Kleczka permitted words, not expenditures, to be vetoed, thereby allowing the governor to rewrite legislation. This case is inconsistent with the narrow view of the executive item veto.

\textsuperscript{76} In Brown, 382 So. 2d at 664, the court held that a qualification or restriction on appropriations will be countenanced "only if it directly and rationally relates to the purpose of an appropriation" and is a "major motivating factor behind enactment." Accordingly, the legislature should view the appropriation as worthwhile only if the contingency is met, and not use the money bill to pass a law unrelated to the appropriation. Specifically, the court allowed the imposition of priorities for certain park projects in a bill funding park projects, \textit{id.} at 670, but struck down a condition on prison funding that the inmate population be reduced at one institution. \textit{id.} at 669. Similarly, in a hospital funding bill, the court upheld a requirement that a teaching hospital be constructed if the teaching hospital was already authorized, but not if the teaching facility had not been previously authorized. \textit{id.}

\textsuperscript{77} In Henry, 346 So. 2d at 157, the court permitted "qualifications, conditions, limitations, [and] restrictions" on expenditures which would not be dealt with more properly in a separate bill. Specifically, several conditions having nothing to do with the appropriations were disallowed: a prohibition on electioneering by an assistant district attorney in Orleans County in a bill appropriating salaries for district attorneys and their assistants; a prohibition on inmate transfers in a bill appropriating money to the Department of Corrections; and a prohibition on spending for subversive campus speakers in an appropriation bill for higher education. Also disallowed were requirements that only certain safety-tested equipment be bought by the Highway Safety Commission and that past due student loans be collected by institutions of higher education. The court upheld provisos that legislative committees approve agency budgets related to the appropriations, \textit{id.} at 160-61, but reserved the question of whether these provisos improperly interfered with the executive's power. In Anderson v. Lamm, 195 Colo. 437, 447-49, 579 P.2d 620, 627-29 (1978), such a proviso was found to violate both the prohibition on substantive legislation in money bills and separation of powers.

process might reduce judicial enthusiasm for enforcing these state constitutional provisions, but even here the evidence is mixed and suspicion of private interest legislation persists. In sum, the dominant tradition in state law is against private interest legislation.

2. Federal Law

The federal Constitution contains few explicit limitations on special interest legislation. It has been interpreted as being more concerned with preventing harm to narrowly defined groups rather than with statutes benefiting private interests. The modern Supreme Court's vision of the political process has implemented this view, in part, by discouraging wealth and literacy barriers to political participation and encouraging a two party system. Still, private interest legislation is suspect. The

Mich. 123, 240 N.W.2d 193 (1976) (striking down a statute containing many provisions dealing with election financing because they did not have the same object).

Ohio is the only state to treat the one subject rule as directory, not mandatory. However, in extreme cases Ohio courts will strike down a statute for violating the one subject rule. See State ex rel. Dix v. Celeste, 11 Ohio St. 3d 141, 145, 464 N.E.2d 153, 157 (1984). At least one judge would treat the rule as mandatory but interpret it leniently. See Hoover v. Board of County Comm'rs, 19 Ohio St. 3d 1, 7-8, 482 N.E.2d 575, 581 (1985) (Holmes, J., concurring).


79. For example, the enrolled bill rule, which courts invoke in order to prevent the examination of whether constitutionally required procedures have been followed, is adopted by only a minority of state courts. 1 N. SINGER, supra note 57, § 15.03, at 611-12. Moreover, Kentucky recently rejected the enrolled bill rule, thereby increasing the judicial role in monitoring state legislative procedure. See D & W Auto Supply v. Dept. of Revenue, 602 S.W.2d 420 (Ky. 1980) (rejecting enrolled bill rule); cf. McGuffey v. Hall, 557 S.W.2d 401, 407 (Ky. 1977) (time and technology have diminished the risks against which the "accurate title" provision was aimed, but the court still struck down a statute for failing to comply with this requirement).


81. Louisiana v. United States, 380 U.S. 145, 151-53 (1965) (literacy tests cannot be used to discriminate against racial minority); see also Oregon v. Mitchell, 400 U.S. 112, 131-34 (Black, J.), 145-47 (Douglas, J.), 235-37 (Brennan, White, & Marshall, J.J., concurring and dissenting), 282-84 (Stewart, J., concurring and dissenting) (1970) (Congress permitted to prohibit literacy tests where they had been used for racially discriminatory purposes, notwithstanding a lack of consensus among the Justices as to the constitutional basis for the decision). The Congress may also prohibit English literacy tests because it has a vision of a political system that does not require English literacy. Katzenbach v. Morgan, 384 U.S. 641, 653-56 (1966).

82. A pluralistic two party system is advanced by preventing states from excluding particular interests from the process, while encouraging the system to accommodate various interests within the party structure. First, state electoral districts may be structured to reflect the statewide political strengths of the two major parties, Gaffney v. Cummings, 412 U.S. 735, 751-54 (1973), but the legislature may not gerrymander to maximize one party's power. Karcher v. Daggett, 462 U.S. 725
Constitution requires that indirect taxes\textsuperscript{83} and bankruptcy laws\textsuperscript{84} be uniform and, although these rules have been interpreted to require only geographical uniformity,\textsuperscript{85} suspicion of private legislation works its way into the interpretation of the uniformity requirement.\textsuperscript{86}

(1983). However, significant adverse impact on an identifiable political group is not permitted, even if there is population equality. \textit{Id.} at 752-55 (Stevens, J., concurring).


Third, public financing of federal elections may favor the two major parties if it allows some opportunity for minor parties. Buckley v. Valeo, 424 U.S. 1, 93-104 (1976).

Fourth, the two party system may be protected by limits on ballot size, thereby discouraging frivolous parties and candidates from contesting an election, but not by rules establishing money requirements as a test of seriousness. Lubin v. Panish, 415 U.S. 709 (1974); cf. McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980) (first or left-hand column on the ballot may not be given to the party with the highest vote in last election, thus giving one of the major parties an advantage, but all independent candidates may be limited to one column).

The two party system must also be kept open to diverse interests within the party. Multi-member districts are disfavored because there is a risk of suppressing smaller political interests that would otherwise be represented. Federal courts may not adopt multi-member districts as a remedy for previously unconstitutional state electoral districts. Chapman v. Meier, 420 U.S. 1, 14-21 (1975). However, states may use multi-member districts if they do not discriminate against minority racial, ethnic, or political interests. City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (multi-member district upheld because there was no proof of discrimination against a racial or ethnic minority); Chapman v. Meier, 420 U.S. 1, 17 (1975) (state allowed to use multi-member districts if it does not discriminate against political minorities); White v. Regester, 412 U.S. 755 (1973) (multi-member districts invalid if used to discriminate against a racial minority); Whitcomb v. Chavis, 403 U.S. 124, 144 (1971) (multi-member districts upheld because there was no proof of discrimination against racial or political elements).

The major exception to the Supreme Court's efforts to encourage the political interaction of a plurality of interests appears in cases limiting what the public must be allowed to vote on. In Ball v. James, 451 U.S. 355 (1981), the Court held that voting for directors of an Agricultural Improvement and Power District could be limited to landowners because the primary and original purpose of the District was delivering water to landowners and the landowners were exclusively responsible for the payment of District bonds, even though the District in fact supplied electric power to Phoenix, Arizona and received most of its revenues from selling electricity. In Gordon v. Lance, 403 U.S. 1 (1971), the Court upheld a 60% voter referendum requirement for incurring public debt because no identifiable class was excluded.

83. \textsc{U.S. Const.} art. I, § 9, cl. 4.
84. \textsc{U.S. Const.} art. I, § 8, cl. 4.
86. \textit{See Gibbons}, 455 U.S. at 470-71 (congressional act that pertained to only one railroad held to violate the uniformity requirement of the bankruptcy clause); \textit{id.} at 473-74 (Marshall, J., concurring) (calling attention to the regional bias rather than the private interest bias of the legislation); \textit{see also} Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601-02, 607 n.14 (1982) (state held to have standing under \textit{parens patriae} for its citizens only when its interest is greater than that which would justify a private bill favoring the persons on whose behalf it is suing).
Suspicion of private interest legislation is also apparent in a variety of federal statutes and constitutional decisions dealing with the influence of money on politics. For example, members of Congress must disclose their financial dealings, and there are limits on their receipt of honoraria. Contributions to candidates can be constitutionally prohibited to avoid both actual and apparent corruption. Furthermore, expenditures by unions and for-profit corporations on federal elections are completely prohibited. Congress also discourages special interest legislation by regulating the passage of private bills. The appropriate executive department reviews proposals for private bills to make sure they conform to general policy and equity criteria and a subcommittee of the House Judiciary Committee sometimes hears the claimant and his attorney or receives affidavits if there is opposition to the claim. These rules do not prevent private interest legislation disguised as public law, but, taken together, they constitute a statement that such legislation is normatively suspect.

Moreover, some traditional private interest pork barrel legislation, such as protective tariffs and tax expenditures, has been integrated into

88. 2 U.S.C. § 31-1 (1982 & Supp. I 1984). Bribery is, of course, prohibited. United States v. Brewster, 408 U.S. 501, 525-26 (1972) (taking of bribe held to be sufficient for guilt without demonstration that alleged illegal bargain fulfilled); see also Tool Co. v. Norris, 69 U.S. 45 (1864) (bribery contract held to be against public policy); cf. Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969) (city council resolution void where one council member was financially interested in the result, even though that member's was vote was not determinative).
90. 2 U.S.C. § 441(b) (1982). Independent expenditures by corporations to support candidates are constitutionally protected if the corporation is a vehicle for amassing capital to profit, but is primarily a means of expressing its contributor's ideas. Federal Election Comm'n v. Massachusetts Citizens For Life, Inc., 107 S. Ct. 616, 627-30 (1986). Similar reasoning has been applied to political action committees. Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 493-96 (1985). Expenditures by for-profit corporations and unions might be constitutionally subject to special statutory limits because of the risk that they will not represent a minority of corporate shareholders or union members.
a broader pattern of public legislation. By 1962, tariff policy had shifted from being a paradigm of private interest logrolling to a statutory program implementing the country's international and trade regulation policy.93 Special interest tax provisions have also been scrutinized because they are listed in a tax expenditure budget.94 This contributed to the elimination in the Tax Reform Act of 1986 of a significant number of tax breaks.95 Even where logrolling continues to be a pervasive feature of federal statutes, as it does in statutes appropriating money for water works and military establishments,96 the fact that such benefits often appear in appropriations bills testifies to their low standing as substantive legislation. Internal congressional rules discourage substantive legislation in appropriations bills, reflecting the view that appropriations statutes are not a proper vehicle for adopting substantive policy.97

B. PRIVATE COMPROMISE

Private interest statutes are not widely viewed as being normatively desirable or as being a good description of most contemporary legislation. Private compromise legislation, however, is considered by both

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Not all tax expenditures can be compared to private special interest legislation. Some tax expenditures reflect a decision to use the tax law to achieve broad public policy objectives. Nonetheless, the suspicion of such tax expenditures rests to a considerable degree on concern that narrowly defined private interests receive many of the benefits.

95. See Minarik, How Tax Reform Came About, 37 TAX NOTES 1359, 1361 (1987). The changes wrought by that act are not as equitable as they seem because many special tax breaks were adopted through transition rules, which are not incorporated into the Code. See 33 TAX NOTES 75 (1986); 32 TAX NOTES 1040 (1986); 31 TAX NOTES 1059-61 (1986).

96. R. FITZGERALD & G. LIPSON, supra note 50, at 1-36.

political scientists98 and scholars of the law and economics school99 to be the legislative norm. The private compromise perspective assumes that statutes result from the clash and compromise of private interests. The image is one of two forces pushing and shoving until they produce an equilibrium, which the statute reflects. Even though the result is not private interest legislation since one interest group does not benefit to the exclusion of others,100 the private compromise and private interest perspectives on legislation are closely linked. In both perspectives, the resulting legislation is nothing more than what private parties have agreed upon. As Easterbrook states:

[Some statutes have a] reach [that] goes on expanding so long as there are unredressed objectionable results. The judge interprets omissions and vague terms in the statute as evidence of want of time or foresight and fills these gaps with more in the same vein.

[But there are other statutes which the judge treats as a contract.] He first identifies the contracting parties and then seeks to discover what they resolved and what they left unresolved. . . . A judge then implements the bargain as a faithful agent but without enthusiasm; asked to extend the scope of a back-room deal, he refuses unless the proof of the deal's scope is compelling. Omissions are evidence that no bargain was struck: some issues were left for the future, or perhaps one party was unwilling to pay the price of a resolution in its favor. Sometimes the compromise may be to toss an issue to the courts for resolution, but this too is a term of the bargain, to be demonstrated rather than presumed. What the parties did not resolve, the court should not resolve either.101

And further:

If legislation grows out of compromises among special interests, however, a court cannot add enforcement to get more of what Congress wanted. What Congress wanted was the compromise, not the objectives of the contending interests. The statute has no purpose. It


100. The distinction between "logrolling" compromise and compromise in hammering out the contents of a program is made by O. OLESZEK, CONGRESSIONAL PROCEDURES AND POLICY PROCESS 15 (2d ed. 1984); Lowi, supra note 92, at 686-715.

is designed to do what it does in fact. The stopping points are as im-
portant as the other provisions.\textsuperscript{102}

Easterbrook makes clear elsewhere that "[a]lmost all statutes are com-
promise."\textsuperscript{103} From this perspective, labor law is the result of employers
and employees pressing their own advantage but settling on a compro-
mise in which each gains and loses.\textsuperscript{104} Workers' compensation laws, for
example, are a compromise between employers agreeing to pay employ-
ees regardless of fault, and employees agreeing to accept limited liabil-
ity.\textsuperscript{105} Similarly, securities legislation balances the interests of market
investors and corporate concerns,\textsuperscript{106} and civil rights laws balance affirm-
ative action against the need for flexibility in dealing with employers and
grant recipients. Judicial creativity is justified only as a delegation of
authority from the legislative compromise, although the expectation is
that delegation is unlikely to occur because private compromise is likely
to limit discretion and set boundaries to the statute.\textsuperscript{107}

A significant feature of the private compromise perspective on legis-
lative will is its concept of the "public interest." According to this per-
spective, the public interest is merely an aggregation of private interests,
tended to overcome market failure and expand, rather than just split up
the available funds,\textsuperscript{108} or to aggregate the wills of those wanting to redis-
tribute income without allowing free-riders to let others foot the bill.\textsuperscript{109}
Morality is either excluded from the process\textsuperscript{110} or characterized as "pub-
lic sentiment."\textsuperscript{111} Indeed, there appears to be no distinctive meaning to
the term "public interest" except to refer to the number of people served
by the statute.

Another feature of the private compromise perspective is that the
judicial role is expected to be relatively simple and passive. All the court

\begin{itemize}
\item \textsuperscript{102} \textit{Id.} at 46; see also Matter of Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987) (Judge Easter-
brook describes a statute as a vector with length and direction. By contrast, the purpose of a statute
has only direction).
\item \textsuperscript{103} Easterbrook, \textit{supra} note 99, at 540.
\item \textsuperscript{104} \textit{Id.} at 543.
\item \textsuperscript{105} See Bohlen, \textit{A Problem in the Drafting of Workmen's Compensation Acts}, 25 \textit{Harv. L.
Rev.} 328 (1912).
\item \textsuperscript{106} Easterbrook, \textit{supra} note 99, at 542; Easterbrook, \textit{supra} note 101, at 46-47.
\item \textsuperscript{107} Easterbrook, \textit{supra} note 99, at 541 (most compromises lack spirit). This sounds suspi-
ciously like the presumption that private laws be narrowly construed. \textit{See} Beacon Oyster Co. v.
\item \textsuperscript{108} \textit{See} Posner, \textit{Economics, Politics, and the Reading of Statutes and the Constitution}, 49 U.
\item \textsuperscript{109} \textit{See} Posner, \textit{supra} note 108, at 265.
\item \textsuperscript{110} Easterbrook, \textit{supra} note 101, at 59-60.
\item \textsuperscript{111} \textit{See} Posner, \textit{supra} note 108, at 271.
\end{itemize}
must do is recognize the legislature’s specific intent behind the legislation and avoid the difficult task of identifying broad legislative purpose.\textsuperscript{112}

The descriptive and normative power of the private compromise perspective is more difficult to criticize than is the private interest perspective. Compromise is an accurate description of the legislative process. Additionally, resolving conflict among private interests is considered to be a normatively desirable feature of our constitutional structure, preventing majority domination of minorities and legitimating the resulting statutes.\textsuperscript{113} The descriptive and normative weaknesses of the private compromise perspective can be evaluated only by contrasting that perspective with another account of the process by which legislative will is expressed. This other perspective, which is termed “public deliberation,” is discussed in Part III. The public deliberation perspective on legislation also provides the foundation for further consideration of the collaborative model of statutory interpretation, in which statutory meaning is not the product of legislative will.

III. LEGISLATIVE WILL AS THE PRODUCT OF PUBLIC DELIBERATION

A. DESCRIBING PUBLIC DELIBERATION

The public deliberation perspective on legislative will has been described recently by Professor Maass\textsuperscript{114} as the “discussion model.”\textsuperscript{115}

\textsuperscript{112} Easterbrook, supra note 99, at 550-51. Easterbrook also argues that the concept of legislative purpose is incoherent because public choice theory reveals how voting can be manipulated by being dependent on the ordering proposals presented to voters. See id. at 547-48. He admits, however, that logrolling permits intensity to be expressed in the legislative bargaining process, thereby eliminating some of the positions that would win simply because of the order in which proposals were considered. He then retreats to an argument that the results of logrolling suppress information about how the legislature would treat situations not covered by the statute. See id. at 548. However, this conclusion simply reasserts his basic thesis, which is that the statute does not cover certain situations because its purpose is likely to be a private compromise. The basic question is precisely whether statutory coverage is limited by a private compromise.

\textsuperscript{113} But see Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 247-50 (1986) (Constitution was enacted to curb rather than promote narrow interest group behavior); Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985) (public interest transformed by legislative determination to seek public good).

\textsuperscript{114} A. MAASS, supra note 20; see also Anderson, The Place of Principles in Policy Analysis, 73 AM. POL. SCI. REV. 711 (1979) (policy evaluation should be done with an ordered set of values); Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 1106 (1981) (judges make moral decisions since legislatures are unable to engage in serious moral discourse); Fiss, supra note 42, at 16-17, 51-52 (court's role is to protect public values); Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency?, 98 HARV. L. REV. 592, 614-17 (1985) (minimizes the distinction between public and private interests).
He rejects as empirically incomplete and normatively flawed what he calls the "partisan mutual adjustment model," which is what I have labeled the "private compromise perspective." Maass contends that public law is not the result of a political process "aggregating and mutually adjusting these group interests," but instead is the result of publicly articulated decisions based on broader community interests, which are qualitatively different from decisions reached by aggregating and compromising private interests. He sees politics in a very different light than does Easterbrook:

[The public deliberation model] holds that the duty of governmental institutions is to promote the articulation by groups and individuals of their preferences for the political community, and that these preferences are likely to be different from the parochial preferences of interest groups and the preferences of individuals for their own narrow economic well-being. Instead of conducting a political process that simply aggregates and reconciles narrow group or individual interests, government conducts a process of deliberation and discussion that results in decisions that are based on broader community interests, and it designs and implements programs in accordance with these decisions.

Maass further argues that congressional leadership, congressional/executive relations, and committee/congressional relations work to achieve this broader perspective. Instead of aggregating private interests from below, politics moves from generalities to particulars as decisions filter from the community through the electoral process to the legislature and administrative agencies.

The significant point of difference between the public deliberation and both versions of the private will perspective lies in the conception of the individual. The public deliberation perspective assumes that individuals are not only in pursuit of private interest but are also capable of

115. A. MAASS, supra note 20, at 5-8, 19, 74. "Basically the general will is expressed only through deliberation of the citizens." Id. at 30; see also Michelman, Politics and Values or What's Really Wrong with Rationality Review, 13 CREIGHTON L. REV. 487, 506-10 (1979) (the relationship between politics and values is not purely economic).

116. A. MAASS, supra note 20, at 3; see also H. ARENDT, ON REVOLUTION 228-30 (1965) (U.S. Senate expected to provide public deliberation); H. ARENDT, THE RECOVERY OF THE PUBLIC WORLD 332 (M. Hill ed. 1979); Tribe, supra note 114, at 614-18 (as law is molded to fit public interests, public interests are reshaped).

117. A. MAASS, supra note 20, at 18-19.

118. Id. at 5.

119. Id. at 7-8.
adopting public purposes. The public deliberation perspective does not deny the existence of bargaining, but claims to provide a better understanding of what legislative compromise is all about. Welfare legislation is a good example. The federal food stamp program first achieved its modern form in national law as a result of logrolling between farm and urban interests. It would be misleading, however, to understand the statute creating the program as an example of the private compromise perspective. Real legislative bargaining about the first federal non-categorical welfare program would have been unheard of at an earlier time. Getting the issue onto the political agenda indicated a significant shift in the concept of public responsibility for the needy.

A similar point can be made about social insurance programs like workers' compensation, where the concerns of employers and employees are pitted against each other. The resulting statutes both extend and limit compensation in a compromise of employer and employee interests, but in a context of social responsibility that did not exist before these statutes were adopted. The mistake made by the advocates of a private compromise perspective is in seeing only part of the factual setting. Bargaining occurs about specific details within a framework of public goals, which determines which proposals will be considered in the first place. Even tariffs, which are a paradigm of federal special interest legislation, are now debated within a framework of public goals about international trade.

120. Maass cites role differentiation studies to show that people are capable of viewing themselves in more than one role. See id. at 23-24. In emphasizing a public perspective, he invokes Rousseau. Id. at 30. This is a "red flag" to those who associate such references with totalitarian imposition of general will on an unwilling public. Rousseau's statement that people must be forced to be free is the usual focus of concern. The problem is, in part, the use of the term "will," which invites tension between public willfulness and individual freedom. Maass, in any event, adopts a deliberative model of the general will. See id. at 30. He invokes Rousseau primarily to support an image of political activity that is public, not private. See M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 177-83 (1982).


122. See supra text accompanying notes 92-93. At the very least, legislators may adopt different perspectives at different times, sometimes bargaining for private interest and sometimes deliberating from a more public perspective. See W. KEEFE & M. OUGL, THE AMERICAN LEGISLATIVE PROCESS 267-68 (6th ed. 1985) (distinguishing private interest and public considerations); M. MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT 245-47 (1979) (distinguishing negotiation and deliberation); J. SUNQUIST, THE DECLINE AND RESURGENCE OF CONGRESS 447-54 (1981). Sunquist is less sanguine about the existence of public perspectives among members of Congress, but the legislative process itself, including the President's role as leader, might provide a more public point of view.
B. PUBLIC DELIBERATION VERSUS PRIVATE COMPROMISE

The public deliberation perspective provides a vantage point for criticizing the descriptive and normative claims of the private compromise perspective on legislation. An apparent strength of the private compromise perspective lies in its hardheaded, no-nonsense description of how legislation is made and in the seemingly simple task the court has in observing that process. By contrast, the court's ability to identify the public purposes of the legislation emerging from a public deliberation process is supposed to be difficult.\textsuperscript{123} This supposed strength of the private compromise perspective is more apparent than real.

First, it is misleading to suggest that it is easier for a court to identify the historical legislative intent embodied in a compromise than to determine legislative purpose. The historical compromise is one of the purposes underlying a statute and its existence and significance for statutory interpretation is no more or less elusive than other purposes which might be uncovered.\textsuperscript{124} For example, in \textit{Board of Governors v. Dimension Financial Corporation},\textsuperscript{125} the issue was whether the Federal Reserve Board acted within its authority to define banks when it included non-bank banks within its regulatory power. The statute defined banks as organizations which made "commercial loans,"\textsuperscript{126} and the Board wanted to include within that definition institutions which purchased commercial paper and certificates of deposit. The history of the statute provided evidence to support claims that the statute was private interest, private compromise, \textit{and} public goal legislation.

The evidence for a narrow private interest origin was in the legislative history, which revealed that the "commercial loan" requirement was adopted to exclude from regulation only one institution. This view of the statute supported a refusal to limit the Federal Reserve Board's expansive regulatory authority.\textsuperscript{127}

There was also evidence that the common understanding of the term "commercial loan" excluded the purchase of commercial paper and certificates of deposit. Whatever private compromise existed at the time of the statute's adoption therefore omitted the purchase of these instruments from the Board's regulatory power to include such transactions.

\textsuperscript{123} See R. DICKERSON, \textit{supra} note 8, at 89-92.
\textsuperscript{124} See Macey, \textit{supra} note 113, at 228, 239-40.
\textsuperscript{125} 474 U.S. 361 (1986).
\textsuperscript{126} \textit{Id.} at 363.
\textsuperscript{127} \textit{Id.} at 365.
Finally, the statute had a public purpose of regulating institutions engaged in banking functions, which would justify the Board’s power to regulate nonbank banks. The Court decided that the private compromise perspective provided the best insight into the statute’s meaning, stating that “[i]nvocation of the plain purpose of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.”\textsuperscript{128} But the Court’s approach was not based on the ease with which the historical compromise could be discerned. Indeed, except for the language of the statute itself, it cited no other evidence of a compromise excluding legislative concern with nonbank banks which functioned like banks.\textsuperscript{129}

Second, the Court’s expectation that private compromise shapes a statute might lead it to overlook the significant role of public purpose in the passage of a statute. For example, a private compromise perspective would anticipate that credit card interest ceilings would be defeated at the insistence of the banking lobby. In the California legislature’s debate on this issue, however, the interest ceiling proposals were defeated by a combination of those opposing government regulation and those who feared that interest limits would dry up credit for the low-income consumer, rather than by the banking lobby.\textsuperscript{130} A recent article has suggested that the mechanism which is usually considered responsible for private interest legislation might actually contribute to public purpose statutes.\textsuperscript{131} Governmental separation of powers, usually expected to fracture government authority and encourage private interest bargaining, may actually provide a context in which legislators claim individual credit for aspirational public interest lawmaking.

Third, the Court’s assertion that a statute originates in compromise often serves a public goal rather than the actual historical purpose. In \textit{Board of Governors v. Dimension Financial Corporation},\textsuperscript{132} the Court’s

\begin{itemize}
  \item \textsuperscript{128} Id. at 374.
  \item \textsuperscript{129} There was evidence that over the years Congress had made periodic amendments to the statute, refining who was being regulated. Such legislative awareness of a problem might provide a justification for leaving the definition of the scope of regulatory power to the legislature, but is not evidence that an historical compromise limited the statute’s meaning.
  \item \textsuperscript{130} W. Muir, \textit{Legislature: California’s School for Politics} 48-49 (1982).
  \item \textsuperscript{132} 474 U.S. 361 (1986).
\end{itemize}
unanimous refusal to extend agency regulatory power over nonbank banks was probably influenced as much by contemporary public policy favoring deregulation as by anything mandated by the words and context of the statute. In Washington Metropolitan Area Transit Authority v. Johnson, the Supreme Court held that a general contractor who bought workers' compensation benefits for employees of subcontractors was not liable in tort because the purpose of the workers' compensation compromise was to trade employer purchase of insurance for limited employer liability. The legislature did not, however, adopt that compromise for this type of defendant, as Justice Rehnquist pointed out in dissent. Finding such a compromise in the statute served the contemporary public purpose of extending recovery through the workers' compensation system.

The descriptive power of the private compromise perspective is therefore weak because private compromise is often hard to discern, is often an inaccurate description of the legislative process, and may even be read into a statute by the court to serve a public goal. These descriptive weaknesses are not surprising, however, because we do not really expect statutes to be private compromises. If statutes were really contracts, as the private compromise perspective suggests, retroactive legislation would be an unconstitutional impairment of contract, rather than an adjustment of public rights and responsibilities. Furthermore, the antitrust laws would not exempt efforts to influence the political process, because that process would be like a private conspiracy in restraint of trade.

The private compromise perspective is in reality a particular normative perspective on legislation which differs from the public deliberation

134. Id. at 941-42 (Rehnquist, J., dissenting). Easterbrook supra note 101, at 54 n.132, cites this case as an example of looking for and enforcing the bargain. Actually, this was a case of the Court finding what it was looking for.
135. Cf. Bennett v. Kentucky Dept. of Educ., 105 S. Ct. 1544 (1985) (federal regulations issued under a grant-in-aid program held not limited to those which most favored the recipient state). In Bennett, the state had argued that the grant-in-aid program was like a contract, to be construed most narrowly against the federal government. The Court stated:

Although we agree with the State that Title I grant agreements had a contractual aspect, the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction. Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy.

Id. at 1552 (citations omitted).
perspective in its normative implications. Although the private compromise perspective denies an active normative judicial role in statutory interpretation, it is simply a conservative version of judicial collaboration. Like any normative perspective, it helps to identify features of the historical legislative process that might otherwise be obscured and brings out normative implications that might otherwise be suppressed. Easterbrook clearly points out that the private compromise perspective derives from nineteenth century liberalism, which favored limited government. It views statutes as contained within the boundaries of private compromise in order to limit the scope of government and the role of judges. This public purpose, contained in a familiar political theory, is brought by judges to the process of statutory interpretation and is not mandated by any act of the legislature. By recognizing an assertive judicial role in statutory interpretation, the private compromise perspective opens up for consideration rival theories of government and approaches to interpretation, including the more active normative judicial role explicitly assumed by the collaborative model.

C. PUBLIC DELIBERATION AND THE JUDICIAL ROLE

The public deliberation perspective on legislation suggests weaknesses in the private compromise perspective but is ambivalent about the more active judicial role contemplated by the collaborative model. On the one hand, by rejecting the notion that politics implements private will, it softens objections to judicial political choice. On the other hand, by assuming that legislative politics can pursue public goals, it encourages courts to foster a public deliberation process in the legislature hospitable to such goals, without the courts becoming too involved in implementing political values. Proposals for a limited judicial role, which are considered in this section, are the most seductive rival to the collaborative model because they hold out the hope that neutral process-based approaches to statutes can be adopted by the courts. These approaches are still versions of the legislative will model, however, because the courts do not play an active role in making normative political choices to determine statutory meaning, but instead encourage a richer version of the legislative will model in which statutes are the product of public deliberation.

137. Easterbrook, supra note 99, at 549-50. A related point is Easterbrook's opposition to extending the life of the legislature by judicial extrapolation of purposes not clearly articulated, thereby lowering the cost to the legislature of being more careful when it legislates. Id. at 548-49.

138. It remains to be seen whether an advocate of the private compromise perspective will narrowly construe a statute when the statute itself limits, rather than expands, government power.
1. Ways of Encouraging Public Deliberation

There are various ways a court might encourage public deliberation in the legislature. First, a court might impose procedural requirements on legislatures to encourage public deliberation. State constitutions often attempt this with rules about legislative procedures and limits on substantive legislation. The Supreme Court appears to have rejected this approach to federal legislation, unless the statute impinges on a suspect classification. When a classification is suspect, a more public deliberative process within the legislature is encouraged by the judicial requirement that actual legislative goals be tested for their fit with legislatively chosen means.\(^{139}\) There is no general federal constitutional requirement that legislatures state their real purposes, however, so that courts are able to determine whether there has been deliberation about public goals and how statutory means fit those goals.\(^{140}\) Some judges are dissatisfied with these limits on judicial scrutiny of legislation. Two Supreme Court justices found legislation unconstitutional when Congress was misled about the statute’s objectives by those who allegedly bargained on behalf of one interest group,\(^ {141}\) and four justices objected to the undeliberative incorporation of standards adopted for one legislative purpose into a statute with a different purpose.\(^ {142}\) But a majority of the Court refuses to impose

\(^{139}\) See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981) (refusal to include women in draft registration).


Agency rulemaking also appears not to be subject to a general procedural due process requirement. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 523-24 (1978); Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1165 (D.C. Cir. 1979). However, a public deliberation requirement is indirectly imposed on agencies in two ways: (1) judicial deference to agency authority is determined by reference to actual agency purposes, not post hoc rationalization, Bowen v. Michigan Academy of Family Physicians, 106 S. Ct. 2133, 2138-41 (1986); Securities Indus. Ass’n v. Board of Governors, 468 U.S. 137, 143-44 (1984); and (2) judicial review to determine whether the agency rule is arbitrary or capricious requires examining the actual process by which the agency connected the facts found to the relevant policies in making a decision, Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 48-51 (1983); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); see also Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976) (agency rule violates due process when there is no considered evaluation of the fit between the likely agency purposes and the adopted rule).


\(^{142}\) Schweiker v. Wilson, 450 U.S. 221, 243-47 (1981) (Powell, J., dissenting) (mentally ill in public institutions are excluded from Social Security Insurance comfort allowance). These judges argued for a stricter standard of scrutiny, requiring a fair and substantial relation of legislative means
a constitutional requirement of public deliberation.

Second, legislative deliberation might be encouraged by allowing members of Congress to challenge violations of congressional procedures. There has been some movement in this direction. The District of Columbia Circuit Court of Appeals now routinely grants standing to members of Congress but often exercises equitable discretion not to hear the case. When it reaches the merits of the case, it is because of some offense to the legislative process, such as improper use of the pocket veto, failure to consult the Senate when abrogating a treaty, or refusal to honor a legislative veto procedure.

Cf. Barnes v. Kline, 759 F.2d 21, 25-26 (D.C. Cir. 1985) (equitable discretion exercised by court to hear challenge to President's use of interession pocket veto; veto improperly exercised), vacated sub nom., Burke v. Barnes, 107 S. Ct. 734 (1987); American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982) (granting standing to challenge an executive branch refusal to follow statutory legislative veto procedures in its capacity as a member of House Committee with veto power, but not in its capacity as member of Congress; legislative veto unconstitutional); Goldwater v. Carter, 617 F.2d 697, 701-03 (D.C. Cir. 1979) (granting standing to challenge President's termination of Taiwan Treaty; President's power upheld), vacated, 444 U.S. 96 (1979); Kennedy v. Sampson, 511 F.2d 430, 435-36 (D.C. Cir. 1974) (granting standing to challenge President's exercise of pocket veto during intrasession recess; veto improperly exercised); Mitchell v. Laird, 488 F.2d 611, 613-16 (D.C. Cir. 1973) (granting standing to challenge President's support of military operation because of effect on impeachment and appropriations decisions; case dismissed as involving political question). But see Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975) (no standing to challenge President's support of Southeast Asia military operation).

Judge Bork objects to using the equitable discretion doctrine on the ground that it gives the court "carte blanche" to decide whatever cases it wants to decide. See Barnes, 759 F.2d at 41 (Bork, J., dissenting); Vander Jagt, 699 F.2d at 1177-85 (Bork, J., concurring).

See Barnes, 759 F.2d at 25-26 (equitable discretion exercised by court to hear challenge to President's use of pocket veto); American Fed'n of Gov't Employees, 697 F.2d at 305 n.3 (President's refusal to allow legislative veto deprived committee member of right to participate in the legislative
Third, a court could encourage public deliberation through its approach to statutory interpretation. It could decide whether to give weight to traditional evidence of legislative intent, depending on whether standards of public deliberation have been met. For example, in *Fishgold v. Sullivan Drydock & Repair Corporation*, Judge Learned Hand refused to interpret a statute to incorporate an agency’s interpretation of the law, in part because the legislature had not given notice to the unions, which would have been intensely interested in whether that interpretation was valid. In *Preterm, Inc. v. Dukakis*, the court held that an appropriations statute repealed prior substantive law despite the general assumption at the time of the decision that appropriations statutes did not change substantive law. The ruling came about, in part, because of an open and thorough debate of the issue on the floor of Congress.

An imaginative proposal in this vein appears in a recent article by Professor Macey, who argues for an approach to statutory interpretation which would encourage public legislative deliberation about public goals by increasing the cost of hidden private interest statutes. He urges reviving the plain meaning approach to statutory language while Easterbrook suggests searching for the private interest lurking in the statute’s historical context. Macey expects that the language of the statute will pay homage to the public goals that statutes are supposed to serve. In addition, the reliance on plain meaning will force the legislature to be explicit if it wants to enact private interest statutes. This approach to statutory language is expected to reduce private interest legislation and encourage public deliberation.
2. Substantive Political Values and Encouraging Public Deliberation

All three approaches to encouraging public deliberation in the legislature assume that concern with the legislative process can be divorced from explicit judicial choice among substantive political values. Deference to the legislative will produced by proper procedures would therefore be salvaged as the correct approach to determining statutory meaning. However, that goal cannot be realized because of the porous nature of the barrier between substance and procedure. Both Maass and Easterbrook view the process of lawmaking as serving a particular substantive vision of government. Maass assumes that public deliberation advances public goals, while Easterbrook assumes that the process of political compromise limits government. State constitutional rules governing the legislative process are also based on the assumption that more public deliberation will affect the substantive content of legislation.\textsuperscript{149} Similarly, the three proposals for improving the legislative process described above cannot be divorced from substantive political considerations for several reasons.

First, the imposition of constitutional procedural requirements on the legislature would affect the substantive values at stake. This is illustrated by the flexibility with which the Court defines the suspect and near suspect classifications; these classifications are considered constitutional only if they meet varying standards of public deliberation. When a court requires a suspect classification to be narrowly tailored to serve a compelling governmental interest, or a near suspect classification to be substantially related to an important or legitimate governmental interest, the court is imposing a standard of public deliberation on the legislature. That standard is reflected in the court's judgment about the values implicated both by the lines drawn by the legislature and the public goals the legislature is pursuing. The stronger the offense created by the classification, the greater must be the showing of a public purpose and of legislative deliberation in thinking through the public purpose and the fit between legislative means and ends.\textsuperscript{150} The close relationship between substance and procedure is also apparent in cases purporting to impose minimum rationality standards on the legislature, but which in fact require the legislature to articulate the actual public policy goals that

\textsuperscript{149} See supra notes 51-79 and accompanying text.

\textsuperscript{150} See Note, Justice Stevens' Equal Protection Jurisprudence, 100 Harv. L. Rev. 1146, 1147-50 (1987). See also, Rostker v. Goldberg, 453 U.S. 57, 72-83 (1981) (upholding a statute excluding women from the draft, in part because of the careful attention the legislature paid to the lines it was drawing).
might justify the discriminatory treatment. Imposition of the minimum rationality standard in these cases is obviously sensitive to the substantive claims put forward by the aggrieved party.151

Second, the exercise of equitable discretion to determine when to hear claims brought by members of Congress is, as Judge Bork contends, a vehicle for deciding which substantive issues the judiciary should be concerned with and when such judicial concern is appropriate.152

Third, neutral principles of interpretation cannot be systematically correlated with the advancement of public goals. For example, Professor Macey’s assertion that deference to a statute’s plain meaning will further public goals is based on the erroneous assumption that looking behind the words will reveal the private compromises dominating the legislative process. Macey’s view accepts the empirical assumptions of the private will version of the legislative will model, even as it rejects its normative implications. In fact, public values are often furthered by rejecting plain meaning, as is demonstrated in Part V of this Article.

Moreover, Macey’s proposal puts more weight on the concept of plain meaning than that concept can bear. When courts rely on plain meaning, it is often because the plain meaning coincides with acceptable public policy. The assertion that rejecting plain meaning for policy reasons is a “rare and exceptional”153 practice is a misleading description of how judges look at statutes.154 The application of the language of the statute to the facts of the case is constantly being tested for its policy implications.

151. Note, supra note 150, at 1150-52; see, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 455 (1985) (Stevens, J., concurring) (rationality test violated when home for mentally retarded was denied a special use permit but no similar requirement was imposed on boarding homes and hospitals); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 619-23 (1985) (discrimination between new and long-time residents violates minimum rationality).

The link between substance and process is explicit in the constitutional doctrine of prior hearings, where the Court fashions remedies based in part on substantive impact, being more solicitous of welfare for the needy than of social insurance benefits. Compare Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970) (procedural due process required in order to terminate welfare benefits) with Mathews v. Eldridge, 424 U.S. 319, 341 (1976) (evidentiary hearings are not required in part because termination of disability benefits is considered less important than termination of welfare benefits).


154. A typical rival quotation is from Justice Frankfurter, dissenting in United States v. Monia, 317 U.S. 424, 431 (1943), in which he implies that equating plain words with plain meaning is a “pernicious oversimplification.” See also FBI v. Abramson, 456 U.S. 615, 625 n.7 (1982) (Justice O’Connor’s dissenting opinion would be acceptable if the Court agreed that language could be read only one way—i.e., if it had a plain meaning).
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implications. If found reasonable, the judge is likely to suppress reference to the underlying policy, citing the plain meaning and denying the existence of a potential tension between plain meaning and policy implications, but the potential tension is always there and will rise to the surface in certain cases.

For example, in Badaracco v. Commissioner, a statute provided that there was no statute of limitations if a taxpayer filed a fraudulent return. The taxpayer argued that filing a nonfraudulent return subsequent to the fraudulent return should begin a limitations period. Justice Blackmun's majority opinion held that the "plain and unambiguous" meaning of the statute was that the limitations period would never commence if a fraudulent return had been filed. This observation was sufficient to decide the case, but the Court also alluded to policy criteria that justified the result, emphasizing the problems the agency would have completing criminal fraud investigations if the statute on the civil tax claim began to run. Justice Stevens, in dissent, was convinced that the statute's meaning was not plain. He emphasized a different policy, arguing that repentant taxpayers should be encouraged to file corrected nonfraudulent returns. The majority's plain meaning approach and

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155. I am not referring here to a case where the court makes sense of gibberish, United States v. R & J Enters., 178 F. Supp. 1, 4 (D. Alaska 1959) (words omitted from criminal statute), or of historically nonsensical references, Cabell v. Markham, 148 F.2d 737, 738-39 (2d Cir. 1945) (statute meant to deal with World War II appears to refer to World War I date), aff'd, 326 U.S. 404 (1945). The discussion in the text deals with conflicts between language and policy when deferring to language would still make sense.


157. Id. at 396.

158. Id. at 397-400.

159. Id. at 401-02 (Stevens, J., dissenting) ("The plain language of § 6501(c)(1) of the Internal Revenue Code conveys a different message to me than it does to the Court."); see also Kahn, The Supreme Court's Misconstruction of a Procedural Statute—A Critique of the Court's Decision in Badaracco, 82 MICH. L. REV. 461 (1983).


161. There are many other cases where judges check the plain meaning for its policy implications. In United States v. Locke, 471 U.S. 84 (1985), Justice Stevens refused to accept the apparent senselessness of a "plain meaning" interpretation of the statute requiring notice before December 31. This would have precluded filing on December 31, which is often the last day for annual filings. An earlier filing requirement would authorize administrative taking of "the valuable property rights of hard-working, productive citizens . . ." Id. at 124 n.12 (Stevens, J., dissenting). Nor would Justice Stevens accept an interpretation of a statute protecting mail carriers that would impose severe federal criminal penalties for robbery of money from a Secret Service Agent. Garcia v. United States, 469 U.S. 70, 72, 80-90 (1984) (Stevens, J., dissenting).

In another example, Justice Powell refused to believe that Congress wanted to stop the building of a dam, despite the statute's apparent meaning. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 204-05, 210 (1978) (Powell, J., dissenting). Incredulity also played a role in other Justice Powell opinions.
the dissent's rejection of plain meaning both resulted from the attention paid to public policy implications.

D. Summary

Legislation, viewed as the product of legislative will, refers all questions of statutory meaning to what the legislature mandates or to the judicial discretion authorized by the legislature. The judicial role appears to be passive, identifying the legislative will, and creatively but rationally developing law only within boundaries set by the legislature. This view of the relationship between courts and statutes should not be adopted. The private will, private compromise, and public deliberation versions of the legislative will model all have defects to which the collaborative model responds.

First, the private interest version of the private will perspective is both descriptively and normatively flawed as a model of legislation.

Second, the private compromise perspective has significant descriptive weaknesses, despite its claim to be a realistic model of legislation, and its normative claims rest on conservative assumptions about the nature of courts and government which are not self-evident. The basic question about the judicial role in determining statutory meaning is, therefore, whether courts should bring political values to the interpretive process.

Third, the public deliberation version of the legislative will model is both descriptively and normatively more sound than either of the private


Congressional caprice in dealing unequally with apparently equal situations seemed unlikely to Justice Frankfurter. United States v. Monia, 317 U.S. 424, 446 (1943) (Frankfurter, J., dissenting). Moreover, significant changes in policy without explicit language specifying the change were looked on with suspicion by Justice Douglas. See Packard Motor Car Co. v. NLRB, 330 U.S. 485, 500 (1947) (Douglas, J., dissenting).

A sure sign that the court is checking up on the reasonableness of the plain meaning is a phrase like “[w]e cannot believe that Congress would have intended,” United States v. Skelly Oil Co., 394 U.S. 678, 686 (1969), or “[n]or will we believe. . . that Congress intended.” Western Union Tel. Co. v. Lenroot, 323 U.S. 490, 507 (1945).
will versions. Its weakness lies in suggesting that we can stop short of adopting a collaborative model. It hopes to encourage a public deliberation process within the legislature, either by mandating or policing legislative procedural standards, or by adopting interpretive rules that encourage public deliberation. Limiting the judicial role in this way still embraces the legislative will model and assumes that legislative will, properly purged of procedural defects, is the sole source of statutory law. However, substantive political values cannot be excluded from consideration while imposing procedural requirements on the legislature or adopting interpretive rules. Constitutional standards concerning legislative procedure, congressional standing to monitor the legislative process, and interpretive principles to encourage or discourage the way statutes are made are all sensitive to particular substantive political values.

The critique of the will model of statutory interpretation lays the foundation for the collaborative model in two important respects. First, by demonstrating that politics is a process of public deliberation rather than a manifestation of private will, it dampens concern with judicial political choice. Second, it demonstrates that the process of public deliberation about public values cannot be confined to the legislature, but must include a creative role for courts as they engage in statutory interpretation. The remainder of this Article discusses in greater detail how courts collaborate in the process of public deliberation to determine the meaning of statutes.

IV. THE COLLABORATIVE MODEL—THE UNDERLYING ASSUMPTIONS

Two major assumptions underlie the collaborative model of statutory interpretation. First, statutes are part of the common law. Second, the common law power is exercised by incorporating political values into the interpretive process which do not originate with the legislature.

A. STATUTES AS PART OF THE COMMON LAW

The point of view which best describes the courts' collaborative role is that legislation is part of the common law.162 If this seems startling, it is because of an ambiguity in the term "common law." One sense of the term refers to substantive law which originates and ends with the courts; it is exclusively court-made law. Another sense is "case law," in which judges play a creative role in developing the law, whatever its origins.

162. See Blatt, supra note 37, at 823.
Statutes become part of the common law because their meaning is determined through cases in which judges necessarily play a creative role.

Although the blurring of statutes and common law has antecedents dating back to a period when statutes and judge-made law were not clearly distinguished and the role of courts was to do justice between *meum* and *teum*, it also has contemporary twentieth century advocates. Many of the modern versions, however, continue to use the rhetoric of the legislative will model. For example, Dean Pound argues that statutes should be a source of common law but assumes that judicial reasoning would implement the "general will" expressed by the legislature. More recently, Dean Calabresi has suggested a judicial common law power to declare statutes obsolete. However, his approach is subtly tied to the legislative will model in two ways. First, although the court's power would supersede legislative will, it is meant to implement popular will and democratic principles in some undefined way, not judicial political choice. Second, Calabresi still appears to believe that legislative intent is what courts seek when determining the meaning of statutes, with judicial choice relegated to the special task of dealing with obsolete statutes. The rhetoric of legislative will is, however, too confining and prevents exploration of the creative role courts play in determining statutory meaning, regardless of whether the statute is obsolete.

There are many contexts in which to test the view that statutes are part of the common law. Statutory interpretation is the most important of these contexts. Part V of the Article shows how courts inevitably bring political values to the interpretive process. Here, the hypothesis that the difference between statutes and common law has blurred will be tested in two particular settings. First, the modern acceptance of retroactive statutes and prospective adjudication breaks down the barriers that previously existed between legislation and judge-made law. At common law, there was a presumption against retroactive statutes, probably associated with the view that legislation was a willful exercise of power which should not disrupt past relationships. Today, that presumption


164. Pound, supra note 2, at 385. See also Note, supra note 37, at 914 ("envisioning statutes as common law would not free the courts from their obligation to implement legislative will"). Professor Freund argues for a more creative judicial role, but then limits that role to cases of statutory ambiguity, implying that judicial creativity originated in legislative authority. Freund, Interpretation of Statutes, 65 U. Pa. L. Rev. 207, 231 (1917).


166. Id. at 38-42.
has all but disappeared.\(^{167}\) Originally, specific categories of statutes, such as procedural, remedial, and curative statutes, were permitted retroactive effect, but today all statutes are tested against a "manifest injustice" or similar standard.\(^{168}\) Statutes are viewed less as willful intrusions, and more as part of the gradual unfolding of law, analogous to common law development.\(^{169}\) That is why later statutes interpreting prior statutes occupy a midpoint between retroactive legislative will and accurate statements about the will of the prior legislature. There are various formulations of the weight attributed to interpretive statutes,\(^{170}\) but the common theme is that such statutes nudge statute law in a particular direction in the same way that case law evolves.

Just as statutory retroactivity made statutes more like cases, so cases became more like statutes by being applied prospectively.\(^{171}\) Criminal cases naturally gave rise to the greatest concern about retroactivity. The ex post facto clause of the United States Constitution is now applied to retroactive cases through the due process clause.\(^{172}\) However, there is

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168. See, e.g., American Fin. Co. v. Lawler, 30 Conn. Supp. 596, 600-01, 314 A.2d 897, 899 (1973) (whether a procedural statute should be applied retroactively is a question of legislative intent and substantial justice); Gibbons v. Gibbons, 86 N.J. 515, 522-25, 432 A.2d 80, 83-85 (1981) (manifest injustice prevents retroactive impact, even for curative statute); see also Von Allmen v. Conn. Teachers Retirement Bd., 613 F.2d 356, 358-60 (2d Cir. 1979) (retroactive pension benefits allowed because it furthers equal treatment; statute does not unsettle private expectations); cf. Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972) (constitutionality of retroactive statute depends on whether the statute is substantive or remedial).


170. For example, such legislation has some weight, FHA v. Darlington, Inc., 358 U.S. 84, 90 (1958), significant weight, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974), or great weight, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969), in determining prior meaning. The judicial rhetoric is important. It denies that such statutes retroactively assert legislative will or that they are necessarily an accurate statement about earlier legislative will. Straddling between these extremes is a way of asserting a pattern of gradual legal development, analogous to case law evolution.

Some old cases viewed such legislation as usurpation of judicial power, but that rigid distinction between legislatures and courts is no longer adhered to. In re Coburn, 165 Cal. 202, 209-10, 131 P. 352, 355 (1913). When interpretive legislation is struck down, it is because there is something substantively wrong with the statute. See, e.g., Hot Springs Indep. School Dist. v. Fall River Landowners Ass'n, 262 N.W.2d 33 (S.D. 1978) (statute interpreted prior law to permit a new method of valuation for property taxes, which was in effect an unfair retroactive change in the method of taxing property).

171. Doubts about whether prospective adjudication was constitutional were laid to rest by Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

also concern with the retroactive impact of civil decisions. The takings clause of the Constitution is probably applicable to both retroactive cases and statutes. Only the impairment of contracts clause remains as an isolated instance of distinguishing between retroactive cases and statutes.

Second, the decline in the distinction between the common law and statutes is evidenced by a change in attitude towards the stare decisis effect of cases interpreting statutes. In the past, there was stricter adherence to stare decisis when a case interpreted a statute than when a case applied a common law principle. One commentator urged greater reluctance to overruling cases interpreting statutes in order to maintain legislative responsibility for setting policy. There is, however, no reason to distinguish between statutes and common law in this respect. Political responsibility is important whether the law originates in statutes or the common law. The likely rationale for adhering more strictly to stare decisis in statutory interpretation is the implicit adoption of the will model of legislation. Interpreting a statute identifies an historical fact—the legislative will—and overruling the interpretation would change history, rather than accommodate judge-made law to change in the manner of the common law. When statutes are part of the common law, meaning


177. Levi, supra note 176, at 523-24. Another reason for adhering more strictly to stare decisis when interpreting statutes is to preserve rights accruing under the prior interpretation. See Note, The Effect of Overruled and Overruling Decisions on Intervening Transactions, 47 Harv. L. Rev. 1403, 1407 n.27 (1934). Although the same rationale applies to common law decisions, statutes might have been viewed as more intrusive on private interests. Prospective overruling can, of course, protect prior rights.
can change over time without necessitating the rewriting of history. Several courts have adopted this more flexible view of stare decisis in statutory interpretation cases.\textsuperscript{178}

A special problem confronts federal courts when the distinction between common law and statutes is blurred. There is no federal common law,\textsuperscript{179} in the sense of judicial creation of law unrelated to a statute, except when there is a uniquely federal concern.\textsuperscript{180} This limitation on federal power is explicit in the Rules of Decision Act, which mandates the use of state law by federal courts whenever federal constitutional, treaty, or statutory law does not “require or provide” the law.\textsuperscript{181} What

\textsuperscript{178} See Windust v. Dep't of Labor & Indus., 52 Wash.2d 33, 323 P.2d 241 (1958) (stare decisis held to deserve no weight in statutory interpretation because courts should appeal to the statute to supersede the prior case). In Monell v. Dep't of Social Servs., 436 U.S. 658, 695 (1978), the Court held that a prior interpretation should be overruled. The Court paid homage to the traditional approach by emphasizing that the prior interpretation clearly erred in identifying the historical legislative intent. Id. at 696. The Court went on to characterize deference to prior judicial statements about historical intent as the most extreme form of the rule that cases interpreting statutes should not normally be overruled and considered other reasons for reversing the earlier decision. Id. at 700.

An irrational distinction between statutes and common law may persist in the treatment of statutes which repeal earlier statutes which had in turn repealed prior law. By statute, a majority of states now specify that repeal of a repealing statute no longer revives the original law, if the original law was a statute. 1 N. Singer, supra note 57, at § 23.31; State ex rel. Jenkins v. Carisch Theatres, 172 Mont. 453, 459-60, 564 P.2d 1316, 1320 (1977). But see Ky. Rev. Stat. Ann. § 446.100(1) (original statute revived if repealing act and repeal of repealer are passed at same session). These state statutes say nothing about what happens if the original law was the common law. In Baum v. Thoms, 150 Ind. 378, 386-87, 50 N.E. 357, 360 (1898), the court held that repeal of a repealing statute revived the original common law, even though the original statute would not have revived.


\textsuperscript{180} Id. at 641-42 (admiralty); United States v. Little Lake Misere Land Co., 412 U.S. 580, 590-93 (1973) (United States was a party to a property transfer involving federal regulatory program.); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943) (United States was an issuer of commercial paper.). But see generally Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (federal common law held not applicable to determine property rights in chain of conveyance originating with federal grant); Woessner v. Johns-Manville Sales Corp., 757 F.2d 634 (5th Cir. 1985) (no unique federal interest held to be applicable in dealing with claims against defendant asbestos producer under federal admiralty jurisdiction because there was insufficient nexus between case at bar and traditional maritime activities).

\textsuperscript{181} The Act states that the “laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” 28 U.S.C. § 1652 (c. 646, § 1, 62 Stat. 944 (June 25, 1948)). A prior version of the statute applied only to cases at “common law,” but the court held that the statute only declared limitations that already applied to federal courts and that there was no independent federal equitable power. Guaranty Trust Co. v. York, 326 U.S. 99, 103-04 (1945); see also United States v. Hudson & Goodwin, 11 U.S. 32 (1812) (no federal common law of crimes).

Professor Merrill argues that federalism principles apply with special force to limit the creative power of federal courts because states are represented in Congress but not in federal courts. Merrill,
federal statutes require or provide, however, depends on a theory of what statutes are and how courts determine their meaning. This simply reintroduces the question of whether judges exercise a common law power when interpreting statutes.\textsuperscript{182}

Two doctrines—congressional delegation of authority and federal preemption of state law\textsuperscript{183}—are frequently invoked when federal courts exercise a common law power to interpret statutes and are so indeterminate that they support the view that courts possess the creative role posited by the collaborative model. While each doctrine uses the rhetoric of the legislative will model to suggest that judicial power depends exclusively on legislative action, neither depends exclusively on legislative action. Judicial judgment is needed to determine the boundaries of delegated power and the scope of federal preemption.

The existence of delegated judicial authority, for example, depends on the court’s judgment about how strong the federal statutory policy is and how necessary the development of common law rules is to the implementation of that policy.\textsuperscript{184} Similarly, the scope of federal statutory preemption requires a federal common law power, because judgment is needed to determine whether the balance of federal and state policy creates a presumption for or against federal preemption in any particular case. The strength of the federal preemptive policy does not come predetermined from the legislature without need of judicial weighing,\textsuperscript{185} and

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\textsuperscript{182} See generally Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881 (1986) (discussing whether judicial power to create federal common law is, and should be, broader than generally assumed); Westen & Lehman, Is There Life for Erie After the Death of Diversity?, 78 Mich. L. Rev. 311, 336 (1980) (arguing that the applicability of Erie Doctrine is not limited to diversity cases).

\textsuperscript{183} Merrill, supra note 181, at 36-46.


\textsuperscript{185} Compare New York Tel. Co. v. New York State Dep’t of Labor, 440 U.S. 519, 540 (1979) ("any proper application of the [preemption] doctrine must give effect to the intent of Congress") with id. at 550-51 (Blackmun, J., concurring) (pointing out that the Court has upheld state jurisdiction notwithstanding congressional directive to the contrary); see also Perez v. Campbell, 402 U.S. 637, 650 (1971) (state denial of driver’s license to a bankrupt debtor to force payment of debts interferes with federal “new start” policy for bankrupt debtors).

Two of the three cases involving preemption in the recent 1986 term were decided by 5-4 votes. Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss., 474 U.S. 409 (1986) (5-4
even the strength of state interests which might prevent federal preemption is analyzed through a federal judicial lens.\textsuperscript{186}

The absence of a general federal common law should be construed to mean that there is no general federal substantive law independent of a statute, treaty, or constitutional provision. There is, however, a federal common law power to work out the meaning of statutes on the basis of policies not mandated by the statute and within boundaries not set by the legislature. Of course, whatever limits there are on a federal court's common law power would not constrain a state court in determining the meaning of a federal statute.

B. VALUES, PRINCIPLES, AND POLICIES: HERCULES AND SISYPHUS

The other major assumption of the collaborative model is that judges exercise their common law power by incorporating political values into the interpretive process.\textsuperscript{187} This assumption has both descriptive and normative significance. Its descriptive validity is demonstrated in Part V, which shows how political values inevitably work their way into the interpretive process. The normative significance of the collaborative model arises from the fact that political values depend on aspirational goals which individuals set for themselves in a political group. All political values implicitly assert claims by a political group on an individual and by an individual on the group. These claims ultimately rest on aspirations about what it means for an individual to participate politically with others. We can better understand the normative content of political values, applied by judges in the collaborative model, by comparing the normative claims of that model with those made by Ronald Dworkin for his model judge, Hercules.\textsuperscript{188}


\textsuperscript{188} Although I stress the differences with Dworkin, there are similarities between the collaborative model and Dworkin's approach. Both posit a partnership with the legislature. R. DWORKIN, EMPIRE, supra note 4, at 313. Both models expect courts to determine statutory meaning by testing substantive values for their statutory fit. \textit{Id.} at 338.
Hercules is most at home with a particular type of political value, which is called a "principle." The significant feature of a principle is that it supports a claim of individual right and is capable of trumping mere policies.\textsuperscript{189} It is Hercules' special insight into matters of principle that supports his ability to determine the right answer in both hard and easy cases.\textsuperscript{190} This special insight into principles has a negative corollary, however, in that Hercules has no apparent expertise when dealing with policies. That is why Hercules should defer to the people on matters of policy, but not principle.\textsuperscript{191} Policies, however, are the ingredients of many statutes.\textsuperscript{192} Although a statute must be principled in the weak sense of avoiding arbitrary linedrawing,\textsuperscript{193} it is easy for a legislature to avoid being arbitrary while adopting policies not based on principles.\textsuperscript{194} However, if Hercules has no special insight concerning policy, his creative role in statutory interpretation is insecure. The distinction between principles and policies therefore raises doubts about how judges should interpret statutes.

Policies, unlike principles, are political values which support general welfare, but are not the foundation of individual rights, except insofar as the adoption of a statute itself creates a right.\textsuperscript{195} A typical policy cited by Dworkin is one based on a utilitarian computation of average general welfare.\textsuperscript{196} Utilitarianism gives "policies" a bad name because a utilitarian general welfare calculus permits disregard of individual rights. Dworkin knows this, however, and acknowledges that a policy is any political value, whether or not utilitarian, as long as it does not support a claim of individual right. Population control and environmental objectives, for example, are policies\textsuperscript{197} whether or not they are grounded in utilitarian considerations. Dworkin's distinction between goal-based and rights-based arguments for or against pornography\textsuperscript{198} is also based on the distinction between policy and principle.

\textsuperscript{189} Id. at 240-50; see also R. Dworkin, Principle, supra note 4, at 89, 359 (discussing the concepts of moral harm and moral independence).

\textsuperscript{190} This is worked out more explicitly in R. Dworkin, Rights, supra note 4, at 81-84; see also Michelman, Self-Government, supra note 4, at 70-73.

\textsuperscript{191} R. Dworkin, Empire, supra note 4, at 340-41.

\textsuperscript{192} Id. at 310-11, 338-39, 410.

\textsuperscript{193} Id. at 178-84, 217-19.

\textsuperscript{194} Id. at 217-18, 243.

\textsuperscript{195} R. Dworkin, Principle, supra note 4, at 73; R. Dworkin, Empire, supra note 4, at 312.

\textsuperscript{196} R. Dworkin, Empire, supra note 4, at 288-95.

\textsuperscript{197} Id. at 339-41.

\textsuperscript{198} R. Dworkin, Principle, supra note 4, at 359 (discussing pornography).
Dworkin seems unwilling to concede any special problem for Hercules in interpreting statutes. The key concept for a Herculean judge interpreting statutes is what Dworkin calls legislative convictions. These convictions are not the intent of any one legislator or even of all legislators combined, but are the values—Dworkin calls them "beliefs" and "attitudes"—which legislators bring to the task of legislating. The judge then elaborates these values in much the same fashion that the judge develops principles in nonstatutory contexts. Dworkin argues that these legislative convictions arise as a result of the legislature promoting a community of principle, but the meaning of principle in the statutory context is the weak concept of coherence, sufficient to satisfy minimum rationality standards and avoid arbitrary statutes. It has no further substantive content. Dworkin's assertion that Hercules has a special role to play in working out legislative policy is therefore not justified, if we accept Dworkin's distinction between policies and principles, because Hercules' strength lies in the application and elaboration of principles.

One possible conclusion from Hercules' difficulty with statutes is that judges, given their inadequacies in matters of policy, should not play a collaborative role in statutory interpretation. However, the collaborative model rejects this conclusion. Put positively, the collaborative model affirms the judge's creative role in applying political values, whether they are principles or policies. The underlying assumption is that the distinction between policies and principles, upon which so much of Dworkin's argument rests, should be rejected. A thorough critique of the principle/policy distinction is beyond what can be attempted here, but the basic outline of the critique necessary to support the collaborative judicial role has the following features.

First, individual rights are determined only after taking into account "policies," even if defined restrictively, as Dworkin does, to mean values which do not themselves justify claims of individual right. Dworkin admits this much when he notes that principled arguments for rights must consider policy consequences when determining whether there are rights in the first place. If judges are competent to determine the point at which policy loses its force against a claim of right, after weighing

199. R. DWORKIN, EMPIRE, supra note 4, at 328-30.
200. Id. at 327.
201. Id. at 328-30; see also id. at 211 (explaining the concept of a community of principle).
202. R. DWORKIN, PRINCIPLE, supra note 4, at 95-96; R. DWORKIN, RIGHTS, supra note 4, at 307-11.
both principle and policy, then judicial competence cannot be distinguished, depending on whether courts are dealing with principles or policies. For example, if judges decide whether policies favoring compulsory public school attendance outweigh private parental rights in educating their children, the judge must be equally competent in making judgments about general policy supporting public education and principles preserving parental rights.

Second, judgments of principle are not fundamentally different from policy judgments because they are both community political values. Dworkin moves tentatively towards this conclusion when he argues that a notion of community must underlie the community of principle, from which rights are derived. But he then argues for a particular notion of community, where individuals have a special, personal, and equal concern for each other, which gives rise to a community of principle.\textsuperscript{203} His arguments for a community of principle are strong, but there are other conceptions of community, which define the relationship between individuals and the political group differently. The community could adopt the individualistic assumptions that Dworkin favors, or an individualism tempered by conceptions of interpersonal relationships, or a view of the individual that is more dependent on group identity. The significant point is that there is no qualitative difference among these views, other than the substantive weight of the values they serve, which justifies declaring rights-based principles to be policies of a different order from other political values.\textsuperscript{204} Principles and policies are both political values.

Collapsing principles and policies into the larger category of political values does not necessarily mean that one set of community values might not trump others, if those are the political values that the community adopts. It does mean, however, that no one set of values can be declared trump before the bidding begins and that the possibility of playing with no trump must be conceded.

\textsuperscript{203} R. DWORKIN, EMPIRE, supra note 4, at 195-202, 211-15.

\textsuperscript{204} Dworkin comes close to admitting this in his own account of moral harm, which he distinguishes from bare harm, to explain why injustice is a special kind of wrong. He notes that moral harm can be as easily explained as a situation of "general" harm in which the "world has gone worse than we thought" as in terms of harm to an individual person. R. DWORKIN, PRINCIPLE, supra note 4, at 81. The "world," which has "gone worse" is the political world, and the "worse" is an offense to group political values.
One version of a no trump political society would be one in which the ascendant political value varied with the activity under consideration. Some rights of privacy might exist without regard to interpersonal or group values. Other legal rules might be derived from a particular view of interpersonal relations, such as the husband-wife testimonial privilege. And some rules, like requiring the pledge of allegiance, might depend on group values that symbolize group membership. No one view of the individual and his relation to the group necessarily dominates.

Another version of the no trump political society is one where all three conceptions of community agree on a legal result, without having to choose one conception as trump. This approach could be consistent with a strong individualism, even if the arguments supporting that result do not rely exclusively on rights-based principles. For example, a claim to be allowed to view pornography, on the ground that forbidding it interferes with a right of individual development is a claim to an individual privacy right to pursue sexual behavior in a certain way, as well as a claim about the effect of the resulting cultural environment on interpersonal relations. A claim to exercise market power freely with one's own property is a claim of individual right to develop one's own personality, as well as a claim about bargaining relationships. In both examples, the arguments for individual freedom are also supportable on the basis of group values about the kind of society in which one wants to claim membership. Limits on pornography, freedom to watch pornography in privacy, and free exercise of market power are all powerful expressions of group values about individual identity derived from membership in a group expressing such values.

Whether the community's political values dictate no trumps, trumps different from those that Dworkin advocates, or rights-based principles as trumps, the collaborative model does not predetermine which political values should prevail by assuming that rights-based principles have a special status. The collaborative judge is concerned with political values, of which principles and policies are both examples. The judge plays the political hand without a preconception about what suit it will be played in or whether it will be played in a no trump situation. Because the

206. R. DWORFIN, PRINCIPLE, supra note 4, at 353-54, 355-56, 364-65. A claim that pornography has deleterious effects on the individual can also be both a claim of individual right to be free of those effects and a claim that the interpersonal relations encouraged by pornography should be discouraged.
A collaborative judge is equally comfortable or ill at ease with policies and principles, collaborating in statutory interpretation is no greater problem than the development of common law or constitutional law. If judges must have an ancient Greek pedigree, they would claim descent from Sisyphus, doing the best they can day after day without privileged access to any special form of knowledge.

The only strong claim made by the collaborative model is that law, not just legislation, is the product of public deliberation, which is an ongoing political process of identifying political values. Legislation is, therefore, tentative and questioning, not willful, and legislative equilibria are unstable, leaving open the possibility of revision. Rather than being an emanation from legislative will, a statute is better understood as a political event which enters into the law, to be interpreted by the courts. Because law, not just statutes, is the product of public deliberation about political values, courts must play a normative role when they interpret and apply the law.207

V. THE COLLABORATIVE MODEL—WAYS OF COLLABORATING

Part V describes and justifies the collaborative model by providing examples of how judges interpret statutes on the basis of political values whose weight is determined by the courts. Conclusive proof of the empirical or normative validity of the model is, of course, impossible. As a description, it claims to provide a better explanation of how judges treat statutes than any other model. Furthermore, judicial application of political values in cases interpreting statutes appears to be an inevitable feature of the interpretive process, even though it is often implicit in what the judge is doing. It is nonetheless impossible to completely rule out other explanations of statutory interpretations.

No post-Legal Realist observer will find the claim that judges bring political values to the interpretive process completely startling. More controversial, however, is the claim that this is normatively desirable. Once again, it is not possible to prove the normative value of the process. An accurate description of the ways in which the process works is, however, a part of the proof, allowing the normative implications of the collaborative model to be seen. The model makes relatively weak normative claims, asserting that it is valuable for judges to bring political values to

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207. There is a danger that judicial collaboration might lower the quality of public deliberation, either by confusing issues they do not understand well, R. MELNICK, supra note 40, at 345-87, or because involvement in enforcement may dull their detachment, Fiss, supra note 42, at 50-58.
bear on the interpretive process, without any preconception as to which values should prevail. It does not embrace relatively strong normative claims, such as Easterbrook's private compromise approach or Professor Macey's commitment to plain meaning. The strongest normative claim made by the collaborative model is that courts participate through case law decisions in the process of public deliberation to develop political values.

The discussion has three parts. First, the attraction of the plain meaning approach to statutory interpretation by reference to the political values underlying the commitment to the statutory language is discussed. The role of language in communication does not have its own rules which determine how meaning shall be determined. Meaning is instead determined by rules that take account of the values inherent in the particular form of communication.208

Second, political values are responsible not only for the importance of language, but also for its fragility. Political values are part of a statute's context, in the form of the statute's purpose and background considerations. These elements of context are always threatening to unsettle the plain meaning of the words. The potential conflict between words and context can only be resolved by courts weighing the relevant values on the basis of criteria brought to the case by the judge. This conflict is discussed in two situations familiar in the history of statutory interpretation:209 the limiting and extending of statutory language.

Third, the statute itself, and not just its language, is fragile. A statute is a political event occurring in a context of developing political values. A statute's meaning, therefore, is affected by how it fits into the broader context of other statutes and temporal change.

A. The Primary Significance of Statutory Language

When interpreting a statute, courts usually accord primary significance to the statutory language. They discuss the statutory language

208. But see R. Dickerson, supra note 8, at 10-11 (arguing that statutory interpretation is properly viewed primarily as a matter of applying standards of communication).
first, and assert either that unambiguous plain meaning is conclusive, or that a "clearly expressed legislative intention to the contrary" is necessary to overcome an unambiguous text. Two misconceptions about the importance of plain meaning should be set aside. First, the commitment to plain meaning is not a commitment to literalism. Literalism wrenches a word completely out of context, looking only at its dictionary meaning or the grammar of its usage. Deference to plain meaning requires examination of more than an isolated word. The term "context" is usually used to describe what else besides the isolated word must be considered to determine statutory meaning.


213. The classic criticism of literalism is by Judge Learned Hand, who compared it to listening to the notes instead of the melody. Helvering v. Gregory, 69 F.2d 809, 810-11 (2d. Cir. 1934).

Literalism has two major defects. First, it is often a subterfuge for judicial activism. N. MacCormack, supra note 23, 210; Note, supra note 37, at 907-12; Posner, supra note 35, at 821. For example, in Regan v. Wald, 468 U.S. 222 (1984), Justice Rehnquist discussed a statute which stated that "the authorities...being exercised [by the President] with respect to a country on July 1, 1977...may continue to be exercised." Id. at 228-29 (quoting the International Emergency Economic Powers Act, § 101(b)). His majority opinion held that the meaning of "authorities" was "clear." Id. at 237. Because the President had been exercising authority dealing with travel to Cuba on the specified date, travel to Cuba after that date could similarly be limited pursuant to that authority. The trouble with this interpretation was that the exercise of authority in 1977 had not restricted travel to Cuba, and the legislative history strongly suggested that the language permitting the President to continue to exercise authority was intended to allow continuation of restrictions in effect at that time, not to impose new restrictions. Justice Blackmun, in dissent, took this history into account and argued that the majority's view that the language was "without ambiguity is pure ipse dixit." Id. at 255 (Blackmun, J., dissenting). Justice Powell's dissent strongly hinted that the majority's decision was adopted in deference to the government's argument for a substantive result based on "the best interest[s] of the United States," not legislative intent. Id. at 262 (Powell, J., dissenting).

Second, literalism provides little guidance for future decisions. Compare Malat v. Riddell, 383 U.S. 569 (1966) (interpreting Internal Revenue Code literally) with Biedenharn Realty Co. v. United States, 526 F.2d 409, 422-23 (5th Cir. 1976) (Malat's literal interpretation did not resolve issues of that case); Int'l Shoe Mach. Corp. v. United States, 491 F.2d 157, 160 (1st Cir. 1974) (Malat does not settle question of whether income from liquidation of inventory is made in ordinary course of business).

214. See Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404 (1945).

215. See Macarthlys Ltd. v. Smith, 3 All E.R. 325, 326 (1979) (restricting statutory meaning to the statute's "natural and ordinary meaning").
Two types of context are distinguished. Internal context refers to the statute's language surrounding the words being interpreted. For example, phrases modifying the relevant language and other uses of the same words in the statute help to determine the plain meaning. External context refers to information about the world outside the statute that sheds light on the text's meaning. It includes the common understanding of the language that the writer and reader are likely to share, the purposes of the text, and the surrounding background of values in which the text is adopted. The first type of external context, the common understanding of the language shared by writer and reader, must be considered if language is to have a plain meaning. Meaning can be plain only when there is an effort at communication, which requires both a speaker or writer and a listener or reader. Moreover, the meaning is plain only to the extent that it is shared by both parties to the communication. A typical use of common understanding to determine plain meaning is to specify how a nontechnical audience would understand a statute. Thus, a tomato is understood to be a vegetable, which is the common usage, rather than a fruit, which is botanically accurate, in a statute aimed at the general business public.

216. See generally R. Dickerson, supra note 8, at 108-16 (discussing the general nature and workings of context).

217. See, e.g., United States v. Morton, 467 U.S. 822, 827-29 (1984) (the phrase "legal process" takes on a more precise meaning when it is read together with the words which follow it—"regular on its face").

218. Frequently, courts will assume that the usage is the same throughout the statute. See, e.g., Sorenson v. Secretary of the Treasury, 475 U.S. 851, 859-60 (1986) (Internal Revenue Code definition of "over payment" applied to two provisions of the Code). But see Lawson v. Suwanee S.S. Co., 336 U.S. 198 (1949), where the term "disability" did not have the same meaning in different parts of the statute. The statute in Lawson provided a second injury fund for employees hurt on the job. If employers were liable for the full disability experienced by a partially disabled worker who became completely disabled on the job, the partially disabled might not be hired. The second injury fund helped to pay for such disabilities, without imposing the full cost on the employer. The statute defined "disability" as work-related in order to serve workers' compensation purposes. Limiting the second injury fund to situations in which the prior disability was work-related, however, would defeat its purpose. The court gave "disability" its more colloquial meaning in the part of the statute dealing with second injuries, even though that disregarded a statutory definition and gave different meanings to the same term used in different places in the same statute.

219. Another example of using internal context is the assumption that the statute does not use surplus language. See, e.g., Exxon Corp. v. Hunt, 475 U.S. 355, 370-71 (1986) (statutory clause held to be "enartfully" drafted rather than "redundant"). In State v. Stovall, 648 P.2d 543, 547 n.1 (Wyo. 1982), however, the court questioned whether avoiding surplusage was typical of American speech. Avoiding surplusage might better be understood as a principle of interpretation imposed by courts to force legislatures to be more careful. The principle is therefore an example of the collaborative model because it is supported by policies not mandated by the legislature.

Sometimes context produces conflicting inferences. For example, internal context in the form of a statutory definition may conflict with the presumption that the same words have the same meaning in different parts of the statute.\textsuperscript{221} Moreover, there will sometimes be disagreement about what the historically shared common understanding actually was.\textsuperscript{222} But these are problems of ambiguity, which are inherent in language, and which sometimes survive consideration of evidence that in other settings would establish a plain meaning. Similarly, a statute sometimes uses vague language, with uncertain borderline applications, despite the fact that many applications of the language come within the statute's plain meaning.\textsuperscript{223} Despite the problems of ambiguity and vagueness, the meaning of statutory language is often plain, without the reader resorting to literalism.

The second misconception about reliance on plain meaning is that the judge first concludes that the words are uncertain, rather than plain, before other evidence of statutory meaning is examined. The interpretive process is almost certainly, as Judge Posner suggests, one of moving back and forth between words and other indicia of meaning without preconceived notions about whether the words are clear.\textsuperscript{224} When courts rely

\textsuperscript{221} For example, in Western Union Telegraph Co. v. Lenroot, 323 U.S. 490 (1945), the Court had to decide whether a telegram was "produced" by Western Union when it transmitted the message. At issue was coverage of the employer under the child labor laws. The statute explicitly defined "produced" as "worked on" or "handled," thus providing the Court with the most powerful evidence of internal context—a statutory definition. \textit{Id.} at 503. This definition persuaded Learned Hand in the court of appeals that Western Union was a producer. Lenroot v. Western Union, 141 F.2d 400, 402 (2d Cir. 1944). The Supreme Court, however, called attention to another portion of the statute exempting goods transported by a common carrier if the common carrier had not "produced" the goods. \textit{Western Union}, 323 U.S. at 504. If production included the mere act of transmitting or carrying something, similar to what Western Union had done, then the exemption for common carriers looked absurd, because it exempted them for goods they did not carry in the first place. This evidence from internal context helped the Supreme Court decide that Western Union was not a producer.

Not surprisingly, the conflict was probably settled by policy considerations not mandated by the legislature. At the end of the opinion, the Court points out the dramatic and undesirable impact of an injunction against Western Union. The dissent, of course, took the majority to task for using this policy to interpret the statute, and urged the evils of child labor as the relevant background policy for construing the statute to cover Western Union. \textit{Western Union}, 323 U.S. at 510, 514-15 (Murphy, J., dissenting).

\textsuperscript{222} \textit{See}, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1970) (disagreement over whether the language of 42 U.S.C. § 1982 was intended to extend to private discrimination).

\textsuperscript{223} An example is the definition of a "guest" in guest statutes, which provide that guests in a car cannot sue the driver for mere negligence. \textit{See} Tallios v. Tallios, 350 Ill. App. 299, 112 N.E.2d 723 (1953).

\textsuperscript{224} \textit{See} Posner, \textit{supra} note 35, at 807-08. \textit{See also} Radin, \textit{Statutory Interpretation}, \textit{supra} note 33, at 864-65 ("plain meaning" of statute includes a variety of interpretations). Parts V(B) and V(C)
on plain meaning, they are stating a conclusion reached after the interpretive process is complete, not specifying a stopping point in the judicial thought process.

The commitment to plain meaning is an example of applying the collaborative model of statutory interpretation because it is based on political values which justify deference to the plain meaning of the text. Six political values underlie the commitment to the plain meaning of statutory language. First, the text influences how people behave and departure from the plain meaning therefore disturbs reliance interests. Even if the persons affected by the statute do not read the words, legal advisors often read the statutory language.

Second, even if readers do not rely on the language of the statute or their reliance interests are not worth preserving, the primacy of words discourages hidden legislation which could not gain legislative assent if more explicit language had been used. Political groups with access to hidden sources of legislative power may be less able to prevail if plain meaning is followed.

Third, deferring to plain meaning discourages excessive discretion by administrators for whom linguistic uncertainty is an invitation to make choices.

Fourth, the primacy of words is one method by which courts adapt to change in the light of contemporary policy. Support for this view comes from an unexpected source. British devotion to statutory language is often defended on the ground that the legislature is sovereign, implying that failure to follow the words would be unfaithful to legislative will. But in fact, deference to language is recognized as a limitation of this Article illustrate the possible results of moving back and forth between words and other indicia of meaning.


226. In Mohasco Corp. v. Silver, 447 U.S. 807, 825 (1980), Justice Stevens dealt with the possibility that both types of readers might read the words. He found that different readings by laymen and professional advisors produced the same interpretation of the statute.

227. Objections to hidden legislation prompted Ackerman and Hassler to favor a plain meaning approach, which they refer to as "textual priority." See Ackerman & Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 YALE L.J. 1466, 1559-61 (1980). However, statutory words can also deceive. A. MAASS, supra note 20, at 114-16, describes a conference committee report that purposely eased legislators' concerns about the impact of a statute, which the complicated but plain language of the law still implemented, as the Committee Chair intended. A later case interpreted the statute in accordance with its plain meaning, allowing the subterfuge to be achieved. Manchester Envtl. Coalition v. EPA, 612 F.2d 56 (2d Cir. 1979).
on legislative sovereignty. Parliament is sovereign only as to the words and focusing on the words allows the court to adapt statutes to contemporary social needs.

Fifth, legislative history, which might be used if words are not of primary significance, is often hard to find, giving the litigant with the greatest resources, often the government, an advantage.

Sixth, the ethical value of honest political communication creates a presumption that words have primary significance. This is not a repetition of the five values just mentioned. Beyond the importance of the protecting public reliance, discouraging hidden legislation, controlling administrative discretion, adapting to change, and avoiding unequal access to statutory meaning, there is an ethical value in conducting political communication honestly through language.

The values favoring the primary significance of statutory language might produce conflicting interpretations. Honest political communication through language emphasizes the shared understandings of those engaged in the political process at the time of the statute's adoption, while concerns with reliance and change are sensitive to shared meanings


229. *Black-Clawson*, 1 All E.R. at 828 (Lord Wilberforce); Dyson Holdings, Ltd. v. Fox, [1976] 1 Q.B. 503 ("family" interpreted to accord with ordinary meaning which changes over time).


231. A litmus test of the importance of prohibiting misleading language would be the legality of a statute which contained an outlandish legislative definition, but which was not otherwise objectionable. Courts often say that senseless definitions are not permitted, appearing to reject a legislative process that produces such a result. However, these cases involve statutes which attempt to achieve a result which is legally objectionable on substantive grounds as well. See, e.g., Central Television Serv., Inc. v. Isaacs, 27 Ill. 2d 420, 189 N.E.2d 333 (1963) (television service defined as sale transaction for tax purposes resulting in nonuniform tax on television service; constitution requires uniform taxes); Calvert v. Zanes-Ewalt Warehouse, Inc., 492 S.W.2d 638 (Tex. Ct. App. 1973) (sale defined to include theft for tax purposes; arbitrary result probably violates equal protection), rev'd, 502 S.W.2d 689 (Tex. 1973).
that develop at a later date. Time occasionally shatters the original shared linguistic understandings, either narrowing or expanding original meaning, and creating reliance interests that could not have been anticipated. In addition, change sometimes puts severe strains on fidelity to shared historical understanding because the contemporary situation is unlike the world that existed when the statute was adopted. These tensions in determining meaning do not, however, undercut the claim that deference to plain meaning depends on substantive values brought to the interpretive process by the courts. They simply point to the potential conflict among such values that may call for further judicial choice.

The primary significance of statutory words can be made consistent with the legislative will model of statutory interpretation by assuming that words are good evidence of legislative will. That assumption evaporates, however, given what we know about the legislation process. Generally, legislation is not read by most legislators. Instead, they rely on the committee process to shape legislation. Whatever justification there may be for relying on legislative committees as a source of statutory meaning, a legislative committee is nevertheless not the legislature. In

232. In People v. Hall, 4 Cal. 399, 400-02 (1854), for example, the term "Indians" originally referred to the Mongolian race generally, including Chinese. This was based on the fact that Columbus thought he had come upon the islands of China when he named the inhabitants Indians, and on the shared anthropological idea of the time that Indians and Chinese had a common origin. The contemporary narrow definition was therefore broadened by historical context.

233. For example, in People v. Gilbert, 414 Mich. 191, 324 N.W.2d 834 (1982), the historical definition of "radio receiving set" excluded radar, even though contemporary usage included radar.

234. N. MACCORMICK, supra note 23, at 209; Ely, Constitutional Interpretivism: Its Allure and Impossibility, 53 IND. L.J. 399, 418 (1978). Reliance on legislative will assumes that the source of legislative will can be identified. See R. DWORKIN, EMPIRE, supra note 4, at 317-27. The point in the text is that, even if difficulties of identification are overcome, reliance on language is unlikely to identify the content of legislative will.


236. The best argument for judicial reliance on committee reports is that the committee is delegated authority by the legislature to make law. See SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935); see also Zaber v. Allen, 396 U.S. 168, 186 (1969) ("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."). Like most delegation theories, however, this one states a conclusion, rather than a fact, about legislative will. When courts recognize a committee as the legislature's delegate, they recognize lawmaking at that institutional level, in much the same way that agency rules are accorded great weight by the courts. Courts are not required to accept committee rulemaking and do so only on the basis of a political theory not mandated by the legislature.
those few situations where a particular piece of legislation gets the attention of most legislators, the legislation is usually so controversial that the resulting language is indeterminate and cannot be relied on as an indication of legislative will.\textsuperscript{237} The primacy of the statute's text is therefore better explained by the collaborative model since it depends on values brought to the statute by the court, not its usefulness in identifying legislative will.

\section*{B. Words and Context}

The statute's text may have a plain meaning, but that is not the same thing as the statute's meaning being plain. External context always threatens to unsettle the plain meaning of the statutory language. Three types of external context were referred to earlier: common understanding, purpose, and background considerations. Some external context works harmoniously with the text to determine meaning. That is true of the common understanding of the statute's text. It is also true of the statute's purpose and background when the purpose and background are used to resolve ambiguities and decide how a vague statute should be applied. The hope that external context will usually have this salutary effect is reflected in Professor Dickerson's assertion that "primary meaning tends to merge with meaning attributable to context . . . ."\textsuperscript{238}

Statutory purpose and background cannot, however, be relied on to have this effect. The statute's text often has a plain meaning, which becomes unsettled when its context is considered. In the traditional vocabulary of statutory interpretation, the apparent breadth or limit of the statute's general language\textsuperscript{239} seems odd in the light of the statute's purpose and background. This potential for conflict between text and context always exists and can only be resolved by a judicial weighing of the political values that support reliance on either the words or context. The following section explains what is meant by the statute's purpose and background and how they can limit or extend the reach of the statute's plain meaning.

\begin{footnotesize}
\begin{itemize}
  \item[238.] R. DICKERSON, supra note 8, at 113.
  \item[239.] See id. at 51-53, 198-99.
\end{itemize}
\end{footnotesize}
1. **Purpose and Background Considerations**

The statute's purpose consists of the political values which explain why particular events are included or excluded from statutory coverage. Background considerations are the political values which provide the broader context in which the statute originates. They either qualify or reinforce the weight accorded to the statute's purpose. The case of *Church of the Holy Trinity v. United States*,

The statute's purpose was to prevent flooding the country with manual laborers. An important background consideration was the country's religious traditions, which implied that pastors could be imported, despite the statute's plain meaning.

Language, purpose, and background might suggest the same statutory meaning, in which case the court will usually say it is deferring to the language, thus obscuring the potential for judicial choice. But purpose and background considerations always have the potential for unsettling language by calling attention to facts, the existence or significance of which may have been overlooked at the time of passage. The court must then resolve the conflict between text and context on the basis of a judicial judgment regarding the values supporting each.

This prospect understandably causes concern because purpose and background can be defined in so many ways and with undetermined weight. "Purpose," for example, can be defined narrowly or broadly.

A workers' compensation statute has the immediate purpose of providing reasonably certain but limited compensation for work-related injuries. However, it also serves a number of broader purposes, including protecting workers and their families from becoming destitute, maintaining the dignity of workers who receive government benefits, and providing governmental help for unavoidable economic risks. If the broader purposes come to signify the statute's legal relevance, more and more events will be affected by what the legislature has done. There will be less certainty that the legislature would have explicitly adopted those results and greater judicial choice of outcome.

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240. 143 U.S. 457 (1892).
241. Id. at 458.
242. Dickerson uses the terms "legislative intent" and "immediate purpose" to describe narrow purpose, and "ulterior purpose" to refer to broader purpose. See R. DICKERSON, supra note 8, at 87-88.
The background in which statutes are adopted also has uncertain significance. For example, certainty of legal rules was at one time a powerful background consideration in our legal system, helping to preserve reliance interests and prevent administrative discretion. It had special force in determining the meaning of criminal and tax statutes. That background consideration is far weaker today, however, as criminal law has come to serve regulatory purposes, and tax avoidance has become a serious concern.

The potential for a conflict between text and context is especially common in contemporary statutes that use terms with a conventional plain meaning which is often at odds with the host statute’s purpose. In tax law, for example, the term “property” has not been given its property law meaning but has been defined to achieve tax law objectives. Justice Holmes reached this conclusion in the early case of Irwin v. Gavit, which dealt with the exclusion of gifts of “property” from taxable income. The purposes of the tax law required that income be taxed once. A gift of income from property was therefore not a tax free gift, even though the income was itself “property” for property law purposes. The dissent argued for the plain meaning of the term “property,” based on its property law definition. The word “property” in the definition of capital gains has also been flexibly defined to achieve the statute’s underlying purpose, and has been defined differently within the statute when the tax structure called for different meanings.

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244. See, e.g., Goldstein v. Commissioner, 364 F.2d 734 (2d Cir. 1966).
245. There may be so little agreement on what the word means outside the host statute that the statutory purpose can easily override any other potential meaning. For example, in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944), the Court defined “employee” in a national labor statute to have a meaning other than that used in respondeat superior law. The statutory purpose favored a uniform national law and the existing confusion in defining “employee” in other legal settings made it easy to use that purpose to determine meaning. Id. at 120-32.
246. 268 U.S. 161 (1925).
247. Id. at 168.
248. Id. at 168-69 (Sutherland, J., dissenting).
250. See Rev. Rul. 77-190, 1977-1 C.B. 88 (“property” in § 337 is not the same as “property” in § 1221, the capital gains definition); John T. Stewart III Trust v. Commissioner, 63 T.C. 682 (1975); cf. McAllister v. Commissioner, 157 F.2d 235, 238-40 (2d Cir. 1946) (Frank, J., dissenting) (property definition in assignment of income area differs from capital gains area). But cf. Boyter v. Commissioner, 74 T.C. 989 (1980), remanded, 663 F.2d 1382 (4th Cir. 1981) (“marriage” in tax law held to have the same meaning as in state law); see also Helvering v. Owens, 305 U.S. 468 (1939) (colloquial meaning of cost rejected; cost means lower of cost or value).
The approach in these tax cases would undoubtedly be praised by those who argue for using statutory purpose to determine statutory meaning, but that approach has no preordained right to prevail. Sometimes the plain meaning prevails, but only because of the political values it serves. For example, in Commissioner v. Brown, the taxpayer had "sold" property for a right to future profits from the sold property. The taxpayer argued that the future periodic profits were entitled to preferential capital gains treatment, despite the fact that the purpose of the preferential taxation of capital gains was to relieve taxpayers of the burden of high taxes when they transferred property for a lump sum consideration. The Court adopted the plain meaning of the word "sale," rather than a special tax law meaning. The Court reached this result because it was concerned with the background consideration of avoiding the uncertainty of a special tax law meaning. Certainty is a persistent theme in tax law, both to protect reliance interests and to encourage equal treatment, free of administrative discretion. Reliance and equal treatment concerns, however, may sometimes clash with protecting the integrity of the underlying statutory purpose and a judicial choice among these values cannot be avoided.

252. Id. at 570-71. Even so, the word "sale" still has flexible meaning in tax law. See Mapco, Inc. v. United States, 556 F.2d 1107, 1110 (Ct. Cl. 1977) ("sale" for share of income which is certain to be paid is a loan).
255. A similar issue arises in securities law. As a general matter, the courts have been willing to develop securities law creatively. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) ("[W]e would by no means be understood as suggesting that we are able to divine... the express 'intent of the Congress'... [W]e deal with a judicial oak which has grown from little more than a legislative acorn."). Courts disagreed, however, on whether "security" had its conventional meaning derived from business parlance or a meaning more in keeping with the statutory purpose of the securities law. The specific issue was whether there was a sale of securities when the seller owned a 100% interest in a corporation. The argument for exclusion was that the statute's purpose was to protect passive investors, not sellers of a business. Lower courts are split on this issue. Compare Sutter v. Groen, 687 F.2d 197, 199 (7th Cir. 1982) ("sale of an entire business to a single purchaser is not considered a security transaction for purpose of federal securities law even if it is accompanied by a sale of stock or other securities") with Golden v. Garafalo, 678 F.2d 1139, 1144-47 (2d Cir. 1982) (transfer of total ownership and control of privately owned company involved "security" within meaning of federal security law). The Supreme Court recently opted for the more conventional definition of the term security, which included the sale of 100% of the stock of a corporation by one shareholder, thereby avoiding the uncertainty of a more flexible definition. Landreth Timber Co. v. Landreth, 471 U.S. 681, 694-97 (1985). But cf. Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) (there is no "purchase" and "sale" of stock when a purchasing stockholder sold the stock after he was unsuccessful in trying to acquire control of a corporation; the evil at which the statute was aimed was absent).
The collaborative model, since it anticipates an important role for judicial choice in determining statutory meaning, accepts the potential conflict between text and context and the need for a judicial resolution of that conflict on the basis of values brought to the case by the judge. This conflict and its resolution are illustrated in this section in two settings: limiting the statutory language and extending the statute’s text. An important point to note is that the collaborative model is politically neutral. Limiting or expanding statutory language can either limit or expand the scope of government power.

2. Limiting the Statutory Language

The generality of statutory language is sometimes more than the court can accept in light of the statute’s purpose, despite the apparent plain meaning of the words. For example, in Church of the Holy Trinity v. United States, the statute made it a crime to bring aliens into the country for “labor or service of any kind.” The defendant brought in a foreign preacher. Despite the plain meaning of the language and the absence of ambiguity or vagueness, the Court refused to apply the statute to this defendant by stating that the statute was not intended to apply to religious preachers. If the Court meant that there was no specific legislative intent to cover preachers, this explanation is clearly not dispositive because statutes are often applied to situations not within the legislature’s specific intent. The Court’s reference to intent makes more sense if intent is understood as referring to the historical purpose, which was to prohibit the importation of cheap unskilled labor. But why should the Court relieve Congress from sloppy drafting? After all, the words “or service” appear after “labor,” an internal context which suggests breadth of coverage. Surely the legislative history explaining the statute’s purpose does not have to “identify all of the ‘weeds’ which are being excised from the garden.” The Court resolved the choice between purpose and words, as it always does, by filtering the strength of the statutory purpose through a judicial lens and balancing it against the importance of deferring to plain meaning.

256. For a discussion of the history of this practice, see S. Thorne, A DISCLOSURE UPON EXPOSITION AND UNDERSTANDING OF STATUTES 78-82 (1942); Thorne, supra note 209, at 202.
257. 143 U.S. 457, 458 (1892).
258. See id. at 459.
259. See generally Chafee, The Disorderly Conduct of Words, 41 COLUM. L. REV. 381 (1941) (suggesting that when words are used and authors contemplate their long continued application, those words must eventually acquire a new context).
The Court received some help from two important background considerations. First, our country’s tradition as a Christian nation suggested that punishing the importation of preachers was an unlikely national policy. Second, the departure from plain meaning favored the defendant. Therefore, one of the important reasons for deferring to plain meaning, which is to protect reliance interests and contain administrative discretion, was absent.

Limiting the general language of a statute does not always limit the statutory burden imposed by the government. In tax law, for example, the statute often uses words that appear to favor taxpayers, but are interpreted to exclude tax avoidance behavior from the general statutory language. In *Goldstein v. Commissioner*, the court held that interest on a loan was not “interest” within the general language of the statute when the loan transaction had no income producing objectives because interest payments exceeded any possible gain that the taxpayer could earn from investing the loan proceeds. The transaction was profitable only because of the tax law. The statute’s purpose was to encourage productive investment, not tax avoidance, and the court resolved the conflict between language and purpose by deciding that the purpose should prevail and tax avoidance should be discouraged. The importance of discouraging tax avoidance necessarily depended on the court’s judgment about the strength of that policy. Taxpayer reliance interests were shunted aside, following Justice Holmes’ hint that tax laws were no longer to be construed with a bias for the taxpayer.

Another way of stating the conclusion that statutory purpose and background can limit the apparent meaning of the text is that a statute, like judicial precedent, has both dictum and holding. In other words, statutes are part of the common law, with the broad dictum of its language potentially limited to facts consistent with its purpose and background considerations. This view of statutes has been rejected and for good reason if it means that statutes are always so limited. The general language of a statute is sometimes limited in this way, and is always

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261. *Holy Trinity*, 143 U.S. at 464-72. The case is therefore a counter-example to Professor Macey’s suggestion that deference to plain meaning will implement public values. See supra text accompanying note 148. In this case, limiting plain meaning implemented public values supporting religion.

262. 364 F.2d 734 (2d Cir. 1966).

263. Other cases in which the language of the tax code was narrowly construed to prevent tax avoidance include United States v. Skelly Oil Co., 394 U.S. 678 (1969); Knetsch v. United States, 364 U.S. 361 (1960).


potentially so limited, depending on value judgments raised by the choice between plain meaning or a narrower construction of the language.\textsuperscript{266}

3. \textit{Extending the Statutory Language}

Limiting statutory language generally removes from statutory coverage something which appears to be within the text. This use of statutory purpose has seemed less controversial than extending statutory language,\textsuperscript{267} probably because statutes traditionally expanded government control. Limiting their impact, therefore, served the politically acceptable background consideration of limiting government power. However, as Austin noted many years ago,\textsuperscript{268} there is no nonpolitical principle which justifies using statutory purpose to limit rather than expand a statute.

There are two ways a statute can be extended. First, the statute's coverage can be extended to cases not within the text's plain meaning in order to serve the statute's purpose. Second, the statute's purpose can influence the evolution of the law in areas where those policies might be relevant.

An early and much quoted example of extending a statute to a case not covered by the statute's plain meaning is Judge Holmes' opinion in \textit{Johnson v. United States}.\textsuperscript{269} By statute, a pleading could not be used as evidence against the filer. The issue was whether the same treatment should be accorded schedules filed in bankruptcy. Justice Holmes was not bothered by the apparent limiting effect of the statutory language. He could "see what [the legislature was] driving at" and therefore would

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\item Another example of treating statutory language as dictum, to be applied in light of the specific facts of the case, is the judicial disregard of the plain meaning of a severability clause. A severability clause mandates that the remaining portions of a partially unconstitutional statute survive. Courts, however, do not take such clauses at face value. Instead, they treat them as merely reversing a presumption that the entire statute fails. \textit{See generally Note, Severability of Legislative Veto Provisions: A Policy Analysis}, 97 HARV. L. REV. 1182, 1184-86 (1984) (severability clause in statute reverses presumption against severability but does not require severability).
\item For example, Dickerson suggests that limiting statutes is often a cognitive act based on context, but extending a statute is usually a creative (not a cognitive) judicial act. R. \textit{Dickerson, supra} note 8, at 198-201, 213-16; \textit{see also} Thorne, \textit{supra} note 209, at 207-09 (tracing historical views suggesting that the interpretation of statutes is based upon the feeling that the common law should be sustained).
\item J. \textit{Austin, Lectures on Jurisprudence}, pt. II, § 835, at 62-63 (Campbell ed. 1863) (limiting a statute is a tyrannical act).
\item 163 F. 30 (1st Cir. 1908). A more recent example is Turner v. Japan Lines, Ltd., 702 F.2d 752 (9th Cir. 1983) (extending a statute dealing with when interest on judgment would begin to run in order to implement the equity of the statute).
\end{enumerate}
\end{footnotesize}
not just "go on as before." He could "see no reason that would apply to an answer in equity that does not apply to [the bankruptcy filing]." Failure to extend the statute did not, however, produce nonsensical or irrational results, so judicial extension was not compelled. Justice Holmes treated the statute as embodying a purpose to be applied beyond the cases denoted by its plain meaning.

Two values underlie an extension of a statute. The first is the weight accorded to the underlying political values inherent in the statute's purpose. The second is the importance of equal treatment of persons similar to those clearly falling within the statute. The only relevant value might seem to be equal protection, on the theory that the cases to which the statute might be extended either do or do not fall within the statute's purpose. Few fact situations, however, are completely indistinguishable from those covered by a statute's plain meaning. In addition to any substantive reasons that justify limiting coverage, administrative costs of implementation and the need to experiment with a policy to see its effects are among the grounds for not extending a statute. Cases covered by extension of the text are usually similar, but not equivalent to cases falling within the statute's plain meaning. Extension of the statute by analogy depends on whether the similarities are legally more relevant than the distinguishing characteristics. The answer to that legal question depends in turn on both the strength of the underlying substantive policies providing for extended coverage and the importance of equal treatment in the specific context of the statute's provisions. A statute might not be extended to analogous cases, even though they are similar to cases clearly within the statute's text. Where the purpose has weakened, the

270. Johnson, 163 F. at 32.
271. Id.
272. Both nonsensical and irrational statutory language evoke judicial responses, but these special cases alone do not explain judicial extensions of statutes to serve political values. See, e.g., Cabell v. Markham, 148 F.2d 737 (2d Cir. 1945) (statute applicable to World War II makes no sense in its reference to date prior to commencement of World War II); United States v. R. & J. Enter., 178 F. Supp. 1 (D. Alaska 1959) (words omitted make statute gibberish).
273. Johnson can be characterized as a small extension of the statute. Thorne describes Heydon's Case this way. See Thorne, supra note 209, at 217. Small extensions, however, still require courts to make policy choices to resolve the tension between language and purpose. Even a modest extension of the statute depends on judicial choice, contingent on the importance of implementing the underlying statutory purpose to facts which are not clearly within the statutory language.
274. The point about extending statutory purpose is the same as that made earlier in the context of constitutional minimum rationality analysis, where substantive judgments about the impact of drawing lines to implement a statutory purpose cannot be disregarded. Substantive value judgments about the interests at stake could not be disregarded. See supra notes 150-51 and accompanying text. For this purpose, the court must at least guess at the statute's purpose, although there is disagreement about how hard the court should look for the likely purpose. Compare United States R.R.
limited application does not offend equal treatment concerns, or where the statute bumps up against strong countervailing contemporary policies, an extension may not occur.

For example, the tax law excludes personal injury recoveries from taxable income, even though the recoveries replace what would have been taxable wages.\textsuperscript{275} One cause of action under modern civil rights statutes is for a type of personal injury, and the measure of damages includes wage replacement. This statutory cause of action is analogous to the tort claims which the tax statute exempts. Both the administering agency and the courts\textsuperscript{276} are nonetheless reluctant to extend the statute to civil rights claims, a reluctance justified on the basis that the underlying policy of providing tax free wage replacement has weakened, that equal treatment of those people entitled to tax breaks is a weak principle, and that incentives to obtain tax free recoveries might distort the deterrent effects built in to the civil rights laws.

Judicial weighing of the underlying political values occurs in many other cases that consider extension. In \textit{Baker v. Jacobs},\textsuperscript{277} the court interpreted a statute prohibiting jurors from receiving "victuals" as prohibiting the receipt of cigars. The importance of preventing improper jury influence was probably a relevant factor in extending the statutory language. In \textit{In re Cochise County Juvenile Action},\textsuperscript{278} the court expressed disbelief that a statute aiding Christian Scientists would not also allow members of nonconventional religions the same rights, although legislative conservatism towards nonconventional religions is hardly implausible.\textsuperscript{279} The policy favoring equal treatment of different religions most likely influenced the decision.\textsuperscript{280}

\textsuperscript{275} I.R.C. § 104(a)(2) (1987).
\textsuperscript{277} 64 Vt. 197, 23 A. 588 (1891).
\textsuperscript{278} 133 Ariz. 157, 163-64, 650 P.2d 459, 465 (1982).
\textsuperscript{279} See Cleveland v. United States, 329 U.S. 14 (1946) (polygamy immoral); cf. Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance law violative of free exercise of religion).\textsuperscript{280} Equal treatment was also a factor in \textit{State v. Stovall}, 648 P.2d 543, 549 (Wyo. 1984). The court had to decide whether a statute allowed negligence suits against the state highway department. A private bill had allowed one plaintiff to bring such an action and the court cited that legislative action as evidence of what the more general legislation meant, inferring an intent to treat the general public and the beneficiary of the private bill equally. As the minority opinion noted, private legislation generally has a private purpose. \textit{Id.} at 550. Indeed, courts will sometimes interpret a private bill narrowly to reflect the bill's private interest objectives. \textit{See} Beacon Oyster Co. v. United States, 63 F. Supp. 761, 765 (Ct. Cl. 1946). The majority's reliance on the private bill is better understood as
The decision not to extend a statute may also rest on strong policy considerations embraced by courts. For example, in *Chung Fook v. White*, the statute in question favored naturalized citizens over natural born citizens, yet the Court held the statute to be constitutional. This somewhat odd result may be explained by the fact that the Court is somewhat weak in immigration law, which is traditionally controlled by the executive and legislative branches. In *Wright v. City of Lawrence*, the court refused to extend to video taping a statute permitting audio recording of a trial, stating that such extension should be a legislative task. However, the significantly different policy implication between audio and video taping was a sufficient, though not dispositive, reason for not extending the statute. Moreover, in *MacMillan v. Director of Taxation*, the court refused to extend tax exemption to life care investments for the elderly because the statute applied only to investments in "property," of which contracts for life care were not an example. The court argued that extension was a legislative function because tax exemptions should be strictly construed. The majority missed the irony, which the dissent noted, that strict construction of tax law was itself a doctrine of judicial origin.

Extending a statute has no political bias. Although extension is usually assumed to expand government in a politically liberal direction, the pervasiveness of modern statutes makes such easy assumptions hazardous. There is no reason to believe that extension of a statute will systematically have politically liberal effects. For example, in *Kenosha County Department of Social Services v. Nelsen*, the court refused to extend to lottery winnings a statute requiring repayment of welfare out of specified windfalls such as gifts, since lottery winnings were a windfall not explicitly listed in the statute, even though limiting the repayment obligation in this way made little sense.

The weight accorded the underlying statutory purpose and equal treatment are such fundamental considerations that they influence how courts deal with statutes in general, not just in those cases where statutory extension is at issue. They are important, for example, in cases

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281. 264 U.S. 443 (1924).
283. Id. at 1153.
285. Id. at 218, 445 A.2d at 398.
286. 102 Wis.2d 49, 305 N.W.2d 924 (1981).
involving traditional statutory interpretation. In *Herb's Welding, Inc. v. Gray*, the specific issue was whether workers on fixed oil rigs were engaged in "maritime employment" so as to be eligible for workers' compensation. The majority held they were not. The central issue was whether the statute eliminated distinctions between workers on floating oil rigs, who were clearly engaged in maritime employment, and workers on fixed oil rigs. The Court was not impressed with the argument that there was no rational difference between floating and fixed oil rig workers. Statutes, the majority opinion stated, have boundaries. That is true enough, but the boundaries are generally not firmly fixed by the legislature or the statutory text. It is usually up to the judiciary to decide just where those boundaries are. Judicial fixing of the boundaries in *Herb's Welding* rested on a judgment about the strength of workers' compensation policies and of equal treatment of injured persons covered by such policies.

288. *Id.* at 424-26. *But cf.* International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926) (Justice Holmes, writing for the majority, concluded that the term "seaman" in a workers' compensation statute included "stevedores.").
290. Interpreting modern detailed statutes also raises questions about statutory extension and equal treatment. Courts sometimes allude to the statutory detail to preclude statutory extension, on the theory that legislative attention to some aspects of a problem suggests an intention to preclude judicial extension. *See, e.g.*, Wilson v. Harris Trust & Savings Bank, 777 F.2d 1246 (7th Cir. 1985) (statutory provision precludes "fresh start" policy of the Bankruptcy Act from being extended to private entities). For differing approaches to extending the detailed solutions of the tax law to analogous cases, compare Helvering v. William Flaccus Oak Leather Co., 313 U.S. 247, 250-51 (1941) (no analogy) with Commissioner v. Ferrer, 304 F.2d 125, 131 (2d Cir. 1962) (analogy).

The claim that detailed statutes discourage extension is reminiscent of the *expressio unius est exclusio alterius* principle, which assumes that mentioning a few things excludes others. This canon of interpretation attributes to legislative will what is not even a plausible description of everyday speech. R. Dickerson, *supra* note 8, at 234. Additionally, its usefulness as a principle of statutory interpretation depends on an assumption that the statute is not a source of law. The underlying question as to the strength of the policy underlying the detailed statute and equal treatment concerns persists. Even judges who suggest that detailed statutes discourage judicial elaboration of statutory purpose will not hesitate to develop the underlying statutory policy in appropriate cases. For example, although Justice Frankfurter made a distinction between detailed tax law and other statutes with respect to judicial power to develop statutory policy, United States v. Hutcheson, 312 U.S. 219, 235 (1941) ("[t]he relation of the [statutes in question] is not that of a tightly drawn amendment to a technically phrased tax provision"), he later read a broad anti-tax-avoidance purpose into one of the more complex and detailed provisions of the income tax law. Bazley v. Commissioner, 331 U.S. 737 (1947). Justice Jackson, in Dobson v. Commissioner, 320 U.S. 489, 504-06 (1943), rejected the argument that legislative attention to one part of a problem precluded judicial reasoning by analogy; *see also* Davant v. Commissioner, 366 F.2d 874, 882 (5th Cir. 1966) (holding that congressional intent did not include corporate liquidation under capital gains tax exemption); Bangor & Aroostook R. Co. v. Commissioner, 193 F.2d 827, 830 (1st Cir. 1951) (analogizing the effect on income tax of capital losses to that of earnings and profits).
The combination of attributing weight to the statute's underlying policies and to equal treatment concerns is also illustrated by cases in which the court strikes down an underinclusive statute as violative of constitutional equal protection standards. The court can either extend the benefit or harm of the statute to others or eliminate the statute altogether.\footnote{Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring); see also Hewitt v. SAIF, 294 Or. 33, 50-54, 653 P.2d 970, 980-82 (1982) (extension of statutory benefits to unmarried couple who had cohabited for over one year).} Unless the statute explicitly precludes one result,\footnote{See, e.g., Heckler v. Mathews, 465 U.S. 728, 734 (1984).} the court must consider the policy implications of its choice. Justice Harlan used the rhetoric of legislative will to explain the Court's approach, stating that the Court was looking for legislative intent, in the sense of inferring what the legislature would want if the statute were held unconstitutional. However, Congress rarely has any intent at all on that subject and a court must decide on the basis of the political values implicated by extension or destruction of the statute.

For example, in \textit{Califano v. Westcott},\footnote{443 U.S. 76 (1979).} the statute violated equal protection by providing welfare for families with unemployed fathers, but not unemployed mothers. Unemployment of the father entitled the family to welfare even if he was not the primary wage earner. The Court refused to strike down the entire statute because of the strong policy of avoiding an adverse impact on welfare recipients. It instead extended the statute to unemployed mothers, even though the result was to benefit families in which an unemployed mother was not the primary earner and the legislature which passed the original statute had clearly wanted to help only families in which the primary earner was unemployed.\footnote{Four judges would have eliminated the whole program for unemployed parents rather than extend the program in violation of legislative intent. However, even these judges acknowledged the contemporary policy justification for this result by noting that the majority's expansion of welfare eligibility might lower dollar benefits for current recipient families. \textit{Id.} at 93.}

Making value judgments when a statute is unconstitutional might seem to be the one situation in which the court must apply its own view of policy to decide the case, which is not generalizable to cases of statutory extension. After all, the statute has failed and the court must do...
something. However, the court does not have to do anything. When a logrolling statute violates state constitutional law by containing two unrelated subjects in the same statute, the court can usually let the statute die. The legislature can repass the law, cured of its defect. That is how an advocate of the private compromise perspective should approach a statute which fails, because the statute is nothing but an unenforceable contract.

In sum, judicial weighing of statutory policy and equal treatment considerations are familiar in the context of traditional interpretation of statutory language and in dealing with statutes which violate equal protection requirements. The collaborative model simply recognizes that these issues are also relevant in deciding whether the statute's text should be extended.

The second way in which statutes can be extended is by applying their underlying purpose, in light of their background, to areas of law where these elements of context might be relevant. A famous example is Moragne v. States Marine Lines, Inc. The Court had to decide whether common law admiralty rules provided recovery for wrongful death in a state's territorial waters. An old precedent denied such recovery. More recently, however, the passage of wrongful death statutes suggested that denying recovery was obsolete. Justice Harlan concluded that contemporary policy, inferred in part from contemporary statutes, supported overruling the precedent.

The implications of the Moragne decision for judicial extension of statutory policy might be limited to situations in which courts exercise a substantive common law power, such as that possessed by federal admiralty courts. Other situations in which courts have such power include statutes that incorporate prior common law and statutes

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295. Ruud, supra note 56, at 398-400.
297. Id. at 402-03.
298. Id. at 393-403. Other cases in which statutory policy influenced common law development are: In re Hampers, 651 F.2d 19, 23 (1st Cir. 1981) (Federal Rules of Evidence); Illinois v. Milwaukee, 599 F.2d 151, 164 (7th Cir. 1979), vacated, 451 U.S. 304 (1981) (federal law of nuisance); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 195-96, 293 N.E.2d 831, 840-41 (1973) (tenant withholding rent from landlord); Agar v. Orda, 264 N.Y. 248, 190 N.E. 479 (1934) (court extended the rules on tangible personal property, found in a state statute, to intangible property under state common law).
whose legislative history specifies that courts retain a substantive common law power.\textsuperscript{300} It is possible to limit the implication of \textit{Moragne} in this way, but only by denying the collaborative judicial role for which I have argued. Once the possibility of collaboration is perceived as a realistic possibility, evidence of judges extending statutory policies without relying on a substantive common law power stands out more clearly. Consequently, \textit{Moragne} becomes a special case of a more general "common law" power to work out the significance of statutes in the context of particular cases.

One area of the law where the debate has proceeded precisely along the lines of whether courts can use statutory policy to develop the law, without regard to whether there is a substantive common law power, concerns the inference of a private cause of action from statutes. The traditional debate was whether private causes of action could be inferred from criminal statutes. The dispute was between those who viewed the criminal statute as evidence of negligence, which relied on a substantive common law power in the courts, and those who treated the criminal statute as an independent basis from which to infer a private cause of action, whether or not the wrong was committed in an area where courts traditionally had common law power.\textsuperscript{301} This framework for deciding whether or not to infer remedies from statutes has become increasingly obsolete, however, as more and more statutes create law without a common law background or carve out a new beginning for the law, shunting aside common law antecedents.\textsuperscript{302} The wrongs committed by violating these statutes are not easily analogized to common law wrongs because they often involve multiple relationships, such as those between federal and state governments, industry, labor, and the general public, rather than the bilateral relationships between victim and tortfeasor that have traditionally characterized tort and contract claims. Moreover, these statutes often adopt enforcement techniques, such as government-enforced criminal and civil remedies, and federal grant-in-aid contracts with recipient groups, which have implications for inferring a private cause of action. The new legal environment created by these statutes has shifted the terms of debate about remedies. The issues now are whether the statute's purpose and background warrant inference of a private cause of action, rather than whether the statute deals with an area of the

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\item \textsuperscript{300} U.C.C. § 2-318 comment 3 (1976).
\item \textsuperscript{301} \textit{See} The Queen in Right of Canada v. Saskatchewan Wheat Pool, 143 D.L.R.3d 9 (1983).
\item \textsuperscript{302} \textit{See} generally Stewart & Sunstein, \textit{Public Programs and Private Rights}, 95 HARV. L. REV. 1193 (1982) (arguing that judicial creation of remedies in the face of legislative silence is justified by the link between remedies and the particular end which a statute is meant to advance).
\end{itemize}
law where courts have a substantive common law power.\textsuperscript{303} Justice Powell and others, with increasing success, argue that the background considerations of "separation of powers"\textsuperscript{304} and "states' rights"\textsuperscript{305} preclude a federal judicial power to infer private remedies from federal statutes, unless specific legislative intent supports inferring a remedy.\textsuperscript{306} Not surprisingly, the Court rarely finds any specific legislative intent about private causes of action because, as Senator Gary Hart admonished his colleagues, that is not a subject Senators should be discussing on a Saturday afternoon.\textsuperscript{307} Others argue that background considerations and statutory purpose may justify judicial inference of private remedies, despite the absence of specific legislative intent or a substantive common law power. Justice Stevens, for example, argues that courts have a common law power to infer remedies,\textsuperscript{308} where the term "common law" refers to the judicial power to work out statutory policy in specific cases, not to

\textsuperscript{303} See generally, Foy, Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts, 71 Cornell L. Rev. 501 (1986) (analyzing the trend away from the Anglo-American tradition of implied private actions toward the requirement that private actions be based upon affirmative legislation).


Justice Stevens has rejected the view that separation of powers considerations foreclose a judicial role. 456 U.S. at 375-77; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 23-24 (1981) (Stevens, J., concurring and dissenting).

305. See Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582, 596 (1983) (White, J.); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985) (Powell, J.) (the right to money damages against the state when the state violates conditions of a federal grant-in-aid program will not be inferred from the federal statute because of sovereign immunity considerations).

Federal values determine the weight accorded to states' rights. This is very apparent in cases where the federal courts' conclusion that there is no cause of action inferred from a federal statute preempts state inference of a remedy from the federal statute under the state's common law. See R.B.J. Apartments, Inc. v. Gate City Sav. and Loan Ass'n, 315 N.W.2d 284 (N.D. 1982) (absence of federal statutory remedy precludes state remedy).\textit{But see Hofbauer v. Northwestern Nat'l Bank, 700 F.2d 1197 (8th Cir. 1983) (remand to state court to decide whether state remedy).}

\textsuperscript{306} Merrill Lynch, 456 U.S. at 396 (Powell, J., dissenting); Middlesex County, 453 U.S. at 13 (Powell, J.); see also California v. Sierra Club, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring) ("[I]n deciding an implied-right-of-action case courts need not mechanically trudge through all four of the [Cort] factors when the dispositive question of legislative intent has been resolved.").

The shift towards analyzing inference of private remedies as a question of legislative intent has come in stages. The criteria announced in Cort v. Ash, 422 U.S. 66, 78 (1975), are now interpreted as an effort to discover legislative intent. Cannon, 441 U.S. at 718-19 n.1 (White, J., dissenting); Id. at 739-40 (Powell, J., dissenting). In more recent cases, the search for legislative intent without trudging through the Cort tests has been advocated. Merrill Lynch, 456 U.S. at 388. Even Justice Stevens has accepted the rhetoric of legislative intent as the basis for inferring private remedies. Sierra Club, 451 U.S. at 302 (Rehnquist, J., concurring). Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985); Merrill Lynch, 456 U.S. at 377-78.


308. Middlesex County, 453 U.S. at 24 (Stevens, J., concurring and dissenting).
the traditional substantive common law. Whichever result is reached, the presence or absence of a prior substantive common law power in the courts no longer provides the framework for deciding whether there is a private remedy. Instead, judges consider the political values implicated by the federal statutory scheme and its background to decide whether a private cause of action should be inferred.  

Federal welfare law also illustrates how statutory policy influences judicial development of the law in the absence of a substantive common law power. Welfare law is exclusively statutory in origin. The landmark federal statute was adopted in 1935, providing for federal grants-in-aid to states with Aid to Families With Dependent Children (AFDC) programs. At that time the statute unmistakably permitted states to exclude families whose mothers were immoral, as evidenced by promiscuous relations with men. By the late 1960s, however, federal statutory policy had changed, even though the definition of eligible families had not been modified in any relevant way.

In 1968, the Supreme Court held that a family could not be removed from AFDC because of the mother's sexual immorality. The Court made repeated references to changes in statutory policy which evidenced a more charitable view of children who resided in unsuitable homes. For example, in the early 1960s, federal statutes had adopted specific provisions allowing states to remove children from unsuitable homes if they provided other adequate care and had provided federal monetary assistance to foster homes in which such children might be placed. In the late 1960s, federal statutes required states to provide rehabilitative and other services to families with unsuitable homes. These statutory provisions suggested to the Court that unsuitability was to be dealt with by helping the family rather than penalizing it. The Court also referred to state legislative policy, citing the fact that fifteen states had repealed "suitable home" requirements for welfare and that legislation to disqualify illegitimate children from AFDC had been rejected in most states where it had been proposed. Clearly the definition of eligible welfare families had become part of a broader-fabric of statutory policy, which

309. Judges who advocate limiting private remedies have, in their opinions, also considered more specific policy concerns that were not mandated by the legislature. For example, a concern with protecting universities, Cannon, 441 U.S. at 731, 747-49 (Powell, J., dissenting), and with preventing disruption of federal contracts, Universities Research Ass'n v. Coutu, 450 U.S. 754, 782-84 (1981), played a role in decisions refusing to infer remedies.
311. Id. at 324.
312. Id. at 325.
313. Id. at 337-38.
was extended to alter the definition that the historical legislature had
adopted, based in part on judicial weighing of the relevant political
values.

C. Statutes in a Broader Setting

Statutes are part of a broad pattern of other statutes and temporal
change. Their meaning depends on the fit between the specific statute
and the broader pattern. Courts can determine this fit only on the basis
of the political values which resolve the potential conflict between adherring
closely to a particular statute and working out the broader pattern.
In these respects, statutes are like cases, whose meaning is also deter-
mined largely by how they fit with earlier and later cases and with the
changing background environment.

1. Statutory Patterns

Several statutory provisions might constitute a pattern which cannot
be inferred from any single provision. Four situations can be identified:
potentially conflicting substantive statutes; several statutes which are
part of a single statutory scheme; common provisions subsidiary to the
main purpose of the statute; and appropriations statutes which seem
inconsistent with substantive legislation.314

First, two statutes might appear to conflict, with repeal of the earlier
by the later statute producing apparently strange results. The later stat-
ute might then be harmonized with the earlier law to avoid this strange
result, thereby achieving an overall statutory pattern that does not
appear consistent with the language of the later statute. For example, in
Watt v. Alaska,315 earlier statutes provided formulas for distributing rev-
ene which came from exploiting government wildlife refuge lands for
private profit, when the refuges were “reserved” from public lands or

314. Pattern building occurs not only when two statutes must be reconciled but also when a
portion of a statute is declared unconstitutional. A court may ask whether the legislature would
have wanted the remainder of the statute to survive, thus using the rhetoric of legislative will. Note,
supra note 266 at 1193-97. However, a court may have no way of knowing what the historical
legislature would do “if certain provisions found to be invalid were excised.” Carter v. Carter Coal
Co., 298 U.S. 238, 321 (1936) (Hughes, C.J., separate opinion). Another test is whether the remain-
der of the statute can survive as a workable law. Workability is, however, a flexible concept; it must
be tested by reference to some underlying policy. If the judgment is by reference to the historical
legislature’s likely wishes, the first and second tests merge. If not, there is inevitably a judicial choice
based in part on policy considerations not mandated by the legislature.
"acquired" by the government. The formula for "reserved" lands distributed revenue to the state and federal government in a ninety/ten ratio. A later 1964 statute specified a new formula for distributing such revenues when the refuge was acquired or reserved by the government. The 1964 formula was a dramatic change from past law, applicable to reserved lands, allocating twenty-five percent to the counties and seventy-five percent to the federal government. Justice Powell, writing for the majority, refused to accept this dramatic change for reserved lands, apparently mandated by the language of the later statute, and interpreted the 1964 statute narrowly to avoid a repeal of the prior statute by implication. He applied the later law only to acquired, not reserved lands, despite the more inclusive "acquired or reserved" language found in the 1964 statute. Pressing the doctrine against repeal of an earlier statute by implication into the service of a collaborative judicial role, the Court questioned the need for a dramatic change in the law that would shift funds away from state governments. The pattern of the two statutes overcame the plain meaning of the later statute.

In *Sorenson v. Secretary of the Treasury*, however, the Court accepted a dramatic change made by a later statute. It held that a 1981 statute, which required tax refunds to be paid to states to reimburse them for welfare benefits previously distributed to the taxpayer's family, applied to refundable earned income credits, not just typical tax refunds. The earned income credit had been adopted in 1976 to help low income working families with children. Only Justice Stevens dissented. He argued that application of the later 1981 law to refundable earned income credits was too startling a change in the effect of the 1976 law. It is difficult to understand the majority's decision, especially after *Watt*, except on the ground that the Court took into account the substantive implications of changing the law to require parents to turn over refundable earned income credits to the state, and decided that this result was more acceptable than the choice in *Watt*—dramatically changing the formula for distributing revenues from wildlife refuges to state and county governments.

Cases which are concerned with dramatic change in the law fit into the will model of statutory interpretation in the following way: the earlier statute is part of the context of the later law, in the light of which the later statute was adopted; that context qualifies the purpose of the later statute, on the assumption that the later legislature was aware of the earlier law and would not want to change it. This approach can be tied to

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the language of the two statutes, as the dissent urged in \textit{Watt},\textsuperscript{317} by avoiding repeal by implication only when a later, generally worded law threatens to repeal an earlier, specifically worded law. The assumption is that the legislature intends the more specific statute to prevail, given the close attention to detail implied by the statute's specificity.

Appeals to context and language as evidence of later legislative will cannot, however, resolve conflicts in the apparent meaning of two statutes. Assumptions about what a later legislature wanted, based on an examination of both the historical context and the language of the later law, are ultimately just assumptions. Real legislative awareness of the prior statute is usually either lacking or simply asserted without proof by the court accompanied by such telltale phrases as "it defies belief that Congress was unaware"\textsuperscript{318} of the prior law. Resolution of the conflict between the earlier and later statutes requires judgment about the political values served by whichever statute prevails, not guesses about real legislative intent based on context and language.

Second, several statutes making up part of a statutory scheme might develop a life of their own not dependent on the language of any particular statute. Instead of the earlier statute qualifying the later law, as in cases which reject repeal by implication, a later law can influence the meaning of the prior statutes. A famous example is \textit{United States v. Hutcheson},\textsuperscript{319} in which Justice Frankfurter concluded that a later statute prohibiting injunctions against certain labor union activity meant that an earlier statute did not make the activity criminal, because it made no sense to criminalize that which could not be enjoined.\textsuperscript{320} Lending support to Justice Frankfurter's conclusion is the idea that a criminal sanction is a more severe penalty than a civil sanction and that it therefore makes little sense to allow criminal prosecution of an activity which cannot be civilly enjoined. But this inference is not inevitable. A criminal sanction might in fact be considered less severe than a civil remedy if enforcement is more sporadic, in which case there is no inconsistency between the later exemption from civil remedies and the earlier criminal penalties.\textsuperscript{321} What makes the most sense depends on judgments about

\begin{footnotes}
\item[317. ] 451 U.S. at 280-82 (Stewart, J., dissenting).
\item[318. ] \textit{Sorenson}, 475 U.S. at 863.
\item[319. ] 312 U.S. 219 (1941).
\item[320. ] The dissent called this "a process of construction never . . . heretofore indulged [in] by this court." \textit{Id.} at 245 (Roberts, J., dissenting).
\item[321. ] The attitude towards remedies underlying Justice Frankfurter's opinion is similar to the argument supporting the inference of civil remedies from criminal sanctions on the theory that, if a civil remedy is less severe, the imposition of a criminal penalty implies the existence of the civil remedy.
\end{footnotes}
the background values associated with imposition of criminal sanctions and the weight of the policies associated with imposing such sanctions in the labor law context, both of which require the exercise of judicial judgment.

A later statute can also influence the interpretation of an earlier law when its purpose affects the meaning of the prior statute, as is illustrated by King v. Smith.\textsuperscript{322} The broader point of cases like Hutcheson is that judicial pattern-building is not limited to cases in which a statute's purpose is relevant. A later statute can simply do something, such as deny criminality to certain activities, which itself alters the legal pattern in light of which the prior statute must be interpreted.

Third, several statutory provisions might contain common language in a provision subsidiary to the main purpose of the statute, such as a rule dealing with attorney's fees payable to the litigant vindicating statutory rights.\textsuperscript{323} Such statutes are often said to be \textit{in pari materia} or \textit{in pari passu},\textsuperscript{324} but the question of harmonizing such provisions is not limited to cases in which this reference appears. The will model of legislation could be invoked to analyze this problem by giving special significance to the fact that the statutes are passed in the same legislative session.\textsuperscript{325} But deciding whether the common provisions have a common meaning is a pervasive problem, even when the statutes are passed at different times.

The tension to be resolved is between the policy of equal treatment of all those who encounter the same common concern, as the language of the several statutes might suggest, and the purpose underlying each statute in which the subsidiary provision appears, which might require a different result in different statutes. Inferring equal treatment is always vulnerable to the argument that each specific statute's purpose requires a

\begin{itemize}
  \item \textsuperscript{322} 392 U.S. 309 (1968). See supra text accompanying note 310 (discussion of this case).
  \item \textsuperscript{323} See Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983).
  \item \textsuperscript{324} See, e.g., id. at 692 (two sections of a statute providing for award of attorneys' fees to litigants in "appropriate" cases are \textit{in pari passu}); Northcross v. Board of Educ. of Memphis City Schools, 412 U.S. 427, 428 (1973) (per curiam) ("The similarity of language . . . is a strong indication that the two statutes should be interpreted \textit{pari passu}").
  \item \textsuperscript{325} State v. Dowell, 297 N.W.2d 93, 96 (Iowa 1980) ("unnecessary delay" in probation and arraignment statutes, which are \textit{in pari materia}). But see Rowan Cos. v. United States, 452 U.S. 247, 257 (1981) (Court interpreted identical language in both the income tax withholding and social security laws to mean the same thing in order to simplify tax administration, without invoking \textit{in pari passu} or \textit{in pari materia}).
  \item \textsuperscript{326} Haig v. Agee, 453 U.S. 280, 300-01 (1981); Erlenbaugh v. United States, 409 U.S. 239, 244 (1972); \textit{Dowell}, 297 N.W.2d at 96.
\end{itemize}
different result. The more central the provision is to the statute's purpose, and the greater the attractiveness of that purpose, the more likely it is that a common result will not be inferred. The tension between equal and disparate treatment can only be resolved by the judicial weighing of the underlying political values.

This tension can also arise when the language is not the same in each statute. For example, the Court has held that different statutes contain the same sovereign immunity rules despite the lack of identical statutory language. Justice Frankfurter argued that the issue was "not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention." The Court declined "to impute to Congress a desire for incoherence in a body of affiliated enactments and for drastic legal differentiation where policy justifies[d] none."

Fourth, federal appropriations statutes are another occasion for courts to fashion statutory patterns. The issue arises when an appropriations bill either forbids money for an authorized program or allocates money for an unauthorized program. Federal appropriations bills normally do not contain substantive legislation and internal House and Senate rules discourage but do not prohibit substantive law amendments in money bills. Even though the distinction between authorizations

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326. See Ruckelshaus, 463 U.S. at 708-09 n.24 (Stevens, J., dissenting); Farid-Es-Sultan v. Commissioner, 160 F.2d 812, 814-15 (2d Cir. 1947) (the term "gift" has different meanings in the gift tax and income tax statutes).

327. Cf. FTC v. Bunte Bros., Inc., 312 U.S. 349 (1941) (interstate commerce has different meaning in I.C.C. and F.T.C. statutes); see also Central Illinois Pub. Serv. Co. v. United States, 435 U.S. 21, 31 n.11 (1978) (referring to Royster Co. v. United States, 479 F.2d 387, 390 (4th Cir. 1973), in which the government "abandoned its position that the income tax provisions of the Code were in pari materia with the withholding provisions").

328. Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 392 (1939). When the Court wants to, however, it makes a significant point about the legislature's ability to make a point explicitly, as evidenced by the language of other statutes. See, e.g., INS v. Phinpathy, 464 U.S. 183, 189-90 (1984) (exceptions to "continuous physical presence" requirement were explicit in other statutes and were therefore not inferred in the statute being interpreted).

329. 306 U.S. at 389. There was "a policy immanent not merely in the single statute ... but in a series of statutes." Id.

330. Id. at 394; see also United States v. Monia, 317 U.S. 424, 431, 442-46 (1943) (Frankfurter, J., dissenting) (common statutory pattern despite different statutory language).

331. Atchison, T. & S. F. Ry. Co. v. Callaway, 382 F. Supp. 610, 620 (1974). Because of this practice a statute which required filing of an environmental impact statement when "legislation" was proposed was interpreted to exclude appropriations requests. The requests were not for "legislation." Andrus v. Sierra Club, 442 U.S. 347, 355-61 (1979).

and appropriations has blurred in recent years,\textsuperscript{333} the normal is still not to legislate substantively in an appropriations bill. This creates a presumption against inferring substantive changes from the fact that money is or is not appropriated, but this presumption is rebuttable. The courts must reconcile substantive and appropriations statutes on the basis of the political values associated with preserving or rejecting the underlying substantive law.

For example, in \textit{Preterm, Inc. v. Dukakis},\textsuperscript{334} the court concluded that denying federal Medicaid funds for abortions to the states changed federal substantive law so as not to require state expenditures on abortions as a condition of the state's participation in the Medicaid program. This inference is controversial, since withholding federal appropriations could have been used to temporarily reject federal abortion funding without the enduring effect of changing substantive statutory law about state funding obligations. The court had to decide whether withholding federal appropriations for abortions was intended to change substantive law by putting the burden on abortion proponents to amend federal law to achieve their goals, or whether the withholding was instead intended only to nudge the states into a debate about how badly they wanted to fund abortions from their own revenues under the threat of losing all federal Medicaid funds. Substantive judgments about states' rights and fairness in refusing to fund abortions for the poor were necessary ingredients in the judicial resolution of these issues.\textsuperscript{335}

\textsuperscript{333} See \textit{United States v. Dickerson}, 310 U.S. 554, 555 (1940); see generally Fisher, \textit{supra} note 97, at 51, (discussing the ways in which Congress legislates through the appropriations process); Schick, \textit{supra} note 97, (providing a history of the development of authorizations, appropriations, and budget processes in the Congress).

\textsuperscript{334} 591 F.2d 121, 133-34 (1st Cir. 1979).

\textsuperscript{335} See also \textit{TVA v. Hill}, 437 U.S. 153 (1978) (an appropriation for a dam held not to repeal a prior substantive law which protected a species from extinction by prohibiting the dam's construction). The \textit{TVA} Court appeared to rely on the plain meaning of the prior law protecting construction. But plain meaning is never dispositive and the strength of congressional environmental policy and the fact that the specific reference to appropriation for the dam only appeared in a little noticed committee report was undoubtedly relevant in the Court's decision. \textit{Id.} at 187-89.

The complex way in which a court can work out the relationship between substantive law and appropriations is also illustrated by \textit{Friends of the Earth v. Armstrong}, 485 F.2d 1 (10th Cir. 1973), \textit{cert. denied}, 414 U.S. 1171 (1974). The court was willing to infer the repeal of a law protecting the Rainbow Bridge National Monument from water encroachment, based on repeated failure to appropriate money to protect the monument, but it retained jurisdiction to prevent damage to the bridge itself. \textit{Id.} at 13-14 (Lewis, J., dissenting). The statute made no distinction between the monument area and the bridge and the court took it upon itself to work out a reasonable solution.
2. Dealing with Change

The common law is accustomed to applying law to a changing world. Courts constantly rethink what an earlier case law rule means because all rules are an equilibrium of policies imparting both extension and limits, which can become unsettled over time. The rule becomes unsettled when the historical significance of the underlying policies is altered in a contemporary setting. We can usually avoid calling attention to this loss of equilibrium because the facts of the contemporary case obviously fall within or outside both contemporary and historical perspectives on the issues addressed by the statute. In such cases, the rule either obviously applies or does not apply and there is no need to agonize over adapting the statute to contemporary points of view. Sometimes, however, it is unclear how the equilibrium established by the old rule applies in a contemporary setting, and the question of applying the rule to contemporary facts must be resolved.

Under the common law, the court can explicitly adapt to change by expanding, limiting, or rejecting the old rule. Statutes are harder to deal with because of the nagging question of judicial power to adapt statutory purposes to contemporary values. Often, a statute was passed precisely because courts had trouble adjusting to a rapidly changing world and, in at least some situations, an agency was delegated power to develop rules, thereby reducing the need for a judicial role. In addition, the words of the statute may be difficult to expand or contract. But the words cannot prevent judicial adaptation to change unless it is concluded that the statute is nothing more than the plain meaning of the language. That conclusion, however, cannot be reached without a political value judgment that the language should prevail over purpose. Change, therefore, presents a potential conflict between statutory language and purpose in yet another form.

Sometimes the problem of change is not very difficult to solve. The statute itself might adopt a common law principle, suggesting continued evolution of the underlying principle. The statute might incorporate by reference another statute, which could be amended. The effect on the incorporating law of future amendments to the incorporated statute is not always obvious, but the breadth or specificity of the incorporating

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language and the purpose of the incorporating statute usually resolves any doubts.\textsuperscript{337} In many cases, however, the statute employs language whose adaptation to change is problematic.

In one respect, change makes it easier for a court to accept a collaborative role in interpreting a statute. Before change occurs, the chances of judicial choice running counter to what the legislature would adopt are considerable. Once significant change occurs, judicial boldness makes law where the legislature might not have acted at all, but the chances of affirmatively contradicting what the legislature would have done are reduced.

Despite the differences between statutes and common law, statutory rules are not immune from the fragility that all rules experience over time.\textsuperscript{338} Easterbrook is certainly correct that statutes usually result from an equilibrium, often established by compromise. Indeed, he understates the point by suggesting that some statutes can expand indefinitely.\textsuperscript{339} All statutes have limits implicit in their history, even if the limits are not apparent when the statute is passed. The flaw in Easterbrook's view is the assumption that an equilibrium can be stable. The statutory purposes underlying the rules are constituted by their effects in the real world, in a context of background considerations which support or limit the statute's purpose. Those effects necessarily change as the world changes and the equilibrium, both the extension and limits in the original rule, becomes unsettled. The court is not free to completely cut loose from the policies implicit in the original statute, but neither can it refuse to evaluate the significance and strength of those policies in a contemporary setting. The rule changes whether we like it or not and the only question is what to do about it.

\textsuperscript{337} The prevailing rule is that a statute making a general reference to other statutes incorporates future amendments, but that statutes referring to specific statutes do not. 2 N. Singer, supra note 63, at § 51.07. This generalization is useful, but overbroad. Its primary purpose is to prevent a void in the law if the specific statute is repealed. 1 N. Singer, supra note 57, at § 23.32. Sometimes it makes sense for the incorporating law to include future amendments even when it referred only to a specific statute and, in such cases, courts can easily reach that result by appealing to "legislative intent." George Williams College v. Village of Williams Bay, 242 Wis. 311, 7 N.W.2d 891 (1943). Conversely, general references might not always include future amendments; cf. Helvering v. Griffiths, 318 U.S. 371 (1943) (statute taxing stock dividends which are constitutionally taxable adopts constitutional principles as they were interpreted when the statute was adopted).

\textsuperscript{338} See generally Eskridge, Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987) (arguing that a more dynamic version of statutory interpretation should be employed). Sometimes the rule is so fragile that it becomes unconstitutional in a contemporary setting. See, e.g., Bierkamp v. Rogers, 293 N.W.2d 577 (Iowa 1980) (guest statute limit on liability no longer makes sense).

\textsuperscript{339} Easterbrook, supra note 101, at 14.
When changing facts clearly come within the purposes of the old statutory rule, broad statutory language, and contemporary values, judicial choice is muted because there is no tension to resolve. For example, in People v. Morton, the court dealt with broad statutory language prohibiting theft, which was adopted before wives could own separate property. The court applied the statute to a husband’s theft of a wife’s property after her right to own separate property was established. The original policy against theft was easily adapted to contemporary values and the language was expansive.

Potential conflict often lies close to the surface, however, regardless of whether the statute’s language is narrow or broad. Narrow statutory language has been adapted to contemporary facts in order to serve the statute’s purpose in several situations: a statute dealing with examination of “bankers books” was applied to microfilm; a statute requiring the legislature to vote viva voce permitted machine voting; and a statute prohibiting “carriages” from travelling too fast applied to bicycles. The narrow words were construed to stand for broader purposes, which allowed the statutes to be applied to contemporary facts not contemplated when the statute was adopted. This was possible, in part, because of the contemporary vitality of the underlying policies. The court could have said that the historical context must have excluded the contemporary facts and defined the statute by the plain narrow meaning of the language. The decision that the statute essentially consisted of a purpose to be applied in a modern context, rather than to be set aside as inapplicable to modern life, was a choice the court made, independent of the legislature, in part because of the contemporary values served by such application.

A decision not to apply an old statute to contemporary facts does not necessarily signify a failure to reevaluate the old policies in a contemporary setting. For example, in Richardson v. Inhabitants of Danvers, the statute required the city to repair the streets so they would be safe for “carriages.” The invention of the bicycle altered the relative cost of road repair between the government and owner of the bicycle. The government would have a lot of trouble keeping bumpy roads from damaging bicycles, while bicycle owners could easily carry tire repair equipment. The policy behind the original requirement of government road repair

343. Taylor v. Goodwin, 4 Q.B.D. 228 (1879).
344. 176 Mass. 413, 57 N.E. 688 (1900).
obviously did not apply in the contemporary setting, but neither was it obviously inapplicable. A society in which government responsibility for roads was clear and cost-effectiveness was an unimportant value would expect the statute to require government road repair for both bicycles and carriages. In any event, the court did not simply put the statute down. It rethought the rule and its policies in a contemporary setting and affirmatively decided to exclude bicycles from the statutory term “carriages.”

Broad language, like narrow language, does not absolve the court from considering how old policies fit new facts. The statute may or may not be applied to contemporary facts, depending in part on the political values implicated by such application. For example, in a state where “voters” serve on juries, should women be eligible for jury duty after they are granted franchise if the jury statute was passed when women could not vote? Although jury service for women would have looked strange to the historical legislature, that is not dispositive. The broad term “voter” could include new voters, but that is likewise not dispositive. Neither the absence of specific legislative intent nor the presence of broad language resolves the issue. The easy solution is to assume that the statute creates a public responsibility to serve on juries corresponding to the right to vote. But that result is not obvious. The correspondence between voting and jury duty was originally created in a context of background considerations in which men were in public and women were in private. The right to vote was only one example of how the public/private line was drawn. Giving women the vote might have shattered only one aspect of that relationship. A court cannot simply assume that the jury qualification statute embodied a policy of endless expansion to include all voters. It must confront the implications of a woman being out of the home for long periods of time on jury duty, a result implicitly rejected when the statute originally imposed jury duty only on male voters. Additionally, it must consider the contemporary strengths of any policies distinguishing between men and women. Not surprisingly, courts in the early part of this century decided this issue differently than do modern courts.

Similarly, a term such as “person” or “human being,” in a murder statute might or might not apply to killing an unborn viable fetus whose survival is now possible because of modern technology. Application of

the statute depends on the contemporary strength of the policy of preserving fetal life from harm by third parties and how important that policy is to require explicit legislation defining criminal and civil responsibility. Once again, courts differ. The reluctance to expand criminal sanctions has resulted in the courts of all but two states refusing to apply the criminal statute to a fetus. When the issue is a civil remedy for wrongful death, however, courts have been less reluctant to interpret the broad language to include an unborn viable fetus.

A stronger argument might be made against extending an old statute to new facts in cases where the historical legislative process focused explicitly on those policies whose contemporary application is in doubt. Such statutes differ from those discussed above where political values such as government responsibility for road safety and a woman’s role were implicitly assumed at the time of the statute’s adoption.

For example, in *United States v. Sisson*, the issue was the government’s right to appeal a decision “arresting a judgment of conviction.” When the statute was originally passed at the beginning of this century, an “arrest of judgment” referred to decisions based solely on the face of the record, not evidence offered at trial. The reason for this limitation was that the record on appeal did not report trial evidence, a shortcoming that no longer exists. The question was whether the new situation—accurate records on appeal of trial evidence—justified rethinking the definition of an “arrest of judgment” in order to expand the circumstances in which the government could appeal. Justice Burger, in dissent, thought that such justification was valid. Justice Harlan, writing for the majority, refused the invitation to rethink the definition, noting the existence of an explicit historical compromise which pitted those favoring broader government appeal rights against those concerned with


348. It is also arguable that implicit assumptions (i.e., the dogs that do not bark) are the views most strongly held.


350. Id. at 319 (Burger, C. J., dissenting).

351. Id. at 313-14.
the defendant’s rights. The majority refused to treat the statute as “an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.”

But was the majority successful in excluding contemporary political values from consideration? Did the obvious fact of an historical compromise produce a lifeless statute or just a more complicated one? The majority argued that the explicit historical compromise evinced congressional solicitude for criminal defendants, but also noted that limiting government appeals was a contemporary political value. If the policy of protecting defendants had weakened substantially, the result might have been different, as it was for Justice Burger in dissent. The vessel may not be empty, but neither is it obviously full.

352. Id. at 297.
353. Id.
354. Id. at 298.
355. Id. at 291.
356. A dramatic example of new facts shattering an explicit historical equilibrium occurred in National Broiler Mktg. Ass’n v. United States, 436 U.S. 816 (1978). The statute provided an exception from the anti-trust laws for “farmers.” When the statute was passed a farmer was typically a small producer and was economically vulnerable to price-setting by powerful processors/distributors down the distribution chain. The industry had changed completely by the time of the litigation and the question was what “farmer” now meant. Was the statutory exception tied to the two historical purposes prevailing when the statute was passed—protecting a small individual farmer/producer and protecting an economically vulnerable farmer? The majority stayed close to the plain meaning of the language, arguing that the person seeking an exception was not a “farmer” and avoiding a resolution of the tension created by new facts. The Court left for another day the question of what to do about someone who did farming but lacked the economic vulnerability that the statute was originally meant to protect.

Justice Brennan’s concurring opinion was less reticent. He would exclude traditional farming activity from the statutory exception when the person engaged in farming activity was not a small farmer/producer. No one else deserved protection under his interpretation of the statute, which made meeting one of the statute’s purposes a necessary condition. In the process, he clearly revealed how contemporary policy influenced this emphasis on the particular historical purpose. He argued that when legislative “purpose has been frustrated by changed circumstances, the courts should not undertake to rebalance the conflicting interests in order to give it continuing effect.” Id. at 836 (Brennan, J., concurring). The specific exemptions for farming were the result of “political accommodations” and “[i]f the passage of time has ‘antiquated’ the premise upon which that compromise was struck, the exemption should not be judicially reincarnated in derogation of the enduring national policy embodied in the Sherman Act.” Id. at 836-37 (Brennan, J., concurring) (emphasis added). In other words, narrow construction of the original policy was appropriate because that policy lacked weight in a contemporary setting and the broader application of the anti-trust laws, from which the statute was an exception, retained contemporary vitality.

The dissenting opinion was also interested in adapting the statute to contemporary facts but chose as the statute’s dominant purpose the expansive historical purpose of protecting producers from powerful processors/distributors. Even if the producer did not engage in farming activity and was itself not a traditional farmer/producer, the reason for the anti-trust exemption persisted if the farmer was still economically vulnerable to price setting by processors/distributors. The term “farmer” was therefore given a functional definition, in keeping with its purpose, rather than a
A similar problem arose in United States v. Perryman. An 1834 statute provided that an American Indian could recover from the United States as a guarantor whenever a "white person" convicted of theft from an Indian was unable to compensate the victim. In 1879, the Supreme Court decided that an 1874 theft by a Negro was not covered by the statute. The Court made the obvious point that white is not black and that Blacks are not included in the descriptive term "white" just because the Negro was granted rights after the Civil War. If plain language was enough to dispose of the case, the Court could have stopped there, sticking to the meaning of the language apparent to the "popular mind." It was, however, bothered by the apparent obsolescence of the exclusion of Blacks from the statute after the Civil War, and therefore looked for evidence of specific historical intent antagonistic to Blacks on Indian territory. It found such evidence in the history of the 1834 statute. Before 1834, the statute provided Indians with indemnity for wrongs committed by convicted persons generally, but the 1834 statute applied only to "Whites," for the purpose of discouraging Indians from being hospitable to fugitive slaves.

Specific legislative attention to the issue of black fugitive slaves could not, however, dispose of the question whether the statute applies to Blacks after the Civil War, when the 1834 equilibrium was shattered by changing relationships between Blacks and Whites. The Court admitted as much when it went on to deny application of the familiar common law principle that the rule ceases to exist when the reason for the rule ceases to exist. The collaborative model takes a different view of statutes, treating them as part of the common law with the potential for being adapted to contemporary political values. The Perryman Court therefore assumed the very issue at stake, which was whether statutes were part of the common law.

357. 100 U.S. 235 (1879).
358. Id. at 236.
359. Id. at 238.
360. Id.
361. Id.
362. There is even more reason today to rethink the old statute because the conception of rights prevailing in 1879 is outdated. The 1879 Court noted that no rights of Blacks were involved in a case involving a suit by Indians for indemnity, presumably because it was Indians, not Blacks, who suffered. Id. at 237. Under contemporary standards, treating Blacks as inferior to Whites in their relations with Indians would violate the Blacks' civil rights. See Wilson v. Omaha Indian Tribe, 442 U.S. 653, 680-81 (1979) (Blackmun, J., concurring) (Perryman, 100 U.S. at 235, implicitly overruled).
The collaborative model expects courts to worry about how statutes fit into the law. It pretends to no special judicial competence based on access to reason, tradition, or any other legitimizing criteria that Ely so successfully criticizes.\textsuperscript{363} The judge is no Hercules, with a special claim to determine right results based on principle. The collaborative model makes only two strong claims. First, law is the result of public deliberation about political values in which courts play an active normative role. Second, the meaning of documents is determined by criteria which vary with the political function of the document.

Stripped of theoretical armor by which to justify judicial choice, all that can be argued is which values the court should adopt when acting collaboratively. In response to the argument that collaboration is illegitimate, this Article has argued that only the framework in which questions of legitimacy have been analyzed is wrong. Because government has been viewed as necessarily willful, the question of whose will is being exercised has seemed crucial. However, if the process of making law is one of public deliberation about political values, it is impossible to deny courts a collaborative role, unless one is prepared to deny courts the authority to decide cases involving statutes. The court can, of course, be wrong about the values it brings to the decision. The description of the collaborative model in this Article provides sufficient ammunition for those who would praise and criticize the way it is implemented. Perhaps there are egregious errors that deserve the label "illegitimate." But there is no such thing as a noncollaborative way for courts to approach statutes and therefore collaboration itself cannot be illegitimate.

\textsuperscript{363} Ely, \textit{supra} note 24, at 33-39.