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PUBLIC VALUES IN STATUTORY INTERPRETATION

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A considerable body of recent legal scholarship has suggested that an important role of constitutional interpretation is to articulate and enforce “public values” for our nation.¹ Public values, as I am using

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¹ I include several distinct strains of constitutional theory in my treatment of public values scholarship. See generally Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985) (surveying the variety of anti-formalist tendencies in recent constitutional theory, and concluding that most, under current social conditions, are rather utopian). The term itself is associated with the “republican revival,” in which constitutional scholars have returned to the concept of the “common good” as an aspiration for government. See generally Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Traces of Self-Government*]; Michelman, *Politics and Values or What’s Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487

(1007)

the term,² are legal norms and principles that form fundamental underlying precepts for our polity—background norms that contribute to and result from the moral development of our political community. Public values appeal to conceptions of justice and the common good, not to the desires of just one person or group. The nondiscrimination principle—people should not be penalized on the basis of their race, sex or sexual preference, ethnic background, or parentage—is an example of a public value. Through their power of judicial review, courts can overturn legislative enactments that violate our important public values (e.g., by penalizing persons based upon their race). Even if an enactment is not invalidated, the process of constitutional adjudication generates a useful dialogue about what kind of political community we want to be. This body of scholarship remains controversial even while it becomes increasingly influential. The academic debate about the role of courts in articulating and enforcing public values has generated great intellectual excitement in constitutional scholarship.

It is anomalous that virtually none of the public values debate has found its way into scholarship about statutory interpretation.³ After all, courts rarely strike down statutes as unconstitutional, whereas they interpret statutes constantly. If courts have a role in articulating and en-

(1979); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Beyond*]; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]. I also include the ample scholarship that pursues the theoretical implications of the *Brown* cases for our democracy. See O. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); O. FISS & D. RENDLEMAN, *INJUNCTIONS* (2d ed. 1984); Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). Finally, I include Ronald Dworkin's scholarship, which argues that law is best seen as "integrity," or a coherent collection of moral guides that bind together and enrich our political society. See R. DWORKIN, *LAW'S EMPIRE* (1986); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

² Oddly, public values thinkers have not satisfactorily defined exactly what a "public value" is. See Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9 (1984) (arguing that traditional legal theorists "fail to acknowledge that the principles we use to justify legal rules are not and cannot be based on considerations completely independent of our views of the good life"). Compare Fiss, *supra* note 1, at 9 (public values are "what is true, right, or just") with Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1694 (1984) (public value is "any justification for government action that goes beyond the exercise of raw political power"). M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 164-65 (1988), argues that there is at bottom no "content" to public values. As Parts II and III will reveal, one can show that there is content to public values in statutory interpretation, although many of us will disagree with the Court's choice of values.

³ The main exceptions are R. DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 313-54; R. DWORKIN, *How to Read the Civil Rights Act*, in *A MATTER OF PRINCIPLE* 316 (1985); Sunstein, *Beyond*, *supra* note 1, at 1581-89.

forcing public values, why should that role not inform judicial interpretation of statutes? Isn't statutory interpretation potentially a richer source of debate about public values? And given the greater variety of cases, can statutory interpretation cases not offer us a useful laboratory for evaluating the problems as well as the operation of public value implementation by courts?

This Article is an effort to explore the substantial role public values already play in statutory interpretation, the potential role they might play, and the values that ought to be considered. Part I provides a brief intellectual history of public values in statutory interpretation and argues that there is substantial reason to consider public values in statutory as well as constitutional interpretation. Part II demonstrates that public values already play an important role in the Supreme Court's interpretation of statutes.⁴ Public values affect statutory interpretation through clear statement rules, rebuttable policy presumptions, and gapfilling precepts, and as important background context wherein principles and arguments are suggested and tested. There are three sources for public values in statutory interpretation—the Constitution, evolving statutory policy, and common law—and I explore the values associated with each source. From this survey of interpretive rules and background principles, I conclude that public values are important influences in statutory interpretation. They do not control statutory meaning when Congress has directed a fairly determinate result, but in a broad range of statutory interpretation cases public values are critical.

Normatively, the role of public values in statutory interpretation is appealing, because such values may foster greater coherence in our statutory law and may help update statutes to reflect modern policies. Nevertheless, the usefulness of the public values concept in statutory interpretation is beset by three problems, which Part III explores. First, there is sometimes a tension between public values interpretation and legislative supremacy. In some cases, invocation of public values analysis displaces a reconstructed legislative intent; this displacement strikes many scholars as inconsistent with our representative democracy. It does not trouble me in many cases, because I view statutory interpretation as a practical exercise that may consider the evolution of a statute as well as its historical origins. Thus, current, rather than original, policy may be decisive, particularly when circumstances have materially changed since the statute's enactment. On the other hand, I am troub-

⁴ The focus of this Article is statutory interpretation by the Supreme Court in the last decade (1978-88), with special attention to cases decided in the last three years (1985-88). Most of the observations in this Article could be made at least as strongly for statutory interpretation decisions of state courts of last resort as well.

led when the Court uses public values analysis to displace an apparent legislative decision that has not been overtaken by changed circumstances, or where there is no strong justification for updating the apparent legislative decision.

Second, the Court's use of public values analysis is not meaningfully consistent. The Court does not always rely on public values when they are relevant, and it is not easy to distinguish the cases in which public values are decisive from those in which they are simply ignored. The Court's inconsistency suggests a deep ambivalence about the legitimacy of such analysis, and many of the Court's applications seem arbitrary. Even in the cases in which public values are treated as relevant, there are often several potentially relevant values, each pulling the Court in a different direction. The Court has difficulty even acknowledging the existence of competing values.

The problems of legitimacy and coherence suggest a third, and most disturbing, problem: Are the values recognized by the Court "good" ones? Often not, I fear. The public values cases decided in the last ten years (the primary focus of this Article) strike me as biased in ways that are hard to justify. They display biases in favor of procedural values over substantive values, time-tested (often obsolescent) concerns over current ones, and the interests and agendas of politically powerful groups over those of marginalized groups. Notwithstanding my admiration for public values analysis, I think many of the decisions discussed in Part II were wrongly decided. The Achilles' Heel of public values analysis is that one person's (my) public value is another's (the Court's) controversial proposition, or vice-versa. What I call the Court's "biases" would be characterized by the Court as "tradition," "judicial restraint," and the like. What concerns me most about public values in statutory interpretation is that the values themselves will be unsatisfactory (because they are obsolescent or class-based) and will be applied in an arbitrary way. If that is so, public values analysis may build no more than the facade of the grand and splendid coherence its adherents fancy. We shall have neither "Law's Empire"⁵ nor "Law's Republic,"⁶ but instead "Law's Hypocrisy."

I. A SHORT INTELLECTUAL HISTORY OF PUBLIC VALUES IN STATUTORY INTERPRETATION

Although much of the rhetoric of statutory interpretation has been interpretivist (the role of the interpreter is to replicate the original in-

⁵ R. DWORKIN, *LAW'S EMPIRE*, *supra* note 1.

⁶ Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988).

tent of the legislature), there is nothing new about affording public values a critical role in statutory interpretation. Blackstone's *Commentaries*, a leading source of legal theory when the Constitution was drafted and adopted, presented a multifaceted approach to statutory interpretation that had little to do with legislative intent; instead, Blackstone emphasized the fit between interpretation and the "mischief" the statute was meant to remedy, the common law context of the statute, and the avoidance of "unreasonable" interpretations as to collateral matters.⁷ Indeed, for Blackstone and for nineteenth century American jurists, the central precepts for statutory interpretation were the narrow construction of statutes in derogation of common law and the broad construction of remedial statutes. Traditional reliance on the common law and "reasonableness" as background precepts for statutory interpretation is a direct antecedent for public values analysis today.

A related antecedent is the cluster of rules developed by Anglo-American courts as background principles of style and substance for guiding statutory interpretation. These are colloquially known as "canons" or "maxims" of statutory construction and have been prominent features of treatises on statutory interpretation for at least a hundred years.⁸ The substantive canons of construction tend to operate as clear statement rules or presumptions: Unless the legislature clearly intends to displace an established background understanding, the court will presume that the understanding is part of the statute. Drawing upon Constitution-based as well as common-law-based values, the canons of construction are a second important antecedent for modern public values analysis.⁹

A final antecedent is the civil law tradition, which draws princi-

⁷ See generally 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 87-92 (1765) (outlining several general principles of statutory construction); *id.* at 87 (three things to be considered in interpreting "remedial" statutes: "the old law, the mischief, and the remedy"; judges should construe the statute "as to suppress the mischief and advance the remedy"); *id.* at 91 ("Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.").

⁸ See, e.g., T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 225-90 (1857). More recent treatises in the same tradition include E. CRAWFORD, THE CONSTRUCTION OF STATUTES §§ 367-431 (1940); E. DRIEDGER, THE CONSTRUCTION OF STATUTES 81-87 (2d ed. 1983); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 45.05, 45.07, 46.01, 53.01, 54.01-04, 55.01 (N. Singer rev. ed. 1984). Sutherland is the leading current treatise, with a heavy emphasis on canons.

⁹ See W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 639-96 (1987); C. Sunstein, Interpreting the Regulatory State (book draft Nov. 1988) for further development of this point.

ples and public values from statutes themselves. Although similar in many respects to Anglo-American statutory interpretation, civil law interpretation is different in its more systematic tendency to seek coherence across statutes.¹⁰ Civil law judges derive principles from one statute and use those principles to make sense of the statute as a whole (the "equity of the statute") and to relate the statute to other statutes. Professors Roscoe Pound and James Landis (both later to serve as Deans of the Harvard Law School) sought to import this tradition to the United States in the early part of this century.¹¹

These three traditions—common law reasonableness, the canons of construction, and civil law equity of the statute—were available to American courts throughout this century and have had some influence. But all three traditions were controversial, especially after attacks on them by the legal realists. The realists fundamentally disagreed with the conservative ideology underlying most of the constitutional and common law background concepts. In addition, they found the methodology of the canons incoherent.¹² They were equally critical of approaches to statutory interpretation focused on original intent.¹³ Despite their critique of these approaches, the realists failed to develop their own unified theory.¹⁴

The development of the *Legal Process* materials by Professors Henry Hart and Albert Sacks in the 1950s was a theoretical watershed in statutory interpretation. The materials are a precursor to public values analysis for statutory interpretation, because they retrieve and defend the three antecedents and suggest directions for overall public values analysis. Thus, while the Hart and Sacks materials paid homage to statutory text and legislative history as important guides to statutory

¹⁰ See W. ESKRIDGE & P. FRICKEY, *supra* note 9, at 241-43 (contrasting civil and common law views of jurisprudence). See generally J. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985) (analyzing the development of the "typical" civil law system and emphasizing the common threads linking the diverse systems within the civil law tradition); Zweigert & Kötz, *Statutory Interpretation—Civilian Style*, 44 TUL. L. REV. 704, 707-08 (1970) (discussing the tendency in civil law systems to interpret statutes broadly to achieve the goals of code law).

¹¹ See Landis, *Statutes as Sources of Law*, in HARVARD LEGAL ESSAYS 213, 214-19 (1934); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-89 (1908).

¹² See, e.g., Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950) (listing examples where two canons express opposing views on a given point).

¹³ See Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 881 (1930) (calling the legislature's intent a "futile bit of fiction").

¹⁴ See Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 829-30 (1985) (tracing the realists' efforts to update the old "mischief rule").

interpretation, they also emphasized the presumptive "reasonableness" of legislative activity and its statutory products,¹⁵ the importance of legal and societal context in yielding different interpretations over time,¹⁶ and the usefulness of statutory purpose and the canons of construction for interpretation.¹⁷ Taken as a whole, the Hart and Sacks materials emphasize the "horizontal coherence" of statutory law—the coherence of a present decision with other sources of law (other statutes, common law decisions). In this way, their synthesis strikingly departs from the Anglo-American tradition's emphasis on vertical coherence—the coherence of a present decision with past antecedents (precedents, legislative history).¹⁸

Notwithstanding the dynamic features of their own widely influential approach to statutory interpretation, Hart and Sacks and (even more strikingly) subsequent legal process scholars were not prepared to accept judicially created background principles as driving forces in statutory interpretation. For example, Hart and Sacks scrupulously avoided detailed analysis of constitutional values and the gravitational pull these values have on statutory interpretation, and only generally endorsed the Pound-Landis thesis that statutes are themselves sources of public values.¹⁹ While Hart and Sacks defended the canons of statutory interpretation, they did so only as guideposts for the interpreter and not as a rich source of public law background principles that might inform statutory interpretation.²⁰ In short, even though Hart and Sacks preserved the major antecedents for modern public values analysis and were generally sympathetic to it, they were very cautious about its content. I believe they were held back from drawing out the implications of

¹⁵ See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1414-15 (tent. draft 1958).

¹⁶ See *id.* at 1211-18, 1379.

¹⁷ See *id.* at 166-67, 1148-79 (purpose of statute guides interpretation); *id.* at 1221, 1235-40, 1412-13 (defending canons).

¹⁸ See *id.* at 167 ("Doubts about the purpose of particular statutes must be resolved, if possible, so as to harmonize them with more general principles and policies of law."); *id.* at 1241 (courts must "continue unremittingly the effort to discern and articulate principles" to help rationalize statutory law). For elaboration of the vertical/horizontal distinction, see Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 116, 122-24 (1988).

¹⁹ Given the comprehensive nature of the legal process materials, its omissions are striking—little or no treatment of the rule that statutes should be interpreted to avoid constitutional problems, of the federalism-based or separation-of-powers presumptions, or of the influence of international law on statutory interpretation. The materials mention the Pound-Landis thesis favorably, see H. HART & A. SACKS, *supra* note 15, at 486, 491, but do not summarize the argument (as they do other theses) or make a major point of it.

²⁰ See *id.* at 1221 (canons "simply answer the question whether a particular meaning is linguistically permissible, if the context warrants it").

their own analysis by the conservative belief structure of their legal process theory.

Three things broadly characterized the belief structure of legal process thinkers.²¹ First was a sanguine view of government, what I call "optimistic pluralism." Drawing from the standard political science treatises in the 1950s,²² legal process thinkers believed that the purpose of government was to resolve clashes among interests and to solve problems that these groups could not solve on their own, and that this politics of pluralism generally produced good policies. Second, adherents of legal process accepted the values of traditional liberalism: Individuals should presumptively be left alone to pursue their own preferences, but the government might interfere when it could do so "neutrally."²³ Government rules must be justified in some way that does not compare preferences—either by reference to some "objective" collective good accepted by a majority of people in the legislature, or to a "rational" expansion of those collective decisions by interstitial lawmakers, such as judges and bureaucrats. Third, legal process scholars possessed an almost religious faith in procedure. The objectivity and neutrality of law both resulted from and was justified by good procedures.

While conceptions of pluralism, positivism, and proceduralism oversimplify the legal process agenda, they were underlying assumptions of it and help explain why traditional legal process theory has hesitated to embrace the idea that courts should articulate and enforce public values. Its optimistic pluralism leaves the selection of overall values to the legislature; judicial choice of policies smacks of natural law. Positivism questions the pedigree of decisionmaking criteria that cannot be rigorously traced back to either constitutional or statutory provisions. Proceduralism cautions against any judicial lawmaking, confining it to the "interstices."

These objections to the public values idea are not as compelling

²¹ See generally Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) (tracing the development of legal process scholarship from Hart & Sacks to the post-legal-process scholarship today, and arguing the importance of expanding legal education in the area of legislation); Eskridge, *Metaprocedure* (Book Review), 98 YALE L.J. 945 (1989) (analyzing and criticizing Hart and Sacks' jurisprudential assumptions); G. Peller, "Neutral Principles" in the 1950s (forthcoming 21 MICH. J.L. REF. (1988)) (outlining the development of legal process scholarship).

²² See A. BENTLEY, *THE LEGISLATIVE PROCESS* (2d ed. 1948); W. BINKLEY & M. MOOS, *A GRAMMAR OF AMERICAN POLITICS* (1949); D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951). See generally T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979) (surveying "interest group liberalism" theory of the 1950s and 1960s).

²³ The main legal texts are H. HART & A. SACKS, *supra* note 15; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

today as they were 30 years ago. Landmark events such as *Brown*²⁴ and its ongoing judicial implementation, the Civil Rights Act of 1964, the War in Vietnam and draft resistance, Stonewall, *Roe v. Wade*,²⁵ and the Equal Rights movement have, for most intellectuals, eroded the cogency of the conservative features of the legal process philosophy. We are cynical about the operation of pluralistic legislatures. We believe that law is more than the positive commands of the sovereign. We are impatient with procedural justifications that mask substantive injustice. While we do not think we are naive about the limitations and foibles of judges, courts command our respect more than do legislatures and executive agencies.

During the last decade, constitutional scholars have addressed their public values philosophy to a receptive audience.²⁶ Their scholarship departs from the assumed wisdom of the 1950s in three ways. The first departure is a renewed interest in right answers. Although old-fashioned natural law enjoys little current academic support, many scholars are receptive to the idea that there are norms and policies that are "right" for our society in a given context. And "wrong" answers cannot be validated by proceduralism. This attitude is inspired by the *Brown* experience. In retrospect, it seems clear that segregation was and is morally wrong, and it hardly matters that the political system in the South (and the North in many cases) sanctioned it. At least here, substance overpowers procedure. Even for the more difficult subsidiary issues involved in implementing *Brown*, we are confident that discussion and experience over time will suggest right and wrong answers. The core idea of public values scholarship is that there are at least some values, like the anti-segregation principle, that have worth and contribute to the moral growth of our society.²⁷

The second departure is the rejection of pluralism and an embrace of a position similar to the republican tradition.²⁸ Public values thinkers posit that politics is more than the pluralist aspiration to accommodate interest group desires. Rather, public life allows citizens to discuss both the common good and the moral content of their society. Hence, the acceptance of republicanism has a descriptive as well as a normative component. Political struggle, such as that leading to the Civil Rights

²⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁵ 410 U.S. 113 (1973).

²⁶ See *supra* note 1.

²⁷ See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 118 (1982); L. TRIBE, *CONSTITUTIONAL CHOICES* 9-28 (1985); Burt, *supra* note 1, at 500-02.

²⁸ This characterization is most explicitly true of Ackerman, Michelman, and Sunstein. See *supra* note 1.

Act of 1964, can transform private preferences and create at least some agreement on divisive issues.²⁹ As a matter of aspiration, moreover, we should encourage this process. A "community of principle," in which legal precepts arise from the public values of the body politic, is a more worthy, more vibrant polity than is a pluralist "rulebook community."³⁰ Indeed, some public values scholars have persuasively argued that the Framers of the Constitution believed that political activity in our democracy ought to be directed towards the common good through a process of practical reason.³¹ The republican tradition is just as much part of our constitutional history as the pluralist tradition.

The third departure is a diminished concern for the countermajoritarian difficulty.³² Public values thinkers believe that the dialogue by which public values are articulated is best performed by courts, not just by the legislature. This belief reflects disappointment in the legislature's ability to carry on a sustained dialogue as much as it reflects faith in the courts. Modern political science scholarship depicts the legislature as typically paralyzed and unable to take constructive action; when it does bestir itself to enact laws, they are typically either feeble compromises or, worse, unprincipled doles to special interest groups.³³ While politics can transform preferences and articulate public values, it does not do so sufficiently often in the legislature. Courts have the institutional ability to contribute more substantially to the politics of public values, because their independence reduces the inertia and interest group pressures of everyday politics, and because their open, reasoned, and incremental decisionmaking assures a more rational discussion of public issues.³⁴

²⁹ See W. ESKRIDGE & P. FRICKEY, *supra* note 9, at 3-28 (Civil Rights Act of 1964 as a transformation of preferences); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1130 & n.5 (1986) (citing the Civil Rights Act of 1964 as the most prominent modern statute designed to shape preferences); cf. Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985) (tracing the process by which passage of some environmental legislation has transformed institutional incentives and thereby created consensus for further measures).

³⁰ I am using the terminology developed in R. DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 209-10, which I believe captures the aspirations of most of the thinkers-listed *supra* note 1.

³¹ See Sunstein, *Beyond*, *supra* note 1, at 1559-60; Sunstein, *Interest Groups*, *supra* note 1, at 31.

³² This is a departure somewhat more consciously true of Ackerman, Dworkin, and Fiss than it is of the other thinkers. Michelman, *Traces of Self-Government*, *supra* note 1, at 74-76, argues the irony of republican displacement of civic virtue from the citizenry to unelected judges.

³³ See Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285-95 (1988).

³⁴ See *id.* at 301-07; Fiss, *supra* note 1, at 14.

The lessons of *Brown*—the revival of anti-pluralist political theory, skepticism about the rationality of legislation, and a greater faith in courts as sources of law's integrity—have stimulated great interest in the public values ideal that fundamental principles and norms developed through adjudication can contribute to the common good of our polity and to the rationality and coherence of its law. Thus far the public values ideal has been developed almost exclusively in connection with constitutional theory. Yet a moment's reflection will suggest the even greater pertinence public values have for statutory interpretation.

Not only is statutory interpretation a much more frequent judicial activity, but it has a more concrete impact on American law. Constitutional invalidation of a statute is a rare occurrence, while interpretation of statutes is an ongoing critical enterprise. Moreover, in historical terms, the case for using public values in statutory interpretation is a stronger one, given the three antecedents developed above. Creative judicial review has had a roller-coaster history—*Dred Scott* and *Lochner* (and perhaps also *Roe v. Wade*) exemplify the excesses of too much bad activism, and much of the remainder of our constitutional history has seen very little activism at all. Creative statutory interpretation, on the other hand, has been an integral part of the Anglo-American tradition, and indeed the civil law tradition as well. The canons of construction themselves illustrate the substantial continuity of this tradition.

Finally, the use of public values to interpret, rather than invalidate, statutes seems more acceptable politically. If the Court can develop and articulate public values in the process of interpreting, as opposed to invalidating, statutes, there is less friction between the Court and Congress. Indeed, the opportunities for public dialogue—between the Court as it sets forth values of interpretation and Congress as it drafts statutes—are potentially greater in statutory interpretation cases. This assertion will be confirmed below by a survey of recent statutory interpretation decisions by the Burger and Rehnquist Courts.

II. PUBLIC VALUES IN STATUTORY INTERPRETATION: META-RULES, POLICY PRESUMPTIONS, CLEAR STATEMENT RULES, GAPFILLING PRINCIPLES, AND BACKGROUND CONTEXT

Drawing upon the historical antecedents developed in Part I, a public values approach to statutory interpretation should emphasize expanded context, the evolution of statutory principles, and the importance of background understandings. First, the interpreter should explicitly consider not just the text and legislative history of a statute, but also its entire public law context and current concepts of reasonableness and justice. She should reject the idea that each statute is an isolated

deal, to be enforced according to its strict and limited terms and without reference to other national policies. This view is supported by legal process theory and is now widely accepted.³⁵

Second, the interpreter should view statutes as dynamic rather than static. Just as constitutional provisions evolve over time, so may statutes, through practical experience and dialogue. From that evolution, which itself reflects changed legal and social circumstances, the interpreter might extract general statutory principles. The dynamic nature of statutory interpretation goes beyond traditional legal process theory and hence is a more controversial proposition than the expanded context notion, but this idea is gaining increased recognition.³⁶

Third, the interpreter should explicitly acknowledge the importance of rational background understandings—public values—when she interprets statutes. While the canons of construction have long operated as presumptive rules for interpreting statutes, they have generally not been articulated in terms of underlying public values,³⁷ until recently.³⁸ The interpretation given a statutory provision is often influenced, and influenced decisively, by public values found outside the provision. These values may have their source in the Constitution, in other statutes, or in the common law. Many rules and presumptions of statutory interpretation find their policy origin (at least partially) in our society's commitment to particular public values, and public values are often equally important as background context for statutory interpretation.

Physics suggests a useful metaphor: gravity.³⁹ Public values have a gravitational force that varies according to their source (the Constitution, statutes, the common law) and the degree of our historical and contemporary commitment to these values. The gravitational force will exercise a pull on other sources of law, including statutes. The gravitational force will not affect the evolution of a statute when the force is weak (for example, an old common law policy that is no longer compelling) and the statutory language relatively clear. Yet the gravitational

³⁵ See Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 24-27 (1988); Eskridge & Frickey, *supra* note 21, at 604-701.

³⁶ See Aleinikoff, *supra* note 35, at 46 & n.117; Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479, 1481-84, 1496-97 (1987).

³⁷ See, e.g., R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 228 (1975) (asserting that most canons simply "consist of rebuttable presumptions . . . that reflect the probabilities generated by normal usage or legislative behavior").

³⁸ See W. ESKRIDGE & P. FRICKEY, *supra* note 9, at 655-59 (substantive policies underlying many of the canons), 658-76 (rule of lenity), 676-89 (construction of statutes to avoid constitutional problems), 689-95 (surveying the scholarly assaults on and defenses of canons); C. SUNSTEIN, *supra* note 9 (general theory of statutory interpretation based upon canons).

³⁹ I apologize to physicists for expropriating a term (gravity) which has a more precise meaning than my analogue (public values).

force of a public value will have a decisive influence on the statutory orbit when the force is strong (for example, a constitutional value to which we are deeply committed) and the statutory language less clear.

To illustrate this argument, consider the following discussion of cases in which the force of public values has affected statutory interpretation. The cases reflect a broad survey of the Supreme Court's statutory interpretation decisions in the last ten years (1978-88), with some emphasis on those of the Burger Court's last Term (1985-86) and the Rehnquist Court's first two Terms (1986-88). I have organized the cases, first, according to the source of the public value (though of course the sources overlap a great deal), and within each source according to the means by which the Court considers the values (meta-rules, policy presumptions, clear statement rules, gapfilling principles, and background context). The cases are not necessarily representative of everyday statutory adjudications, and Part III will demonstrate that the Supreme Court itself is not consistent in its use of public values. The point of this description is to show how accepted doctrines of statutory interpretation are themselves responsive to our polity's interest in public values and, consequently, how public values already exercise an influence in statutory interpretation.

A. *Constitutional Values*

Public values developed from the Constitution have the greatest effect on statutory interpretation. This power partly results from the special coercive force of constitutional values: Statutes not sensitive to them stand a greater chance of invalidation. Also, constitutional values have been articulated through a rich tradition of Supreme Court cases and extensive academic commentary and systematic theorizing. The thought and effort going into this uniquely public discussion have perceptible effects on the Court's approach to statutes when similar issues of statutory interpretation are raised. Statutory interpretation doctrine has over time developed several clear statement rules and presumptions that grow out of constitutional values and that bring those values explicitly into the interpretive process. I shall analyze first the overall meta-rules incorporating constitutional values, and then several more specialized rules and presumptions. This Section will conclude with examples of the spillover of constitutional argumentation and value articulation as context for related statutory issues.

1. Meta-Rules

There are three general rules of statutory interpretation that reflect the gravitational force of constitutional values. These meta-rules

posit that even when Congress has the constitutional authority to enact a particular result by statute, the Court will presume against that result unless Congress clearly directs it. Underlying these meta-rules is the notion that the Court should be reluctant to interpret laws expansively when doing so would approach the constitutional periphery.

a. *Interpretation to Avoid Significant Constitutional Problems*

The most important meta-rule based upon constitutional values dictates that statutes should be interpreted to avoid constitutional problems. There are at least two ways of stating this meta-rule. One is to limit it to cases in which a particular interpretation would yield an unconstitutional statute. The rule would state only that if there are two plausible interpretations of the statute, and one of them would be unconstitutional, the Court should choose the interpretation that passes constitutional muster.⁴⁰

This version of the meta-rule, avoidance of an interpretation that would render the statute unconstitutional, is typically given an institutional competence explanation: The Court should avoid constitutional confrontations with Congress and, hence, should find ways around unnecessary declarations that a law is unconstitutional.⁴¹ Public values analysis suggests more substantive rationales for the meta-rule: The Court should assume that Congress is sensitive to constitutional concerns and presumably would not pass an unconstitutional statute; by

⁴⁰ A leading case is *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961) (interpreting the Sherman Act of 1890 not to penalize political petitioning protected by the first amendment). See also *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1939 (1988) (reiterating the *Noerr* standard but finding the standard-setting process of a private trade organization outside of "efforts to influence [the government]"); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (developing a "sham" exception under which political petitioning aimed not at securing a governmental response but rather at placing procedural roadblocks in front of competitors may not be covered by *Noerr* immunity); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (extending the *Noerr* immunity to cover attempts to influence government decisionmaking with specific intent to drive competitors out of business). For cases applying the *Noerr* analysis to other statutes, see *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1331 (7th Cir. 1977) (creating a *Noerr*-type exception to 42 U.S.C. § 1985(1), which proscribes interference with the public officials' legal performance of duties), *cert. denied*, 434 U.S. 975 (1978); *Weiss v. Willow Tree Civic Ass'n*, 467 F. Supp. 803, 817-18 (S.D.N.Y. 1979) (Weinfeld, J.) (similarly limiting 42 U.S.C. § 1983).

⁴¹ Cf. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (Brandeis, J., concurring) (noting various avoidance techniques, such as not passing upon the constitutionality of legislation in a friendly proceeding, not ruling in anticipation of a constitutional question, and construing statutes to ensure their constitutionality if a different construction would raise serious constitutional questions).

narrowly construing statutes venturing close to the constitutional periphery, the Court can signal its concerns to Congress. The Court can also update statutes by construing them to reflect society's evolving values as they relate to the Constitution. These public values explanations are even more apt for the second version of the meta-rule: The Court interprets a statute to avoid constitutional problems even though the broader interpretation would not necessarily be invalid. Under this rule, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."⁴²

A leading case for this latter version of the meta-rule is *NLRB v. Catholic Bishop*.⁴³ The NLRB had exercised jurisdiction over lay faculty at two groups of Roman Catholic high schools, based on its policy of declining jurisdiction only when a school is completely religious; the schools in question were only religiously associated, since secular as well as religious topics were taught. The National Labor Relations Act (NLRA) defines the NLRB's jurisdiction very broadly,⁴⁴ and the evolution of the statute suggested that Congress expected the NLRB to be able to regulate religious institutions.⁴⁵ The Court's analysis began not with the statutory text and history, however, but rather with the constitutional protection against state infringement on the free exercise of religion. "The values enshrined in the First Amendment plainly rank high 'in the scale of our national values.' In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions."⁴⁶

Drawing from its free exercise precedents, the Court emphasized

⁴² *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988); see *Crowell v. Benson*, 285 U.S. 22, 62 (1932), quoted in International Ass'n of Machinists v. Street, 367 U.S. 740, 749-50 (1961) ("When the validity of an act of the Congress is drawn in question, and if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). For examples of judicial application of the *Crowell-Street* principle, see *Communications Workers of Am. v. Beck*, 108 S. Ct. 2641 (1988); *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 63 (1964); *Hooper v. California*, 155 U.S. 648, 657 (1895); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448 (1830) (Story, J.); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64, 118 (1804) (Marshall, C.J.).

⁴³ 440 U.S. 490 (1979).

⁴⁴ 29 U.S.C. § 152(2) (1982) (defining as an "employer" subject to the NLRB's jurisdiction "any person acting as an agent of an employer, directly or indirectly" and then specifically exempting eight categories of employers from such jurisdiction).

⁴⁵ *Catholic Bishop*, 440 U.S. at 511-17 (Brennan, J., dissenting).

⁴⁶ *Id.* at 501 (opinion of the Court).

the importance of the teacher's role in the religious mission of a church school and concluded that there was a "significant risk that the First Amendment will be infringed"⁴⁷ by a broad interpretation of the statutory jurisdiction. Since Congress had not clearly addressed the issue in the statute or the most authoritative legislative history, the Court interpreted the statute not to give the NLRB jurisdiction over church schools.

Catholic Bishop is anomalous from a traditional perspective, for the Court's interpretation severely strains the statutory text in order to avoid a constitutional question that the statute should easily have survived.⁴⁸ The decision is at least explicable (I reserve discussion of its correctness to Part III) from a public values perspective. Government regulation of religious institutions is fraught with dangers of interference with the free exercise of religion, and whenever Congress ventures into that area it must proceed cautiously and with sensitivity to the free exercise issues. When Congress fails to proceed in a manner cognizant and protective of such fundamental values, the Court will give the statute a narrowing interpretation, leaving it to Congress to rethink the issue. The Court in the 1980s has relied on this strategy in several important cases,⁴⁹ though the Court will not follow it when Congress has clearly and precisely addressed the issue.⁵⁰

⁴⁷ *Id.* at 502.

⁴⁸ Not surprisingly, traditional scholars tied to the legal process pluralist tradition have been harshly critical of this rule. See H. FRIENDLY, *BENCHMARKS* 211-12 (1967); R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285-86 (1985).

⁴⁹ See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988) (narrowly construing the NLRA to avoid conflict with the first amendment); *Regan v. Wald*, 468 U.S. 222, 243 (1984) (narrowly interpreting the laws restricting travel to Cuba to avoid conflict with the due process clause); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 n.24 (1983) (declining to address equal protection issues involved in granting discriminatory schools tax-exempt status, and deciding instead on nonconstitutional grounds based on a narrow interpretation of the Internal Revenue Code); *United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982) ("In the absence of a clear expression of Congress' intent to' apply [a provision of the Bankruptcy Reform Act of 1978] to property rights . . . 'we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive [constitutional] questions . . .'" (quoting *Catholic Bishop*, 440 U.S. at 507)); *Saint Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (holding that the repeal of part of a statute must be interpreted to limit its effect if such interpretation is reasonable and precludes possible constitutional conflicts); cf. *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (interpreting statute narrowly to avoid facial constitutional problems, but invalidating statute as applied).

⁵⁰ See *Tull v. United States*, 481 U.S. 412, 417 n.3 (1987) (requiring determination of a constitutional question regarding the applicability of the seventh amendment to the Clean Water Act); *United States v. Locke*, 471 U.S. 84, 98 (1985) (explicit congressional statement required Court to test constitutionality of statute requiring mine claims to be recorded); *Regan v. Time, Inc.*, 468 U.S. 641, 652-55 (1984) (con-

b. *Interpretation to Preserve Traditional Separation of Responsibilities in Government*

A second meta-rule, related to the first, presumes that congressional enactments do not unnecessarily trench upon the lawmaking traditionally left to other sources of government authority, namely, the states and the coordinate branches of the federal government. That is, even where Congress clearly has the authority to preempt state law and provide policy rules for the coordinate federal branches, the Court will not presume that Congress has chosen to do so, unless necessary to effectuate legislative policies. Hence, deferring to the constitutional values inherent in federalism, the Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (the rule against preemption of traditional state functions).⁵¹ Or, deferring to the constitutional values inherent in separation of powers, the Court will assume that when Congress passes laws dealing with foreign affairs and other matters where congressional and executive power interact, Congress does not intend to interfere with traditional executive actions (the rule against overriding traditional executive functions).⁵² Deferring again to the constitutional values inherent in separation of powers, the Court may also presume that Congress does not intend to strip federal courts of their inherent powers, especially their power to fashion creative relief in equity (the rule against overriding traditional judicial powers).⁵³

Like the first meta-rule, this rule has traditionally been understood in institutional competence terms: Statutes should be interpreted to permit each institution of government—Congress, the President, the judiciary, and the states—to make policy in the areas where it is most competent to act. But this meta-rule also has a public values justification: Unless Congress has thoughtfully considered and adopted a new

struing statute broadly, then facing constitutional issues); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900-02 (1984); *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 157 & n.10 (1983); *City of Rome v. United States*, 446 U.S. 156, 173 (1980).

⁵¹ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

⁵² See, e.g., *Haig v. Agee*, 453 U.S. 280, 301 & n.50 (1982) (presuming that Congress had acquiesced in the executive's traditional authority to regulate passports); *Zemel v. Rusk*, 381 U.S. 1, 12 (1965) (same).

⁵³ See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982) ("[T]he legislative history [of the Federal Water Pollution Control Act] does not suggest that Congress intended to deny courts their traditional equitable discretion."); *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944) ("[I]f Congress desired to make such an abrupt departure from traditional equity practice . . . it would have made its desire plain.").

approach to important public issues, courts should presume that the answers being developed by those institutions that have been thinking about them should be left in place. This meta-rule may also involve a substantive judgment by the Court that the answers reached by those institutions are in fact good ones. Recent examples of its application by the Court suggest the particular cogency of the public values explanation.

An interesting recent application of the rule against federal preemption of traditional state functions is *Kelly v. Robinson*.⁵⁴ The Court held that restitution obligations, imposed upon a criminal defendant as conditions of her probation in state criminal proceedings, are nondischargeable obligations under Section 523(a)(7) of the Bankruptcy Act of 1978. Section 523(a)(7) protects from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."⁵⁵ Because a restitution is not necessarily "for the benefit of a governmental unit" and may be viewed as "compensation for actual pecuniary loss," the statutory language does not naturally lend itself to the Court's interpretation.⁵⁶ But the Court did not start with the bare language. Instead, its analysis began with a history of the Bankruptcy Act before its amendment in 1978; courts had uniformly interpreted the old Act not to discharge state criminal judgments, including restitutionary judgments, and there was no legislative discussion in connection with the 1978 Act to indicate congressional disapproval of, or departure from, that approach.⁵⁷ The Court reasoned that its "interpretation of the [Act] also must reflect the . . . deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings."⁵⁸ In a short discussion, the Court rehearsed "the fundamental policy against federal interference with state criminal prosecutions,"⁵⁹ and emphasized the useful rehabilitative and deterrent purposes served by state restitutionary remedies in criminal cases. "This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief This reflection of our feder-

⁵⁴ 479 U.S. 36 (1986).

⁵⁵ 11 U.S.C. § 523(a)(7) (1982).

⁵⁶ This was the reading adopted by the Second Circuit in *Robinson v. McGuigan*, 776 F.2d 30, 40-41 (2d Cir. 1985), but rejected by the Supreme Court in *Kelly*, 479 U.S. at 50-53.

⁵⁷ *Kelly*, 479 U.S. at 50-52.

⁵⁸ *Id.* at 47.

⁵⁹ *Id.* (quoting *Younger v. Harris*, 401 U.S. 37, 46 (1971)).

alism also must influence our interpretation of the Bankruptcy Code in this case.”⁶⁰

As *Kelly* suggests, the rule against preemption of traditional state functions is often the occasion for the Court to protect important local values from inadvertent federal interference.⁶¹ Similarly, the rule against overriding traditional executive powers can often be analyzed as the Court’s effort to protect rational executive lawmaking. This analysis is, I believe, the best explanation of the widely criticized case of *Dames & Moore v. Regan*,⁶² which upheld the President’s power to negotiate an executive agreement with the Islamic Republic of Iran in 1981. The agreement directed the transfer of Iranian assets from this country to Iran and to a special fund. The Court found that the executive transfer of assets was authorized by the International Emergency Economic Powers Act of 1977 (IEEPA), which permits the President in a national emergency to “regulate . . . any acquisition, holding, withholding, use, [or] transfer . . . of . . . any property in which any foreign country or a national thereof has any interest.”⁶³ The executive agreement also “suspended” private lawsuits against Iran in U.S. courts so that the matters in controversy could be handled in a special international claims tribunal. IEEPA does not directly approve such suspension, but the Court held that Congress had “acquiesced” in the President’s authority to order it, because Congress had never objected to previous executive agreements that similarly settled claims of U.S. citizens against foreign states.⁶⁴

The acquiescence argument (a classic legal process argument) is unpersuasive. Many of the executive agreements cited by the Court were formally ratified by the Senate or otherwise accepted by Congress, and none was quite like the broad agreement involved in *Dames & Moore*. Moreover, there was no reason to believe that Congress’ inac-

⁶⁰ *Id.* at 49 (citing *Younger* and Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539-40 (1947)).

⁶¹ For other recent examples, see *Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704, 1711-12 (1988) (no preemption of state safety regulation of private contractor operating nuclear power plant); *Rose v. Rose*, 481 U.S. 619, 637 (1987) (O’Connor, J., concurring in part and concurring in the judgment) (no preemption of state child and spousal support decree by federal anti-attachment statute); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256-58 (1984) (no preemption of state punitive damages rules by Atomic Energy Act); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 220-23 (1983) (no Atomic Energy Act preemption of California law limiting expansion of nuclear plants, to ensure vitality of state regulation of economic development); *id.* at 226-29 (Blackmun, J., concurring in part) (same, but characterizing California law in safety terms).

⁶² 453 U.S. 654 (1981).

⁶³ 50 U.S.C. § 1702(a)(1)(B) (1982).

⁶⁴ *Dames & Moore*, 453 U.S. at 678-83.

tion was not the result of inertia or simple ignorance rather than any approval of the President's prior actions, much less of desire to forfeit its ultimate control over such treaty dispensations.⁶⁵

A better argument, one probably underlying the Court's opinion, rests upon the perceived public value of the challenged practice. Especially in the post-World War II era, foreign countries (such as Iran) have often nationalized or otherwise penalized U.S. companies that operate within their borders. Typically, these controversies between U.S. companies and foreign states pursuing their own national policies have *not* been resolved in domestic U.S. courts. In part because such disputes are intimately tied to long-term U.S. relations to these foreign countries, the United States needs to coordinate these disputes in light of its evolving relations with these countries.⁶⁶ These disputes have been resolved by executive agreements negotiated by the President (sometimes with the consent of Congress). In cases such as *Dames & Moore*, the need for most expeditious yet definitive action to bring the fifty-two hostages back to the United States supports a practical power for the President to act unilaterally. Several of the Court's recent decisions similarly rest upon the need for statutes to afford the President breathing room to pursue long-term foreign policy objectives which might rebound to the overall common good.⁶⁷

c. *Interpretation Consistent with International Law and Treaty Obligations*

By operation of the supremacy clause, the principles set forth in international law and in treaties entered by the United States are "the supreme Law of the Land."⁶⁸ Courts will generally "interpret general

⁶⁵ See Eskridge, *supra* note 18 (general critique of acquiescence arguments); M. Froomkin, *The Sound of One House Clapping: Theories of Congressional Acquiescence* (draft July 1988) (criticizing *Dames & Moore*); see also Marks & Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68, 83-92 (1982) (demonstrating that the evidence of legislative acquiescence in *Dames & Moore* was in fact flimsy).

⁶⁶ See generally Eskridge, *The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction over Foreign States*, 22 HARV. INT'L L.J. 525, 566-71 (1981) (articulating this national policy and the various constitutional, statutory, and common law bases for it).

⁶⁷ See *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 232-33 (1986) (upholding President's discretion to ignore Japan's past violations of international whaling rules, notwithstanding legislation expressing congressional concern about such violations, as part of an overall executive strategy of seeking more certain Japanese compliance through executive agreement); see also *Department of Navy v. Egan*, 108 S. Ct. 818, 824-25 (1988) (granting executive discretion to grant national security clearances).

⁶⁸ See U.S. CONST. art. VI, cl. 2 (treaties); *The Paquete Habana*, 175 U.S. 677,

or ambiguous words in statutes in a manner consistent with international law,"⁶⁹ and "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."⁷⁰ Also, "courts do not favor repudiation of an earlier international agreement by implication and require clear indications that Congress, in enacting subsequent inconsistent legislation, meant to supersede the earlier agreement."⁷¹ International law and treaties thus have a quasi-constitutional status: Congress can override them, but it must do so clearly. International law, in particular, is a rich source of public values in statutory interpretation, because its precepts are formulated slowly, through a process of academic consensus and transnational debate.

Under this meta-rule, the Court has often been sensitive to international comity concerns when it interprets statutes having an international dimension.⁷² One justification for the result in *Dames & Moore* is the binding force that executive agreements have in international relations. Another recent example of the international comity meta-rule is the Court's decision in *Immigration & Naturalization Service (INS) v. Cardoza-Fonseca*.⁷³ Since 1980, the Immigration & Nationality Act (INA) has provided two methods through which an otherwise deport-

700 (1900) (international law).

⁶⁹ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 comment j (1965).

⁷⁰ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

⁷¹ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145 comment b (1965); see *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690-91 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights.").

⁷² For some recent examples, see *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 232-33 (1986) (deferring to bilateral understanding between Japan and U.S. Executive); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-29 (1985) (concerns of international comity and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Trans World Airlines v. Franklin Mint*, 466 U.S. 243, 254-60 (1984) (updating liability rules of U.S. version of Warsaw Convention; relying in part upon international practice); *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (preemption of state law; relying in part on international agreements); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (interpreting executive agreement by reference to international law); *United States v. California*, 447 U.S. 1, 5-6 (1980) (interpreting Submerged Lands Act by incorporating portion of Convention on the Territorial Sea). I find inconsistent with this line of cases a divided Court's refusal to apply the Hague Evidence Convention in *Société Nationale Industrielle Aerospatiale v. United States Dist. Court*, 107 S. Ct. 2542, 2548 (1987). See also *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104, 2107-11 (1988) (grudging approach to Hague Service of Process Convention).

⁷³ 480 U.S. 421 (1987).

able noncitizen who claims she will be persecuted if deported can seek relief. Under Section 243(h), the INS *must* withhold deportation if the noncitizen demonstrates by a preponderance of the evidence that her "life or freedom would be threatened" by the deportation.⁷⁴ Congress added Section 208(a) to the Act in 1980, authorizing the INS to grant asylum to a noncitizen unwilling to return to her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁷⁵ The INS took the position that the standards of proof in Sections 208(a) and 243(h) are the same and, hence, that a refugee seeking the INS's protection under Section 208(a) must show a probability of persecution. The Court rejected the INS's interpretation, in part because it is inconsistent with a natural reading of the statutory language and with the legislative history.

The Court also relied on an imputed legislative desire to conform to the standards of the 1967 United Nations Multilateral Protocol Relating to the Status of Refugees (to which the United States has formally acceded)⁷⁶ and related international documents (which the United States has not formally accepted). The 1967 Protocol provided clear support for the Court's interpretation of the INA to create a broader class of refugees that could receive discretionary relief. The Court was "further guided" by the analysis of the well-founded fear standard in the Handbook on Procedures and Criteria for Determining Refugee Status, promulgated by the Office of the U.N. High Commissioner (and also not formally acceded to by the United States).⁷⁷ The Court's message in *Cardoza-Fonseca* is a distinctly public values one: The interpretation of a statute touching upon asylum might be influenced by the evolving wisdom of international consensus.

2. Specific Presumptions & Clear Statement Rules

The rules discussed above—avoidance of constitutional problems, protection of separate governmental responsibilities, and deference to international law and treaties—are the meta-rules by which a variety of Constitution-based public values affect statutory interpretation. A

⁷⁴ 8 U.S.C. § 1253(h) (1982), as interpreted in *INS v. Stevic*, 467 U.S. 407, 421 n.15 (1984).

⁷⁵ 8 U.S.C. § 1158(a) (1982), as defined in *id.* § 1101(a)(42)(A).

⁷⁶ 19 U.S.T. 6223, TIAS No. 6577.

⁷⁷ See *Cardoza-Fonseca*, 480 U.S. at 438-41 (relying on the High Commissioner's analysis and finding it "consistent" with the Court's review of the Protocol's meaning); cf. *id.* 463-64 (Powell, J., dissenting) (arguing that the international materials are only "marginally relevant").

number of other maxims are more focused in their constitutional concerns. They can be phrased as either clear statement rules (the Court will interpret the statute in a certain way unless Congress clearly expresses a contrary intention), or as presumptions (Congress is presumed to accept a certain interpretation), or simply as weights in a balance (ambiguity will be resolved in favor of a particular value). I shall examine three such maxims: the rule of lenity in criminal cases, the presumption of state immunity, and the rule protecting "*Carolene* groups."

a. *Rule of lenity*

The "rule of lenity" for interpreting criminal statutes is a special version of the meta-rule that statutes should be interpreted to avoid constitutional questions and is most susceptible to a public values reading. The rule of lenity rests upon the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable; as well as the separation-of-powers value that prosecutors and courts should be unusually cautious in expanding upon legislative prohibitions where the penalty is severe.⁷⁸ The rule of lenity is usually stated simply: Penal statutes should be strictly, or narrowly, construed. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."⁷⁹ Given its grounding in the fair notice and reasonable penalty precepts of due process, the rule is applied most generously when the questioned conduct is accepted by general social norms and least frequently when the questioned conduct is widely considered horrible.⁸⁰

The Court in the 1980s has frequently invoked the rule of lenity.⁸¹

⁷⁸ See *United States v. Kozminski*, 108 S. Ct. 2751, 2764 (1988) (uncertainty resolved in favor of lenity to avoid "the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (striking down vagrancy ordinance that implicated due process concern over "arbitrary and discriminatory enforcement of the law").

⁷⁹ *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952), quoted in *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971).

⁸⁰ See O.W. HOLMES, JR., *THE COMMON LAW* 50 (1881) ("a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear"); J.W. HURST, *DEALING WITH STATUTES* 64-65 (1982) (courts follow general community standards as context in which to construe sweep of statutory text).

⁸¹ See, e.g., *Kozminski*, 108 S. Ct. at 2764 ("[W]e adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity."); *Kungys v. United States*, 108 S. Ct. 1537, 1557 (1988)

One of its most interesting invocations came in *McNally v. United States*,⁸² which interpreted the federal mail fraud statute to be applicable only when the fraud involves property rights and inapplicable when the fraud consists of depriving the citizenry of intangible rights to honest government. The Court's opinion relied on the statutory text, its legislative history, parallel common law developments, and the purpose of the statute, though the dissenting opinion presented an unusually persuasive critique of each asserted ground.⁸³ What may have been decisive to the Court was its fear that the common law development of the mail fraud statute had become so unbounded that virtually any arguably unethical conduct could be brought within its penalty.⁸⁴ The expansion of criminal culpability without clearer legislative authorization implicated the rule of lenity concerns for cabining prosecutorial discretion and ensuring adequate notice; these concerns were especially acute in a case that also implicated federalism values. Consequently, the Court invoked the rule of lenity and chose the less expansive reading of the statute.⁸⁵

(Stevens, J., concurring in the judgment) (denaturalization for making false statements "patently excessive"); *Tanner v. United States*, 107 S. Ct. 2739, 2753 (1987) (ambiguity in criminal statutes resolved in favor of lenity); *Dowling v. United States*, 473 U.S. 207, 229 (1985) (same); *Liparota v. United States*, 471 U.S. 419, 427 (1985) (same); *Williams v. United States*, 458 U.S. 279, 290 (1982) (same). On the other hand, the Court has declined to invoke the rule of lenity in cases where it was arguably applicable. *See, e.g., Regents of the Univ. of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404, 1413 (1988) (Stevens, J., dissenting) (rule of lenity should have been applied to require a strict construction of the penal provisions protecting U.S. postal monopoly); *United States v. Yermian*, 468 U.S. 63, 83 (1984) (Rehnquist, J., dissenting) (rule of lenity should have been applied); *Russello v. United States*, 464 U.S. 16, 29 (1983) (rule of lenity inapplicable where "the language of the RICO forfeiture provision is clear").

⁸² 107 S. Ct. 2875 (1987); *see also* *Carpenter v. United States*, 108 S. Ct. 316, 320 (1987) (distinguishing *McNally*).

⁸³ *Compare McNally*, 107 S. Ct. at 2879-81 (interpreting mail fraud statute in light of text, legislative history, parallel common law developments, and statutory purpose) *with id.* at 2884-89 (Stevens, J., dissenting) (criticizing each argument supporting the majority's interpretation of the statute).

⁸⁴ *See id.* at 2881 (expressing desire not to construe statute in a way that would leave "its outer boundaries ambiguous"); *id.* at 2890 (Stevens, J., dissenting) ("I recognize that there may have been some overly expansive applications of § 1341 in the past."); *see also* *United States v. Margiotta*, 688 F.2d 108, 141-44 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part) (persuasive critique of the common law expansion of § 1341), *cert. denied*, 461 U.S. 913 (1983).

⁸⁵ *See McNally*, 107 S. Ct. at 2881 ("Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has."). Congress amended § 1341 in 1988 to overrule *McNally*.

b. *Presumption of State Immunity*

The eleventh amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."⁸⁶ The Supreme Court has interpreted the amendment broadly, to prohibit lawsuits in admiralty (in addition to the "suit in law or equity" in the amendment) and to prohibit lawsuits by citizens of the state (in addition to "Citizens of another State, or . . . Foreign State" in the amendment).⁸⁷ The Court has recognized that a state may waive its eleventh amendment immunity and that Congress can abrogate that immunity in lawsuits pursuant to federal statutes. As to the latter, the Court is reluctant to interpret a federal statute so as to abrogate a state's constitutional immunity and in recent years has created a clear statement rule to this effect. "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."⁸⁸

The Court applied this strong presumption against congressional abrogation of state immunity most recently in *Welch v. Texas Department of Highways & Public Transportation*.⁸⁹ The Jones Act provides a remedy for "[a]ny seaman who shall suffer personal injury in the course of his employment."⁹⁰ A closely divided Court held that this "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."⁹¹ *Welch* is grounded in the public values implicated in the eleventh amendment and the broader precepts of federalism, but it also illustrates the dynamic nature of the public values approach to statutes. The 1980s Court has been more aggressive in its application of this

⁸⁶ U.S. CONST. amend. XI.

⁸⁷ See *Ex parte New York*, 256 U.S. 503, 511 (1921) ("public property [a vessel] of a State used and employed for public and governmental purposes" exempt from seizure by admiralty process *in rem*); *Hans v. Louisiana*, 134 U.S. 1, 10, 21 (1890) (a state may not be sued in federal court even on a federal question by one of its own citizens). But see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259-80 (1985) (Brennan, J., dissenting) (criticizing *Hans* and arguing that the eleventh amendment should prevent federal jurisdiction over suits against a state only in the absence of a federal question).

⁸⁸ *Atascadero State Hosp.*, 473 U.S. at 243; see also *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (unwilling to infer congressional abrogation without clear evidence, given the "vital role of the doctrine of sovereign immunity in our federal system").

⁸⁹ 107 S. Ct. 2941 (1987).

⁹⁰ 46 U.S.C. § 688(a) (1982).

⁹¹ *Welch*, 107 S.Ct. at 2947 (quoting *Atascadero State Hosp.*, 473 U.S. at 246).

clear statement rule. Indeed *Welch* overruled⁹² *Parden v. Terminal Railway of Alabama Docks Department*,⁹³ which had interpreted similarly general language of a similar federal statute to abrogate eleventh amendment immunity.

c. Protection of "Carolene Groups"

A third special rule of statutory interpretation is not stated as such in any of the Court's decisions but can be discerned from their overall pattern: Statutes affecting certain discrete and insular minorities—"Carolene groups"⁹⁴—shall be interpreted, where possible, for the benefit of those minorities. The inspiration for this maxim is the special equal protection scrutiny applied by the Court to statutes that adversely affect *Carolene* groups. Groups receiving this protection are racial groups (especially blacks and Native Americans), women, and noncitizens. The constitutional values served by strict scrutiny—counteracting possible prejudice against these groups and ensuring that the political process treats them fairly—also show up in statutory interpretation cases. Their presence is alien to traditional theory and strong evidence that public values play an important role in statutory interpretation. This precept of interpretation can be found in two types of cases.

In some cases, the Court will explicitly announce that statutes should not readily be interpreted against a *Carolene* group. For example, in *Cardoza-Fonseca*, the Court adverted to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."⁹⁵ The rule of lenity is often applied with particular care when the rights of noncitizens are involved.⁹⁶ Similarly, the Court will usually interpret ambiguous treaties and statutes affecting Native

⁹² See *id.* at 2947-48 (Powell, J., plurality opinion); *id.* at 2958 (Scalia, J., concurring in part and concurring in the judgment).

⁹³ 377 U.S. 184 (1964).

⁹⁴ Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985) (asserting that the four operative terms in the *Carolene* test—prejudice, discrete, insular, and minorities—attempt to identify groups "unconstitutionally deprived of their fair share of democratic influence").

⁹⁵ *Cardoza-Fonseca*, 480 U.S. at 449 (citing *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

⁹⁶ See *Kungys v. United States*, 108 S. Ct. 1537, 1557 (1988) (Stevens, J., concurring in the judgment) (stating that there is a "special burden on the Government when it seeks to denaturalize an American citizen"); cf. *United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971) (language of 18 U.S.C. § 1546 construed strictly to withhold criminal penalty for possessing a counterfeit alien registration card); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388-89 (10th Cir. 1981) (relying also on deference to international law rules against indefinite detention of noncitizens).

Americans in favor of the latter. "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."⁹⁷

Blacks and women are not the focus of federal statutes as often as are noncitizens and Native Americans. Nonetheless, the rule protecting marginalized groups sometimes protects blacks and women. The best examples are cases in which general duties created by federal law appear to clash with private or public efforts to compensate blacks and women for unique disadvantages they suffer or have suffered. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, sex, religion, or national origin.⁹⁸ This statute obviously protects blacks and women from "discrimination" against them, but its language also might be read to prevent affirmative action, or "discrimination," to help them. Notwithstanding substantial support in the legislative history for that interpretation, the Court in *United Steelworkers v. Weber*⁹⁹ held that under some circumstances Title VII does not preclude employers and unions from adopting voluntary affirmative action for black employees. The Court reaffirmed and expanded upon *Weber*, and applied it to affirmative action programs for women as well, in *Johnson v. Transportation Agency*.¹⁰⁰

As amended in 1978, Title VII's prohibition of discrimination on the basis of sex includes discrimination "on the basis of pregnancy," and provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."¹⁰¹ The Court in *California Federal Savings & Loan Association v. Guerra*¹⁰² held that Title VII does not prohibit or preempt a state law requiring reinstatement of workers on pregnancy leave, even though that right is not accorded to male workers on similar types of leave.¹⁰³ Essential to this conclusion was the *Weber*-based ar-

⁹⁷ *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), *quoted in* *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *see also* *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("[T]his Court has often held that treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians' favor."); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) (upholding Native American hunting and fishing rights that were conferred by treaty, "since the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934))).

⁹⁸ 42 U.S.C. § 2000e-2(a) (1982).

⁹⁹ 443 U.S. 193 (1979).

¹⁰⁰ 480 U.S. 616 (1987).

¹⁰¹ 42 U.S.C. § 2000e(k) (1982).

¹⁰² 479 U.S. 272 (1987).

¹⁰³ *See id.* at 290-92.

gument that the pregnancy discrimination language was added to protect women against traditional discrimination and that it would be anomalous to interpret this remedial provision to invalidate a law meant to promote equal employment opportunities for women.¹⁰⁴

3. Background Context

Guerra, *Weber*, and *Johnson* illustrate a broader way in which constitutional values may affect statutory interpretation. The public values articulated in constitutional cases may frame the arguments in analogous statutory cases, provide useful experience from which the Court can draw in evaluating the consequences of different interpretations, and influence—though not necessarily dictate—the direction in which the interpreter is willing to bend the statute. Critical background experiences influencing the Court's willingness to allow some affirmative preferment include the efforts to remedy both segregation after *Brown* and employment discrimination after the passage of Title VII. A year before *Weber*, five members of the Court held in *Regents of the University of California v. Bakke*¹⁰⁵ that affirmative action in public college admissions is acceptable under some circumstances, namely, to promote diversity or to redress the continuing effects of past discrimination. This holding reflected almost a decade of intense public debate about affirmative preferences and validated the concept that nondiscrimination—the key term in both the constitutional and statutory cases—does not always mean pure color or gender blindness.¹⁰⁶

The continuing statutory ramifications of *Bakke* were abundantly evident in the Court's 1985 and 1986 Terms. The Court not only decided *Johnson* and *Guerra*, but also several other cases exploring the consequences of *Weber*.¹⁰⁷ The Court, or at least some of the Justices, adverted to the constitutional principles in several of these cases for the proposition that "affirmative race-conscious relief may provide an effective means of remedying the effects of past discrimination."¹⁰⁸ Of

¹⁰⁴ See *id.* at 292-95 (Stevens, J., concurring in part and concurring in the judgment).

¹⁰⁵ 438 U.S. 265 (1978).

¹⁰⁶ See *Johnson*, 480 U.S. 642-44 (1987) (Stevens, J., concurring).

¹⁰⁷ For analytical surveys of these cases, see Ortiz & Rutherglen, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988); Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524 (1987).

¹⁰⁸ Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 450 n.27 (1986); see Local 93, Int'l Ass'n Firefighters v. City of Cleveland, 478 U.S. 501, 516 (1986) (interpreting *Weber* as holding "that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination").

course, the constitutional values underlying *Weber* do not mandate that Title VII should be interpreted the same as the Constitution, and *Johnson* may grant broader permission for voluntary private programs than the post-*Bakke* cases would permit for public employers. Nonetheless, the constitutional cases continue to exercise influence on the statutory cases, and Justice O'Connor for one favors closer congruence.¹⁰⁹

The role of public values as background context in statutory interpretation is the best way to understand the Supreme Court's curious interpretation of the charitable institutions exemption provision of the Internal Revenue Code in *Bob Jones University v. United States*.¹¹⁰ The Code exempts from income taxation institutions "organized and operated exclusively for religious, charitable, . . . or educational purposes."¹¹¹ The Court held that Bob Jones University, obviously an "educational" institution, was not entitled to the exemption, because it prescribed racially discriminatory admissions standards. To get around the statutory language apparently entitling Bob Jones to the exemption, the Court argued that the underlying purpose of the tax exemption is to subserve overall public policy goals, which a racially discriminatory institution does not do. The Court also relied upon Congress' failure to overturn the Internal Revenue Service (IRS) rule in the 1970s, notwithstanding extensive debate within and outside Congress and several legislative proposals to change it. These are classic legal process arguments, yet they are patently unpersuasive in *Bob Jones*. The Court radically oversimplified the purpose of the exemption, which also aims to foster a diversity of viewpoints intrinsic to a pluralistic society.¹¹² That purpose does not support the Court's interpretation. Nor is the acquiescence argument wholly persuasive, since much the same argument could have been made in favor of the opposite interpretation, in which Congress apparently acquiesced before the IRS changed the rule in 1970.¹¹³

It is not clear that the legal process reasoning in *Bob Jones* even amounts to a serious effort to justify the Court's decision, but a public values explanation suggests a more cogent basis for that decision.¹¹⁴ It

¹⁰⁹ See *Johnson*, 480 U.S. at 647-57 (O'Connor, J., concurring in the judgment).

¹¹⁰ 461 U.S. 574 (1983).

¹¹¹ 26 U.S.C. § 501(c)(3) (1982).

¹¹² See *Bob Jones*, 461 U.S. at 609-10 (Powell, J., concurring in part and concurring in the judgment); *Walz v. Commissioner*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring) (exemptions are granted because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society").

¹¹³ See Eskridge, *supra* note 18, at 90; Freed & Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 Sup. Ct. Rev. 1, 8-12.

¹¹⁴ *Bob Jones*, 461 U.S. at 606-07 (Powell, J., concurring in part and concurring in the judgment).

starts with the question: Do we as a society want to give tax breaks to institutions that discriminate on the basis of race? Our answer is "no" because of the constitutional values generated by the *Brown* cases. To be sure, *Brown* only applies to state-sanctioned discrimination, and the civil rights statutes and regulations adopted in the 1960s and 1970s did not directly apply to Bob Jones, a private institution not accepting federal grants. Yet *Brown* has come to stand for a much broader public value: racial segregation, especially in education, is wrong. Given this public value, whose gravitational force is among the strongest of all, the Court was reluctant to reject the agency's new interpretation of the Code's tax exemption.

B. *Statutory Values*

Because constitutional values are fundamentally "constitutive" of our public society, they naturally are the primary and most dramatic source of public values in statutory interpretation. But statutes themselves can be the source of public values. While many statutes are not much more than ad hoc deals, as the economists teach us, other statutes are sources for more enduring principles and values. For example, one of the most fundamental public values of my generation is concern for the environment, and environmental statutes and regulations have articulated this value for us.¹¹⁵ In this Section, I want to demonstrate the ways in which statute-generated public values may influence statutory interpretation, using the same categories deployed in the Section on Constitution-generated public values.

1. Meta-Rules

Fundamental to a public values approach to statutory interpretation is the notion that statutes are more than a series of ad hoc deals, and that typically statutes embody some overall policy rationality. Policy rationality suggests three related propositions: (1) different provisions of the same statute fit together in a coherent way and embody a reasonable public policy; (2) the statute is consistent with other statutes, so that the different statutes fit together coherently; and (3) the statute develops coherently over time. It would be an overstatement to say that these precepts always guide the Supreme Court's interpretation of statutes, but these precepts do seem to exert a consistent and pervasive influence and are routinely noted by the Court. Again, I shall use recent cases to illustrate these meta-rules of interpretation.

¹¹⁵ See Elliott, Ackerman & Millian, *supra* note 29, at 335.

a. *The Purposive Whole Act Rule*

One established canon of construction is the purposive whole act rule, which seeks to impose some degree of coherence within a single statute. "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions.'" ¹¹⁶ The rule assumes that a statute should be interpreted to serve its rational, purposive policy and is frequently invoked in Supreme Court opinions. ¹¹⁷ While classic legal process theory endorses "purposive" interpretation of statutes, ¹¹⁸ a public values approach uses this approach more aggressively.

Public values analysis better captures the Court's own use of purposive interpretation in two different kinds of cases. First, traditional legal process theory teaches that a statute's purpose cannot overcome

¹¹⁶ *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); see *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."); *Richards v. United States*, 369 U.S. 1, 11 (1962) ("[A] reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred.").

¹¹⁷ In many of the Court's decisions, there is at least some argument supporting the Court's interpretation based upon the overall statutory purpose. See, e.g., *Citicorp Indus. Credit, Inc. v. Brock*, 107 S. Ct. 2694, 2700-01 (1987) (applying the Fair Labor Standards Act to limit resale of goods produced under substandard conditions, in order to promote the Act's overall policy of eliminating such goods' competitive advantage). In some opinions overall purpose is the key argument. See, e.g., *Houston v. Lack*, 108 S. Ct. 2379, 2381-85 (1988) (using overall purposes of notice to interpret FED. R. APP. P. (4)(a)(1)); *EEOC v. Commercial Office Prods. Co.*, 108 S. Ct. 1666, 1671-74 (1988) (interpreting the deferral provisions of Title VII of the Civil Rights Act of 1964 in light of the "policy of the legislation as a whole" prohibiting discrimination); *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1520-25 (1988) (finding vertical restraints not per se illegal under § 1 of the Sherman Act because they do not necessarily restrain trade); *Langley v. FDIC*, 108 S. Ct. 396, 399-403 (1987) (broad interpretation of FDIC statute, to ensure complete bank records); *McNally*, 107 S. Ct. at 2879-82 (reversing convictions under the mail fraud statute because the act aims to protect only property rights); *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2337 (1987) (enforcing arbitration of statutory rights, based on Arbitration Act's strong policy favoring arbitration); *United States v. Hohri*, 107 S. Ct. 2246, 2251-53 (1987) (finding a congressional intent to increase "nationwide uniformity in certain areas of the law," and therefore holding that cases presenting both nontax Little Tucker Act claims and Federal Tort Claims Act issues may be appealed only to the Federal Circuit); *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2216-19 (1987) (finding no federal preemption because it would not further ERISA's purposes "to afford employees the advantages of a uniform set of administrative procedures governed by a single set of regulations"); *Rose v. Rose*, 481 U.S. 619, 631-34 (1987) (allowing states to require disabled veterans to pay child support out of their benefits because it coincides with "Congress' intent to provide veterans' disability compensation for the benefit of both [the recipient] and his dependents").

¹¹⁸ See H. HART & A. SACKS, *supra* note 15, at 1200-01.

the plain meaning of the statute,¹¹⁹ and the Court often relies on this idea.¹²⁰ But the Court often invokes the purposive whole act rule precisely when the text seems dead against the desired interpretation. The Court may be viewed as having done just that in *Weber*, *Bob Jones, Johnson, Guerra*, and *Kelly*.¹²¹ Notwithstanding the argument (made in a dissenting opinion in each case) that a clear text and supporting legislative history prescribed a contrary result, the Court in each case relied instead upon a purpose-of-the-statute analysis. In *Kelly*, for example, the Court's holding that state criminal restitution orders are not discharged in bankruptcy was in tension with Section 523(a)(7) of the Bankruptcy Act, which protects only a penalty that is "payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."¹²² In bending the apparent meaning of the text, the Court candidly admitted that it found the text only "the starting point" for interpretation and then proceeded to "look to the provisions of the whole law, and to its object and policy."¹²³

Second, traditional legal process theory tends to speak in terms of the original legislative purposes, while public values analysis suggests that a statute's purpose can and usually will evolve over time. For instance, the original purposes of Title VII were to produce a color-blind society and to provide more job opportunities for minorities. When the statute was enacted, legislators thought—or pretended to think—that these were consistent purposes. Over time, they were revealed to be somewhat inconsistent, because continuing effects of discrimination were felt by minorities. Hence, in *Weber* the Court gave priority to the job opportunities purpose (which supports affirmative action), a priority that is at odds with the original legislative assumptions.¹²⁴ The

¹¹⁹ *Id.* at 1412 ("[A] court ought never to give the words of a statute meaning they will not bear . . .").

¹²⁰ See, e.g., *Huffman v. Western Nuclear, Inc.*, 108 S. Ct. 2087, 2092 (1988) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940))).

¹²¹ *Guerra*, 479 U.S. at 284, and *Weber*, 443 U.S. at 201, quoted from *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892): "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

¹²² 11 U.S.C. § 523(a)(7) (1982).

¹²³ *Kelly*, 479 U.S. at 53 (multiple quotation marks omitted). This quotation has a long lineage in Supreme Court opinions. It derives from *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 121 (1850), by way of *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956), and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986).

¹²⁴ See *Weber*, 443 U.S. at 213 (Blackmun, J., concurring) (noting that "discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted"); Eskridge,

Court carried out a similar transformation of original legislative purpose in *Bob Jones and Guerra*.

b. *The In Pari Materia Rule and The Rule Against Implied Repeals*

There is no federal rule of statutory interpretation that forces different statutory schemes to be harmonious, but there are two rules that ameliorate those disharmonies and even encourage a policy dialogue. One is the "in pari materia rule": Where a federal law is similar to (in pari materia with) another federal law, the Court will presumptively interpret the former law consistently with the other and will rely on prior interpretations of one to interpret the other. The Supreme Court typically explains this rule by reference to the traditional legal process idea of imputed legislative intent: "[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."¹²⁵ But sometimes this rule is an occasion for the Court to harmonize statutory policy and to articulate public values.¹²⁶

In *Wimberly v. Labor & Industrial Relations Commission*¹²⁷ the Court applied this rule to interpret the Federal Unemployment Tax Act, which governs a federal-state program of benefits to unemployed workers.¹²⁸ The states administer the program but are constrained by certain statutory rules. Section 3304(a)(12) of the Act mandates that "no person shall be denied compensation . . . solely on the basis of pregnancy or termination of pregnancy."¹²⁹ Although most states regarded leave on account of pregnancy as a voluntary termination for good cause, thereby entitling workers to unemployment benefits, Missouri and a few other states defined "leaving for good cause" narrowly. In these states, all workers who left their jobs were disqualified from

supra note 36, at 1488-94 (discussing *Weber*).

¹²⁵ *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); see *Kungys v. United States*, 108 S. Ct. 1537, 1546 (1988) (in an action to revoke citizenship under 8 U.S.C. § 1451(a), construing "material" as having the same meaning that Congress had given it in previous statutes); *Western Air Lines v. Board of Equalization*, 480 U.S. 123, 130-31 & n.* (1987) (defining "in lieu tax," as used in 49 U.S.C. § 1513(d), in light of the legislative history of the Railroad Revitalization and Regulatory Reform Act).

¹²⁶ See, e.g., *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-49, 50-51 (1987) (relying on the McCarran-Ferguson Act to conclude that a Mississippi law of bad faith does not fall under the savings clause of the Employee Retirement Income Security Act (ERISA)); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987) ("The presumption that similar language in two labor law statutes has a similar meaning is fully confirmed by the legislative history of ERISA's civil enforcement provisions.").

¹²⁷ 479 U.S. 511 (1987).

¹²⁸ 26 U.S.C. §§ 3301-3311 (1982 & Supp. IV 1986).

¹²⁹ *Id.* § 3304(a)(12).

benefits unless they left for reasons directly attributable to the work. Thus, while Missouri treated women leaving for pregnancy reasons no differently from other workers leaving for non-job reasons, the plaintiff argued that Section 3304(a)(12) is more than an antidiscrimination statute and *requires* preferential treatment for pregnant women.¹³⁰ The text of the statute is not helpful to that argument, and the legislative history of Section 3304(a)(12) is ambiguous. A decisive consideration for the unanimous Court was that it had "construed language similar to that in § 3304(a)(12) as prohibiting disadvantageous treatment, rather than mandating preferential treatment."¹³¹ Thus, the Court cited its interpretation of a recent statute protecting veterans against employment penalties because of their reserve duties. That interpretation, in turn, rested upon a line of cases in which the Court had developed a reasoned approach to veterans' protection statutes, emphasizing nondiscrimination against veterans but not favoritism (unless clearly mandated by the statute).¹³² In short, the *in pari materia* rule was the *Wimberly* Court's way of applying the principles long developed by the Court in areas of intense discussion (veterans' statutes) to a new statutory scheme.

A second rule harmonizing different statutes is the rule that "repeals by implication are not favored."¹³³ That is, "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."¹³⁴ The Court will reconcile the two statutes in order to give maximum effect to the policy of each, and to give

¹³⁰ See *Wimberly*, 479 U.S. at 514-18.

¹³¹ *Id.* at 517 (citing *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981) (interpreting Vietnam Era Veterans' Readjustment Assistance Act of 1974), and *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (interpreting Rehabilitation Act of 1973)).

¹³² The leading case, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-291 (1946), interpreted the first modern veterans' job protection statute, the Selective Training and Service Act of 1940, and articulated the same nondiscrimination-but-not-mandatory-preference idea that the Court reiterated in connection with the 1974 Act in *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).

¹³³ *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); see also *Saint Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.") (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (quoting *Posadas* rule); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (same); *Universal Interpretive Shuttle Corp. v. Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 193 (1968) (acknowledging the rule against implied repeals).

¹³⁴ *Mancari*, 417 U.S. at 551.

greater effect to the statute that more clearly focuses on the issue in the case.¹³⁵ As a formal matter, the rule is justified as an indication of original legislative intent, or at least as the best way to reconcile apparently conflicting legislative signals.¹³⁶ As a functional matter, the rule is often a method for courts to develop public values from earlier statutes and thereby narrow or expand the effect of later ones.

Several cases in the last several Terms applied this rule,¹³⁷ but the most interesting and elaborate application of the rule is still the leading case, *Morton v. Mancari*.¹³⁸ The Indian Reorganization Act of 1934¹³⁹ gives Native Americans a preference for employment with the Bureau of Indian Affairs (BIA). Plaintiffs challenged this employment preference as violating the Equal Employment Opportunity Act of 1972,¹⁴⁰ which extended Title VII and its rule of nondiscrimination on the basis of race to federal government employment. Plaintiffs' position was solidly founded upon the sweeping language of the 1972 Act and the core meaning of nondiscrimination, yet the Court upheld the preference based in large part upon the rule against implied repeals. That, in turn, was largely informed by the Court's public values analysis. A series of federal statutes dating back to 1834 have pursued the preference for Native Americans in the government organs dealing with Native American affairs. The Court found that the underlying justifications for this time-tested legislative policy have been "to give Indians a greater participation in their own self-government; to further the Gov-

¹³⁵ "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower*, 426 U.S. at 153 (quoting *Mancari*, 417 U.S. at 550-51); see *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494, 2497 (1987) (holding that FED. R. Civ. P. 54(d), which grants district courts discretion to tax appropriate costs, does not nullify a more specific statute listing taxable costs).

¹³⁶ See, e.g., *United States v. Fausto*, 108 S. Ct. 668, 681 n.9 (1988) (Stevens, J., dissenting) ("We can presume with certainty that Congress is aware of this longstanding presumption [against implied repeals] and that Congress relies on it in drafting legislation Changing the weight to be accorded this presumption alters the legal landscape. [And it] increase[s] the risk that we will reach an erroneous interpretation.").

¹³⁷ See *Traynor v. Turnage*, 108 S. Ct. 1372, 1381 (1988) (applied in interpreting the 1978 Rehabilitation Act amendments); *Crawford Fitting Co.*, 107 S. Ct. at 2497 (holding that FED. R. Civ. P. 54(d) does not impliedly repeal federal statutes limiting the compensation of expert witnesses); *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 564-67 (1987) (holding that the Railway Labor Act does not repeal any part of the Federal Employers' Liability Act); *Rodriguez v. United States*, 480 U.S. 522, 523-26 (1987) (per curiam) (Probation Act was not superseded by the Comprehensive Crime Control Act).

¹³⁸ 417 U.S. 535 (1974).

¹³⁹ 25 U.S.C. §§ 461-479 (1982) (originally enacted as Act of June 18, 1934, ch. 576, § 1, 48 Stat. 984, 986).

¹⁴⁰ 42 U.S.C. § 2000e-16(a) (1982).

ernment's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."¹⁴¹ The policy was a keystone of the 1934 Act, which was a legislative decision to shift greater control of Native American affairs to Native American tribes themselves; this shift was to be accomplished in part by strengthening the BIA's preference for employing Native Americans. The Court was reluctant to interpret the 1972 Act as repealing this policy without public discussion that was more focused on the preference for Native Americans. "The preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision [of the 1972 Act], aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem."¹⁴²

c. *Rule of Deliberative Statutory Evolution*

Statutes develop over time through judicial interpretation, agency interpretation (where applicable), and legislative amendment. Though not stated as such in the cases, the Supreme Court follows a rule of deliberative statutory evolution. That is, the Court encourages a step-by-step development of statutory policy by implementing institutions (courts, agencies, or the executive), thereby promoting orderly change and measured continuity.

For statutes with no associated agency, the Court itself is charged with the case-by-case development of the statute, with occasional (typically episodic) legislative intervention. The Court is very much concerned that each decision interpreting a statute build upon the principles and lessons articulated in the Court's prior decisions interpreting that statute (and, sometimes, on its decisions interpreting related statutes). This concern shows up in the Court's "super-strong presumption against overruling statutory precedents."¹⁴³ That is, the Court is generally more reluctant to reconsider its statutory precedents than to reconsider and overrule its constitutional or common law precedents.¹⁴⁴ One

¹⁴¹ *Mancari*, 417 U.S. at 541-42 (footnotes omitted).

¹⁴² *Id.* at 550.

¹⁴³ See generally Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (analyzing the super-strong presumption).

¹⁴⁴ See *id.*; see also *Miller v. Fenton*, 474 U.S. 104, 115 (1985) (Supreme Court decisions on which Congress has later based a statute have especially compelling stare decisis value); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-37 (1977) ("considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); *Runyon v. McCrary*, 427 U.S. 160, 174-75 (1976) (where Congress declined to modify the Supreme

rationale for the unusual *stare decisis* effect given to statutory precedents is that each judicial interpretation of a statute is a building block upon which private parties, Congress, and the Court itself build.¹⁴⁵ So long as Congress does not disapprove the interpretation, the strong presumption is that the interpretation (even if demonstrably wrong) ought to stand. For example, the *Johnson* Court relied on this argument to support its refusal to reconsider the *Weber* precedent.¹⁴⁶

When the Court considers statutes that charge an agency with implementing the statute, the Court will defer to the agency's interpretation in most cases. "If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." ¹⁴⁷ This reasoning has been increasingly popular in Supreme Court opinions of the 1980s.¹⁴⁸ Again, the rule of deference to agency interpretation has a traditional legal process justification—the Court should not make law in areas where agencies are more institutionally competent and are delegated formal authority.¹⁴⁹ The rule also has a powerful public values justification similar to the quasi-constitutional rules that defer to state lawmaking

Court's interpretation of a statute "there is no basis for deviating from the well-settled principles of *stare decisis* applicable to this Court's construction of federal statutes").

¹⁴⁵ See Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEX. L. REV. 247, 250-52 (1947) (if the Court changes its interpretation of a statute, it is taking on a legislative function by "changing an established rule of law under which society has been operating"); Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 523-40 (1948) (supporting the doctrine that prior judicial decisions involving statutory interpretation should be viewed as more compelling than decisions relating to case law and constitutional interpretation). Both Horack and Levi are discussed in Eskridge, *supra* note 143, at 1397-1402.

¹⁴⁶ *Johnson*, 480 U.S. at 629-30 n.7 (1987); see *United States v. Johnson*, 481 U.S. 681, 686 & n.6 (1987) (same); Eskridge, *supra* note 18, at 92-94 (discussing *Johnson* and *Weber*).

¹⁴⁷ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)); see *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (leading case for deference to administrative interpretation).

¹⁴⁸ Consider its constant invocation in the 1987 Term alone. See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. 2428, 2443 (1988) (Scalia, J., concurring in the judgment); *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *EEOC v. Commercial Office Prods. Co.*, 108 S. Ct. 1666, 1676 (1988) (O'Connor, J., concurring in part and concurring in the judgment); *Regents of the Univ. of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404, 1413 (1988) (White, J., concurring in the judgment); *Gardebring v. Jenkins*, 108 S. Ct. 1306, 1314 & n.16 (1988); *Honig v. Doe*, 108 S. Ct. 592, 605 n.8 (1988); *NLRB v. United Food & Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1987); see also *id.* at 426 (Scalia, J., concurring) (very strong statement of *Chevron* rule).

¹⁴⁹ See Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985).

for local matters and executive lawmaking for foreign affairs. The Court is somewhat more likely to defer to an agency's interpretation when it is fair-minded and carefully deliberated than when the interpretation is apparently grounded in pressure politics or is an unmindful adherence to tradition.¹⁵⁰

The public values justification is apparent in a comparison of two cases decided within a week of one another in the 1986 Term. In *Cardoza-Fonseca*, the Court refused to defer to the interpretation adopted by the Board of Immigration Appeals (BIA), charged with implementation of the statute. Formally, the Court reasoned that the BIA interpretation was overwhelmed by the statutory language and history (including the international law background). But the Court also seemed suspicious about the diligence of the BIA to its public duties, citing "the inconsistency of the positions the BIA has taken through the years"¹⁵¹ and "the years of seemingly purposeful blindness by the [agency], which only now begins its task of developing the standard entrusted to its care."¹⁵² Five days earlier, in *School Board v. Arline*,¹⁵³ the Court relied heavily upon Department of Health & Human Services (HHS) regulations to interpret the Rehabilitation Act of 1973 to prohibit discrimination against a schoolteacher with contagious tuberculosis. Even though the HHS regulations were only interpretive and ordinarily would not carry preclusive weight, the Court treated them with great deference—because they were formulated through an unusually public process (including the opportunity for Congressional debate)¹⁵⁴ and arguably also because they reinforced the Court's "own sense of fairness."¹⁵⁵

¹⁵⁰ For recent examples of the Court's refusal to defer to poorly deliberated agency interpretations, see *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 636 (1986) (stating that "there is nothing in the administrative record to justify the Secretary's belief that 'discriminatory withholding of medical care' in violation of § 504 provides any support for federal regulation"); *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 144 (1984) (finding that "*post hoc* rationalizations by counsel for agency action are entitled to little deference: 'it is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress'" (citation omitted)); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 46 (1983) (voiding National Highway Traffic Safety Administration withdrawal of passive restraint regulation, holding that agency's failure to consider alternatives such as airbags was "arbitrary and capricious").

¹⁵¹ *Cardoza-Fonseca*, 480 U.S. at 446 n.30.

¹⁵² *Id.* at 452 (Blackmun, J., concurring).

¹⁵³ 480 U.S. 273 (1987).

¹⁵⁴ *Id.* at 283-84 & n.10.

¹⁵⁵ *Id.* at 289 (Rehnquist, C.J., dissenting). *But see id.* at 286-87 n.15 (majority's answer to dissent's fairness charge).

2. Clear Statement Rules & Presumptions

The meta-rules discussed above are the Court's overall guidelines for drawing public values from particular statutory schemes and for harmonizing different statutory schemes over time. Other rules of interpretation have been developed by the Court from particular lines of statutes. Over a period of time, Congress enacts and amends statutes that represent a general policy preference. Obviously, the statutes are applied to the specific problems at which they are directed, or which fall within their textual ambit. But sometimes the Court also extrapolates a broader principle from the line of statutes, much as it might extrapolate a principle from a line of common law cases.¹⁵⁶ The principle can be expressed as a presumption of interpretation or as a clear statement rule. While there are a good many such presumptions and rules, only three will be explored here.

a. *Presumption of Arbitrability (Plus an Exception)*

Traditional common law was hostile to private arbitration agreements, since these agreements effectively usurped judicial jurisdiction to resolve disputes. The Federal Arbitration Act of 1925¹⁵⁷ was enacted to reverse this common law hostility by ensuring that courts would enforce arbitration agreements upon the same terms as they enforce other contracts¹⁵⁸ and not proceed with a lawsuit whose claims are subject to an enforceable arbitration agreement.¹⁵⁹ The Arbitration Act has been a highly successful statute, and the Supreme Court has been unusually generous in applying the statute liberally,¹⁶⁰ especially to international disputes in which arbitration subserves important international comity concerns.¹⁶¹

¹⁵⁶ See W. ESKRIDGE & P. FRICKEY, *supra* note 9, at 240-61 (discussing how courts have evolved principles from statutes); Landis, *supra* note 11, at 214 ("much of what is ordinarily regarded as 'common law' finds its source in legislative enactment"); Pound, *supra* note 11, at 385-86 (arguing that courts must apply the principles inherent in legislation).

¹⁵⁷ 9 U.S.C. §§ 1-14 (1982).

¹⁵⁸ See *id.* § 2; H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924) (noting that the Act aims to place arbitration agreements "upon the same footing as other contracts").

¹⁵⁹ See 9 U.S.C. § 3 (1982) (instructing a court in which such a suit is pending to grant a stay "until such arbitration has been had in accordance with the terms of the agreement").

¹⁶⁰ See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (stating that "we rigorously enforce agreements to arbitrate"); *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984) (applying Arbitration Act to state courts); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasizing the "liberal federal policy favoring arbitration").

¹⁶¹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614,

There is some tension between the Arbitration Act and a number of federal statutes. The latter assure federal rights and vest jurisdiction (sometimes exclusive) in federal courts, while the former suggests that such statutory rights might be subject to enforceable arbitration agreements. The Court has resolved this tension through a presumption that federal statutory rights are subject to arbitration unless the party opposing arbitration can convincingly show that Congress intended to limit waivers of a judicial forum or that arbitration is inherently inconsistent with the statute's purposes.¹⁶² For statutes that were enacted before arbitration became a popular and easily enforceable remedy, it is obviously hard to rebut this presumption. Such was the case in *Shearson/American Express, Inc. v. McMahon*,¹⁶³ in which a closely divided Court upheld an agreement to arbitrate anti-fraud claims based upon Section 10(b) of the Securities Exchange Act of 1934.

There is at least one exception to this strong presumption, which was applied in a case decided just before *Shearson/American Express*. The Court in *Atchison, Topeka & Santa Fe Railway v. Buell*¹⁶⁴ held that a railway worker injured because the railroad breached its duty to furnish workers with a safe work place has the option of bringing a lawsuit pursuant to the Federal Employers' Liability Act (FELA),¹⁶⁵ even though the dispute is also arbitrable under the Railway Labor Act. The Court justified its decision primarily by reference to prior Supreme Court decisions holding that workers seeking to enforce specific statutory rights are not precluded from doing so by the availability of arbitration schemes. "[T]he theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'"¹⁶⁶ The Court noted the distinct scheme of statutory rights created by the FELA and invoked the *Mancari* rule against repeals by implication.¹⁶⁷

629 (1985) ("concerns of international comity" require the enforcement of international arbitration agreements); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974) ("A parochial refusal by the courts of one country to enforce an international arbitration agreement would . . . invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.").

¹⁶² See *Mitsubishi Motors Corp.*, 473 U.S. at 628; *Dean Witter Reynolds*, 470 U.S. at 221.

¹⁶³ 107 S. Ct. 2332 (1987).

¹⁶⁴ 480 U.S. 557 (1987).

¹⁶⁵ 45 U.S.C. §§ 51-60 (1982).

¹⁶⁶ *Buell*, 480 U.S. at 565 (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981)).

¹⁶⁷ See *id.* at 566-67.

b. *Strong Presumption of Native American Tribal Autonomy*

The Supreme Court in the nineteenth century established the federal common law rule that Native American reservations were "distinct political communities, having territorial boundaries, within which their authority is exclusive."¹⁶⁸ In the twentieth century, this common law value has been reinforced by a series of federal statutes guaranteeing "a meaningful Indian self-determination policy."¹⁶⁹ Although Native American reservations are not fully independent sovereignties, the statutory and common law value of Native American self-determination provides a "backdrop against which the applicable treaties and federal statutes must be read"¹⁷⁰ and suggests a presumption that "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."¹⁷¹

These public values had a decisive impact in several cases decided in the last two years. In *Iowa Mutual Insurance Co. v. LaPlante*,¹⁷² the Court interpreted the federal diversity jurisdiction statute as inapplicable to a case in which Native Americans were sued based upon activities transpiring on their reservation; the Court held that the reservation's tribal court should have the first opportunity to exercise jurisdiction over the controversy.¹⁷³ Although neither the diversity statute nor its legislative history suggests such an exception, the Court placed heavy emphasis upon the public values presumption: "In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline [the] invitation to hold that tribal sovereignty can be impaired"¹⁷⁴ Similarly, in *California v. Cabazon Band of Mission Indians*,¹⁷⁵ the Court invalidated state and local regulation of bingo and other games within a reservation. The Court relied upon the "congressional goal of Indian self-government,

¹⁶⁸ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (Marshall, C.J.).

¹⁶⁹ Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a(b) (1982); see *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.17 (1983) (noting the federal government's strong commitment to tribal self-government as embodied in relevant legislation); Indian Reorganization Act, 25 U.S.C. §§ 476-479 (1982) (stating that Native American tribes have the right to organize themselves, to join with others on the same reservation, and to promote their common welfare); Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1982 & West Supp. 1988) (delineating the constitutional rights of Native Americans).

¹⁷⁰ *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

¹⁷¹ *Id.* at 170-71 (quoting U.S. DEP'T OF INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

¹⁷² 480 U.S. 9 (1987).

¹⁷³ See *id.* at 17.

¹⁷⁴ *Id.* at 18.

¹⁷⁵ 480 U.S. 202 (1987).

including its 'overriding goal' of encouraging tribal self-sufficiency and economic development,¹⁷⁶ and invoked specific executive and legislative encouragement of gaming activities as a way to generate tribal revenue.¹⁷⁷

c. *Presumption against Implied Tax and Antitrust Exemptions*

Two other federal statutory schemes that have stimulated extensive debate about public values are the federal tax and antitrust statutes. The central policies of these statutes—raising money for the government and prohibiting anticompetitive activity—have been vigorously enforced by the Court. This enforcement shows up in strong presumptions against exemptions from those broad policies. Reflecting "the felt indispensable role of antitrust policy in the maintenance of a free economy,"¹⁷⁸ implied antitrust immunities are disfavored,¹⁷⁹ and established statutory exemptions in the antitrust laws are narrowly construed.¹⁸⁰ Similarly, the Court has recognized the "principle that exemptions from taxation are not to be implied."¹⁸¹

This latter presumption was critical to the Court's recent decision in *United States v. Wells Fargo Bank*,¹⁸² which addressed whether public housing project notes issued pursuant to the Housing Act of 1937 are exempt from federal estate taxation. Section 5(e) of the Act provides that such notes "shall be exempt from all taxation now or

¹⁷⁶ *Id.* at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 464 U.S. 324, 334-35 (1983)).

¹⁷⁷ *See id.* at 217-19.

¹⁷⁸ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963).

¹⁷⁹ *See National Gerimedical Hosp. & Gerontology Center v. Blue Cross*, 452 U.S. 378, 388-89 (1981); *see also United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975) ("implied antitrust immunity . . . can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system"); *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975) ("repeal of the antitrust laws by implication is not favored and not casually to be allowed"); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 561 (1944) ("if exceptions are to be written into the [Sherman] Act, they must come from the Congress, not this Court").

¹⁸⁰ *See, e.g., Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 156-57 (1983) (holding state purchases for purpose of competing against private companies outside the statutory exemption of the antitrust laws); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed.").

¹⁸¹ *United States v. Wells Fargo Bank*, 108 S. Ct. 1179, 1182 (1988); *see Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943) ("This Court has repeatedly said that tax exemptions are not granted by implication."); *Rapid Transit Corp. v. New York*, 303 U.S. 573, 592 (1938) (affirming New York state court's assertion that "the right to tax cannot be lost by . . . tenuous implication").

¹⁸² 108 S. Ct. 1179 (1988).

hereafter imposed by the United States.”¹⁸³ Notwithstanding the apparent clarity of the statutory language *and* supportive legislative history,¹⁸⁴ the Court held that such notes are subject to estate taxes but not to income taxes.¹⁸⁵ The Court’s analysis started with the “settled principle that exemptions from taxation are not to be implied.”¹⁸⁶ The Court then noted the longstanding policy distinction between income and property taxes and excise taxes, such as estate taxes: “The former has historically been permitted even where the latter has been constitutionally or statutorily forbidden,” such that “on the rare occasions when Congress has exempted property from estate taxation it has generally adverted explicitly to that tax, rather than generically to ‘all taxation.’”¹⁸⁷

3. Background Context

Wells Fargo illustrates the Court’s frequent willingness to derive general principles from one statute or statutory scheme and apply them to a separate statute, even when it is quite clear that the first statute is formally inapplicable.¹⁸⁸ Under a public values analysis, the policy discussion and experience derived from other statutes is a useful starting point for discussion for problems arising under more recent statutes.

A classic example of the way in which statutory values can have a decisive effect as background context is *Midlantic National Bank v. New Jersey Department of Environmental Protection*.¹⁸⁹ The issue was whether Section 554(a) of the Bankruptcy Act¹⁹⁰ authorizes a trustee in bankruptcy to abandon property in contravention of state environmental protection laws. The text of Section 554(a) provides little guidance, for it simply allows the trustee to “abandon any property of the [bank-

¹⁸³ 42 U.S.C. § 1437i(b) (1982).

¹⁸⁴ The taxpayers relied upon statements made by Senator Walsh on the floor of the Senate to the effect that § 5(e) would include estate and gift tax exemption, and upon the Finance Committee’s rejection of the Administration’s proposed version of § 5(e), which explicitly excluded estate taxes from the exemption. See *Wells Fargo*, 108 S. Ct. at 1183-84. The Court conceded the accuracy of these facts but refused to draw enough significance from them to rebut the policy presumption. See *id.*

¹⁸⁵ See *id.* at 1184.

¹⁸⁶ *Id.* at 1182.

¹⁸⁷ *Id.*

¹⁸⁸ For other recent examples, see, e.g., *Kungys v. United States*, 108 S. Ct. 1537, 1546 (1988) (deriving a definition of “materiality” from a group of criminal statutes and applying it to a more recent immigration statute); *United Paperworkers Int’l Union v. Misco, Inc.*, 108 S. Ct. 364, 372 n.9 (1988) (noting that although the Arbitration Act does not apply to workers engaged in foreign or interstate commerce, the federal courts have “often looked to the Act for guidance in labor arbitration cases”).

¹⁸⁹ 474 U.S. 494 (1986).

¹⁹⁰ 11 U.S.C. § 554(a) (1982 & Supp. IV 1986).

rupt] estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.”¹⁹¹ A divided Court relied on constitutional and statutory values to hold the trustee’s abandonment powers subject to state laws protecting the environment and the health and safety of its citizens. The Court began with the Constitution-based presumption of deference to state regulation of local matters, which had been applied by lower courts to the trustee’s abandonment powers before the Bankruptcy Act was amended in 1978. “If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, ‘the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.’ ”¹⁹²

The constitutional value set the stage for the Court’s main line of analysis, based upon statutory values taken from other parts of the Bankruptcy Act and from other statutes. The Court first relied on Section 959(b) of the Bankruptcy Act, which directs the trustee to “manage and operate the property in his possession . . . according to the requirements of the valid laws of the State.”¹⁹³ Although Section 959(b) is not formally applicable to the trustee’s abandonment power, it reflects an underlying public value in the Bankruptcy Act, that reorganization of the debtor’s estate must be conducted subject to state health, safety, and environmental regulations.¹⁹⁴ The Court found “additional support” for its interpretation of the Act in the more recent federal statutes enacted to regulate the treatment and disposal of solid wastes.¹⁹⁵ These statutes suggest a compelling national policy to deal with solid waste and authorize federal lawsuits to enforce environmental obligations on polluters, similar to the state lawsuit involved in *Midlantic National Bank*. “In the face of Congress’ undisputed concern over the risks of the improper storage and disposal of hazardous and toxic substances, we are unwilling to presume that by enactment of

¹⁹¹ *Id.*

¹⁹² 474 U.S. at 501 (quoting *Swarts v. Hammer*, 194 U.S. 441, 444 (1904)).

¹⁹³ 11 U.S.C. § 959(b) (1982).

¹⁹⁴ See *Midlantic Nat’l Bank*, 474 U.S. at 505. The Court also relied on the exception to the automatic stay provision, which “permits the Government to enforce ‘nonmonetary’ judgments against the debtor’s estate” notwithstanding the stay. *Id.* at 503 (referring to 11 U.S.C. § 362(b)(5) (1982)). Although the provision to the automatic stay provision does not formally apply to the trustee’s abandonment power, its underlying policy—which explicitly includes “environmental protection” and “safety” rules—struck the Court as more broadly significant. See *id.* at 503-04.

¹⁹⁵ See *id.* 505-06 (discussing the Resource Conservation and Recovery Act, 42 U.S.C. § 6901-6987 (1982 & Supp. IV 1986 & West Supp. 1988)).

§ 554(a), Congress implicitly overturned longstanding restrictions on the common-law abandonment power.”¹⁹⁶

C. *Common Law Values*

The old meta-rule of statutory interpretation, that statutes in derogation of the common law must be strictly (narrowly) construed, suggests the importance that common law values once had for statutory interpretation.¹⁹⁷ When most law was judge-made, and statutes were the exception, these values were paramount. In this age of proliferate statutory and constitutional values, the old meta-rule has lost much of its force,¹⁹⁸ but the common law exercises a substantial influence on statutory interpretation in other ways. An updated version of the old meta-rule is that the common law can be used to fill in statutory gaps, unless it is inconsistent with the overall statutory policy. Additionally, the common law is the source for a number of presumptions and clear statement rules that remain important to statutory interpretation, and in some cases common law background exerts a decisive influence on statutory developments.

1. The Common Law Meta-Rule

Every statute has gaps in coverage, and often the gaps relate to issues for which the common law has developed rules and principles. The Supreme Court will often use the common law rules as a starting point for filling in those gaps, in part because it is convenient (the common law offers a readily accessible body of rules), in part because of existing private reliance (private parties already are generally familiar with such rules and are accustomed to following them), and in part because the common law rules represent public values (they have been the object of judicial trial-and-error and critical commentary and are, as a result, thought to represent good policy). For example, in *Buell*, the Court recognized that “FELA jurisprudence gleans guidance from common-law developments”¹⁹⁹ and held that FELA (like the common law) provides compensation for emotional distress in some cases. Be-

¹⁹⁶ *Id.* at 506.

¹⁹⁷ “No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.” *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1879).

¹⁹⁸ *See, e.g., Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (“The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.” (quoting *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930))).

¹⁹⁹ 480 U.S. at 568 (citing *Urie v. Thompson*, 337 U.S. 163, 174 (1949)).

cause the common law itself had not reached a consensus on when emotional injury is compensable, the Court remanded the case for factual development, so that there could be a "precise application of developing legal principles to the particular facts at hand."²⁰⁰

The Court's invocation of common law principles to fill in gaps within fairly detailed statutes such as FELA is a regular occurrence, but the meta-rule is even more critical for several older, generally worded federal statutes that Congress has substantially left to the courts to develop. These "common law statutes" include Section 1983 and several of the other civil rights measures enacted after the Civil War, the Sherman Act of 1890, the anti-fraud provisions of the securities laws, and Section 301 of the Taft-Hartley Act of 1947. To fill in the details of these statutes, federal courts routinely look to the common law, which often serves as a presumptive starting place for interpretation.

The Section 1983 cases illustrate this precept best. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²⁰¹

As the legislative history makes clear, the statute was designed to create a species of tort liability in favor of persons deprived of their federal constitutional and statutory rights under color of state law. Yet the statute itself tells us almost nothing about the exact contours of liability, damages, defenses, and so forth; the legislative history closes only a few of the gaps. Hence federal courts have often looked to the common law of tort to fill in these gaps.

On the question of damages a leading case is *Carey v. Piphus*.²⁰² The Court drew from Section 1983's legislative history the proposition that Section 1983 plaintiffs at the very least ought to be compensated for their injuries. Nothing in the legislative history, however, elaborated on what sorts of injuries might be worthy of compensation. Predictably, the Court turned to the guidance of the common law, which "has devel-

²⁰⁰ *Id.* at 570.

²⁰¹ 42 U.S.C. § 1983 (1982) (derived from Civil Rights Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13).

²⁰² 435 U.S. 247 (1978).

oped a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under § 1983 as well.”²⁰³ Based upon tort law analysis, the Court held that a damage remedy is available for actual mental and emotional anguish inflicted by an unlawful denial of procedural due process. The Court rejected plaintiffs’ argument that the defamation per se concept of presumed damages should be invoked, finding the presumption “‘an oddity of tort law’” and, in any event, not appropriate for due process injuries.²⁰⁴ The Court nonetheless did hold that a Section 1983 plaintiff, like a tort plaintiff at common law, is entitled to nominal damages for the deprivation of an absolute right.²⁰⁵

The *Piphus* methodology has been used to establish other elements of damages for Section 1983 violations, including punitive damages (which go beyond the compensation principle supported by the legislative history).²⁰⁶ A similar methodology has been used by the Court to establish defenses to Section 1983 actions. In *Pierson v. Ray*²⁰⁷ the Court held that judges cannot be sued under Section 1983 for their judicial actions. Although the legislative history contains substantial support for the dissenting opinion’s argument that the 1871 Congress expected judges to be sued,²⁰⁸ the Court found more persuasive the strong public value underlying the longstanding common law immunity for judges—namely, the need to free judges from fear of harassment or intimidation by losing litigants.²⁰⁹ The Court’s cases have developed this public value in a relatively principled way. On the one hand, the Court has extended this immunity to protect others, such as prosecutors and witnesses, who are “intimately associated with the judicial phase of the criminal process.”²¹⁰ On the other hand, the Court has not permitted judicial immunity to insulate the judiciary from lawsuits when the common law and its rationale have not supported it. Consequently, the

²⁰³ *Id.* at 257-58.

²⁰⁴ *Id.* at 260-64 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)).

²⁰⁵ *See id.* at 266-67.

²⁰⁶ *See Smith v. Wade*, 461 U.S. 30, 38-55 (1983) (exploring common law impositions of punitive damages); Eskridge, *supra* note 36, at 1484-88 (discussing *Smith*).

²⁰⁷ 386 U.S. 547 (1967).

²⁰⁸ *See id.* at 559-63 (Douglas, J., dissenting).

²⁰⁹ *See id.* at 553-55.

²¹⁰ *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (prosecutorial immunity); *see Briscoe v. LaHue*, 460 U.S. 325, 329-34 (1983) (witness immunity). *But see Tower v. Glover*, 467 U.S. 914, 920-23 (1984) (refusing to extend immunity to state public defenders).

Court has recently declined to extend immunity to protect judges against injunction lawsuits,²¹¹ or against suits based on a judge's administrative, ministerial (as opposed to judicial) activities.²¹²

The most interesting recent case in this line is *Town of Newton v. Rumery*,²¹³ which addressed the question of whether federal courts will enforce a criminal defendant's waiver of her Section 1983 claims, in return for the prosecutor's agreement to dismiss pending—and arguably unfounded—criminal charges. A majority of the Court resolved the issue “by reference to traditional common-law principles, as we have resolved other questions about the principles governing § 1983 actions.”²¹⁴ Contract law suggested that a promise is unenforceable only if the interest in its enforcement is outweighed by a contrary public policy. The majority found no such policy in this case, although Justice O'Connor (concurring in part and in the judgment) appeared willing to do so in other cases.²¹⁵ The dissenting Justices would have created out of Section 1983 “a strong presumption against the enforceability of such agreements.”²¹⁶ The debate within the Court in *Rumery* articulates constitutional, statutory, and common law values and is a model of a good public values dialogue.

Obviously, Section 1983 has resulted in an unusual amount of gapfilling based upon common law values, because it is a much-litigated statute, has a statutory text and legislative history that answer very few interpretive questions, and is directly analogous to an arena of vast common law experience (torts). But the Court has relied on the principles of the common law to fill gaps in the other common law statutes as well, including the Sherman Act of 1890,²¹⁷ the anti-fraud

²¹¹ See *Pulliam v. Allen*, 466 U.S. 522, 528-42 (1984).

²¹² See *Forrester v. White*, 108 S. Ct. 538, 543-45 (1988).

²¹³ 480 U.S. 386 (1987).

²¹⁴ *Id.* at 392.

²¹⁵ See *id.* at 399-403 (O'Connor, J., concurring in part and in the judgment) (suggesting that a case-by-case approach to these bargains is preferable to a per se rule holding them always in accord with public policy).

²¹⁶ *Id.* at 418 (Stevens, J., dissenting).

²¹⁷ See, e.g., *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565-74 (1982) (using common law agency principles to hold petitioner civilly liable for antitrust violations that its agents committed with apparent authority); *United States v. United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978) (invoking common law intent principles to hold that a defendant's state of mind is an element of a criminal antitrust offense, hence must be affirmatively proven and not taken from the trier of fact through reliance on a legal presumption). But see *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-46 (1981) (refusing to apply a common law right of contribution to antitrust co-conspirators, on grounds that judicial power to use common law to interpret the Sherman Act's substantive provisions does not extend to remedial sections).

provisions of the securities laws,²¹⁸ Section 301 of the Taft-Hartley Act of 1947,²¹⁹ the wire and mail fraud statutes,²²⁰ and various jurisdictional and procedural statutes.²²¹

2. Presumptions & Clear Statement Rules

Many specific policy presumptions and clear statement rules have some origin in the common law; only three groups of such rules will be explored here. One group of rules, protecting sovereign immunity, is of almost pure common law origin. The other rules, construing public grants narrowly and construing anti-attachment statutes to preserve family support obligations, are inspired by the common law, but also have constitutional underpinnings.

a. *Presumption against Waiver of Governmental Immunities*

At common law, the sovereign could not be sued without its consent. This common law policy has been relaxed considerably in the twentieth century, mainly by statutes waiving sovereign immunity and by exceptions to common law immunity that apply to sovereigns acting

²¹⁸ See, e.g., *Basic, Inc. v. Levinson*, 108 S. Ct. 978, 988-92 (1988) (employing common law fraud-on-market theory to presume reliance on corporation's misrepresentations, thus relieving proof problems faced by plaintiffs suing under Rule 10(b)(5)); *Chiarella v. United States*, 445 U.S. 222, 225-30 (1980) (concluding, from common law agency and fiduciary principles, that one who obtained merger information through his work as a printer of corporate takeover documents had no Rule 10(b)(5) duty to disclose that information when buying securities); see also *Pinter v. Dahl*, 108 S. Ct. 2063 (1988) (holding that common law in pari delicto defense is available to defendants in Section 12(1) actions under the Securities Exchange Act of 1933); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445-50 (1976) (using the common law materiality test—whether a reasonable investor would attach importance to the fact misrepresented—in a Rule 14(a)(9) action under the Securities Exchange Act of 1934).

²¹⁹ See, e.g., *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364, 373-74 (1987) (analyzing common law contract doctrine nullifying agreements that are contrary to public policy and refusing to apply it to an arbitration award); *Carbon Fuel Co. v. UMW*, 444 U.S. 212, 216-18 (1979) (unions liable for breach of contract only where the union is responsible according to the common law rule of agency).

²²⁰ See, e.g., *Carpenter v. United States*, 108 S. Ct. 316, 320-22 (1987) (drawing on common law property, fiduciary, and agency principles to bring petitioners, who bought stock using confidential information developed for publication in future financial newspaper columns, within the reach of the mail and wire fraud statutes); *McNally*, 107 S. Ct. at 2879-81 (finding the common law of fraud traditionally protected only property rights, not the intangible rights to honest government).

²²¹ See, e.g., *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 950 (1988) (common meaning of "embargo" does not include government-aided exclusion of goods from market by a trademark owner, thus placing jurisdiction of issue in district court not Court of International Trade); *Carnegie-Mellon Univ. v. Cohill*, 108 S. Ct. 614, 616-22 (1988) (using common law jurisdictional principles to decide that a case properly removed to federal court could be remanded to state court where federal law claim has been eliminated and only pendent state law claims remain).

in a private or commercial capacity. The policy still survives, however, due in part to the formalism that the sovereign is not subject to suit in its own courts without consent, but also in part to our desire not to squander collective resources in litigation and our faith that most of the sovereign's errors can be corrected politically. Whatever the values implicit in common law sovereign immunity, they thrive today in the form of clear statement rules for interpreting statutes. Because "the United States, as sovereign, 'is immune from suit save as it consents to be sued,'"²²² a waiver of the sovereign's immunity in a statute is effective only when "unequivocally expressed."²²³ Additionally, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied."²²⁴ Finally, there is no right of jury trial against the sovereign, unless it is clearly and explicitly provided in a statute.²²⁵

Several of the Court's recent decisions reflect the rule against derogation of sovereignty. In *Library of Congress v. Shaw*,²²⁶ the Court held that Congress' waiver of federal agencies' sovereign immunity in Title VII did not encompass awards of interest on monetary judgments. "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award," the Court concluded. "This requirement of a separate waiver reflects the [common law] view that interest is an element of damages separate from damages on the substantive claim."²²⁷ Similarly, in *United States v. Johnson*²²⁸ a closely divided Court interpreted the Federal Tort Claims Act (FTCA)²²⁹ as

²²² *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)).

²²³ *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)).

²²⁴ *Soriano v. United States*, 352 U.S. 270, 276 (1957) (citing *Sherwood*, 312 U.S. at 590-91); see *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) ("We should not take it upon ourselves to extend the waiver beyond that which Congress intended.").

²²⁵ See *Lehman v. Nakshian*, 453 U.S. 156, 162 n.9 (1981) ("Since there is no generally applicable jury trial right that attaches when the United States consents to suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action.").

²²⁶ 478 U.S. 310 (1986).

²²⁷ *Id.* at 314 (citation omitted). But cf. *Loeffler v. Frank*, 108 S. Ct. 1965, 1969, 1974 (1988) (holding the Postal Service susceptible to prejudgment interest in Title VII cases, because the presumption favors prejudgment interest "when Congress launch[es] a governmental agency into the commercial world" and authorizes it to "sue and be sued" (quoting *FHA v. Burr*, 309 U.S. 242, 245 (1940))).

²²⁸ 481 U.S. 681 (1987).

²²⁹ 28 U.S.C. § 1346(b) (1982) (waiving sovereign immunity and rendering the Federal government liable to government employees for damages from work-related injuries).

generally inapplicable to torts incident to the victim's service in the armed forces.²³⁰ The debate within the Court concentrated on the cogency of the policy rationales for a broad immunity for armed-service-related injuries. And in *United States v. James*²³¹ the Court expansively applied the immunity provision of the Flood Control Act²³² to insulate the United States from an otherwise meritorious FTCA lawsuit.²³³ In all of these cases, the plain language of the statutes conferring jurisdiction over claims against the government and ordinary tort policy would support results contrary to the Court's. These decisions demonstrate that the clear statement rules on immunity rank high among the canons of statutory interpretation.

b. *Narrow Construction of Public Grants*

Related to the immunity clear statement rules is the rule narrowly construing public grants. That is, when grants of federal lands are at issue, any doubts "are resolved for the Government, not against it."²³⁴ When the public grant was made in return for valuable consideration (for instance, the land grants given in return for construction of the transcontinental railroad in the 1860s), however, the strict rule will not necessarily be applied.²³⁵ The public values inherent in this rule of interpretation rest upon our desire that collective rights and property not be lost through official inadvertence or mistake and on our perception that as our bargaining agent the government is apt to be marshmallow soft. Although rooted in the common law, the rule construing public grants narrowly in some cases also possesses constitutional dimensions.

The issue in *Utah Division of State Lands v. United States*²³⁶ was

²³⁰ See *Johnson*, 481 U.S. at 692. *Johnson* reaffirmed and expanded *Feres v. United States*, 340 U.S. 135 (1950), which had created the military affairs exception. See also *United States v. Stanley*, 107 S. Ct. 3054, 3063 (1987) (expanding *Feres* principle to preclude damage claims based on constitutional violations). The Court has grudgingly applied the FTCA's exceptions to sovereign immunity, see, e.g., *United States v. Shearer*, 473 U.S. 52, 59 (1985) (*Feres* doctrine bars claim against government based on negligent supervision of soldier who killed another soldier off-duty and off base); *Kosak v. United States*, 465 U.S. 848, 862 (1984) (affirming that claims involving damage to goods obtained by customs officers could not be brought under the FTCA), except when the text of the Act seems to require it. See *Sheridan v. United States*, 108 S. Ct. 2449, 2453-56 (1988).

²³¹ 478 U.S. 597 (1986).

²³² 33 U.S.C. § 702 (1982).

²³³ See *James*, 478 U.S. at 606-12.

²³⁴ *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978) (quoting *United States v. Union Pac. R.R.*, 353 U.S. 112, 116 (1957)).

²³⁵ See *Leo Sheep Co. v. United States*, 440 U.S. 668, 677-88 (1979).

²³⁶ 107 S. Ct. 2318 (1987).

whether an 1889 administrative decision, pursuant to statute, reserving Utah Lake as a future reservoir site and closing it to private settlement meant that Utah did not acquire title to the lakebed when it achieved statehood.²³⁷ The issue encompassed two questions, one turning upon common law values and the other upon constitutional values. The first question was whether there had been a pre-statehood conveyance of rights. The Court started with “‘a strong presumption against conveyance by the United States’” and refused to “‘infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words.’”²³⁸ The Court noted that in only one case had it found such a statutory conveyance and declined to find the “reservation” of the lake to be a conveyance. Secondly, the Court held that in the case of a reservation, Utah would still succeed to the federal rights at statehood unless Congress showed intent to abrogate the rights of the new state, which it found Congress did not do.²³⁹

c. *Presumption that Common Law Family Obligations Are Not Displaced by Anti-Attachment Statutes*

An important common law obligation is that of the family breadwinner to support the rest of the family; upon divorce or separation this obligation may be formalized in a support decree. These obligations can be enforced at the state level against the breadwinner's government entitlements and other assets, despite state statutes generally protecting them from attachment by ordinary creditors. The Supreme Court has at times adopted a similar approach to federal anti-attachment statutes: “Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the [supporting spouse] to support [the remainder of the family].”²⁴⁰

²³⁷ Under the constitutional “equal footing” doctrine, a new state automatically succeeds to the lands underlying navigable waters unless Congress had made an express pre-statehood conveyance of the property. *Id.* at 2320-21.

²³⁸ *Id.* at 2321 (quoting *Montana v. United States*, 450 U.S. 544, 552 (1981)).

²³⁹ *See id.* at 2321, 2326-27.

²⁴⁰ *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904); *see Shine v. Shine*, 802 F.2d 583, 586 (1st Cir. 1986) (stating that “the exception from discharge for alimony and payments for maintenance and support has long been an accepted part of bankruptcy law”); *Schlaefter v. Schlaefter*, 112 F.2d 177, 185 (D.C. Cir. 1940) (allowing assignment of disability insurance because “[f]or the head of a family, the essentials of sustenance for his dependents remain ‘necessaries’ as much when he is disabled as when he is well and employed”); *Cartledge v. Miller*, 457 F. Supp. 1146, 1158 (S.D.N.Y. 1978) (creating an exception to ERISA's anti-assignment and anti-alienation provisions on the

The Supreme Court addressed the common law exception to anti-attachment statutes again in 1987. *Rose v. Rose*²⁴¹ posed the question whether a state court may hold a disabled veteran in contempt for failure to pay child support, when he could satisfy the obligation only by using Veterans' Administration (VA) benefits protected by federal law from alienation or attachment. The federal anti-attachment provision provides that "[p]ayments of benefits . . . under any law administered by the Veterans' Administration . . . made to, or on account of, a beneficiary . . . shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."²⁴² A majority of the Court found the provision inapplicable,²⁴³ based upon the purposive whole act rule. The anti-attachment provision aims to avoid the possibility of the VA becoming a collection agency and to "prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income."²⁴⁴ The former purpose would in no way be impaired by state court orders entered against the veteran. Nor would the later purpose, the Court argued, because VA benefits are the means by which the government assures "'reasonable and adequate compensation for disabled veterans *and their families*.'"²⁴⁵ Since a primary public value implicated in the anti-attachment provision is protection of the veteran's family, it is not inconsistent to infer an exception for support obligations.²⁴⁶ I find this argument generally persuasive, though it invites the response that the statute aims to protect primarily the veteran and not the family as a whole. If we must decide who should get the benefits, the statutory purpose arguably gives us no reason not to prefer the veteran, who after all was injured in military duty, over other members of the family.²⁴⁷

ground that failure to do so would "erode the statutory and common law policy of protecting the security of family dependents"). *But see* *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (no implied exemption for support obligations in anti-attachment provision of Servicemen's Group Life Insurance Act).

²⁴¹ 481 U.S. 681 (1987).

²⁴² 38 U.S.C. § 3101(a) (1982 & Supp. IV 1986).

²⁴³ *See Rose*, 481 U.S. at 630-34 (opinion for the Court by Marshall, J., joined on this issue by Rehnquist, C.J., and Brennan, Blackmun & Powell, JJ.).

²⁴⁴ S. REP. NO. 1243, 94th Cong., 2d Sess. 148, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5241, 5369-70.

²⁴⁵ *Rose*, 481 U.S. at 630 (quoting S. REP. NO. 604, 98th Cong., 2d Sess. 24, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4479, 4488) (emphasis added by the Court)).

²⁴⁶ *See id.* at 630-32.

²⁴⁷ *See id.* at 642-44 (Scalia, J., concurring in part and concurring in the judgment) (questioning whether "depriving a veteran of benefits in favor of his children does not conflict with the statute's purpose").

The more persuasive public values argument in this case was made by Justice O'Connor. Joined by Justice Stevens, she concurred in the majority's conclusion that the state court order was not preempted. However, she provided a reason the statute should permit a preference for family members over the veteran. Her opinion began by invoking the "special sanctity" the Anglo-American tradition affords the support obligation.²⁴⁸ She then argued that orders to support one's family have traditionally been considered analytically distinct from orders to pay one's external debts and that our nation's values appear to give priority to the former in accordance with public concern for the security of vulnerable family members. Crucial to her argument was "the fact that the common law generally will not enforce similar anti-attachment provisions against a family member's claim for support."²⁴⁹ Given "this Nation's common law tradition" and the generality of the federal statute's anti-attachment language—which apparently was aimed at traditional creditors and not family members—Justices O'Connor and Stevens read an exception into the statute for support obligations.

3. Background Context

Like statutory and constitutional values, common law values sometimes provide critical background arguments in statutory cases.²⁵⁰ One good example of this phenomenon is the influence of the common law "American rule" against requiring losing litigants to pay the fees of opposing counsel. The leading case on this rule, *Alyeska Pipeline Co. v. Wilderness Society*,²⁵¹ interpreted a series of federal statutes²⁵² as requiring that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser,"²⁵³ absent explicit statutory authorization.²⁵⁴

²⁴⁸ *Id.* at 637 (O'Connor, J., concurring in part and concurring in the judgment).

²⁴⁹ *Id.* at 638.

²⁵⁰ Of particular importance is the line of cases flowing from *Younger v. Harris*, 401 U.S. 37 (1971), which disapprove federal court exercise of statutory jurisdiction in cases that would violate "the national policy forbidding federal courts to stay or enjoin pending state court proceedings," *id.* at 41, a policy grounded upon traditional equity jurisdiction as well as constitutional federalism. *See id.* at 43-44; *see, e.g., Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987) (holding, in a multi-billion-dollar case, that application of the *Younger* doctrine is mandated "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government").

²⁵¹ 421 U.S. 240 (1975).

²⁵² 28 U.S.C. §§ 1920 & 1923 (1982).

²⁵³ *Alyeska*, 421 U.S. at 247.

²⁵⁴ *See id.* at 266-67 & n.40 (citing 28 U.S.C. § 2412 (1982)). *Alyeska's* scope has since been partially limited in that it no longer governs civil rights litigation. The Civil Rights Attorney Fees Award Act, 42 U.S.C. § 1988 (1982), "reinvested the judiciary

In *Ruckelshaus v. Sierra Club*,²⁵⁵ the Court interpreted one of the specific statutory authorizations adverted to in *Alyeska*, namely, Section 307(f) of the Clean Air Act. It provides: "In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate."²⁵⁶ Notwithstanding the broad authorization of the statutory language and specific support in the House committee report for awarding counsel fees to nonprevailing parties,²⁵⁷ a divided Court held that a party must enjoy some success on the merits in order to obtain counsel fees.²⁵⁸ The Court's analysis started by stating the American rule and then noted that "virtually every one of the more than 150 existing federal fee-shifting provisions predicates fee awards on *some* success by the claimant."²⁵⁹ From these common law and statutory principles, the Court distilled a public value that a successful party need not pay counsel fees: "Before we will conclude Congress abandoned this established principle that a successful party need not pay its unsuccessful adversary's fees—rooted as it is in intuitive notions of fairness and widely manifested in numerous different contexts—a clear showing that this result was intended is required."²⁶⁰ The Court also invoked the public value of narrowly construing waivers of sovereign immunity, relevant because the United States was the defendant in this case.²⁶¹

III. A CRITICAL ANALYSIS OF PUBLIC VALUES IN STATUTORY INTERPRETATION

Our experience with public values in statutory interpretation suggests that such values are not limited to those arising out of the Constitution nor to those constitutional values that are operative only to strike

with the discretion to grant attorneys' fees in civil rights cases." *Shadis v. Beal*, 685 F.2d 824, 831 (3d Cir. 1982); see also *Stanford Daily v. Zurcher*, 550 F.2d 464, 465 (9th Cir. 1977) (holding that the passage of the Civil Rights Attorney Fees Award Act "restored pre-*Alyeska* law" to civil rights litigation), *rev'd on other grounds*, 436 U.S. 547 (1978).

²⁵⁵ 463 U.S. 680 (1983).

²⁵⁶ 42 U.S.C. § 7607(f) (1982).

²⁵⁷ See *Ruckelshaus*, 463 U.S. at 689-91 (discussing H.R. REP. NO. 294, 95th Cong., 1st Sess. 337 (1977), which expressed the committee's intent that the court's authority to award attorney's fees under this bill not be limited to "cases in which the party seeking fees was the 'prevailing party'").

²⁵⁸ See *id.* at 694.

²⁵⁹ *Id.* at 684. Conversely, one can argue that when Congress meant for fees to be available only to the prevailing party, it knew how to say so. Its choice of more open-ended language in § 307(f) then suggests greater liberality.

²⁶⁰ *Id.* at 685.

²⁶¹ See *id.* at 685-86.

down statutes. It may be that constitutional values can be most useful as interpretational filters (clear statement rules, policy presumptions, gapfilling principles, background context) and that statutory and common law values are just as important as constitutional values in discovering our nation's public virtue. At the very least, the analysis in Part II suggests that public values analysis can be an illuminating way of looking at many of the Court's statutory interpretation decisions. Just as public values analysis helps us evaluate these cases, though, these cases provide an interesting laboratory for evaluating the cogency and legitimacy of public values analysis. In this Part, I shall evaluate the cases described in Part II, and suggest the major problems with public values analysis taken as a whole. In my view, the most controversial of the public values decisions—*Weber*, *Johnson*, *Bob Jones*, and *Dames & Moore*—were correctly decided, while several of the more obscure decisions—*Catholic Bishop*, *Shearson/American Express*, *McNally*, *Ruckelshaus*, *Welch*, *Rumery*, and others described in this Part—were wrongly decided.

As a scholar who finds public values analysis attractive, I am surprised at how much I disagree with the Supreme Court's use of it. Part III explores this quandary in connection with the three main critical tests that face public values analysis in statutory interpretation cases: Is the analysis consistent with the overriding constitutional commitment to legislative supremacy? I believe so, but must note one important exception. The principle of legislative supremacy suggests that public values ought not be able to displace the apparent meaning of a clear statutory text which is reinforced by similarly clear legislative history.²⁶² Is a public values approach a determinate or coherent approach to statutory interpretation? As deployed by the current Court it is not, and I am not optimistic that another group of nine Justices would do the analysis any more consistently or coherently. The upshot of this criticism is that the Justices have a great range of value choices to make under public values analysis, and that in turn raises a third question. Can the Court justify its value choices in all these cases? No. My analysis of the recent cases suggests that the Court's overall set of public values is biased in ways that are hard to justify.

A. *Public Values & Legislative Supremacy*

If constitutional law scholarship is any guide, the obvious objection to public values analysis is the "countermajoritarian difficulty." In a

²⁶² See D. Farber, *Legislative Supremacy & Statutory Interpretation* 19 (draft Aug. 1988) ("[W]hen legislation clearly embodies a collective legislative understanding, the court must give way even if its own view of public policy is quite different.").

representative democracy, unelected judges should be leery of substituting their values for those put into a statute by Congress, which under the Constitution has supreme lawmaking authority.²⁶³ While legislative supremacy is an axiom of our constitutional separation of powers, and public values analysis does call upon the Court to read beyond the four corners of the legislative product, the analysis is not necessarily in direct conflict with legislative supremacy. Consider the following range of cases.

1. Open-Textured Statutes

Frequently the Court has no choice but to go beyond the four corners of the statute and its legislative history to answer an interpretive question, because the statute's open texture (the open-endedness of the statutory language and indeterminacy of legislative history) forecloses determinate answers and makes judicial policymaking inevitable. Indeed, in many instances Congress' enactment of an open-textured statute may constitute an implicit legislative delegation of lawmaking authority to the Court.²⁶⁴ Examples include the common law statutes discussed above²⁶⁵—the FELA (*Buell*), Section 1983 (*Carey v. Phipps* and *Pierson*), and the Sherman Act.²⁶⁶ In interpreting such statutes, the Court's reliance on common law precepts to fill in the details of the open text is not only consistent with, but positively obedient to, legislative supremacy.

Other statutes include an open-textured mandate for agencies (rather than the Court) to develop the statutory policies over time. These statutes traditionally have been analyzed as delegations of lawmaking authority to agencies. The Court's meta-rule of deference to

²⁶³ On the countermajoritarian difficulty, see A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962). Cf. J. ELY, *DEMOCRACY AND DISTRUST* 4 (1980) (stating that countermajoritarian difficulty is not so important in statutory and common law cases, because judicial decisions are "subject to overrule or alteration by ordinary statute.").

²⁶⁴ For the now-classic statement of this argument in the constitutional context, see J. ELY, *supra* note 263. See also R. POSNER, *supra* note 48, at 286-93 (1985) ("common law statutes" invite judicial gapfilling as part of process of statutory interpretation).

²⁶⁵ See *supra* notes 199-221 and accompanying text.

²⁶⁶ "The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted," Justice Scalia (a Justice unusually concerned with legislative supremacy) wrote for the Court last Term. "The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890." *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1523 (1988).

coherent and rational agency interpretations is consistent with legislative supremacy when it ratifies agency interpretations not inconsistent with the statute.²⁶⁷ There is a debate within the Court whether this meta-rule requires very much rationality from agencies;²⁶⁸ I agree with the formulation in *Cardoza-Fonseca* that the agency's interpretation is itself subject to public values scrutiny. This position is consistent with legislative supremacy, insofar as we can presume that Congress' delegation of lawmaking power to the agency is generally subject to a reasonableness requirement.

Even where the statute as a whole is not a broad delegation to courts or agencies to fill in policy details, the statute will typically contain many ambiguities, because Congress either did not anticipate all the problems that would arise, or anticipated them and could not reach consensus about how to respond. For these "open issues," the Court's public values analysis seems appropriate. The purposive whole act meta-rule and a number of the clear statement rules are ways in which the Court permits an ambiguous statute to address new situations not anticipated by the Congress that drafted the statute (*Weber, Guerra, and Johnson*).

2. Conflicting & Weakened Legislative Signals

Sometimes, rather than providing too little policy guidance, Congress provides too much guidance, pushing the Court in different directions. In these cases, there is no way the Court can avoid compromising one or more statutory policies, and the use of public values analysis to make these hard choices is consistent with legislative supremacy. For example, Congress sometimes enacts a statute that on its face clashes with earlier enactments. The Court's narrowing interpretation to avoid implicit, unintended repeals subserves rather than undermines legislative supremacy (*Mancari*).

The harder cases are those in which Congress apparently adopted one policy in an early statute, and then retreated from that policy in later statutes without amending or repealing their antecedent. Through the statute-based clear statement rules, the Court updates and harmo-

²⁶⁷ See *School Bd. v. Arline*, 480 U.S. 273, 280-86 (1987).

²⁶⁸ Compare *NLRB v. United Food & Commercial Workers Union, Local 23*, 108 S. Ct. 413, 421 (1988) (on a pure issue of statutory interpretation, the Court will enforce legislative intent, using traditional methods, and will apply reasonable agency view if statute is ambiguous) with *id.* at 426 (Scalia, J., concurring) (urging broader deference to agency interpretations). See also *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988) ("If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the agency regulation is a permissible construction of the statute." (citations omitted)).

nizes statutory policy based upon evolving legislative and judicial developments (*Wells Fargo* and *Shearson/American Express*). Although these public value cases may be in some tension with earlier legislative expectations, they do not violate the precept of legislative supremacy; they merely make the reasonable assumption that where Congress has not clearly said otherwise, it wants its ongoing policies effected. For example, *Midlantic National Bank* arguably subserves legislative supremacy because it recognizes and articulates recent statutory policies and applies those policies to a statutory scheme in which Congress had not focused on environmental issues.

3. Bending Statutes to Reflect Common Law & Constitutional Policies

Concerns of legislative supremacy are greatest in those cases where the Supreme Court bends a statutory text based upon a constitutional or common law value; often that bending process displaces an apparent expectation of the enacting Congress. While there is tension in these cases between public values and legislative supremacy, the tension should not be exaggerated. Recall that the background rules and presumptions are generally subject to clear statements of contrary legislative expectations. Hence, if the text and legislative history support one interpretation, public values analysis cannot displace it. In many cases, the public values presumptions operate as "tiebreakers" in the close cases, where there are good textual and legislative history arguments for different interpretations.

A clear statement rule might tip the scales in a case where, absent the rule, the interpreter would say that it is slightly more probable (55% to 45%) that Congress intended the other interpretation. *Rose v. Rose* may be such a case, where the breadth of the statutory language and the ambivalence of the legislative purpose could easily have supported denying pension benefits to the dependents, but the common law value tipped the scales toward the other interpretation (for at least two Justices). This result is not strikingly contrary to legislative supremacy,²⁶⁹ for the Anglo-American legal tradition has employed clear statement rules for as long as it has done statutory interpretation. Indeed, most of these clear statement rules and presumptions are long-standing doctrines of which Congress ought to be aware. Not only can Congress overrule an erroneous public values interpretation of a stat-

²⁶⁹ Cf. Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 461-65 (1988) (where legislative history does not yield clear-cut answers, current policy considerations should be decisive).

ute, but it is on notice when it writes statutes that these principles will be applied.²⁷⁰

While public values can readily be defended in those close cases where the text and legislative history are ambiguous, their invocation to trump a clear text and supportive legislative history would be inconsistent with legislative supremacy. The most controversial public values decisions are those where the result "rewrites" the statute *and* negates clearly expressed legislative expectations that have not been undone by substantially changed circumstances. One case in which that charge seems justified is *Catholic Bishop*. The NLRA's definition of covered "employers" is quite broad enough to embrace religiously affiliated educational institutions, and Congress listed eight exceptions to the coverage, none of which even arguably applied.²⁷¹ Congress would have been hard put to have drafted the statute more comprehensively. Moreover, the statute's history strongly suggests that Congress actually intended to include religiously affiliated educational institutions. The NLRB interpreted the Act to apply to charitable employers in 1942, and in 1947 the House-Senate conference committee for the Taft-Hartley amendments to the NLRA rejected the House proposal to exclude charitable institutions from the definition of "employer."²⁷² The 1947 amendment did, however, add an exception solely for charitable hospitals.²⁷³ Even that was deleted by Congress when it amended the NLRA in 1974, and the legislative history of the 1974 amendments suggests Congress assumed that the Act applied to religiously affiliated institutions.²⁷⁴

Catholic Bishop is inconsistent with legislative supremacy, and for that reason I believe that the case was wrongly decided. The same can

²⁷⁰ Cf. *United States v. Fausto*, 108 S. Ct. 668, 680-81 n.9 (1988) (Stevens, J., dissenting) (repeals should be inferred only when an earlier and a subsequent statute cannot be reconciled, in order to avoid changing "the legal landscape against which Congress works").

²⁷¹ See 29 U.S.C. § 152(2) (1982) (defining "employer" as "any person acting as an agent of an employer, directly or indirectly, *but shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (emphasis added and citation omitted)).

²⁷² See *NLRB v. Catholic Bishop*, 440 U.S. 490, 511-14 (Brennan, J., dissenting).

²⁷³ *Id.* at 513-14.

²⁷⁴ Senator Ervin proposed an amendment to preserve the exemption for religiously affiliated hospitals. See 120 CONG. REC. 12950, 12967-68 (1974). The amendment was defeated, and during the debate the floor manager of the bill based his argument against the amendment upon "the existing national policy which holds religiously affiliated institutions generally[,] such as . . . educational facilities[,] to the same standards as their nonsectarian counterparts." *Id.* at 12957 (statement of Sen. Cranston).

be said of *Ruckelshaus*.²⁷⁵ But I do not think that any other case discussed in Part II is so inconsistent with legislative supremacy that it is, for that reason alone, an illegitimate decision. To illustrate and develop my position, I shall contrast the public values approach to Title VII in *Weber* and *Johnson* with the approach taken by the dissenting Justices.²⁷⁶

Weber is a classic example of public values in statutory interpretation, because the Court explicitly drew upon the statutory purpose and evolution to broaden the statute's concerns and implicitly relied upon the constitutional debate over corrective preferences. The dissent in *Weber* claimed that the result is deeply inconsistent with legislative supremacy, because it negates the original legislative deal clearly evidenced by the text and background of the statute.²⁷⁷ I have argued the correctness of *Weber* in prior publications,²⁷⁸ but in brief there are three reasons why I consider *Weber* to be a legitimate decision, notwithstanding the powerful case built by the dissenting opinion.

To begin with, the evidence of legislative expectations is not so strong as it was in *Catholic Bishop*, where an inclusive text and repeated legislative consideration undercut the Court's public values inquiry. The text interpreted in *Weber* forbade "discriminat[ion],"²⁷⁹ a relatively open-textured term that is nowhere defined in the statute, and a term with many different connotative meanings. The legislative discussion in 1964 certainly evidenced a hostility to government-imposed employment "quotas,"²⁸⁰ but the precise issue of voluntary affirmative action was not prominently discussed. More important, Title VII has since 1964 evolved in ways that undercut the cogency of any original legislative understanding about voluntary affirmative action. If Congress had been asked in 1964 whether voluntary affirmative action were permissible, it might well have said no, in order to effectuate color-blindness values. If it had been asked the same question in 1972,

²⁷⁵ See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 695-706 (1983) (Stevens, J., dissenting) (demonstrating that the text and, especially, the legislative history cut sharply against the Court's public values result).

²⁷⁶ Chief Justice Burger and Justice Rehnquist dissented in *Weber*. See *United Steelworkers v. Weber*, 443 U.S. 193, 216 (1979) (Burger, C.J., dissenting); *id.* at 219 (Rehnquist, J., dissenting). Chief Justice Rehnquist and Justices White and Scalia dissented in *Johnson*. See *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (White, J., dissenting); *id.* (Scalia, J., dissenting).

²⁷⁷ See *Weber*, 443 U.S. at 219-55 (Rehnquist, J., dissenting); Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 444-47 (1980); D. Farber, *supra* note 262, at 34-39.

²⁷⁸ See Eskridge, *supra* note 36, at 1488-94; W. Eskridge & P. Frickey, *Statutory Interpretation as Practical Reasoning* (Apr. 1989 draft).

²⁷⁹ 42 U.S.C. § 2000e-2(a)(1), (d) (1982).

²⁸⁰ See *Weber*, 443 U.S. at 231-52 (Rehnquist, J., dissenting).

it might have answered differently, because by then both the Court²⁸¹ and Congress²⁸² had recognized that formally color blind decisions were not solving the problem of exclusion of blacks from the workforce, apparently due to continuing effects of past discrimination and covert discrimination. Finally, by 1979, our legal culture had developed, in the constitutional arena especially, a sophisticated understanding of the ambiguities of discrimination and the greater difficulty faced in solving the country's racial problems. To insist that the Court ignore this uniquely public discussion and instead to recreate the answer that would have been given in 1964 strikes me as bizarre.

These public values arguments were considered and rejected by the two Justices dissenting in *Weber* and the three Justices dissenting in *Johnson*. Their disagreement goes beyond the technical issues (such as the meaning of discrimination or of the 1964 debates) and represents a fundamental disagreement about the role of public values in statutory interpretation. The dissenters' position can be considered a substantially more "nominalist" approach to statutory interpretation. Starting from the precept of legislative supremacy, the statutory nominalist argues that the only legitimate interpretation is the one that is a logical deduction from the authoritative statements of the original legislative mandate.²⁸³ Generally, the nominalist approach differs from the approach I have taken in defending *Weber* in its greater reluctance to

²⁸¹ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-36 (1971) (holding illegal under Title VII as discriminatory an employer's requirements of a high school diploma and a certain aptitude test score, because, although applied in a color-blind fashion, they had a discriminatory effect with no demonstrated relationship between the requirements and successful job performance).

²⁸² When it amended Title VII in 1972, both House and Senate committee reports approved the Court's greater emphasis on results. See H.R. REP. NO. 238, 92d Cong., 1st Sess. 20-22 (1972) ("The provisions of the bill are fully in accord with the decision of the Court [in *Griggs*]."); S. REP. NO. 415, 92d Cong., 1st Sess. 5 (1972) (noting that while in 1964 discrimination "tended to be viewed as a series of isolated . . . events," it had by 1972 come to be recognized as a problem within the system needing system-wide solutions).

²⁸³ The primary *Weber* dissent, written by Justice Rehnquist, emphasized original legislative intent, while the primary *Johnson* dissent, written by Justice Scalia, emphasized the statutory text. These represent two somewhat different analyses. While Justice Rehnquist considers both text and legislative history binding on the Court, Justice Scalia only considers the text binding. See *Pierce v. Underwood*, 108 S. Ct. 2541, 2550-51 (1988) (Scalia, J.) (refusing to follow one committee report purporting to interpret language, which that committee had not drafted, where 12 of 13 circuits had interpreted the language to reach the opposite result). Compare *Weber*, 443 U.S. at 219-55 (Rehnquist, J., dissenting) (asserting that Title VII's legislative history made its meaning clear) with *United States v. Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part) ("[I]t must be assumed that what Members of [Congress] thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said.").

bend statutes to reflect common law or constitutional values and in its refusal to draw general principles from specific statutes.²⁸⁴

Statutory nominalism is related to a formalist theory of the judicial role, in which judicial "choices" are narrowly limited by the directions provided judges by the legislature (the statutory text and/or the legislative history).²⁸⁵ But statutory nominalists have not, to my knowledge, presented us with a persuasive theory supporting their version of formalism.²⁸⁶ (Such a theory would be necessary to displace decades of Supreme Court reliance on public values in at least some cases.) As I have argued above, it will not do for nominalists simply to invoke legislative supremacy, for most public values analysis is consistent with legislative supremacy. As best I can discern, statutory nominalists ultimately ground their approach to statutory interpretation upon a special claim about what legislative supremacy means: It means enforcing the specific historical "deal" reached in the legislative process; because the deal is evidenced by the statutory text (Scalia) and the legislative history (Rehnquist), judges as contract enforcers must adhere closely to the answers suggested by the *specific* materials. Ergo, they must not enlarge upon or constrict the deal by reference to values "outside" that deal.²⁸⁷

To the extent that statutory nominalists are concerned primarily with preserving the precise contours of legislative deals, it appears that their major normative inspiration is pluralist political theory. A pluralist views government as a means to resolve interest group clashes and views legislation as typically a "deal" between legislators and interest groups. The goal of the pluralist system is not to surpass, but to survive; not to produce optimally rational, public-seeking statutes, but to keep the political game rolling along so as to foster social moderation and stability.

²⁸⁴ These generalizations are inspired by Justice Scalia's positions in statutory cases, see *infra* note 319, by the early work of Judge Posner, see R. POSNER, *supra* note 48 at 285-93; Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-22 (1983), and by the work of Judge Easterbrook, see Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

²⁸⁵ For more interesting explorations of formalism than those presented here, see Posner, *Legal Formalism, Legal Realism and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986-87); Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

²⁸⁶ And Judge Posner, who is something of a nominalist, see *supra* note 284, rejects formalism. See Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Posner, *supra* note 285.

²⁸⁷ See sources cited *supra* note 284; see also Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 894 (1975) (describing the political process as a struggle between interest groups with the judiciary set apart, not to make value judgments, but to enforce the "deals").

Accepting purely pluralist governmental theory admittedly would make public values interpretation highly questionable in any case where the statutory text and/or legislative history suggest a contrary answer.²⁸⁸ But do statutory nominalists have a persuasive normative argument for their pluralist vision of politics? Some pluralists ground their position upon the original design of the United States Constitution to create a "liberal" polity; yet this view of our constitutional history has become increasingly controversial.²⁸⁹ It is apparent that our constitutional history contains elements that derive *both* from the republican, public values tradition *and* from the liberal, pluralist tradition.²⁹⁰ Other pluralists ground their position upon a gritty realism about politics, arguing that it rarely rises above the level of dealmaking. Theirs tends to be more a positive than a normative argument, and in any event its descriptive power has been cogently questioned by modern scholarship suggesting that public values do play a critical role in politics.²⁹¹

Not only have the traditional arguments for pluralism lost much of their force, but there are strong reasons for us to prefer a political vision which encourages the development and application of public values. At a very simple level, it is a more appealing vision of, or aspiration for, our polity. This idea is suggested by Dworkin's distinction between a rulebook community and a community of principle.²⁹² In a rulebook community, people are bonded by their commitment to following the rules established through a self-interested but fair bargaining process; the rules don't have to embody anything more than a special

²⁸⁸ Pure pluralism, in other words, frowns on public values interpretation of statutes that are not truly open-textured. Such pluralist theory runs prominently through the work of Judge Posner, who is very skeptical of many of the clear statement rules and meta-rules, see Posner, *supra* note 284, at 805-17 (rejecting most canons of statutory construction), of judicial efforts to impute rational goals and purposes to Congress, see R. POSNER, *supra* note 48, at 285-93, and of judicial expansions of statutes beyond their formal boundaries, see Posner, *supra* note 285. Note, however, that Judge Posner's later work is moving away from the nominalist and deal-seeking perspective of his earlier pieces. See Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 774-77 (1987).

²⁸⁹ Leading legal essays discussing the historical debate are Ackerman, *supra* note 1, at 1013-23, 1051-70; Sunstein, *Interest Groups*, *supra* note 1, at 45-48.

²⁹⁰ See generally Sunstein, *Beyond*, *supra* note 1, at 1558-64, 1576-89 (discussing the republican role in American constitutional tradition and its implications for present political practice).

²⁹¹ For leading works in this area, see S. KELMAN, *MAKING PUBLIC POLICY: A HOPEFUL VIEW OF AMERICAN GOVERNMENT* (1987); J. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); A. MAASS, *CONGRESS AND THE COMMON GOOD* (1983).

²⁹² See R. DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 208-15.

compromise for us to obey them. In a community of principle, citizens accept that they are bonded by common principles, which are reflected in, yet transcend their specific laws. Dworkin argues, persuasively in my view, that the rulebook community is "shallow" and "hollow," because it isolates citizens from one another and undermines the emotional interrelationships essential to a true associational community.²⁹³ The community of principle, in contrast, helps engender the interrelational qualities needed for true bonding.²⁹⁴

Consider, too, a simpler contrast. On the one hand, living in a rulebook community is like a series of business transactions: Bargain for the best rules you can get, follow the rules (perhaps breaching when efficient to do so), make your money, and move on to the next deal. This aspiration does capture much of American life, but we are deeply ambivalent about it.²⁹⁵ Even as a description of the business world, isolated dealmaking seems incomplete, for it marginalizes the importance of fostering goodwill, cooperating, and building relationships over time.²⁹⁶ More importantly, only the most hard-nosed entrepreneur would want to live her whole life by the deal approach she might use in business. Especially for those who are not good dealmakers (often for reasons having nothing to do with talent), the transactional ideal seems not only empty but anti-human and alienating. In contrast, living in a community of principle is like living in a family. Familial communities offer their members a potentially richer life. Compete and dispute though they may, family members are bonded together by common goals, shared experiences, and mutual concern for the interests of others. Any conception of community that limits itself to the transactional ideal, and ignores the family ideal, neglects essential human and societal needs.

For profound philosophical reasons, the transactional ideal—the rulebook community—no longer makes sense as an exclusive statement of our political aspiration. Pluralism assumes that individuals are isolated and that their preferences are independent of politics; this assumption is now highly controversial. The nineteenth century liberal

²⁹³ *Id.* at 212.

²⁹⁴ "Everyone's political acts express on every occasion, in arguing about what the rules should be as well as how they should be enforced, a deep and constant commitment commanding sacrifice, not just by losers but also by the powerful who would gain by the kind of logrolling and checkerboard solutions integrity forbids." *Id.* at 213.

²⁹⁵ Witness the popular successes of Tom Wolfe's novel *BONFIRE OF THE VANITIES* (1987), and the movie *Wall Street* (1987), both of which feature protagonists whose adherence to the dealmaking ethic both fuels their rise and dictates their ultimate disgrace.

²⁹⁶ See, e.g., R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

vision of individuality and politics (the key to pluralism as I am using it here) is giving way to a vision that is founded upon an intersubjective definition of individuality and a dialectic view of politics and interpretation.²⁹⁷ Whereas traditional liberalism defined the individual as an autonomous collection of exogenous preferences, we now recognize the many ways in which such autonomy is impossible and, indeed, inhuman. Our individuality is not only strongly influenced by the community in which it is situated but is dependent upon our interactions with others. Our potential as individuals is determined through dialogue and interchange with others. According to this view of human nature, our preferences are inevitably shaped by our community, by our discussions with others, and by the process by which we articulate and press our preferences.²⁹⁸

In a society where individuals are defined in part by their community interaction, politics is dialogic, and interpretation is an ongoing process by which meaning is created and changed. Rather than simply being the mechanism by which interest groups make deals to attain their preexisting preferences (the pluralist view), politics is often the organic activity through which we discover our values and implement them in some concrete way, after discussion and accommodation (the public values view).²⁹⁹ Similarly, interpretation of legal texts is not the archeological excavation of some long-departed historical understanding (the pluralist view), but the retrieval of meaning from the past that is pertinent for a present-day problem (the public values view).³⁰⁰

This modern view of politics and society suggests that legislative supremacy (and certainly the special use of it by the nominalists) is only one of several fundamental precepts of our polity. Specifically, it is subordinate, or not superior, to the precept that lawmaking is informed by values formed through a process of public discussion. Statutory in-

²⁹⁷ For leading works in the area, see R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS* (1983); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

²⁹⁸ See generally Cornell, *Institutionalization of Meaning, Recollective Imagination, and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1178-96 (1988) (explicating the view that identity is formed through interaction with one's community).

²⁹⁹ See Sunstein, *Beyond*, *supra* note 1, at 1548-58 (developing a theory of republicanism based on dialogue, equality, universalism, and representation, as opposed to self-serving deal-making).

³⁰⁰ See Cornell, *supra* note 298, at 1161-66 (asserting that interpreters of precedent should look not for what the law "is" but for what the law "might have been," thus evoking meaning "out of the reinterpretation of the past"); Michelman, *supra* note 6, at 1495 (noting that republican constitutionalism "involves the on-going revision of the normative histories . . . needed to extend the political community" to those who played no role in its past).

terpretation, in such a community of integrity, ought not needlessly flaunt the deliberative decisions made by the legislature (*Catholic Bishop*), but does have the capacity for harmonizing statutes with changing values and policies over time (*Weber, Bob Jones*). To the extent that interpretation can contribute to "law's integrity," it can augment the legitimacy of our government and contribute to our community of principle.

B. *Incoherence & Indeterminacy*

As suggested by the previous Section, the case for the legitimacy of public values interpretation in a representative democracy is strongest if it can be demonstrated that the Court contributes to law's integrity by using public values analysis coherently. Unhappily, I cannot make that claim about the Court's decisions of the last ten years. Just as the old canons of statutory construction were criticized as indeterminate (each canon having a nullifying complement),³⁰¹ so the public value rules examined in Part II can be seen as indeterminate: Sometimes the Court will find them pertinent and decisive; other times the Court will not even find them; and it is hard to predict when the Court will do either. There is a randomness to the Court's invocation of public values which is quite troubling and which prevents public values from contributing as much to law's integrity as they theoretically could.

Thus for every case like *Catholic Bishop*, which interprets statutes to avoid constitutional doubts, there are other cases where a statute is construed boldly, to face substantial constitutional troubles.³⁰² For every case like *Cardoza-Fonseca*, which interprets statutes in light of international law and comity, there are other cases in which the Court ignores or slights equally compelling international agreements.³⁰³ For

³⁰¹ See Llewellyn, *supra* note 12, at 401-06.

³⁰² For cases rejecting the *Catholic Bishop* approach and decided about the same time as *Catholic Bishop*, see *Dalia v. United States*, 441 U.S. 238, 248-54 (1979) (holding that authority given federal courts to approve electronic surveillance under Title III of the Safe Streets Act includes authority to approve covert entries); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (refusing to narrow statutory prohibition of "obscene, profane, or indecent" radio broadcasts to cover only the "obscene"); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (interpreting President's statutory authority to "adjust" imports threatening to impair national security to include authority to raise license fees on imported oil).

³⁰³ *Compare Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104 (1988) (Hague Service Convention does not apply when a domestic subsidiary is served as an agent of a foreign corporation) *with id.* at 2116-17 (Brennan, J., concurring in the judgment) (Hague Convention does apply). *Compare Société Nationale Industrielle Aerospatiale v. United States Dist. Court*, 107 S. Ct. 2542 (1987) (Hague Evidence Convention provides optional but not exclusive way to obtain foreign evidence from litigant subject to jurisdiction of U.S. court) *with id.* at 2561-62 (Blackmun, J., dissent-

every case like *McNally*, which interprets criminal statutes restrictively, lest defendants not have notice of the meaning of the prohibition, there are other cases in which the Court interprets ambiguous criminal statutes broadly.³⁰⁴ One such case is *United States v. Albertini*.³⁰⁵

Albertini was a criminal prosecution based upon a federal statute making it unlawful to reenter a military base after having been "ordered not to reenter by any officer or person in command or charge thereof."³⁰⁶ After an incident in which he and a friend had entered an air force base and destroyed government property, Albertini had been issued a "bar letter" from the commanding officer, forbidding him from reentering without written permission. Nine years later, Albertini and some friends reentered the base during its annual open house for Armed Forces Day. The friends engaged in a peaceful demonstration protesting the nuclear arms race, and Albertini took pictures. For this, he was charged with, and convicted of, violating the criminal reentry statute.

An interpretation of the reentry statute to cover the peaceful conduct at an open house, nine years after the bar letter, seems to me at war with both the rule of lenity and the meta-rule to avoid constitutional (first amendment) questions. Yet a divided Court affirmed Albertini's conviction. Why? This is a complicated inquiry, and its answer suggests three systemic reasons the Court's episodic use of public values analysis may not contribute significantly to the community of principle that is its aspiration.

To begin with, the Justices are themselves ambivalent about the role of public values in statutory interpretation. Because of concerns about legitimacy (analyzed in the previous Section), many of the Justices are hesitant to invoke public values in statutory interpretation. In 1985, when *Albertini* was decided, at least two Justices—White and Rehnquist—tended to be statutory nominalists,³⁰⁷ and two other Jus-

ing in part) (arguing that principle of comity should be followed).

³⁰⁴ Compare *Kungys v. United States*, 108 S. Ct. 1537 (1988) (expanding the definition of "material misrepresentation" constituting grounds for denaturalizing an immigrant) with *id.* at 1557 (Stevens, J., concurring in the judgment) (denaturalization statute should be narrowly construed). Compare *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404 (1988) (postal monopoly statute prohibits state university from carrying letters from union to university employees through its internal mail system) with *id.* at 1413 (Stevens, J., dissenting) (Private Express Statutes should be narrowly construed).

³⁰⁵ 472 U.S. 675 (1985).

³⁰⁶ 18 U.S.C. § 1382 (1982).

³⁰⁷ As they continue to be, on the whole. Both Justices dissented in *Johnson, Guerra, Cardoza-Fonseca*, and other cases using public values analysis. See also *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2223-25 (1987) (White, J., dissenting); *School Bd. v. Arline*, 480 U.S. 273, 289-93 (1987) (Rehnquist, C.J., dissenting). Both

tices—Burger and Powell—were sometimes concerned about the legitimacy of public values analysis.³⁰⁸ Changes in the Court's personnel since 1985 have further undermined the Court's willingness to bend statutes; the replacements for Chief Justice Burger and Justice Powell appear to be even more committed to statutory nominalism than (now) Chief Justice Rehnquist and Justice White. Justice Scalia is the strongest voice on the Court for a narrow statutory nominalism,³⁰⁹ and Justice Kennedy's early opinions have been almost as narrow and nomi-

Justices wrote important decisions eschewing a public values analysis that ought in my view to have been pertinent. *See, e.g.,* *Bourjaily v. United States*, 107 S. Ct. 2775, 2778-82 (1987) (Rehnquist, C.J.) (reading FED. R. EVID. 104(a) literally to permit "boot strapping" admissibility of co-conspirator hearsay without independent proof of conspiracy); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610-13 (1987) (White, J.) (allowing Arab-American to maintain racial discrimination action under the Civil Rights Act on the curious ground that Arabs would have been considered a distinct race in the nineteenth century). On the other hand, even these two nominalist Justices have joined or written opinions using public values. Justice Rehnquist joined the Court's opinions in *McNally* and *Rose v. Rose*, for example. And, somewhat surprisingly, Justice White wrote three of the strongest public values opinions last Term. *See* *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1942-45 (1988) (White, J., dissenting) (aggressive application of meta-rule to avoid constitutional issues); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1394-1404 (1988) (disapproving NLRB interpretation of statute for unnecessarily raising a serious first amendment issue); *Department of the Navy v. Egan*, 108 S. Ct. 818, 827-30 (1988) (White, J., dissenting) (interpreting statute to reconcile national security interest and Navy employee's interest in full hearing on discharge action).

³⁰⁸ Thus although Chief Justice Burger wrote such leading public values opinions as *Bob Jones* and *Catholic Bishop*, he dissented in other leading public values opinions, such as *Weber*. *See also* *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986) (Burger, C.J.); *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (Burger, C.J.).

During his tenure on the Court, Justice Powell was much less concerned about the legitimacy of public values analysis, for he wrote the opinions for the Court in *Midland National Bank*, *Kelly*, *Welch*, and an excellent concurring opinion in *Bob Jones*. Some doubts about public values for Justice Powell might be discerned in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233 (1986) (Powell, J., dissenting); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 523 (1985) (Powell, J., dissenting); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 62 (1983) (Powell, J., dissenting); *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980) (Powell, J., dissenting); *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

³⁰⁹ *See infra* note 319. Justice Scalia dissented from the Court's public values decision in *Johnson*, arguably the Court's main public values decision of the 1986 Term. He did not write a single opinion that I would characterize as inspired in significant ways by public values, though he joined the Court's opinions, without comment, in *Kelly*, *McNally*, *Rumery*, and *Buell*. He concurred in the judgment, on narrow textual grounds, in *Guerra*, *Cardoza-Fonseca*, *Rose v. Rose*, and *Welch*. *See also* *Citicorp Indus. Credit, Inc. v. Brock*, 107 S. Ct. 2694, 2702 (1987) (Scalia, J., concurring) (asserting that deciding the case did not require knowing the legislature's purpose); *Lukhard v. Reed*, 481 U.S. 368, 374-76 (1987) (Scalia, J., plurality opinion) (rejecting in *pari materia* argument and deciding that personal injury recoveries may be treated as income in determining welfare eligibility).

nalistic as those of Justice Scalia.³¹⁰

Thus, at least two of the Justices on the *Albertini* Court (and perhaps four now) started out deeply skeptical of a public values analysis. That alone, of course, does not explain the decision, since the other Justices have been receptive to such analysis. The author of the opinion, Justice O'Connor, has often relied on public values analysis in both constitutional and statutory cases.³¹¹ In fact, her opinion in *Albertini* started with the rule that the Court should first determine whether an interpretation of the statute is "fairly possible" by which the constitutional question might be avoided.³¹²

Justice O'Connor found the statutory language unyielding, however. "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature."³¹³ This suggests a stronger reason for not applying the constitutional values here: the statutory text is clear. The various public values rules and presumptions are generally

³¹⁰ See *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1814-19 (1988) (Kennedy, J.) (using literal reading of statute to invalidate part of a long-standing Customs Service regulatory scheme); *Bethesda Hosp. Ass'n v. Bowen*, 108 S. Ct. 1255, 1258-60 (1988) (Justice Kennedy's first important statutory interpretation decision, striking down federal regulation governing cost reimbursement to hospitals as contrary to "plain meaning" of medicare statute).

³¹¹ See generally Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592-613 (1986) (suggesting that Justice O'Connor's position diverges from other conservatives because of a feminist perspective that emphasizes community and civic virtue values over individual rights and pluralist values). Justice O'Connor wrote the opinions for the Court in important public values cases such as *Utah Public Lands*, *Shearson/American Express*, and *Wimberly*. Her concurring opinions in *Rose v. Rose*, *Rumery*, and *Johnson* are models of public values analysis. See also *United States v. Kozminski*, 108 S. Ct. 2751, 2764-65 (1988) (O'Connor, J.) (applying rule of lenity to limit slavery statute to situations involving use or threat of physical force or by the use or threat of coercion through law or the legal process); *EEOC v. Commercial Office Prods. Co.*, 108 S. Ct. 1666, 1676-77 (1988) (O'Connor, J., concurring in part and in the judgment) (deferring to agency determination); *Tanner v. United States*, 107 S. Ct. 2739, 2751-54 (1987) (O'Connor, J.) (applying rule of lenity to construe statute regarding defrauding the United States); *Société Nationale Industrielle Aerospatiale v. United States Dist. Court*, 107 S. Ct. 2542, 2557-68 (1987) (Blackmun, J., joined by Brennan, Marshall & O'Connor, JJ., dissenting in part) (urging more respect for Hague Evidence Convention, in the interest of international comity); *Perry v. Thomas*, 107 S. Ct. 2520, 2528 (1987) (O'Connor, J., dissenting) (seeking to preserve state regulation); *Bowen v. Yuckert*, 107 S. Ct. 2287, 2298-300 (1987) (O'Connor, J., concurring) (appealing to fairness in construing regulations governing evaluation of social security disability claims); *Lukhard v. Reed*, 481 U.S. 368, 384-92 (1987) (Powell, J., joined by Brennan, Marshall & O'Connor, JJ., dissenting) (rejecting regulations that treat personal injury awards as income, since unjust and inconsistent with the basic purpose of the statute); *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 43 (1987) (O'Connor, J.) (applying purposive whole act rule and in pari materia rule to find ERISA preemption of state common law).

³¹² See *Albertini*, 472 U.S. at 680 (internal quotation marks omitted).

³¹³ *Id.*

subject to legislative rebuttal, and clear statutory text might be considered sufficient for this purpose. With the two statutory nominalists (Justices White and Rehnquist) forming a core group suspicious of public values in 1985, it only required three Justices finding the text sufficiently clear in order to negate the public values.

Yet this reason, too, is not entirely persuasive, because the statutory text does not answer the question as clearly as the Court's opinion would suggest. While the statute is broad enough to cover *Albertini*, it certainly does not target people like him, and it would be inconceivable for courts to apply the statute as broadly as it is written. As Justice Stevens argued in dissent, a literal reading of the statute would justify criminal prosecution of someone, removed from the base because of drunkenness, who returned nine years later to an open house, or even wandered onto the base wholly by accident.³¹⁴ These absurd consequences could be avoided by reading a *mens rea* requirement into the criminal statute. Although the Court was not willing to do so in *Albertini*, in other cases the Court, "in keeping with the common-law tradition and with the general injunction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide."³¹⁵

Indeed, the criminal statute in *Albertini* seems no clearer than the bankruptcy statute whose apparent meaning was overridden in *Kelly* and *Midlantic National Bank*, decisions written by literalist Justice Powell. And when the legislative history is also considered, the statute in *Albertini* (which had no history suggesting such a draconian application) seems somewhat less clear than the statute in *Catholic Bishop* (where equally sweeping language was backed up by quite specific supporting legislative history), the latter decision written by literalist Chief Justice Burger. Comparing the statute whose language was applied strictly and literally (*Albertini*) with those statutes applied very leniently (*Kelly*, *Midlantic National Bank*, and *Catholic Bishop*), it is hard to find relevant textual distinctions. In all four of the cases, the statutory language is broad enough to cover the issue squarely, yet the only case where the broad language was strictly applied is the single case supposedly covered by the rule of lenity—*Albertini*. It seems unlikely that the asserted clarity of the statutory text is what persuaded six Justices to uphold *Albertini*'s conviction.

³¹⁴ See *id.* at 697-99 (Stevens, J., dissenting). The Court, quite properly, disclaimed any willingness to read the statute that broadly. See *id.* at 683-84.

³¹⁵ *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Justice O'Connor's opinion suggests a third reason the constitutional values I find dispositive were not so for the Court: a competing public value. The bulk of the Court's opinion is a balanced discussion of the first amendment issues. Based on prior case law applying first amendment principles to military installations, the Court concluded that the commandant's action was not constitutionally questionable. Although the commandant's action seems extreme in *Albertini*, the Court believed that the judiciary must afford broad discretion to military authorities who are assigned to protect our national security. Indeed, judicial deference to executive decisions on national security matters might be said to be a public value itself, for it has influenced judicial interpretation of statutes in cases like *Dames & Moore* and in three military affairs cases decided in the 1986 Term, the Term immediately after *Albertini*.³¹⁶ The three Justices who voted against the military in all three of those cases—Justices Brennan, Marshall, and Stevens—were the three dissenters in *Albertini*. Chief Justice Rehnquist and Justices White and Powell voted with the military in all three cases; Justices Blackmun and O'Connor voted with the military in two of the three. Their five votes, plus the vote of then-Chief Justice Burger (also quite deferential to military discretion), furnished the majority in *Albertini*.

This analysis of *Albertini* suggests several systematic limitations on the ability of public values interpretation to create coherence in law. First, such analysis will not eliminate our country's overall pattern of "checkerboard statutes,"³¹⁷ which treat similarly situated people differently. That is, if the statutory language clearly indicates a certain result, it is unlikely that public values will trump that result. Hence, similarly situated people will be treated differently. This checkerboard rule is obviously at odds with the idea of a community of principle. Yet checkerboard statutes are quite common. Congress tends to draft statutes in an ad hoc way, responding to particular events and problems; over time, Congress tends to add on new rules and exceptions to statutes (if it does anything at all) but not to make different statutes coherent with one another; each statutory scheme builds upon its own traditions and even accidents. The Court is limited in its ability to reconcile

³¹⁶ See *United States v. Stanley*, 107 S. Ct. 3054 (1987) (barring constitutional tort suit for military experimentation with LSD on unwitting soldiers); *Solorio v. United States*, 107 S. Ct. 2924 (1987) (expanding military court-martial jurisdiction); *United States v. Johnson*, 481 U.S. 681 (1987) (no statutory tort lawsuit for soldier killed incident to military service, even if negligence was by civilian employees).

³¹⁷ See R. DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 179 n.6 (using the word "checkerboard" to describe statutes "that display incoherence in principle and that can be justified, if at all, only on grounds of a fair allocation of political power between different moral parties").

those checkerboard statutes which are detailed in their prescriptions, because even most public values interpreters are loathe to tamper with a clear statutory text. Indeed, one might consider the plain meaning rule of statutory interpretation to embody a public value: Citizens ought to be able to discern the apparent meaning of the statutes printed in the United States Code and to rely on that understanding in organizing their affairs.³¹⁸ In most cases, therefore, public values rules will just operate at the margins of statutory schemes.

Second, the Court's heterogeneity suggests that it is unlikely to develop a consistent public values approach to statutory cases. Consider the current Court, which can be divided into three groups of Justices. One group (Chief Justice Rehnquist and Justices Scalia, White, and [probably] Kennedy) is fairly nominalistic.³¹⁹ These Justices are strongly committed to pluralism as a political philosophy and, hence,

³¹⁸ The nominalist Justices do not state this argument for emphasizing the plain meaning of statutes over other values, but it may be an important assumption. See *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986) (Burger, C.J.) (rejecting appeal to purpose or policy of statute where the language was clear in defining "bank"); *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 574-77 (1982) (Rehnquist, J.) (rejecting argument that statute should not be read literally to produce damages disproportionate to injury to seaman denied wages); *United Air Lines v. McMann*, 434 U.S. 192, 203 (1977) (Burger, C.J.) (relying on ordinary definition of "subterfuge" to confirm Congressional intent that mandatory retirement before age 65 is permitted if pursuant to long-established pension plan).

³¹⁹ Justice Scalia, in particular, has a well-developed theory of statutory nominalism (emphasizing process values and focusing on statutory text) that stands as an alternative to a public values approach. The best expressions of his underlying theory may be found in *Johnson v. Transportation Agency*, 480 U.S. 616, 657-77 (1987) (Scalia, J., dissenting) (emphasizing literal reading of text and original intent of legislature, and therefore reading Title VII of Civil Rights Act to require color-blind hiring and to prohibit affirmative action plans), and *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring in the judgment) (clear language in statute should be conclusive without need to consult legislative history). See also *United States v. Johnson*, 481 U.S. at 692-703 (Scalia, J., dissenting) (dangers of judicial creativity, as statute evolves further away from textual meaning); *Rose v. Rose*, 481 U.S. 619, 640-41 (1987) (Scalia, J., concurring in the judgment) (narrow textual grounds for joining the Court's purposivist result); *California Coastal Comm'n v. Granite Rock Co.*, 481 U.S. 572, 607-14 (1987) (Scalia, J., dissenting) (administration of state land should always be characterized as land use regulation, regardless of standards applied); *Lukhard v. Reed*, 481 U.S. 368, 374-76 (1987) (Scalia, J.) (holding that Virginia's treatment of personal injury awards as income in determining AFDC eligibility was not inconsistent with the AFDC statute); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 295-96 (1987) (Scalia, J., concurring in the judgment) (rejecting purpose analysis and arguing that Court should rely on narrowest possible grounds in holding state anti-pregnancy-discrimination statute not preempted by federal law). For cases illustrating the nominalist views of Chief Justice Rehnquist and Justice White, see *supra* note 307; on Justice Kennedy, see *supra* note 310. Cf. *Denver, Justice Brennan, Justice Rehnquist, and Free Speech*, 80 Nw. U. L. REV. 285, 292-99 (1985) (noting Justice Rehnquist's emphasis on majoritarianism, efficiency, and process values in first amendment cases).

are most sensitive to the countermajoritarian difficulty and charges of judicial lawmaking. They will apply the meta-rules, presumptions, and clear statement rules discussed in this Article, to the extent that other signals from the legislature (text and/or legislative history) are not dispositive. Consistent with a thoroughgoing pluralism, the public values most appealing to the nominalistic Justices are process values in which courts defer to other decisionmakers—state governments, federal agencies and the executive branch, and private arbitrators.

A second group (Justices Brennan, Marshall, and [to some extent] Blackmun) is substantially committed to the republican tradition in which public values pervasively affect statutory interpretation.³²⁰ The republican Justices are more committed to the *Brown* experience than they are to a thoroughgoing political pluralism, and their sensitivity to the countermajoritarian difficulty is often balanced by a sensitivity to the systemic flaws in the political process—exclusion of minority groups, inertia, and statutory obsolescence.³²¹ They will aggressively apply most of the meta-rules, presumptions, and clear statement rules, often trumping apparent legislative signals (albeit not necessarily “clear” signals). Republican Justices differ markedly from nominalist Justices in the priority and harmonization precepts they follow when public values are in conflict (as in *Albertini*). For example, the republican Justices have less enthusiasm for process values than do the nominalist Justices and are more likely to follow substantive policy values in cases of conflict (the injustice of jailing *Albertini* outweighs deference to

³²⁰ These Justices wrote most of the leading public values decisions discussed in this Article—*Johnson*, *Weber*, *Guerra*, *Mancera*, *Rose v. Rose*, *Wells Fargo*, *Arline*, *LaPlante*—and voted together not only in these cases, but also tended to dissent together in cases where the Court arguably ignored or slighted important public values. For recent examples, see *Pierce v. Underwood*, 108 S. Ct. 2541, 2555 (1988) (Brennan, J., dissenting); *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2519 (1988) (Brennan, J., dissenting); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104, 2112 (1988) (Brennan, J., concurring); *Monessen S.W. Ry. v. Morgan*, 108 S. Ct. 1837, 1896 (1988) (Blackmun, J., concurring in part and dissenting in part); *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1819 (1988) (Brennan, J., concurring in part and dissenting in part); *Traynor v. Turnage*, 108 S. Ct. 1372, 1384 (1988) (Blackmun, J., concurring in part and dissenting in part); *Welch v. State Dep’t of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2958 (1987) (Brennan, J., dissenting); *Bourjaily v. United States*, 107 S. Ct. 2775, 2784 (1987) (Blackmun, J., dissenting); *Tanner v. United States*, 107 S. Ct. 2739, 2754 (1987) (Marshall, J., concurring in part and dissenting in part); *Société Nationale Industrielle Aerospatiale v. United States Dist. Court*, 107 S. Ct. 2542, 2557 (1987) (Blackmun, J., concurring in part and dissenting in part); *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2346 (1987) (Blackmun, J., concurring in part and dissenting in part); *Bowen v. Yuckert*, 107 S. Ct. 2287, 2300 (1987) (Blackmun, J., dissenting). In all but *Monessen* and *K Mart*, all three Justices voted together, and usually were joined by no other Justice.

³²¹ Cf. *Denvir*, *supra* note 319, at 299-306 (noting Justice Brennan’s willingness to overrule majoritarian regulation to protect individual participation values).

the commandant).

A third group (Justices Stevens and O'Connor) might be associated with the pragmatic tradition, in which the statutory interpreter is sensitive to both pluralist and republican concerns, to both legislative supremacy and just results, and to both the countermajoritarian difficulty and the *Brown* legacy.³²² Like the republican Justices, the pragmatic Justices will follow the full range of meta-rules, presumptions, and clear statement rules but will stop short of displacing clear statutory text and history with a judicially derived value. Like the nominalist Justices, the pragmatic Justices are deferential to more majoritarian decisionmakers, but are also more willing to bend those decisions to reflect public values. The pragmatic Justices tend to write narrower, fact-based opinions, and their voting is a bit ad hoc, because the facts of individual cases will make more of a difference to them.

In short, the role of public values in the Supreme Court's statutory interpretation is going to vary from case to case, depending upon how persuasive an argument the nominalist and republican Justices will be able to make, and how the pragmatic Justices behave. This phenomenon, moreover, is not limited to the current Court, for most of the Courts in this century have shown fragmentation on issues arising out of different political assumptions. Because Justices often remain on the Court for long periods of time, and because appointments reflect (however imperfectly) changing political tastes, the Court at any one time is

³²² Justices Stevens and O'Connor joined almost all of the public values decisions discussed in this article, with the notable exception of *McNally*, where they dissented on practical grounds. Like the republican Justices, Justices Stevens and O'Connor support the evolution of civil rights statutes, as in *Johnson*, *Guerra*, and *Bob Jones*. Like the nominalist Justices, Justices Stevens and O'Connor will adhere to relatively clear statutory texts and/or legislative history, over the objections of the republican Justices, as in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 425 (1988) (Stevens, J., joined by Rehnquist, C.J., and White and O'Connor, JJ., dissenting); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S. Ct. 2104 (1988) (O'Connor, J.); *Bourjaily v. United States*, 107 S. Ct. 2775 (1987) (Rehnquist, C.J., joined by Stevens and O'Connor, JJ.); *Bowen v. Yuckert*, 107 S. Ct. 2287 (1987) (O'Connor, J., joined by Stevens, J., concurring); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (Stevens, J., joined by O'Connor and Scalia, JJ., dissenting).

While they are both pragmatic, Justices Stevens and O'Connor are very different pragmatists. Justice Stevens is more willing to bend apparently clear statutory texts in response to public values, and is more skeptical of status quo values than is Justice O'Connor. Contrast Justice O'Connor's opinion for the Court in *Albertini* with Justice Stevens' dissent. For other opinions that illustrate their differences in this area, see *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404 (1988); *Tanner v. United States*, 107 S. Ct. 2739 (1987); *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987); *Town of Newton v. Rumery*, 480 U.S. 386, 399 (1987). In each case, Justice O'Connor was in the majority, and Justice Stevens was in dissent.

likely to reflect a variety of political viewpoints.³²³ Hence, it is not surprising to see disagreement about the proper role of public values in statutory interpretation.

Third, and most important, public values analysis is beset by problems of definition and harmonization. What is a public value? How should it be weighed? What if it conflicts with another public value? Neither the Court nor commentators have worked out rules for harmonizing competing public values,³²⁴ and the most that I can say is to expand upon the gravitational metaphor suggested earlier: Public values will be most important in cases where the statutory text and/or legislative history are ambiguous or, especially, deliberately open-textured (for even statutory nominalists must fill in vague statutes with something). They will be less often influential when the statutory text is clear, especially if the plain meaning is buttressed by legislative history. Constitutional values will have greater weight than statutory or common law values. There is further variation even within these categories, since some constitutional values (free speech and protection of *Carolene* groups) count more than others (deference to state decision-making). The extent to which a public value is implicated in a case also makes a difference.

Under this analysis, *Albertini* rests upon a complex weighing of values by the Court. Given the perceived clarity of the text, the Court started with a presumption in favor of that meaning, thereby negating the rule to avoid constitutional questions. The Court did not consider free speech or fairness values strongly implicated in the case, because the defendant was put on notice by the bar letter and because his prosecution arguably was not precipitated by his picture-taking. To the extent that such values were implicated, they were offset by the constitutional value of military discretion in national security matters. The public values, for the Court, were too beclouded to rebut the presumptive plain meaning of the statute. This is what I believe the Court was doing in *Albertini*. I think it's crazy.

³²³ The current Court consists of three Justices appointed by conservative President Reagan, one by moderate President Ford, two by moderate President Nixon, one by liberal President Johnson, one by liberal President Kennedy, and one by moderate President Eisenhower. While the Justices do not necessarily reflect the ideology of the President appointing them, the variations often have a way of balancing out. Liberal Justice Brennan was appointed by Eisenhower, while moderately conservative Justice White was appointed by Kennedy, for example.

³²⁴ C. Sunstein, *supra* note 9, makes some tentative suggestions that the presumption of decisions by politically accountable actors should occupy highest priority, followed by Constitution-based rules, followed by presumptions in favor of coordination and against statutory obsolescence.

C. *Arbitrariness & Elitism*

Albertini is no isolated example of what I consider to be an indefensible weighing of public values. The rule of lenity cases, in particular, strike me as capricious. The constitutional value of sufficient notice to the defendant that she is breaking the law seems ill-served by the Court's rather random invocation of the rule. Hence, the rule of lenity was not invoked in *Albertini*, where the conduct posed no threat to the statutory goals and was at best *malum prohibitum*, while the rule was invoked in *McNally*, where the conduct (bribery and corruption) was *malum in se* and had been found criminal by a long line of circuit court decisions.³²⁵ Several cases last Term continue the Court's bizarre use of the rule of lenity.³²⁶

Other cases discussed in Part II are equally vulnerable to the objection that the Court weights public values in an arbitrary and indefensible way. For example, *Shearson/American Express* subordinated the securities law anti-fraud policy to the arbitration policy. This is questionable since the former policy was supported by precedent, signals of congressional approval of the specific application of the precedent to the situation in question, and the demonstrated inefficacy of arbitration as a remedy for consumers who lack an equal footing with investment advisers.³²⁷ *Rumery's* application of common law contract waiver policies in a situation of inherently unequal bargaining power strikes me indefensible, especially given our longstanding presumption against waiver of constitutional rights. In fact, several cases decided in the 1987 Term strike me as questionable weighings of competing public values.³²⁸

These cases suggest that the greatest danger of public values analysis in statutory interpretation is that it will be decisively influenced by

³²⁵ See *McNally*, 107 S. Ct. at 2884-91 (Stevens, J., dissenting).

³²⁶ Compare *United States v. Kozminski*, 108 S. Ct. 2751, 2764 (1988) (rule of lenity protects psychological coercion of retarded laborers from reach of involuntary servitude statute) with *Regents of Univ. of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404, 1410 (1988) (rule of lenity does not protect university mail system from ambiguous postal monopoly prohibition).

³²⁷ See *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2346-58 (1987) (Blackmun, J., concurring in part and dissenting in part).

³²⁸ See, e.g., *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2519-28 (1988) (Brennan, J., dissenting) (objecting to Court's federal common law tort immunity for defense contractors, in part because Congress has decided not to supersede state law in this area); *Monessen S.W. Ry. v. Morgan*, 108 S. Ct. 1837, 1843-44 (1988) (common law gapfilling rule trumps purpose of statute); *Traynor v. Turnage*, 108 S. Ct. 1372, 1381-83 (1988) (presumption against implied repeals trumps statutory antidiscrimination policies); *United States v. Fausto*, 108 S. Ct. 668, 675-77 (1988) (purpose of statute precluding judicial review overcomes presumptions of judicial review and against implied repeals).

the political preferences of the Justices, who are subject to biases that are hard to defend in a modern democracy.³²⁹ Most public values scholars do not argue that judges will always make the right political choices. Rather, they argue that judges are constrained in ways that make good choices more likely. As Owen Fiss puts it, "[t]he judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values. It is a dialogue with very special qualities,"³³⁰ for judges do not control their agenda and must interpret statutes critical to cases before them, are bound to listen to a multiplicity of viewpoints, and must respond to these viewpoints with a reasoned justification for their resolution of the case.³³¹ A related constraint is imposed by the audience for judicial decisions that interpret statutes—what literary theorists, and now law professors, call the "interpretive community."³³² That is, the expectations of legislators, academics, other judges, and the parties themselves constrain the political choices made by judges, and compel judges to justify their choices by reference to something more than fiat or personal preference.

I think that there is much to this response. The very process of public values interpretation at least ventilates policy issues in an open intellectual forum. This airing often does advance the coherence and rationality of the statutes being interpreted. Even in *Albertini*, where I disagree with the Court's balance, the Court's opinion is no worse than the statute (which is woefully broad; dicta in the Court's opinion suggest situations where the statute's broad language must not be applied) and is a reasoned explanation for the defendant's punishment. Nonetheless, in a good many of the Court's decisions in the 1980s, the dialogue of interpretation is more a cosmetic than a real limitation upon the Court, because the Justices' political biases run so deep. I discern three types of deep bias in the Court's opinions of the 1980s that I find unjustifiable.³³³

³²⁹ See Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 770-73 (1982); Michelman, *Traces of Self-Government*, *supra* note 1, at 16.

³³⁰ Fiss, *supra* note 1, at 13.

³³¹ See Eskridge, *supra* note 33, at 303-06 (similar argument from the perspective of economic theory); see also S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (1985).

³³² See Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 183 (1985); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744-45 (1982).

³³³ Cf. Brest, *supra* note 329, at 770-73 (arguing that the fact that the interpretative legal community, the courts, are demographically composed of the ruling elite presents problems in a democratic society).

1. Bias for Procedural over Substantive Values

The current Court is more willing to defer to other decisionmakers—state courts (*Kelly*) and prosecutors (*Rumery*), the President (*Dames & Moore*), the military (*Albertini*), agencies (*Arline*), arbitrators (*Shearson/American Express*)—than to take substantive positions of its own.³³⁴ This bias is, in part, a reflection of the divisions within the Court. Because of their commitment to political pluralism, the statutory nominalists on the Court are usually all too happy to apply rules and presumptions under which the Court defers to other decisionmakers to guide the nation's public values. Conversely, they are usually reluctant, even outraged, when the Court itself takes a leadership role—as it has on issues of racial and gender discrimination, treatment of noncitizens, criminal punishment, employees' rights, and Native American sovereignty. For the Court to take a strong substantive position on an issue of statutory interpretation, there must be virtual unanimity among the remaining Justices as to the content of the public value, for the loss of one or two votes can mean the loss of a majority. This result is not unusual, since Justices Blackmun, Stevens, and O'Connor each have certain conservative value preferences.

The willingness of the Court, and especially its statutory nominalists, to follow rules of deference is also strongly influenced by the legal process philosophy and its emphasis on the value of regularized procedures in yielding good decisions.³³⁵ Like individualism, the value of elaborate procedures is an increasingly controversial assumption. Although encouraging deliberative decisionmaking at several points in the political system may improve the quality of decisions, diffusion often distorts policymaking as well by amplifying the tendency of political decisionmakers to develop endogenous values more responsive to constituency groups than to the public interest.³³⁶ When the result of deliberative decisionmaking is wrong, is it entitled to deference just because the procedures were regularized?

³³⁴ Concededly, the procedural deference may often reflect a substantive value choice as well. See *supra* notes 62-67 and accompanying text (discussing *Dames & Moore*); *supra* notes 153-55 and accompanying text (discussing *Arline*).

³³⁵ See Eskridge & Frickey, *supra* note 21, at 694-701 (1987); Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 224-32 (1981); G. Peller, *supra* note 21.

³³⁶ See Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1581-82 (1988) (discussing the disproportionate influence that special interest groups wield because of individual legislators' tendencies to work only for their districts' interests and their lack of incentive to work for the good of the public at large); see also Eskridge, *supra* note 33, at 285-89 (discussing the distorting influence of interest groups on political decisionmakers' putative goal of making laws that provide "public goods").

Albertini illustrates my quarrel with the Court's proceduralist orientation. Although I believe that the substantive values implicated in the case—freedom of expression, fairness, and notice to the wrongdoer—strongly support a narrowing interpretation of the statute, the Court apparently believed that courts would do more harm than good if they opened the door to questions about individual judgments made by military commandants. I find this view to be a thoroughly counterintuitive proposition, especially given the circumstances of *Albertini's* arrest (which smacks of spite rather than judgment). Yet the Court seems committed to that hands-off principle, however questionable its wisdom or unjust the results it may spawn in certain cases. A number of the decisions in the last two Terms similarly reflect the Court's excessive deference to military and other executive decisionmakers.³³⁷

2. Bias for Obsolescent Values

The military discretion cases suggest a second type of systematic bias in the Court's public values decisions: By the time the Court forms a consensus about a public value, the value may be obsolete, and the Court may cling to established public values long after their cogency has passed. Hence, there may be a bias in the Court's decisions in favor of traditional, time-tested values, and some reluctance on the part of the Court to expand the nation's public values, or update them to reflect important changes in society and moral theory. Perhaps deference to military discretion was high-minded and right before Vietnam, but our experience in that "war" and in the 1970s ought to make us skeptical of the military's claims for unreviewable decisionmaking power.

The sovereign immunity cases also illustrate this bias. Sovereign immunity has a longstanding common law pedigree, but in modern times the principle has been questioned and usually rejected in cases where the government enters the marketplace and/or commits a tort.³³⁸

³³⁷ The worst in my view was *United States v. Stanley*, 107 S. Ct. 3054 (1987), in which the Court held that military officials are immune from suits alleging that they intentionally tested LSD on unwitting, unconsenting military personnel. It is shocking that the Court would defer to the military in an instance in which its conduct was "so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." *Id.* at 3065 (O'Connor, J., concurring in part and dissenting in part). For other (less outrageous) examples, see *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971 (1987) (upholding USOC monopoly on "Olympics" terminology); *Bowen v. Yuckert*, 107 S. Ct. 2287 (1987) (upholding HHS regulations creating stricter standards for disability claimants); *United States v. Johnson*, 481 U.S. 681 (1987) (utilizing a broad application of judicially created exception to FTCA for injuries to people in the armed services).

³³⁸ See, e.g., *Whitney v. City of Worcester*, 373 Mass. 208, 366 N.E.2d 1210

Some of the Court's opinions reflect this modern concept of immunity, but many do not. The presumption of state immunity embodied in *Welch* (which in fact overruled a prior opinion) seems awkward and out-of-date. And the Court has in the 1980s given the FTCA an exceedingly narrow reading, reflecting an unfair willingness to perpetuate the common law immunity doctrine.³³⁹

Even where I support the Court's public values, I am troubled by doubts that the Court has thought through the implications of its decisions carefully. For example, the Court's validation of employment preferences in *Johnson v. Transportation Agency*³⁴⁰ was phrased in terms much broader than necessary to decide the case.³⁴¹ This boldness is troubling, because Justice Scalia's dissenting opinion suggested several fairness problems with the Court's public value. Employers having racial or gender disparities in their workforce face potential Title VII liability, under the Court's precedents. The costs of such liability—probable judgment plus defense costs—can be avoided through affirmative action programs, which will shift the cost of past discrimination, or the appearance of it, from the employer to employees (many of whom had no role in the past discrimination). "This situation is more likely to obtain, of course, with respect to the least skilled jobs—perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past."³⁴² The result may be to transform Title VII into a powerful instrument for compelling employers to make choices based upon race and sex, which seems anomalous.

(1977) (abrogating governmental immunity for torts, contingent on no legislative activity); *Spanel v. Mounds View School Dist. No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962) (prospectively overruling sovereign tort immunity doctrine as "archaic").

³³⁹ See, e.g., *United States v. Johnson*, 481 U.S. 681 (1987) (utilizing a broad reading of the *Feres* doctrine in denying a wrongful death claim brought by the widow of a deceased coast guard pilot); *United States v. Shearer*, 473 U.S. 52 (1985) (applying the implied FTCA exception for military-service-related deaths to make the government immune even for the wrongful death of a soldier killed off-base and off-duty); *Kosak v. United States*, 465 U.S. 848 (1984) (extending the FTCA exception for property losses caused by customs officials to make the government immune even for customs officials' negligent handling of property; the traditional reading had limited the exception to damages caused by detention of property).

³⁴⁰ 480 U.S. 616 (1987).

³⁴¹ See *id.* at 648 (O'Connor, J., concurring in the judgment) ("[T]he Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers . . . [This] course of action gives insufficient guidance to courts and litigants . . ."); *id.* at 666 (Scalia, J., dissenting) ("[The] decision . . . disregards the limitations carefully expressed in last Term's opinions . . . While those limitations were dicta, it is remarkable to see them so readily . . . swept away." (citations omitted)).

³⁴² *Id.* at 676 (Scalia, J., dissenting).

Moreover, Justice Scalia argued, the powerful elite groups in this country are perfectly happy with this transformation of Title VII. The corporate and governmental employers filing amicus briefs in *Johnson* argued for affirmative action, because it makes their decisions more predictable and permits them to head off potential Title VII lawsuits by dramatic improvement in their statistics. Well-organized civil rights groups support it because it helps them win points for their immediate agenda. Congress, which has done nothing but avoid saying anything controversial about affirmative action for twenty-five years, is delighted that the Court has taken the heat off of it. "In fact," Justice Scalia sarcastically concluded, the "losers" in this process are blue-collar white males, like Paul Johnson and Brian Weber. "The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent."³⁴³

3. Bias for Establishment Values

Justice Scalia's sarcastic observation pinpoints my greatest qualm about the Court's application of public values—the "haves" tend to come out ahead.³⁴⁴ That is, the winners in these cases tend to be the same well-organized political groups that are winners in the political arena: the military (*Albertini* and *Dames & Moore*); state prosecutors (*Kelly* and *Rumery*); organized minority groups (*Weber*, *Guerra*, *Johnson*, *Bob Jones*, and *Mancari*); environmentalists (*Midlantic National Bank*); and mainstream religious organizations (*Catholic Bishop*). Conversely, the losers in these cases tend to be losers in politics generally: war protesters (*Albertini*), victims of prosecutorial discretion (*Rumery*) and securities fraud (*Shearson/American Express*), marginalized religious groups (*Bob Jones*), and blue collar white males denied job opportunities due to affirmative preferences for other groups (*Weber*, *Johnson*, and *Mancari*).

In an appendix to this Article, I have assembled the public values cases for the 1986 and 1987 Terms and have characterized the winning and losing groups (as best I can). This appendix is a slightly more systematic effort to show how political losers tend also to lose public values cases, though they are not without their victories. What struck me most profoundly as I was compiling the appendix was how often I

³⁴³ *Id.* at 677.

³⁴⁴ Cf. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 149 (1974) (arguing that "the architecture of the legal system tends to confer interlocking advantages" on the "haves").

characterized the losers of public values cases as "victims"—the diffuse, faceless, often powerless periphery of our political community. The dialogue of public values is dominated by the voices of establishment groups, and the marginalized groups in our polity are too often silent or overwhelmed.

One of the marginalized groups in our society is the poor, and they have received little protection from the Court's public values in the 1980s. Characteristic of the Court's approach is *Sorenson v. Secretary of the Treasury*.³⁴⁵ The case involved the Omnibus Budget Reconciliation Act of 1981 (OBRA),³⁴⁶ which among thousands of other things added provisions to the Social Security Act and the Internal Revenue Code to provide for "interception" of tax refunds for the benefit of state agencies that had been assigned child-support rights. Thus, when a taxpayer is in arrears for his or her child support payments, and when the former spouse assigns them to a state welfare agency as a condition for receiving public assistance, the state can notify the IRS, which will then give the state's recoupment claim priority over the delinquent taxpayer's claims for refund of overpaid federal income taxes. The issue in *Sorenson* was whether the "overpayment" that is subject to the recoupment claim includes refunds resulting from an "earned income credit." Section 6402(c), added by OBRA, provides that "*any* overpayment to be refunded . . . shall be reduced by the amount of any past-due support."³⁴⁷ Section 6401(b), already in the Internal Revenue Code when OBRA was enacted, provides that if an earned income credit exceeds the taxpayer's tax liability, the excess amount is "considered an overpayment."³⁴⁸ Putting these provisions together, literally, the Court held that the recoupment does include the credit.³⁴⁹

This reading is logical but neglects an important public value, as Justice Stevens argued in dissent.³⁵⁰ The Earned Income Credit Program was created by Congress in 1975 to help keep low-income people off welfare. It was the result of the following conundrum: Social Security taxes were assessed against earned income but not against welfare payments. As a result, a dollar of welfare meant more money in the

³⁴⁵ 475 U.S. 851 (1986).

³⁴⁶ Pub. L. No. 97-35, § 2331, 95 Stat. 357, 860.

³⁴⁷ 26 U.S.C. § 6402(c) (1982 & Supp. IV 1986) (emphasis added).

³⁴⁸ *Id.* § 6401(b).

³⁴⁹ See *Sorenson*, 475 U.S. at 860.

³⁵⁰ See *id.* at 866 (Stevens, J., dissenting) ("The question is whether Congress in 1981 intended to divert these federal funds from the original beneficiaries of the Earned Income Credit Program to the treasuries of state governments. Notwithstanding the Court's careful and admittedly accurate parsing of the language of the statute, I am not persuaded that Congress had any such intent.").

pocket than a dollar of earned income. To redress this disincentive to work, Congress created a fully refundable credit for low-income workers. Applying the OBRA recoupment scheme—one of the obscure goodies doled out to the states in the 1981 statute—to penalize low-income families, is, as Justice Stevens persuasively argued, neither rational nor fair. Nor does it even reflect any legislative desire. OBRA had sprinted through the legislative process, with scarcely any time for the hurried drafters to catch their breath, much less think through all the changes.³⁵¹ If any interpretational issue cried out for public values analysis, it was the question in *Sorenson*.

Sorenson is paradigmatic of my criticisms of public values analysis as applied by the Supreme Court in the 1980s. Its result seems not only unjust but also contrary to overall legislative goals. Yet the same court that applied fatuous public values in *McNally* (to protect fraudulent state officials) and *Albertini* (to protect the discretion of a vindictive commandant) refused to apply public values to protect the working poor in *Sorenson*. On the face of it, the Court's utilization of public values is incoherent. But not *simply* incoherent, because it is incoherent for disturbing reasons: excessive reliance on statutory text (whose breadth was apparently a mistake), reluctance to create new substantive values to reflect new thinking about justice (such as the need to protect and encourage poor people who are trying to find useful livelihoods), and insensitivity to the claims of particularly marginalized groups.

There are many reasons for this phenomenon. Some of them probably relate to the ideology and background of the Justices themselves. Those strongly committed to pluralism and especially those committed to textual formalism are not going to bend the statutory text in *Sorenson*. Nor is it likely that five Justices would have bent even a more malleable text. Can we really expect people who are overeducated and predominantly wealthy, socially conservative, European, and male to lead us in the articulation of our diverse nation's public values? That might ultimately be too much to ask of any such relatively homogeneous group.

Other reasons for the Court's insensitivity relate to the litigants and the posture of the cases coming before the Court. The most successful litigants tend to be the "repeat players"—the government, corporations, and well-funded interest groups.³⁵² These repeat players are in a

³⁵¹ See *id.* at 867 ("[I]t defies belief to assume that a substantial number of legislators were sufficiently familiar with OBRA to realize that somewhere in that vast piece of hurriedly enacted legislation there was a provision that changed the 6-year-old Earned Income Credit Program.").

³⁵² See Galanter, *supra* note 344, at 97-107 (contrasting "repeat players" with

position to hire the best lawyers, to uncover facts or create statistics that put their case in a favorable posture, to make sophisticated strategic decisions about what cases are likely to make good law for them, and to attract good allies (*amicus* briefs).³⁵³ Just as they have few resources and little clout in the political process, so too the working poor have few resources and little clout in the court system. Ergo, results like *Sorenson*.

CONCLUSION

My analysis of the Court's use of public values in statutory interpretation in the last decade leads to a paradox: The Court seems to rely on public values analysis in a broad range of cases, yet the Court in other cases neglects public values analysis or relies on values that are hard to defend. There are several possible implications of this paradox.

Critics can argue from this analysis that public values reasoning is basically a dead end, an example of "contemporary legal utopianism."³⁵⁴ That is, public values analysis is logically or practically incoherent, promising principles grounded in the common good but delivering policies suited to the judiciary. This incoherence is not simply the result of conservative judicial appointments and clear statutory texts, it might be argued, but is inherent in the enterprise. To succeed, public values analysis (and the republican tradition generally) presumes greater public dialogue and politico-social consensus than we now have. Without such a tradition, public values analysis is severely limited in its ability to contribute effectively to law's integrity.

Worse yet, from a critical perspective, is the self-deluding quality of public values analysis. If it is true that our polity is driven by pluralist, interest group pressures, and that those pressures drive judicial lawmaking as much as legislative lawmaking, then public values analysis is the mere image of republicanism. It may be (as Mark Tushnet has recently argued) that we cannot easily recreate the social and political conditions necessary for a republican dialogue and that we should be reluctant to vest that dialogue in socially and ethnically homogenous jurists who are as politically and socially conservative as they are unelected.³⁵⁵ If public values analysis is only a screen for judicial power

"one-shotters").

³⁵³ For example, the quintessential repeat player before the Supreme Court is the Solicitor General, who represents the federal government and effectively serves as a "tenth Justice." See L. CAPLAN, *THE TENTH JUSTICE* (1987).

³⁵⁴ This is a position eloquently argued by Professor Mark Tushnet. See M. TUSHNET, *supra* note 2, at 162-68.

³⁵⁵ See *id.* at 1-17 (arguing the need to revive the republican tradition but empha-

politics, it is worse than impotent. It is hypocritical. Whatever normative problems one might have with unadulterated pluralism, an honest pluralism might be a better aspiration for our polity than a hypocritical republicanism—one that pretends to integrate our nation's interests but in reality just imposes upon us the politics of unelected judges.

Defenders of public values analysis can argue that the Burger and Rehnquist Courts have never given public values analysis much of a chance (outside of civil rights and a few other areas of law), because the Justices have not committed themselves to the intellectual prerequisites of doing public values analysis. Any group of Justices that includes three or perhaps four statutory nominalists is going to have great difficulty doing public values analysis in a satisfactory way. Unless the Court, or a consistent majority of its members, transforms the vision it has of its mission, the Court will not do justice to public values in statutory interpretation. In my view, the Court would have to change its direction in three significant ways if it really took seriously the concept of public values in statutory interpretation.

First, the Court ought to complement rather than replicate the political process. Even legal process theory concedes that the Court might well intervene to protect politically marginalized groups,³⁵⁶ but the status quo orientation of legal process theory has submerged this insight. The political process already listens to the Department of Justice, mainline churches, trade associations, unions, and other organized groups. Often their deals harm those who truly are left out of the political process—the poor, victims of government abuses, political refugees, working mothers, gays, migrant workers, blue collar workers, ghetto residents, minor ethnic groups. The Court's historical role of protecting marginalized minorities needs to be updated to include a broader range of people for whom justice will not be done in the political process.³⁵⁷ Only then might the equality of citizens needed for law's integrity be realized.

Second, the Court ought to be more critical of the existing hodgepodge of public value rules and presumptions. Many of the rules

sizing the socio-political difficulties in so doing); *id.* at 313-14 (decentralization of power and redistribution of wealth are prerequisites to the creation of a republican society).

³⁵⁶ See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 64-65 (1980) (identifying such groups as "aberrant political groups and persons accused of crime, but also individuals in certain economic positions (racial groups being added by later events)"); J. ELY, *supra* note 263, at 135-79 (advocating a "process-oriented system of review" in order to facilitate the representation of minorities).

³⁵⁷ See Ackerman, *supra* note 94, at 742 (urging the judiciary to refocus its protective efforts from "discrete and insular minorities" to "other groups who fail to achieve influence remotely proportionate to their numbers").

and presumptions noted in this Article are outdated and should be reformulated to reflect modern needs.³⁵⁸ For example, the rule against waivers of sovereign immunity should be rethought for this era when the government is our nation's leading contractor and tortfeasor and property owner. Moreover, new rules should be devised. *Sorenson's* error suggests the need for a rule like that of the *Carolene* group of cases: The Court should resolve legitimate statutory doubts in favor of groups essentially left out of the legislative process. *Sorenson* also suggests a procedural rule: The Court can correct apparent legislative drafting errors, and should not impute unreasonable results to Congress when it appears Congress did not focus on those results. Finally, the Court needs to consider more carefully how to deal with competing public values. For example, I think fundamental substantive values—such as nondiscrimination, first amendment concerns, and environmental policy—should prevail over procedural values—such as executive discretion, federalism, and arbitration. Accepting this position would represent a major shift in the Court's approach to statutory interpretation.

Third, the Court ought to see itself as a counterhegemonic force, rather than as a rubber stamp for the political branches of government and for centers of private power. It may be, as Bob Cover taught us, that courts are inherently "jurispathic" (they kill "law" by choosing one side's vision of law over that of another) and that "jurisgenesis" (the creation of law) occurs best outside of government.³⁵⁹ If that is necessarily so, then the critics are substantially right and public values may contribute to law's hypocrisy rather than law's integrity. But even Cover thought the Court could be jurisgenerative by serving as an outspoken critic of government, rather than as its deferential handservant.³⁶⁰

Public values in statutory interpretation may indeed be just "contemporary legal utopianism,"³⁶¹ but it does not ask so much of the judiciary as its critics think. The most interesting exemplars of public values reasoning on the present Court, Justices Stevens and O'Connor, are hardly radicals and are substantially committed to the pluralist tradi-

³⁵⁸ The beginnings for this task are suggested in W. ESKRIDGE & P. FRICKEY, *supra* note 29; C. Sunstein, *supra* note 9.

³⁵⁹ Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40-44 (1983) ("Courts, at least the courts of the state, are characteristically 'jurispathic.'"); *id.* at 11 & n.30 ("the creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium" and "requires no state").

³⁶⁰ See *id.* at 57-58 ("When they oppose the violence and coercion of the other organs of the state, judges begin to look more like the other jurisgenerative communities of the world.").

³⁶¹ M. TUSHNET, *supra* note 2, at 168.

tion. Yet Justice Stevens' majority opinion in *Cardoza-Fonseca*, his concurring opinions in *Johnson* and *Guerra*, and his dissenting opinions in *McNally*, *Albertini*, and *Sorenson* are models of the analytic power of candid public values analysis in their attentiveness to marginalized groups, fine awareness of the dynamic nature of public values analysis, and willingness to confront social and political power. Coming from a more conservative tradition, Justice O'Connor's opinions in *Albertini* and *Shearson/American Express* rest upon public values (or a weighing of different values) I find questionable. Nonetheless, I find her opinions in these cases candid and instructive, and her concurring opinions in such cases as *Rose v. Rose*, *Rumery*, and *Johnson* strike me as excellent and persuasive expositions of public values.

Inspired by the work of Justices Stevens and O'Connor, pragmatists can argue from the analysis of this Article that public values reasoning is not going to generate a grand change in the way the Supreme Court decides cases. And to the extent public values are being used by the Court, they will not be used consistently or decisively. Nonetheless, the pragmatist can note that public values reasoning substantially contributed to law's integrity in certain areas of law—civil rights statutes, the securities laws, immigration law, antitrust law, and statutes affecting Native Americans. More important, by exposing background policy presumptions and understandings, public values analysis sharpens the policy issues at stake in statutory interpretation cases. No less than in constitutional cases, the Court is engaged in creative analysis, with political consequences. The candid exploration of these background understandings in the context of concrete cases is characteristic of the opinions of Justices Stevens and O'Connor.

Ultimately, the fate of public values in statutory interpretation may rest with these pragmatic Justices. In practical application, public values analysis may lose much of its utopian romance but may gain concreteness grounded in practical reason. This is the path I see for public values in statutory interpretation—neither law's republic *nor* law's hypocrisy, but instead "law's pragmatism."³⁶²

³⁶² See D. Patterson, *Law's Pragmatism* (book draft Dec. 1988).

APPENDIX
Winners & Losers in Supreme Court's
Public Values Decisions
(1986-88)

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
United States v. Kozminski, 108 S. Ct. 2751 (1988)	Rule of lenity	Employers relying on psychological coercion	Victims of psychological coercion
Communications Workers of America v. Beck, 108 S. Ct. 2641 (1988)	In pari materia rule; avoidance of constitutional problems	Dues-paying non-union employees	Unions
Boyle v. United Technologies Corp., 108 S. Ct. 2510 (1988)	Common law gapfilling rules	Govt contractors	Victims of govt contractor negligence
Houston v. Lack, 108 S. Ct. 2379 (1988)	Purposive whole act rule	Prisoners	State prisons
Stewart Org., Inc. v. Ricoh Corp., 108 S. Ct. 2239 (1988)	Forum selection by parties	Big companies & businesses	Smaller businesses
INS v. Pangilinan, 108 S. Ct. 2210 (1988)	Avoidance of constitutional problems (N/A)	INS	Filipino nationals in U.S. army during WWII
Volkswagenwerk Aktiengesellschaft v. Schlunk, 108 S. Ct. 2104 (1988)	International comity (not applied) [hereinafter N/A]	U.S. plaintiffs suing foreign defendants	Foreign defendants with U.S. connections

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
Pinter v. Dahl, 108 S. Ct. 2063 (1988)	Common law gapfilling rules	Securities law violators	Securities law violators
Webster v. Doe, 108 S. Ct. 2047 (1988)	Presumption of judicial review for constitutional violations, but not for other violations	1st issue: CIA 2d issue: Victims of CIA abuses	1st issue: Victims of CIA abuses 2d issue: CIA
Loeffler v. Frank, 108 S. Ct. 1965 (1988)	Liberal waiver of immunity for commercial enterprises	Litigants against Post Office	Post Office
Allied Tube & Conduit Corp. v. Indian Head, Inc., 108 S. Ct. 1931 (1988)	Avoidance of constitutional questions (N/A)	Victims of anti- competitive conduct	Violators of Sherman Act
Monessen Sw. Ry. v. Morgan, 108 S. Ct. 1837 (1988)	Common law gapfilling rules (FELA)	FELA employers	Injured FELA employees
K Mart Corp v. Cartier, Inc., 108 S. Ct. 1811 (1988)	Deference to agency decisions (applicable to 1st but not 2d issue)	1st issue; Dep't Treasury & trademark holders 2d issue: Gray market firms	1st issue: Gray market firms 2d issue: Dep't of Treasury and Trademark holders
Goodyear Atomic Corp. v. Miller, 108 S. Ct. 1704 (1988)	Preservation of state regulation of local matters	States & environmental- ists	Contractors for nuclear reactors

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
EEOC v. Commercial Off. Prods. Co., 108 S. Ct. 1666 (1988)	Deference to agency interpretation; purposive whole act rule	EEOC & victims of job discrimination	Employers
Kungys v. United States, 108 S. Ct. 1537 (1988)	In pari materia rule; rule of lenity	Accused war criminals	INS
Business Electronics Corp. v. Sharp Electronics Corp., 108 S Ct. 1515 (1988)	Common law gapfilling rules	Manufacturers seeking to control dealer prices	Dealers
Regents of the Univ. of Calif. v. Public Employment Relations Bd., 108 S. Ct. 1404 (1988)	Rule of lenity (N/A)	Post Office & universities	Unions
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 108 S. Ct. 1392 (1988)	Avoidance of constitutional question	Unions	Employers
Traynor v. Turnage, 108 S. Ct. 1372 (1988)	No repeals by implication	Veterans' Admin.	Veterans suffering from alcoholism
Gardebring v. Jenkins, 108 S. Ct. 1306 (1988)	Deference to agency interpretation	HHS	AFDC recipients

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
United States v. Wells Fargo Bank, 108 S. Ct. 1179 (1988)	Presumption against tax exemptions	IRS	Banks and other taxpayers
Basic, Inc. v. Levinson, 108 S. Ct. 978 (1988)	Common law gapfilling rules (§ 10(b)); purposive whole act rule	Victims of securities fraud	Corporations & sellers of securities
Department of the Navy v. Egan, 108 S. Ct. 818 (1988)	Nat'l security; deference to executive control of security matters	Dep't of Navy	Govt employees
United States v. Fausto, 108 S. Ct. 668 (1988)	Presumption of judicial review and against implied repeals (N/A)	Federal bureaucracy & supervisors	Govt employees
Honig v. Doe, 108 S. Ct. 592 (1988)	Deference to agency interpretation	State & local education authorities	Disabled children & their parents
Forrester v. White, 108 S. Ct. 538 (1988)	Common law gapfilling rules (§ 1983)	Victims of judicial administrative decisions	Judges
Mullins Coal Co. v. Director, OWCP, 108 S. Ct. 427 (1987)	Deference to agency interpretation	Dep't of Labor & coal cos.	Victims of black lung disease
NLRB v. United Food & Commercial Workers Union, Local 23, 108 S. Ct. 413 (1987)	Deference to agency interpretation	NLRB general counsel	Victims of unfair labor practices

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
United Paperworkers v. Misco, Inc., 108 S. Ct. 364 (1987)	Deference to arbitration	Arbitrators	Victims of poor arbitral factfinding
Carpenter v. United States, 108 S. Ct. 316 (1988)	Common law gapfilling rules (§ 1341)	Dep't of Justice	Traders on confidential newspaper information
San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971 (1987)	Avoidance of constitutional problems (N/A)	U.S. Olympic Committee	Gay Olympic groups
Welch v. State Dep't of Highways & Public Transp., 107 S. Ct. 2941 (1987)	Presumption of state immunity	State as employer	State employees
McNally v. United States, 107 S. Ct. 2875 (1987)	Rule of lenity	Corrupt state & local officials	Dep't of Justice & citizens of states
Bourjaily v. United States, 107 S. Ct. 2775 (1987)	Avoidance of constitutional problems (N/A)	Dep't of Justice	Criminal defendants
Citicorp Indus. Credit, Inc. v. Brock, 107 S. Ct. 2694 (1987)	Narrow interpretation of exemptions from regulatory policy	Low income workers	Holders of collateral

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 107 S. Ct. 2542 (1987)	International comity (N/A)	U.S. plaintiffs suing foreign defendants	Foreign defendants in U.S. courts
Perry v. Thomas, 107 S. Ct. 2520 (1987)	Deference to arbitration; preservation of state regulation of local matters (N/A)	Employers	Workers seeking to collect wages unlawfully held
Crawford Fitting Co. v. J.T. Gibbons, Inc., 107 S. Ct. 2494 (1987)	No repeals by implication	Wealthy litigants in U.S. courts	Poorer litigants in U.S. courts
Tanner v. United States, 107 S. Ct. 2439 (1987)	Rule of lenity; avoidance of constitutional problems (N/A)	White collar fraud defendants	Dep't of Justice
Shearson/Am. Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987)	Deference to arbitration	Firms accused of securities fraud	Victims of securities fraud
Utah Div. of State Lands v. United States, 107 S. Ct. 2318 (1987)	Narrow interpretation of public grants	Utah	U.S. govt
Rockford Life Ins. Co. v. Illinois Dep't of Revenue, 107 S. Ct. 2312 (1987)	Presumption against tax exemption	State govts	Holders of Fannie Mae securities

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
Bowen v. Yuckert, 107 S. Ct. 2287 (1987)	Deference to agency interpretation	HHS	Social Security disability recipients
United States v. Hohri, 107 S. Ct. 2246 (1987)	Purposive whole act rule	U.S. govt	Claimants against U.S. govt
Fort Halifax Packing Co v. Coyne, 107 S. Ct. 2211 (1987)	Preservation of state regulation of local matters	Dislocated employees	Plant-closing employers
Young v. United States <i>ex rel.</i> Vuitton et Fils, S.A., 481 U.S. 787 (1987)	Preservation of inherent judicial powers	Federal district judges	Persons held in contempt of court
United States v. Johnson, 481 U.S. 681 (1987)	Presumption of sovereign immunity; deference to military decisions	United States govt & armed forces	Servicemen and women injured by U.S. negligence
Rose v. Rose, 481 U.S. 619 (1987)	Purposive whole act rule; common law gapfilling rules	Spouses and families of veterans	Veterans
NLRB v. IBEW, Local 340, 481 U.S. 573 (1987)	Deference to agency interpretation (N/A)	Unions	Dissenting union members
Lukhard v. Reed, 481 U.S. 368 (1987)	Deference to agency interpretation	HHS & state AFDC agencies	AFDC recipients

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	In pari materia rule; purposive whole act rule	Pension plan managers	Victims of improper processing of benefit claims
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)	In pari materia rule	Federal courts	State courts
West v. Conrail, 481 U.S. 35 (1987)	Borrowed statute rule	Dawdling plaintiffs	Defendants seeking repose
Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987)	Federalism values	State courts	Federal courts
United States v. Cherokee Nation, 480 U.S. 700 (1987)	Presumption against conveyance of federal rights	U.S. govt	Native American tribes
Johnson v. Transportation Agency, 480 U.S. 616 (1987)	Protection of <i>Carolene</i> groups	Black & female employees	White male employees
California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)	Preservation of state regulation of local matters	Environmental-ists & state regulators	Cos. operating unpatented mining claims in national forests

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
Atkinson, Topeka & Sante Fe Ry. v. Buell, 480 U.S. 557 (1987)	Presumption against implied repeals; in pari materia rule; deference to arbitration (N/A)	Railway employees	Railway employers
Amoco Prods. Co. v. Village of Gambell, 480 U.S. 531 (1987)	Protection of Native Americans (N/A)	Alaska	Alaskan Native Americans
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	Int'l comity; protection of <i>Carolene</i> groups; deference to agency interpretation (N/A)	Noncitizens seeking asylum	INS
Towns of Newton v. Rumery, 480 U.S. 386 (1987)	Common law gapfilling rules	State prosecutors	Victims of law enforcement abuses
School Bd. v. Arline, 480 U.S. 273 (1987)	Purposive whole act rule; deference to agency interpretation	Victims of tuberculosis	Employers
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	Presumption of Native American sovereignty	Native American reservations	State and local govts
Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987)	Presumption of Native American sovereignty	Native American defendants	Non-Native American plaintiffs

<i>Case</i>	<i>Public Value</i>	<i>Winner[s]</i>	<i>Loser[s]</i>
Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511 (1987)	In pari materia rule	Employers	Female employees
International Paper Co. v. Ouellette, 479 U.S. 481 (1987)	Common law gapfilling rules (N/A)	Polluting firms	Environmentalists
Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987)	Deference to agency interpretation	Comptroller & national banks	Local banks
California Fed. Savs. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987)	Purposive whole act rule	Female employees	Employers & male employees
R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986)	Preservation of state regulation of local matters; purposive whole act rule	State govts	Tobacco cos.
Kelly v. Robinson, 479 U.S. 36 (1986)	Preservation of state regulation of local matters	State govts	Firms subject to state restitution obligations