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Interpretive Communities: The Missing Element in Statutory Interpretation

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INTERPRETIVE COMMUNITIES: THE MISSING ELEMENT IN STATUTORY INTERPRETATION

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A text acquires meaning only by reference to its readers. The shared understanding of such readers constitutes the "interpretive community" for the text.[1] The word "spirit," for example, means one thing to a painter and another to a minister. Yet, despite their obvious importance,[2] such interpretive communities receive surprisingly little attention in the scholarly literature on statutory interpretation.[3]

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[1] The concept of interpretive communities is most prominently featured in the work of Stanley Fish. *E.g.*, STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989) [hereinafter FISH, NATURALLY]. As used here, an interpretive community includes both readers and authors of texts. Fish uses this concept to explain why there is substantial agreement on otherwise indeterminate texts. STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 338 (1980) ("[T]he fact of agreement, rather than being a proof of the stability of objects, is testimony to the power of an interpretive community to constitute the objects upon which its members (also and simultaneously constituted) can then agree."). "Fish's concept of interpretive communities is thus a sociological generalization . . . rather than a defense of objectivity or a guide to interpretation." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 450 (1990). This Article does not claim that texts are determinant. It does, however, claim that particular communities have authority to construe certain texts.

[2] *See, e.g.*, Cont'l Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990) (Easterbrook, J.) ("You don't have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities."); Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 407 (1994) ("[E]ven the strictest textualist would acknowledge that the meanings of the words and sentences in a statutory text are a function of their usages within a linguistic community.").

[3] The literature on statutory interpretation is immense. Representative works include: GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 31 (1988); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?* 93 MICH. L. REV. 1, 3-4 (1994); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1985);

This is a huge omission. Statutes engage the following three distinct communities: the policy community of specialized professionals found in government bureaucracies, the political community of elected politicians, and the public community of the general electorate. Recognizing these communities dissipates much of the confusion surrounding statutory interpretation.[4] Judges vary their readings of statutes depending on which community comprises the audience for the decision, and rightly so. In a representative democracy, judges usually should adopt the perspective of the community responsible for the issue.

This Article explores the implications of interpretive communities for three related questions. The first half of this Article considers the central question in statutory interpretation scholarship:[5] "What is the appropriate theory of statutory interpretation?"—a question that has inspired a debate over the choice among textualist, purposive, and dynamic theories of interpretation. Scholars tend to associate each theory with a different model of legislative behavior. For example, the theory that relies on legislative purpose presupposes that the legislature is a rational actor pursuing reasonable ends. Although the models reflect assumptions that judges make in deciding cases, they provide an incomplete picture of statutory interpretation. The models do not describe the entire legislature as well as they describe the communities within it. The rational actor model, for instance, describes the actions of bureaucrats better than it does the actions of politicians or voters. Therefore, in choosing a theory by which to interpret a statute, a judge must consider which community is responsible for the issue before her. Certain theories of interpretation apply more appropriately to some communities than to others.

Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

[4] *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("[C]onsistent and uniform rules for statutory construction and use of legislative materials are not being followed today. It sometimes seems that citing legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'"). Perhaps the greatest source of confusion is the canons of construction. Karl Llewellyn demonstrated almost 50 years ago that for each canon an exception can be invoked. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (listing canons and counter canons). The choice among theories of interpretation also spawns confusion. *See infra* text accompanying notes 14-21.

[5] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990) ("In the post-World War II era . . . legal scholars have preferred theories that offer a unitary foundation for statutory interpretation. Much of the theoretical debate has been over which of the competing foundations is the best one."); Jonathan R. Siegal, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1024 (1998) ("The current debate about statutory interpretation is often characterized as a battle between textualists and intentionalists.").

The debate over interpretive theory blurs how courts *should* interpret statutes with how they *do* interpret them.[6] The second half of this Article separates the descriptive from the normative by asking two additional questions. The first question is: "Why do judges agree on statutory interpretation?" Interpretive communities help explain a court's ultimate choice of theory, its preferences among sources of legislative history, and the cases in which it defers to administrative interpretation. The second question is: "What rules of statutory interpretation should courts adopt?" Recognition of the role of interpretive communities in government furthers our commitment to representative democracy and the rule of law. Such recognition reveals that some rules of interpretation provide useful guidance, others only apply in limited circumstances, and still others are misleading.

This account sheds new light on important cases in statutory interpretation.[7] One such case is *United Steelworkers of America v. Weber*.[8] A central case in current scholarship,[9] *Weber* presented the question of whether the Civil Rights Act of 1964 bars a voluntary affirmative action plan according racial preferences to African Americans. Scholars use this case to illustrate the wide range of available approaches to statutory interpretation. An appreciation of interpretive communities reveals, however, that *Weber* is atypical. *Weber* presents the rare situation in which a court confronts a controversial, high-profile issue. Most cases present policy or political issues that offer a much narrower range of plausible arguments. Thus, *Weber* is in fact a poor guide on how to read statutes, one that distorts as much as it illuminates.[10]

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[6] *See* Larry Alexander, *Practical Reasoning and Statutory Interpretation*, 12 LAW & PHIL. 319, 326 (1993) (noting scholars' tendency to blend normative and descriptive observations).

[7] Most cases discussed in this Article are drawn from WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1995), a leading casebook in the field. A Lexis search conducted on March 1, 2000 in the law review database shows that most of these cases are widely cited: *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (701 citations); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (640 citations); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (561 citations); *Green v. Bock Mach. Laundry Co.*, 490 U.S. 504 (1989) (222 citations); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (160 citations); and *United States v. Locke*, 471 U.S. 84 (1985) (120 citations).

[8] 443 U.S. 193 (1979).

[9] *See* ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 855 (1995) ("*Weber* is one of the most controversial statutory interpretation decisions of modern times. It has led to probing debates about the powers and functions of legislative and judicial branches of government."); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 245 (1992) (describing *Weber* as the most important statutory interpretation decision in the 1980s); *see also* Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546, 1561 (1996) (agreeing that much of the contemporary debate about statutory interpretation has been sparked by *Weber* and observing that all current legislation casebooks use *Weber* as a principal case). The first chapter in Professors Eskridge and Frickey's casebook on legislation centers on *Weber*. ESKRIDGE & FRICKEY, *supra* note 7.

[10] Preoccupation with "hard" cases pervades American legal scholarship. *See generally* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 407 (1985) ("Contemporary constitutional theory has be-

A second important case is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council.*[11] One of the most important Supreme Court opinions written during the last thirty years,[12] *Chevron* requires that judges defer to reasonable agency resolutions of issues left open by Congress.[13] The Supreme Court, however, has applied this requirement erratically. An appreciation of interpretive communities reveals why. *Chevron* erroneously assigns most agency decisions to the political community. In fact, most agency decisions fall within the policy domain, a realm in which courts also claim authority. Accordingly, agency interpretations are not inviolate. Judges can and should exercise independent judgment on policy issues decided by agencies.

In a nutshell, interpretive communities are the missing element in statutory interpretation. Current scholarship does not acknowledge that statutes engage different communities. As a result, scholars miss a critical factor in judicial decisions. Recognition of interpretive communities supplies this factor and helps solve long-standing puzzles over how courts do interpret statutes and how they should interpret them.

I. CURRENT SCHOLARSHIP ON STATUTORY INTERPRETATION

A. The Debate Over Theory

Scholars spend considerable energy debating the appropriate theory of statutory interpretation. They offer three theories, which form a spectrum (see chart below). In the center is intentionalism, which looks to legislative intent, the traditional approach to interpreting statutes.[14] Legislative intent can be understood either narrowly or broadly,[15] as referring to either the ac-

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come mired in a fixation with the decision of hard cases .... [T]he contemporary agenda has neglected an enormous portion of constitutional law. It has forgotten the easy case."); H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 615 (1958) (distinguishing between the "core" meanings of legal rules and the "penumbra" and observing that "preoccupation with the penumbra is ... as rich a source of confusion in the American legal tradition as formalism in the English").

[11] 467 U.S. 837 (1984).

[12] *See* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 110 (3d ed. 1994) (describing *Chevron* as "one of the most important decisions in the history of administrative law"); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) (describing *Chevron* as "one of the very few defining cases in the last twenty years of American public law").

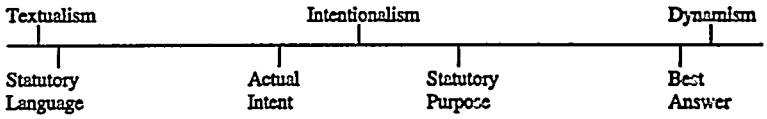
[13] *See infra* note 294.

[14] *See* NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.05 (6th ed. 2000) (stating that when interpreting statutes, "'the intent of the legislature' is the criterion most often recited").

[15] *See* William N. Eskridge, Jr., *Legislative History Values,* 66 CHI.-KENT L. REV. 365, 369-71, 391-95 (1990) (describing subjective and objective understandings of intent). Professor Eskridge further distinguishes among actual intent, conventional intent, and imaginative reconstruction. *Id.* at 380, 382-85; Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes,* 60 HARV. L. REV. 370, 370-71 (1947) (distinguishing between intent as "purpose" and intent as "specific particularized application").

tual beliefs of legislators[16] or an objective purpose independent of personal views.[17] The latter understanding has dominated since the New Deal.[18]

In the last fifteen years, scholars have explored more extreme theories.[19] Textualists, most prominently Justice Scalia and Judge Easterbrook, narrow the inquiry by focusing on statutory language.[20] Dynamic interpreters, notably Professors Eskridge, Sunstein, and Aleinikoff, broaden the inquiry by considering the best answer, the result a court would reach if unconstrained by original intentions.[21]



The debate over theory bears on the use of extrinsic sources to aid in interpretation.[22] Different theories support different attitudes towards legislative history.[23] Intentionalists rely on legislative history as evidence of intent,[24] whereas textualists dismiss it[25] as prone to manipulation.[26] Likewise,

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[16] *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Court Room*, 50 U. CHI. L. REV. 800, 817 (1983). For a famous illustration, see *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785 (2d Cir. 1946), *aff'd*, 328 U.S. 275 (1946) (reading narrowly a pre-war statute protecting persons in military service because prior to American entry into World War II Congress would not have granted broad relief).

[17] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1410, 1413-14 (10th ed. 1958).

[18] *See* William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 828-34 (1985) (describing the dominance of purposive interpretation).

[19] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1507 (1987) ("Scholars from a variety of viewpoints agree that the idea of legislative intent is incoherent."); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1087 (1992) (observing that adherence to intent of enacting legislature "has no serious defenders in the academy").

[20] *See* SCALIA, *supra* note 3, at 22 ("The text is the law, and it is the text that must be observed."); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 449 (1990) ("The objective of statutory interpretation is to give the text a meaning appropriate to our constitutional republic.").

[21] *See* Aleinikoff, *supra* note 3, at 21 (describing statutory interpretation as a voyage in which Congress builds the ship, but courts set the course); Eskridge, *supra* note 19, at 1516; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1584 (1988) (defending dynamic interpretation).

[22] *See* Siegal, *supra* note 5, at 1029 ("A striking thing about the [current] debate is how much of it concerns the question of whether the [permissible] context includes legislative history.").

[23] *See* Zeppos, *supra* note 19, at 1080-81.

[24] *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1306 (1990) ("Legislative history is relevant if the pertinent inquiry is congressional intent."); *see also* W. David Slawson, *Legislative His-*

different theories support different applications of the *Chevron* standard. Most commentators believe that an intentionalist applying *Chevron* is more likely to defer to an agency interpretation than is a textualist,[27] either because text is more determinate than intent[28] or because textualism subtly expands the judicial role.[29]

Much of the debate over theory centers on the results in hard cases. For example, in *Weber*, the theory of interpretation largely controlled the is-

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tory and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 STAN. L. REV. 383, 395 (1992) (arguing that the use of legislative history is predicated upon the assumption that the law is legislative intent).

[25] *See* SCALIA, *supra* note 3, at 29-30 ("[L]egislative history should not be used as an authoritative indication of a statute's meaning.").

[26] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 651-52 (1990).

[27] *See* ESKRIDGE & FRICKEY, *supra* note 7, at 876-77; Karkkainen, *supra* note 2, at 460-61; Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking Is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1248-50 (1996); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 992 (1992) [hereinafter Merrill, *Executive Precedent*] (arguing that a textualist approach "if consistently followed, would dramatically transform *Chevron* from a deference doctrine to a doctrine of antideference"); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q 351, 359-62 (1994) [hereinafter Merrill, *Textualism*] (observing that an increasingly textualist Supreme Court has marginalized the deference doctrine); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995). *But see* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 53 (1998) (finding no relationship between a judge's theory of interpretation and willingness to defer to agencies).

[28] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1992):

> One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a "plain meaning" rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of "reasonable" interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require *that* judge to accept an interpretation he thinks wrong is infinitely greater.

[29] *See* Merrill, *Textualism*, *supra* note 27, at 373 ("By changing the focus from what Congress intended to what the ordinary reader would understand, textualism adopts, at least implicitly, a model of the court as an autonomous interpreter."). Moreover,

> [i]ntentionalism mandates an "archeological" excavation of the past, producing opinions in the style of the dry archivist sifting through countless documents in search of the tell-tale smoking gun of congressional intent. Textualism, in contrast, seems to transform statutory interpretation into a kind of exercise in judicial ingenuity. The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer. . . . This exercise places a great premium on cleverness . . . .
>
> This active, creative approach to interpretation is subtly incompatible with an attitude of deference toward other institutions—whether the other institution is Congress or an administrative agency. In effect, the textualist interpreter does not *find* the meaning of the statute so much as to *construct* the meaning. Such a person will very likely experience some difficulty in deferring the meanings that other institutions have developed.

Id. at 372.

sue of whether affirmative action violated Title VII's ban on racial discrimination.[30] The principal opinions in *Weber* reflect the divisions in intentionalism. Justices Brennan and Rehnquist each used legislative intent[31] to reach different conclusions.[32] Writing for the majority, Justice Brennan equated intent with statutory purpose,[33] which was to improve the economic position of blacks.[34] Dissenting, Justice Rehnquist emphasized the immediate concern of the enacting legislators,[35] which was to eliminate overt discriminatory practices.[36]

In a later case, Justice Scalia took a purely textualist position on affirmative action. Relying exclusively upon statutory interpretation, he argued for overruling *Weber*.[37] In *Weber* itself, Justice Blackmun wrote a

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[30] More specifically, section 703(a), 78 Stat. 255 (codified as amended at 86 Stat. 109, 42 U.S.C. § 2000e-2(a) (1994)), provided:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's, color, religion, sex, or national origin.

Section 703(d), 78 Stat. 256, 42 U.S.C. § 2000e-2(d), provided:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retaining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

[31] *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979) ("It is a 'familiar rule, that 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.'") (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)); *id.* at 253 (Rehnquist, J., dissenting) ("Our task in this case, like any other case involving the construction of a statute, is to give effect to the intent of Congress.").

[32] *See* Burt Neuborne, *Observations on* Weber, 54 N.Y.U. L. REV. 546, 554 (1979) (noting that Justices Brennan and Rehnquist asked different questions: Justice Brennan searched for "statute's core purpose," whereas Justice Rehnquist asked "how members actually would have voted had the question explicitly been put to them").

[33] *See Weber*, 443 U.S. at 202 (relying on the "purpose of the statute") (quoting United States v. Public Utils. Comm'n, 345 U.S. 295, 315 (1953)).

[34] *See id.* at 202-03.

[35] *See id.* at 220 (Rehnquist, J., dissenting) (relying on the understandings of "all Members of Congress who spoke to the issue during the legislative debates"); *see also id.* at 254 (Rehnquist, J., dissenting) ("[C]lose examination of what the Court proffers as the spirit of the Act reveals it as the spirit animating the present majority, not the 88th Congress.").

[36] *See id.* at 237-51.

[37] *See* Johnson v. Transp. Agency, 480 U.S. 616, 670 (1987) (Scalia, J., dissenting) ("*Weber* disregarded the text of the statute, invoking instead its 'spirit.'") (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)). Justice Burger's opinion in *Weber* also gave great weight to text. *See*

concurrence appealing to best answer. By 1979, the Court had held that a facially neutral employment practice with discriminatory impact violated Title VII.[38] Eliminating such practices in the future, however, would not remedy past discrimination. By rectifying imbalance attributable to prior unlawful practices,[39] voluntary affirmative action solved a "practical problem in administration of Title VII not anticipated by Congress."[40]

B. Underlying Models of the Legislature

Theories of interpretation do not stand in isolation. In a system based on legislative supremacy,[41] courts are subordinate to Congress.[42] Therefore, judges choosing among theories of interpretation necessarily make assumptions about the legislature.[43] Legal scholars typically discuss three models of legislative behavior.

Weber, 443 U.S. at 216 (Burger, J., dissenting) (refusing to join the Court's opinion because "it is contrary to the explicit language of the statute").

[38] *See* Griggs v. Duke Power Co., 401 U.S. 424, 424-25 (1971).

[39] *See Weber*, 443 U.S. at 210-11.

[40] *Id.* at 211.

[41] *See* William N. Eskridge, *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 319 (1989) ("Legislative supremacy has long been a shibboleth in discourse about statutory interpretation.").

Legislative supremacy is traditionally based on the text of the Constitution and the political accountability of elected representatives. *See* U.S. CONST. art. I, sec. 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."); Osburn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (determining that judicial power under Article III constrains courts to giving "effect to the will of the legislature"); Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1132-39 (1992) (describing positivist and normative arguments for legislative supremacy).

More generally, legislative supremacy is based on representative democracy and the rule of law. *See* Schacter, *supra* note 3, at 594 ("The impulse to reconcile the enterprise of statutory interpretation with the idea of legislative supremacy has a kind of primal quality and reflects the central preoccupation in American law with constraining judicial discretion because of the fear that judicial lawmaking will compromise democracy and undermine the rule of law."); Aleinikoff, *supra* note 3, at 31 ("All interpretive theories must ultimately be grounded in a political theory and a theory of law, even if the interpreter is unwilling to recognize or state the underlying premise."). For more discussion of the role of representative democracy and the rule of law in statutory interpretation, see *infra* notes 304-27 and accompanying text.

[42] *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 283 (1989) ("Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures."); Sunstein, *supra* note 3, at 415 ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature."). *See generally* Eskridge, *supra* note 41, at 322 (describing positive theory of legislative supremacy, under which judges act as relational agents, and negative theory of supremacy, under which judges should not violate legislative expectations).

[43] *See* Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 152 (1989) ("Faced with vague or ambiguous statutes the judiciary must use *some* set of background presuppositions about legislatures and legislative behavior in order to give meaning to statutes in a polity that is dedicated to legislative supremacy. Moreover, those background presuppositions cannot safely be adopted without some positive theory of politics or the legislative process."); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" Legal Process*, 12 CARDOZO L. REV. 1597,

One model is that of a rational actor. Rationality varies in intensity. At a minimum, it requires mere intelligibility. One famous analogy compares the legislature to a housekeeper directing a domestic to "fetch some soup-meat."[44] A stronger version demands the systematic pursuit of the common good. Hart and Sacks posited that the legislature was "made up of reasonable persons pursuing reasonable purposes reasonably."[45]

The rational actor model supports intentionalism. Rational actors have intent,[46] and legislative history supplies reasons for legislative action.[47] Different degrees of rationality support different conceptions of legislative intent. Scholars inquiring into the legislature's actual understandings assume that statutes are intelligible commands of the sovereign.[48] Scholars searching for objective purpose assume that the legislature systematically pursues the common good, an assumption incorporated[49] in the rule in *Heydon's Case*.[50]

The second model, found in public choice theory, is that of a malfunctioning machine. Public choice theory regards preferences as exogenous, or preceding the process. This means that preexisting, usually materialistic,

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1642 (1991) ("The judicial task ultimately is to make sense of the legislative product. . . . [A] view of the legislature is an essential part of giving meaning to statutes.").

[44] FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17-20 (3d ed. St. Louis, F.H. Thomas 1880). Professor Eskridge has recently revived this analogy. *See* William N. Eskridge, Jr., *Fetch Some Soupmeat*, 16 CARDOZO L. REV. 2209 (1995).

[45] HART & SACKS, *supra* note 17, at 1415.

[46] *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 275-76 (1988) (associating deference to legislative intention with a view of government as reasonable persons acting reasonably); Slawson, *supra* note 24, at 398-99 (asserting that intent theory assumes that the legislature is a person).

[47] *See* Brudney, *supra* note 3, at 79 (basing reliance on legislative history on the assumption of "reasonable legislators acting reasonably").

[48] *See* Eskridge, *supra* note 15, at 370 (describing nineteenth-century attitudes towards statutes).

[49] *See* Blatt, *supra* note 18, at 804, 807 n.43, 811 n.68, 830-33 (tracing reliance upon rule in *Heydon's Case* from Blackstone and nineteenth-century case law to its revival in the mid-twentieth century by Max Redin, Felix Frankfurter, and Hart and Sacks).

[50] 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584). In *Heydon's Case*, the Court of the Exchequer said:

> [F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:—
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Id. at 638.

objectives[51] drive legislation. The legislature passively mirrors the preferences of society at large.[52] Two factors, however, prevent the legislature from reflecting society's preferences. First, some interests, most noticeably those that are large and diffuse,[53] are underrepresented in the legislative assembly. Such interests have difficulty organizing because they cannot prevent noncontributors from free riding upon their lobbying efforts.[54] Second, legislation sometimes does not reflect the views of the assembly. Majority voting cannot aggregate certain preferences.[55]

The malfunctioning machine model supports textualism. It casts doubt on the coherence of legislative intent[56] and the reliability of legislative history.[57] It leaves statutory language as the only certain product of the legislative process.[58]

A third model of the legislature, developed in civic republicanism,[59] is that of a forum for deliberation. This model treats preferences as endogenous,[60] that is, as resulting from the democratic process. Individuals do not know what they want until they engage in discussion. Accordingly, government plays an active role in developing preferences. Legislation is not a

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[51] *See* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 5-6 (1991) (stating that public choice theory assumes that "all political participants . . . are motivated solely by the desire to maximize their material self-interest").

[52] Focusing almost exclusively on re-election, legislators themselves contribute little toward articulating society's desires. *See id.* at 14-19 (explaining that recent public choice analyses "rest on the assumption that legislators are motivated primarily by their desire to maximize their chance of reelection").

[53] Diffusion is not the only factor causing underrepresentation. Financial capacity also has this effect. *See* KAY LEHMAN SCHOLZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 65-73 (1986) (noting that interest group representation is skewed toward business groups and against those representing the less advantaged).

[54] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 165 (1965) ("[L]arge or latent groups have no tendency voluntarily to act to further their common interests.").

[55] Majority voting cannot, for example, resolve the choice between three mutually exclusive alternatives voted in pairs. *See* ESKRIDGE & FRICKEY, *supra* note 7, at 52 for an illustration. This is a consequence of Arrow's theorem. *See generally* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

[56] *See* Eskridge, *supra* note 46, at 277 (arguing that the public choice vision of the legislative process undermines an intentionalist approach to statutory interpretation).

[57] Special interests may use legislative history to bypass safeguards built into the legislative process. *See* Zeppos, *supra* note 24, at 1304-08 (describing how public choice critique undermines use of legislative history).

[58] *See* Easterbrook, *supra* note 3, at 51 ("Interest-group legislation requires adherence to the terms of the compromise. The court cannot 'improve' on a pact that has no content other than the exact bargain among the competing interests because the pact has no purpose.").

[59] *See* Sunstein, *supra* note 21, at 1548-49 ("Many republican conceptions treat politics as above all deliberative, and deliberation is to cover ends as well as means. . . . [E]xisting desires should be revisable in light of collective discussion and debate, bringing to bear alternative perspectives and additional information.") (footnote omitted).

[60] *See id.* at 1549 ("A central point [in republicanism] is that individual preferences should not be treated as exogenous to politics. They are a function of existing practice.") (footnote omitted).

flawed mirror of society at large. In fact, it plays an essential role in the development of public values and the inculcation of civic virtue.[61]

The forum for deliberation model supports dynamic interpretation.[62] Legislation is part of an ongoing debate over public values. That discussion does not end with the legislative session, but continues into society at large.[63] Courts participate in this ongoing discussion and are not limited to materials emanating from the legislative process.[64]

C. Gaps in Current Scholarship

The debate over theory exposes the "legisprudential" assumptions underlying judicial opinions. At one end of the spectrum, Justice Blackmun's *Weber* opinion relied on the forum for deliberation model.[65] Less dynamic Justices, like Brennan, Breyer, and Stevens, who routinely invoke statutory purpose and rely on legislative history,[66] presuppose reasonable persons.[67] Relatively textualist judges rely on other models. Seeking actual intent, Justice Rehnquist views the legislature as intelligibly aggregating pluralistic values.[68] Limiting himself to text, Justice Scalia is frankly pessimistic about the capacity of the legislative process to aggregate preferences accurately.[69]

The focus on judicial attitudes,[70] however, creates certain gaps in our understanding of the legislature and judiciary. First, current scholarship

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[61] *See id.* at 1541.

[62] *See id.* at 1584 (arguing that republicanism supports interpreting statutes in a way that could plausibly be understood as the outcome of a deliberate process).

[63] *See* ESKRIDGE, *supra* note 3, at 184 (observing that, in republicanism, "the political and social cultures continuously interact in what Robert Cover calls 'jurisgenerative' (norm- or law-creating moments)").

[64] *See* Sunstein, *supra* note 21, at 1582 ("[A] republican approach to statutory construction . . . repudiates the idea that the only role of courts is to ascertain legislative intent in the particular case.").

[65] *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1075-81 (1989) (describing Blackmun's position in *Weber* as a "public values" approach).

[66] *See* Jorge L. Carro & Andrew R. Brann, *Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis*, 9 J. LEGIS. 282, 302-03 (1982) (demonstrating that Justices Brennan, Blackmun, and Stevens cite legislative history more than others); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 371, 393 (1999) (confirming and updating prior study); William Popkin, *An Internal Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1135 (1992) (describing Justice Stevens's willingness to go beyond text).

[67] *See* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 n.7 (1992) (quoting HART & SACHS, *supra* note 17, at 1415); *see also supra* note 45 and accompanying text.

[68] *See* Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 642-44 (1994) (ascribing Justice Rehnquist's focus on the deal struck by Congress to a pluralist description of the legislature).

[69] *See id.* at 663-66 (attributing Justice Scalia's textualism to pessimism about the legislative process).

[70] *See* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 3-4 (1994) ("Much of scholarly literature considers statutory interpretation from a judge-centered perspective, regarding statutes as one among the various sources of law to be interpreted and applied to particular controversies.").

oversimplifies the legislature. The debate over theory reduces legislative behavior to a single model.[71] It slights the fact that Congress is a huge institution in which elected representatives play but one role. The public provides considerable input. Congress's deliberations are televised and its offices are open to everyone. Furthermore, Congress has nearly twenty thousand employees.[72] Legislators live and die with elections, but many of their employees do not. The employees often regard themselves as experts in substantive fields.

Second, current scholarship lacks a comparative description of governmental institutions—a common baseline by which to assess similarities and differences. Such a baseline is necessary to choose a theory of interpretation. Courts interpreting statutes do not just adopt a model of the legislature; they also make assumptions about judicial behavior.[73] The malfunctioning machine model supports textualism only if judges cannot adjust for deficiencies in the legislative process.[74] Similarly, the forum for the deliberation model supports best answer only if judges are viewed as participants in deliberation.[75]

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[71] *See, e.g.*, Richard Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990); Rubin, *Beyond Public Choice, supra* note 51, at 55 (comparing public choice and comprehensive rationality as descriptions of legislative behavior and as a basis for interpretive theory); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990) (comparing public interest and public choice theories of legislation).

[72] *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 323 (1990) (stating that in 1989, Congress had 19,504 employees).

[73] *See* Schacter, *supra* note 3, at 593-94 (arguing that to interpret a statute, a "court must adopt—at least implicitly—a theory about its own role by . . . taking an institutional stance in relation to the legislature."); *cf.* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1690-94 (1988) (criticizing republicanism for neglecting the role of the interpreter).

[74] *See* Eskridge, *supra* note 46, at 314-15 (noting that the inferences drawn from public choice theory differ according to one's assumptions); Rubin, *supra* note 51, at 46 (describing the spectrum of interpretive theories based upon an interest group politics description of the legislative process).

Superior judicial capacity might justify an inquiry into intent or best answer. Professors Farber and Frickey argue that public choice theory is consistent with an inquiry into legislative intent. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 461-65 (1988) (describing a pragmatic approach to legislative intent that is consistent with public choice theory). Professor Macey goes further and argues that, notwithstanding the role of interest group bargains in legislation, courts should nonetheless interpret statutes as public regarding. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-55 (1986) (defending the traditional approach to statutory interpretation as reducing the quantity of private interest legislation).

[75] Although modern republicans assume that judges participate in deliberation, that assumption was not shared by early republicans, who were suspicious of judicial review. *See* Sunstein, *supra* note 21, at 1556. Even Sunstein and Eskridge disagree over whether public values can supersede ordinary interpretation. *See* Sunstein, *supra* note 3, at 411 n.21 (criticizing Eskridge's assumption that public values are independent of ordinary interpretation).

II. INTERPRETIVE COMMUNITIES AND CURRENT SCHOLARSHIP

A. The Policy, Political, and Public Communities

There are, however, richer accounts of institutions than those offered in the current debate. Astute students of government have long recognized that government involves three basic groups. In 1939, Karl Llewellyn described the working constitution by reference to specialists in governing, interested groups, and the general public.[76] Fifty years later, John Kingdon provided substantial empirical verification for this taxonomy. Conducting 247 interviews with Washington insiders,[77] Kingdon identified three separate streams—policy, political, and problem—feeding into governmental decisions.[78]

Llewellyn and Kingdon's work dovetails with Stanley Fish's concept of an interpretive community, which constitutes a shared point of view as much as a group of individuals.[79] These communities comprise ideal types—intellectual constructs that reflect widespread phenomena, but that do not exist in pure form.[80] Their use is justified not by some ultimate truth but by the insights they generate.[81] Llewellyn and Kingdon's work points to three interpretive communities, which comprise both the author and the

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[76] *See* Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 19 (1934).

[77] *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 220 (1984). These interviews were with congressional staff, executive department personnel, journalists, consultants, academics, and researchers. *Id.* at 221.

[78] *See id.* at 92.

[79] According to Stanley Fish, an interpretive community is:

> not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property.

FISH, NATURALLY, *supra* note 1, at 141.

[80] *See* CARL G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION 156 (1965). Max Weber introduced this term. *See* MAX WEBER, ECONOMY AND SOCIETY 19-22 (Guenther Roth & Claus Wittich eds., 1978); *see also* Llewellyn, *Constitution as Institution*, *supra* note 76, at 20 n.32 ("[A]ll that is intended by the use of such terms, unqualified, is, throughout this paper, twofold: first (and descriptively) that in significantly high measure the attributes of the concept are present in the life around us; second (and theoretically) that any increasing quantum of their presence or of their range or intensity where present would strengthen the truth-value of the proposition announced concerning them.").

[81] *See* HEMPEL, *supra* note 80, at 156; Llewellyn, *supra* note 76, at 20 n.32 ("the marking off of '*an* interest,' '*a* group,' '*an* institution' is an artificial abstraction from a complexly concrete mass of phenomena . . . [and] the boundaries drawn will always be indefensible, save for as they become useful and significant *for the purpose in hand.*"). The policy, political, and public communities are not the "only" or "true" communities involved in statutory interpretation. The only claim here is that this grouping generates useful insights.

audience for statutes. These communities are each described by a different model[82] (see chart below).

THE DYNAMICS OF INTERPRETIVE COMMUNITIES		
Policy (Specialized Professionals)	Political (Politicians)	Public (Generalists)
Reasoned Argument	Bargaining and Voting	Reaction Based on Cultural Archetypes
Rational Actor	Malfunctioning Machine	Forum for Deliberation

The first community, the policy community, consists of professionals with specialized substantive knowledge. Members of this community work in administrative agencies, congressional offices, universities, and sometimes, lobbying groups. The policy community comprises the hidden actors in government. Sharing specialized understandings, the policy community strives for consensus through reasoned argument.[83]

The policy community consists of separate subcommunities, depending upon the substantive area. There are as many subcommunities as there are subjects. Different communities form around subjects, such as the environment, corporate securities, communications, and taxation. The communities vary considerably as to their coherence and structure. Taxation, for example, is the province of a relatively small cadre of lawyers and economists concentrated in the Treasury Department and the staffs of the tax writing committees. Environmental law involves a cross section of scientific specialties, dispersed among an array of departments and committees.[84] The policy community relies on formal reasoning.[85]

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[82] Kingdon's problem stream consists of value judgments drawn from the larger culture. *See* KINGDON, *supra* note 77, at 116-17.

[83] *See id.* at 122-51.

[84] *See* CELIA CAMPBELL-MOHN ET AL., ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 79-80 (1993) (identifying 17 federal agencies with environmental law responsibilities and attributing this division to fragmented congressional committees).

[85] For various descriptions of policy analysis, see, for example, GARY D. BREWER & PETER DE LEON, THE FOUNDATIONS OF POLICY ANALYSIS 33, 83, 179 (1983) (recognition of problem, identification of problem context, determination of goals and objectives, and generation of alternatives, estimation of alternatives, and selection); MELVIN J. DUBNICK & BARBARA BARDES, THINKING ABOUT PUBLIC POLICY: A PROBLEM-SOLVING APPROACH 168 (1983) (defining the problem, analyzing the problem, establishing a goal or objective, developing alternative solutions, analyzing the alternatives, selecting the "best alternatives" and evaluating the chosen alternative once selected); E.S. QUADE, ANALYSIS FOR PUBLIC DECISIONS 45-47 (1989) (decision maker should consider the objectives of the decision, the alternatives available for attaining the objectives, the impact of the alternatives, the criteria for ranking the alternatives, and the model for predicting the consequences of the alternatives); EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 5-6 (1978) (establishing the context, laying out the alterna-

The legal profession itself is one policy subcommunity. Lawyers and judges[86] are hidden actors who claim specialized knowledge.[87] Trained in law school and legal practice,[88] this community often reasons from analogy.[89]

The policy community is described by the rational actor model, especially in its strong form. That community views itself as pursuing reasonable ends reasonably.[90] By selecting the best means for arriving at a given goal, the rational analysis favored by this community mimics the rule in *Heydon's Case.* Hart and Sacks's willingness to impute rationality to the legislature was likely influenced by the proliferation of policy communities after the New Deal.

The dynamics of the policy community insulate it from the difficulties predicted by public choice theory. Reaching agreement through persuasion instead of voting, this community is less subject to Arrow's Theorem.[91] Furthermore, this community is largely immune from the free rider effect.

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tives, predicting the consequences, valuing the outcomes, making a choice); DEBORAH A. STONE, POLICY PARADOX AND POLITICAL REASON 185 (1988) (goal determination, canvassing of available alternatives, evaluation of the alternatives, and selection of the alternative most likely to reach the goal).

[86] *See* Owen M. Fiss, *Comments on Conventionalism*, 58 S. CAL. L. REV. 177, 177-78 (1985) (acknowledging that a "judge is a thoroughly socialized member of a profession").

[87] *See* Richard H. Fallon, Jr., *Non-Legal Theory in Judicial Decisionmaking*, 17 HARV. J.L. PUB. POL'Y 87, 88 (1994) (arguing that American law cannot be *reduced* to any other discipline, nor can legal analysis be reduced to any other methodology); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 38 (1981) ("[W]hat judges are expert at, is, not surprisingly, the law.... [T]he law is a distinct subject, a branch neither of economics nor of moral philosophy, and that it is in that subject that judges and lawyers are expert; it is that subject which law professors should expound and law students study.").

[88] *See generally* Andrew Goldsmith, *Is There Any Backbone in This Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice*, 23 LAW & SOC. INQUIRY 373 (1998) (analyzing the interpretive community of practicing lawyers).

[89] *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 362 (1993) ("What lawyers are particularly trained to do and can generally do better than philosophers and economists is think about cases.... The ability to fashion hypothetical cases and empathically to explore both real and invented ones is the lawyer's professional forte."); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949) (describing legal reasoning as analogical); Fried, *supra* note 87, at 57 ("Analogy and precedent are the stuff of the law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the mass of particular details."); Cass R. Sunstein, 106 HARV. L. REV. 741, 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning."). Other disciplines rely more on the "top-down" theories. *See* Fried, *supra* note 87, at 57 (distinguishing law from philosophy); Sunstein, *supra*, at 749-50 (distinguishing legal reasoning from "top-down" theories, which apply general principles to particular cases). Others still rely on the ends-means reasoning. *See* Fried, *supra* note 87, at 46 (concluding that legal concepts cannot be reduced to economic discourse); Sunstein, *On Analogical Reasoning*, *supra*, at 758 (distinguishing legal reasoning from ends-means rationality).

[90] "Reasonableness," is used descriptively here to refer to a particular way of making decisions. This method for making decisions is not necessarily better or more accurate than others.

[91] *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 825-29 (1982) (explaining that Arrow's Theorem only applies if there is a range of admissible choices).

Relatively unconcerned with material self-interest, the community is less moved by group pressure.[92]

The second community is the political community. This community consists of the elected politicians and their consultants, who each respond to electoral, partisan, or pressure group factors. Politicians reach out to voters, debate opposing politicians, and court interest groups. Members of this community comprise the visible actors in government: the President and his administration, political appointees, members of Congress, and political parties. The political community reaches consensus by bargaining rather than persuasion. Voting is crucial. Its members trade provisions, build coalitions, and compromise.[93]

The machine model most accurately conveys the self-understanding of the political community. That community consciously responds to exogenous preferences. Elected politicians focus on re-election and undertake strategic actions designed to enhance their personal power. Their substantive positions derive from constituents—organized interest groups or political parties.

The third community, the public community,[94] consists of society at large, persons lacking a special role in government. The public community is the largest and most heterogeneous community. Its members usually don't know and don't care about legislation. They usually react instinctively, drawing conclusions from unquestioned images and symbols.[95] On rare occasions, segments of the public community actively mobilize for social change.[96]

Core elements of the forum for the deliberation model resonate with the public community. Public preferences are typically endogenous, emerging only through a process, such as polling or legislation. By contrast, the policy community begins from preexisting goals like efficiency and equity and focuses on the best means for achieving them.[97] Furthermore, civic virtue develops in the public community, not among policy elites.

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[92] *See* Rubin, *supra* note 51, at 47 (arguing that judges do not engage in self-interested behavior).

[93] *See* KINGDON, *supra* note 77, at 152-72.

[94] Kingdon's third "stream" is the "problem stream." This stream, however, is formed largely by judgments from society at large. *See id.* at 115.

[95] *See, e.g.*, MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 5 (Illini Books ed. 1985) ("For most men most of the time, politics is a series of pictures in the mind, placed there by television news, newspapers, magazines, and discussions. The pictures create a moving panorama taking place in a world the mass public never quite touches, yet one its members come to fear or cheer, often with passion and sometimes with action.").

[96] *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990).

[97] Admittedly, this analysis does not proceed as orderly as sometimes claimed. *See* Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 82 (1959) ("[E]valuation and empirical analysis are intertwined; that is, one chooses among values and among policies at one and the same time.").

Other aspects of the forum for deliberation model resonate with the policy community. That community engages in hands-on, day-to-day issues of governance. Public participation is largely restricted to occasional, large-scale social movements, culminating in "constitutional moments."[98] Furthermore, the policy community deliberates more deeply. By contrast, the public community typically reacts instinctively. It does not probe and reconsider its position.

Each community has its own sphere of influence in government. The public community exerts the greatest influence over the agenda, the list of subjects to which persons in government pay attention.[99] Action requires perception of a public problem.[100] The policy community has the greatest influence over the specification of alternatives. This community has principal responsibility for drafting legislation.[101] The political community operates in both realms, influencing both proposals and agendas.

The relative contributions of the communities may vary from subject to subject. The policy community plays a large role in technical areas like tax, where the sheer density of the statute and the importance of specialized knowledge reduce access from other communities.[102] The political community dominates more accessible areas such as tariffs, in which there are obvious winners and losers.[103] The public community has more impact on

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[98] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6 (1991); Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 254 n.23 (1996) (describing the idea of a constitutional moment as "a metaphor, connoting large-scale change spurred by popular wishes").

[99] *See* KINGDON, *supra* note 77, at 3-4 (distinguishing agenda setting from alternative specification).

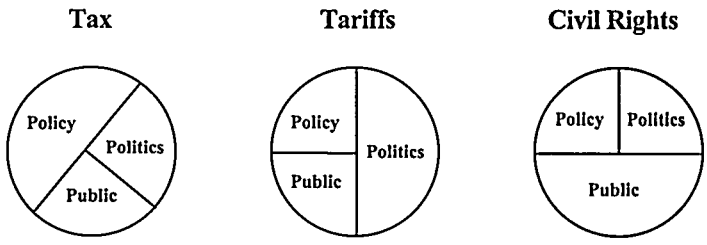
[100] *See id.* at 95-121. A condition becomes a problem only if there is a shared cultural judgment that something must be done. A focusing event—a disaster, crisis, or powerful symbol—provides the occasion for expressing this judgment. *See* ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 172-73 (2d ed. 1983) ("Policy problems are socially constructed. They arise not so much from events and circumstances as from the meanings that people attribute to events and circumstances.").

[101] *See* Zeppos, *supra* note 24, at 1313 ("Virtually no members of Congress draft their own legislation. Rather, that task is left to committee staff, the Office of Legislative Counsel, or lobbyists."). The Office of Legislative Counsel drafts a huge number of bills. *See* KENNETH KOFMEHL, PROFESSIONAL STAFFS OF CONGRESS 194 (3d ed. 1977) (observing that the combined total drafting assignments performed by House and Senate legislative counsel offices numbered over 6,000 in 1952).

[102] Members of the tax-writing committees do not vote on statutory language and the nonpartisan staff of the Joint Committee on Taxation drafts committee reports. *See* Michael Livingston, *Congress, the Courts and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 833, 838 (1991).

[103] For a classic study of the politics endemic to tariff legislation, see ELMER E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF (1935).

high profile issues such as civil rights, on which almost everyone has an opinion[104] (see chart below).



B. Interpretive Communities in Government

A recognition of interpretive communities fills some gaps in current scholarship. That acknowledges the diversity of the legislature by revealing that Congress is the meeting place of all three communities. The public community forms the backdrop against which Congress operates,[105] exercising its influence through polls and elections. The political community dominates representatives and their personal staffs. A representative's personal staff is headed by an administrative assistant, who usually has political experience in the home district or state[106] and hires staff with campaign experience.[107] The policy community is represented in the professional staff. The Office of Legislative Counsel, for example, is an apolitical[108] bureaucracy that hires directly from law school[109] and promotes from

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[104] Public opinion polls are frequently taken in such areas. A Westlaw search conducted on November 14, 2000 in the poll database in DIALOGUE shows 901 citations to "civil rights," compared to 207 citations to "tariffs," and 79 citations to "taxation." *See infra* notes 241-42.

[105] *See* Llewellyn, *supra* note 76, at 19 (noting that the public plays a role like that of an audience in a theater).

[106] *See* HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, CONGRESSIONAL STAFFS: THE INVISIBLE FORCE IN AMERICAN LAWMAKING 40 (1977) ("Of the AA's, 59 percent had worked in district or state politics prior to Hill employment; indeed, in many cases, it was because of this involvement that the AA was invited to Washington as an employee.").

[107] *See id.* ("A majority of the [personal] staff members, 55 percent, in the survey had been active in politics prior to coming to the Hill.").

[108] *See* KOFMEHL, *supra* note 101, at 185 ("In accordance with the organic law of the Office, appointments were made without reference to political affiliations. In fact, if a candidate had been prominently identified with political activities, he was automatically disqualified.").

[109] *See id.* ("[T]he legislative counsel generally followed the practice of appointing young men who had just graduated from law school and been admitted to the bar.").

within.[110] Likewise, professional training[111] and executive branch experience[112] link committee staff to the policy community.

Legislation involves all three communities,[113] not just the political one. The sheer difficulty of passage, institutionalized in sundry vetogates,[114] generally demands that legislation have a veneer of public benefit. Even industry specific subsidies are couched in terms acceptable to the entire country. Advocates of agricultural subsidies, for example, usually appeal to the plight of the family farm,[115] a powerful symbol in American culture.[116] On the other hand, legislation will not proceed without a credible solution,[117] a component that requires policy consensus.

The role of the communities in legislation is illustrated by the statute at issue in *Weber*—the Civil Rights Act of 1964. The public community placed the bill on the legislative agenda. Mass movements led by civil rights and religious groups focused attention on civil rights.[118] The political community affected both the timetable for enactment and the substance of the legislation. Politicians scheduled the bill for legislative consideration[119] and engaged in the bargaining and negotiations necessary for the bill to be-

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[110] *See id.* (observing that after a probationary period, assistants in legislative counsel office had "in effect permanent tenure," that vacancies were filled from the bottom rung, and that there was a remarkable continuity in the staff, with several senior staffers serving two decades or more).

[111] *See* FOX & HAMMOND, *supra* note 106, at 44 ("Committee aides are highly trained specialists. Law is the predominant field, and nearly half of all committee professionals hold legal degrees."); KOFMEHL, *supra* note 101, at 84 (observing that educational background of professional staff compares favorably with that of employees in executive branch and other segments of congressional staff).

[112] *See* FOX & HAMMOND, *supra* note 106, at 45 (noting that executive branch work is the most usual path to committee appointment); KOFMEHL, *supra* note 101, at 84 (observing that the educational background of professional staff compares favorably with that of employees in the executive branch and other segments of congressional staff).

[113] *See* KINGDON, *supra* note 77, at 211 ("The probability of an item rising on a decision agenda is dramatically increased if all three elements—problem, policy proposal, and political receptivity—are linked in single package."); *see also* Llewellyn, *supra* note 76, at 18 (describing the working Constitution as embracing "the interlocking ways and attitudes of different groups and classes in the community—*different* ways and attitudes of *different* groups and classes, but all cogging together into a fairly well organized whole").

[114] *See generally* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994) (describing "vetogates" through which legislation must pass to be enacted).

[115] *See generally* INGOLF VOGELER, THE MYTH OF THE FAMILY FARM: AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE (1981).

[116] The family farm served as the prototype for the American dream of success through hard work. *See* REX BURNS, SUCCESS IN AMERICA: THE YEOMAN DREAM AND THE INDUSTRIAL REVOLUTION (1976); PETER D'A. JONES, THE CONSUMER SOCIETY: A HISTORY OF AMERICAN CAPITALISM 100 (1965); JOHN MICKEL WILLIAMS, OUR RURAL HERITAGE 83 (1925).

[117] *See* KINGDON, *supra* note 77, at 150 (describing the need for a viable alternative before government acts).

[118] *See* ESKRIDGE & FRICKEY, *supra* note 7, at 2-3 (describing political protests as inspiring introduction of the civil rights bill).

[119] *See id.* at 8-9 (describing how the civil rights bill was delayed for the Kennedy tax cut bill).

come law.[120] Finally, the policy community provided statutory language and technical expertise. Government lawyers drafted the administration bill, redrafted the house version,[121] and prepared the briefing book used on the floor of the House of Representatives.[122]

Issues arise at different levels in the legislative process. Some high profile issues are central to public understanding. For example, the public clearly expected that the Civil Rights Act would overturn Jim Crow. Other issues pertain to political deals cut on behalf of organized groups. The burden borne by employers and unions was brokered by politicians. Still other issues fall below the political radar screen and are left for resolution by the policy community.[123] Rules of procedure and administration fall within this category.

An appreciation of interpretive communities not only acknowledges the diversity of the legislature, it also provides a comparative description of the branches of government. The legislature is particularly responsive to the public and political communities. Elections give the public power, and voting on bills facilitates the weighing of competing preferences.

The executive is less responsive to these communities. Although the President is an elected official, the policy community dominates the administrative agencies. The President can influence only a few programs[124] and cannot direct details.[125] This dominance is based on numbers and expertise.[126] Only 3,100 of the three million executive employees are political

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[120] *See id.* at 20-22 (describing negotiations between Senators Humphrey and Dirksen).

[121] *See* CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 93 (1985) ("'[S]taff people on the Judiciary Committee participated in redrafting this bill, [and] duly constituted and appointed and confirmed people in the Department of Justice helped write the bill, the same general people who often help in writing difficult and technical bills which are considered by the Judiciary Committee.'") (second alteration in original) (quoting William McCulloch, ranking member of the House Judiciary Committee).

[122] *See* ESKRIDGE & FRICKEY, *supra* note 7, at 14-15 (explaining that Justice Department attorneys prepared the briefing book and stood by for assistance).

[123] *See* Easterbrook, *supra* note 3, at 17 ("Most statutes are interest-group compromises only in part, and the question is, 'Which part?' . . . A court sensitive to these things must start with the bargaining behind the statute but cannot stop there. This is not the place, though, for a map of the journey it must take.").

[124] *See* WILLIAM P. BROWNE, POLITICS, PROGRAMS, AND BUREAUCRATS 161 (1980) ("The person who occupies the White House is not the 'civics book president' exerting personal influence on a vast array of public programs. Any president's influence is limited to a few key programs. . . . Chief executives accept most programs on face value and approve them just as they were developed and submitted by bureaus.").

[125] *See id.*

[126] *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 586 (1984) ("As Presidents and political scientists are fond of remarking, the White House does not control policymaking in the executive departments. The President and a few hundred political appointees are at the apex of an enormous bureaucracy whose members enjoy tenure in their jobs, are subject to the constraints of statutes whose history and provisions they know in detail, and often have strong views of the public good in the field in which they work.") (citations omitted).

appointees,[127] and bureaucrats possess specialized knowledge that constrains those appointees.[128]

The judiciary is most insulated from the public and policy communities. Life tenure, a hierarchy of courts, written opinions, and a leisurely process all promote rational decision making. Judges aspire to reasoned elaboration, not bargaining or gut reaction.[129]

C. The Effect of Communities on Statutory Interpretation

Cutting across institutions, the interpretive community account bridges positions in the debate over the appropriate theory of interpretation. As members of a particular policy community, judges encounter legislative product emanating from all three communities, each presenting a distinct interpretive challenge and range of options (see chart below). By providing a context for assessing competing claims about the legislature,[130] the interpretive community account grounds the intuition that different statutes[131] deserve different theories of interpretation.[132]

There is no simple one-to-one correspondence between the responsible community and the theory of interpretation chosen by judges. Judges typically draw on two or more theories.[133] Community involvement does, however, affect the relative weight given each theory. Thus, the center of

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[127] These belong to schedule C of the excepted service, noncareer senior executives, and the executive schedule. *See* KENNETH J. MEIER, POLITICS AND THE BUREAUCRACY: POLICYMAKING IN THE FOURTH BRANCH OF GOVERNMENT 38-39 (3d ed. 1993). Ninety percent of executive employees are part of the career civil service or another merit system.

[128] *See, e.g.*, William D. Berry, *An Alternative to the Capture Theory of Regulation: The Case of State Public Utility Commissions*, 28 AM. J. POL. SCI. 524 (1984); William D. Berry, *Utility Regulation in the States: The Policy Effects of Professionalism and Salience to the Consumer*, 23 AM. J. POL. SCI. 263 (1979).

[129] *See* ALBERT P. BLAUSTEIN & CHARLES O. PORTER, THE AMERICAN LAWYER 269 (1954); LON L. FULLER, THE MORALITY OF LAW ch. 2 (rev. ed. 1964).

[130] *See* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 540-41 (1997) (arguing that abstract and a priori claims do not support a distinctive interpretive approach, "which must be defended by a set of pragmatic and empirical claims about various governmental institutions and how those institutions are likely to respond to different interpretive strategies. . . . The most basic point is that no context-free view of legal interpretation will make much sense.").

[131] *See* Easterbrook, *supra* note 3, at 16 (distinguishing general interest laws, deserving a broad reading, from private interest laws, which should be narrowed); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 269-72 (1982) (dividing statutes between public interest (economically defined), public interest in other senses, public sentiment, and narrow interest group legislation).

[132] *See* Easterbrook, *supra* note 3, at 14-15 (identifying two different styles of interpretation: one in which the court attributes a purpose to the statute; the other in which it treats the statute like a contract); *see also* Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting) (recognizing that courts interpret some general, sweeping statutes "by developing legal rules on a case-by-case basis in the common-law tradition").

[133] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 348 (1990) (arguing that courts draw from multiple theories).

gravity among theories varies depending upon the community responsible for the issue.

INTERPRETIVE COMMUNITIES AND STYLES OF INTERPRETATION		
Policy	Political	Public
Review of Agency Decisions	Contract Interpretation	Constitutional Construction
Replicate Reasoning or Assure Rationality	Implement Will of Parties or Police the Process	Read Freely or Adhere to Professional Norms
Purpose	Actual Intent/Text	Best Answer

1. The Policy Community and Review of Agency Decisions. Courts discern the views of a policy community by engaging in distinctive reasoning, usually policy analysis. An ongoing life and shared commitment to a rational discourse based upon specialized knowledge make the policy perspective theoretically accessible to those who can reproduce its reasoning. However, the importance of specialized knowledge to this community creates a practical barrier for persons lacking such knowledge.

For issues emanating from the policy community, judges can replicate the reasoning underlying the statutory provision—an approach that permits them to fill necessary gaps.[134] Failing that, courts can at least adopt an intelligible reading. Thus, the challenge is similar to that encountered in reviewing agency actions, where courts exercise anything from independent judgment to rational basis review.

This challenge affects the weight given to each theory of interpretation. On the one hand, the policy community's specialized reasoning provides a common foundation for determining the best answer. On the other hand, the policy community lacks power over the agenda. That community claims authority only insofar as its proposals are enacted. Consequently, statutory purpose is the center of gravity for issues emanating from the policy community.[135]

The willingness of courts to engage in policy analysis is influenced by the proximity of the particular policy discourse to traditional legal expertise.

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[134] *See* Easterbrook, *supra* note 3, at 14 (describing interpretive style, in which "the judge starts with the statute, attributes to it certain purposes (evils to be addressed), and then brings within the statute the class of activities that produce the same or similar objectionable results. The statute's reach goes on expanding so long as there are unredressed objectionable results. The judge interprets omissions and vague terms in the statute as evidence of want of time or foresight and fills in these gaps with more in the same vein.").

[135] Hart and Sacks recognized that policy analysis must be linked to text. *See* HART & SACKS, *supra* note 17, at 1411 ("The words of the statute are what the legislature has enacted as law, and all that it has the power to enact. Unenacted intentions or wishes cannot be given effect as law.").

The closer the policy discourse is to legal expertise, the more likely it is that the court will inquire deeply into the substantive result. For core legal areas, namely, rules of procedure[136] and evidence, courts exercise independent judgment.[137] Lawyers are society's sole experts in those areas. A court writing on such topics may ultimately rely on textual language, but if it does so, it is because it believes text itself provides the best answer, not out of respect for the legislature. Lawyers have long recognized that reliance on text, like other rule-like approaches, curbs official caprice, conserves judicial resources, and provides guidance to private actors.[138]

The judicial confidence in core legal areas is illustrated by Justices Marshall and Stevens's opinions in *United States v. Locke*.[139] The statute in that case required that certain holders of mining claims against federal land file documents with the Bureau of Land Management or be treated as having abandoned their claims. The issue before the Court was whether statutory language requiring a filing "before December 31" disallowed a filing made on that date. Although ultimately disagreeing on this issue, Justices Marshall and Stevens both found the issue to be within judicial expertise. Exercising independent judgment, they each opined on the substantive nature of the rule. Each also invoked statutory purpose, albeit defining it quite differently.[140] Disallowing the filing, Justice Marshall pointed to the policy underlying clear rules. He argued that "the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute. . . . '[D]eadlines are inherently arbitrary,' while fixed dates 'are often essential to accomplish necessary results.'"[141] In his dissent, Justice Stevens, too, appealed to

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[136] *See* Siegel, *supra* note 5, at 1024 (claiming that background principles of administrative law are a dominant force in construing many administrative statutes).

[137] *See* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 659 (1992) ("When judges are certain about the policy consequences of their decisions, their confidence with respect to their predictive capabilities will enable them to decide cases on the basis of public policy.").

[138] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1701 (1976).

[139] 471 U.S. 84 (1985).

[140] Justice Marshall was arguably insufficiently sensitive to differences between judicial and statutory deadlines. Unlike a court-ordered filing date, the deadline in *Locke* was not directly communicated to the parties, who relied on erroneous information from an agency employee. *See* 471 U.S. at 89-90, n.7. Thus, the case for textual reading is weaker than for a court-ordered date; *cf.* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387 (1947) (Jackson, J., dissenting) ("To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops.").

[141] *Locke*, 471 U.S. at 93-94 (alterations in original) (quoting United States v. Boyle, 469 U.S. 241, 249 (1984)).

purpose.[142] He believed that the date in the statute was an "error," lacking "any rational basis,"[143] which the agency could have corrected by regulation[144] and which Congress would have changed had "its attention been focused on this precise issue."[145]

Further afield from core legal expertise are common law subjects such as contracts and torts. Although they lack unique expertise, courts nonetheless have abundant experience in such areas.[146] Accordingly, courts sometimes interpret statutes governing contracts and torts as developments of the common law.[147]

An example of this tendency is *Li v. Yellow Cab Co. of California,*[148] which read the California Civil Code[149] to permit comparative negligence. Admitting that the enacting (1870) legislature contemplated only the defense of contributory negligence (modified by the last clear chance doctrine), the majority nonetheless read the statute to conform with the evolving common law.[150] Although the legislature normally makes such modifications, the majority believed that the judiciary could do so as well.[151] The dissent expressed less confidence about the capacity of judges to make these judgments.[152]

Still further afield are subjects that lawyers do not routinely master pursuant to their legal training. Largely a product of the regulatory state, these subjects include antitrust, environmental law, bankruptcy, patents, and taxation. Judges who master these areas often engage in purposive interpretation. For example, the willingness of usually textualist Judges Posner and

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[142] *Id.* at 120 (claiming that the December 31 filing was "entirely consistent with the statutory purposes").

[143] *Id.* at 123.

[144] *Id.* at 122-23 ("If the Bureau had issued regulations expressly stating that a December 31 filing would be considered timely . . . it is inconceivable that anyone would question the validity of its regulation.").

[145] *Id.* at 125.

[146] *See* Fried, *supra* note 87, at 39 (illustrating law's autonomy by reference to the law governing contract, tort, and restitution).

[147] Such development is not necessarily confined to common law subjects. *See Guardian's Ass'n*, 463 U.S. at 641 n.12 (Stevens, J., dissenting) ("Congress phrased some older statutes in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common-law tradition.").

[148] 532 P.2d 1226 (Cal. 1975).

[149] Section 1714 of the California Civil Code provides that: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, *except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.*"

[150] *Li*, 532 P.2d at 1243.

[151] *Id.* at 1233 ("[I]t was the intention of the Legislature to announce and formulate existing common law principles and definitions . . . with a distinct view toward continuing judicial evolution.").

[152] *Id.* at 1247 (Clark, J. dissenting) ("[T]he Legislature is the branch best able to effect transition from contributory negligence to comparative or some other doctrine of negligence.").

Easterbrook to engage in substantive interpretation of antitrust laws[153] is likely influenced by their mastery of law and economics. Judges lacking such knowledge are less likely to engage in substantive interpretation[154] and are more likely to assure minimal rationality by alternative means.

One alternative relies on administrative interpretation. This approach is perhaps most evident in environmental law. Two famous deference cases, *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*[155] and *Chevron*, involved environmental regulation. Professor Farber suggests that the Court deliberately minimizes its influence in this area.[156]

Another way of assuring minimal rationality is by relying on statutory text,[157] an approach often taken in bankruptcy[158] and tax.[159] One example is *Arkansas Best Corp. v. Commissioner of Internal Revenue.*[160] In that case, the Supreme Court held that the term "capital asset" included property held for business reasons. In doing so, it relied on statutory language that enumerated only five exceptions.[161] This refusal to recognize an extrastatutory exception was a reasonable construction of text, although it was inconsistent with specialized understanding.[162]

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[153] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 278 (1985) (approving interpretations of the Sherman Act that depart from statutory language); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law.").

[154] *See* Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547, 547-48 (1997) ("During the past twenty years, the Court's decisions have not substantially affected environmental regulation."); *id.* at 549 n.7 (suggesting that similar tendency may occur in other technical areas such as tax or regulation of telecommunications and transportation).

[155] 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances . . . agencies 'should be free to fashion their own rules of procedure.'") (reviewing an agency decision to prepare an environmental impact statement).

[156] *See* Farber, *supra* note 154, at 549 ("[T]he Court behaves almost as if it had deliberately undertaken to minimize its own influence on environmental law.").

[157] *See* Macey & Miller, *supra* note 137, at 658 (claiming that most cases invoking plain meaning "are difficult and highly technical, and do not deal with subject areas that fall within the particular expertise of any of the justices").

[158] *See* ESKRIDGE & FRICKEY, *supra* note 7, at 630-31 (exploring the admission by two nontextualists that in a complex area like bankruptcy, they might adhere to text and defer to those with more expertise: "Only after gaining greater familiarity and confidence with the bankruptcy code and the policy issues associated with it might we become more venturesome interpreters."); Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 597 (1993) (presenting an argument for textualism in bankruptcy cases that recognizes that the Supreme Court cases "evince little knowledge about bankruptcy policy").

[159] *Cf.* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 525 (1994) (describing Supreme Court aversion to tax issues).

[160] 485 U.S. 212 (1988).

[161] *Id.* at 217-18.

[162] The extrastatutory exception the court struck down in *Arkansas Best* had a long lineage. Created by the Supreme Court, *see* Corn Prods. Ref. Co. v. Comm'r, 350 U.S. 46 (1955) (denying capital asset treatment to business property), the exception underlay IRS rulings and congressional statutes. *See* Rev. Rul. 72-179, 1972-1 C.B. 57 (applying *Corn Products*); I.R.C. 1256(e)(2)(b) (1999) (statutory provision

2. The Political Community and Interpretation of Contracts. Courts have great difficulty discovering the views of the political community.[163] That community lacks a mode of reasoning reproducible by outsiders, and courts in particular are insulated from its electoral, partisan, and interest group influences. Furthermore, because a political compromise is highly sensitive to historical conditions, it is uncertain whether even the political community could later replicate a given deal. Thus, for issues emanating from the political community, judges face a challenge similar to that presented in interpreting a contract.[164] Unable to reach conclusions about substantive results, the court settles for implementing the will of another. It may do so by reconstructing the original legislative "deal"[165]—predicting what the enacting legislators would have done with the issue before them, considering legislative history as appropriate.[166] Failing that, some judges adopt rules designed to alter legislative drafting. Just as courts interpreting contacts adopt a parol evidence rule, courts reading statutes might adhere to plain meaning. Such an approach encourages the legislature to state the deal as precisely as possible. A court is not, however, constrained to determining the will of the parties. Judges also police the bargaining process. Just as courts interpreting contracts consider duress and unequal bargaining power, courts reading the product of the political community adjust for systemic underrepresentation.[167]

This challenge affects the relative weight accorded each theory of interpretation. As a bargain, the statute lacks an overriding purpose or best

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governing hedges predicated on assumption that business property is not a capital asset). By overturning this understanding, *Arkansas Best* created considerable confusion. *See* Edward Kleinbard & Suzanne F. Greenberg, *Business Hedges After* Arkansas Best, 43 TAX L. REV. 393, 393 (1988) ("[T]he *Arkansas Best* court has created substantial confusion as to the types of transactions that continue to qualify as hedges for tax purposes, and, accordingly, has left open the potential for serious tax whipsaws for both taxpayers and the Internal Revenue Service.").

[163] *See* Posner, *supra* note 131, at 273 (claiming that it is "beyond the judicial competence to undertake" an inquiry into "how completely the [interest] group prevailed upon Congress to do its will").

[164] *See* Easterbrook, *supra* note 3, at 15 (describing an interpretive approach that "treats the statute as a contract. [The judge] first identifies the contracting parties and then seeks to discover what they resolved and what they left unresolved .... A judge then implements the bargain as a faithful agent but without enthusiasm; asked to extend the scope of a back-room deal, he refuses unless the proof of the deal's scope is compelling."). Some scholars challenge the contract analogy. *See, e.g.*, Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1998). Whatever the ultimate merits of the analogy, the claim in this Article is relative, not absolute—that the contract analogy is most persuasive for items from the political community.

[165] *See* Posner, *supra* note 16, at 817. Judge Posner later acknowledged that such reconstruction is quite difficult. *See* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 851 (1988).

[166] There is disagreement over the extent to which the contract analogy permits the use of legislative history. *Compare* Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195 (1998), *with* Movsesian, *supra* note 164.

[167] In this sense, courts "discipline" the legislature. *See* Schacter, *supra* note 3, at 636-46.

answer. Courts are left with actual intent, or statutory text, if evidence of such intent is lacking. Extrinsic policy affects interpretation only at the margins.

Judge Norris's opinions in *Montana Wilderness Ass'n, Nine Quarter Circle Ranch v. United States Forest Service*[168] illustrate the judicial stance toward issues from the political community. That case considered whether a provision in the Alaska National Interest Lands Conservation Act[169] granting private land owners a right of access through the "national forest system" applied outside Alaska. In determining the scope of the right of access through the "national forest system," Judge Norris made no guess about the best answer. Instead, he reconstructed the original deal by examining legislative history. His first opinion limited the right to lands in Alaska.[170] His second opinion, issued after the submission of additional legislative history, withdrew the first and held that the right extended to forests throughout the United States. Judge Norris also may have subtly disciplined politics by reading the statute narrowly in the absence of clear evidence to the contrary. Within the context of federal lands law, the effect of the statute was "quite malign" because, by granting private landowners a right of access denied to the federal government, it eliminated incentives to bargain and required the government to incur high transaction costs.[171]

3. The Public Community and Constitutional Interpretation. Courts can theoretically discern the views of the public community, but have difficulty doing so. The concepts that move this community are accessible to judges as members of society at large, but seldom answer specific questions of statutory interpretation.[172] The product of a community lacking a specialized perspective, these concepts consist largely of symbols[173] and stories that fit uneasily into legal discourse.[174] These concepts lack the sharp

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[168] 655 F.2d 951 (9th Cir. 1981).

[169] Pub. L. No. 96-487, 94 Stat. 2371 (1980).

[170] *See* No. 80-3374 (filed May 14, 1981), *published in* ESKRIDGE & FRICKEY, *supra* note 7, at 797-802.

[171] *See* ESKRIDGE & FRICKEY, *supra* note 7, at 811-12.

[172] *See* Mark H. Moore, *What Sort of Ideas Become Public Ideas?*, *in* THE POWER OF PUBLIC IDEAS 55, 79 (Robert B. Reich ed., 1990) ("[I]t is not clear reasoning or carefully developed and interpreted facts that make ideas convincing. Rather, ideas seem to become anchored in peoples's minds through illustrative anecdotes, simple diagrams and pictures, or connections with broad common-sense ideologies that define human nature and social responsibilities.").

[173] *See* Llewellyn, *supra* note 76, at 24 (describing the public perspective as "the combination of intense loyalty to a symbol with total emptiness of concrete content").

[174] *See* Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2259-60 (1989) (arguing that narrative lacks the generality, nonreflexibility, and reliability necessary for an institutionalized discourse).

boundaries favored in policy analysis.[175] Thus, they are too fuzzy and abstract to generate legislative detail.

This intermediate access makes statutory interpretation similar to constitutional construction. Although there are many ways to construe the constitution, constitutional interpretation is especially sensitive to public values.[176] As Chief Justice Marshall recognized, "it is a *constitution* we are expounding."[177] This public quality encourages courts to abandon traditional legal materials, like statutory language and legislative history, and grasp popular understandings directly.[178] Such abandonment, however, is not inevitable, and courts confronting public issues often adhere to their professional role.[179]

This challenge offered by the public community affects the weight attached to each theory of interpretation. On the one hand, the case for text diminishes.[180] The public knows and cares little about statutory language.[181] On the other hand, the diversity of the public community makes determination of a best answer hazardous. In cases in which public understanding is clear, however, the center of gravity shifts toward best answer.

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[175] *See* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1150-51 (1989) (describing the radial and container metaphors underlying speech).

[176] *See generally* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND (1992).

[177] M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[178] *See* Philip B. Kurland, Curia Regis: *Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is,"* 23 ARIZ. L. REV. 581, 591 (1981) (observing that whenever a judge quotes Marshall's language in *M'Culloch*, "you can be sure that the Court will be throwing the constitutional text, its history, and its structure to the winds in reaching its conclusion").

[179] *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1978) (arguing that some constitutional clauses appeal to moral concepts while others lay down particular conceptions).

[180] *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 219 (1998) ("Judges prefer to rely on legal texts; they will generally abandon those texts, and make decisions designed to achieve beneficial results, only when they have some assurance that the beliefs that motivate them are strongly felt and widely held, that is, that these beliefs are truly elements of social morality."); Pope, *supra* note 96, at 360 (urging a broad reading of "republican statutes" resulting from populist movements).

Conversely, as Professor Schauer notes, textualism dominates cases lacking broad public interest. He claimed reliance on plain meaning in most Supreme Court cases in a recent term "should come as little surprise. For there was one factor that (to me) was present in every one of these cases: None of them was interesting. Not one. Compared to flag burning or affirmative action or separation of powers or political patronage, these cases struck me as real dogs." Schauer, *supra* note 3, at 247.

[181] *Cf.* Llewellyn, *supra* note 76, at 24:

> Whereas the public not only know nothing of the real operation of the Constitution—they also care nothing about it. What difference whether income taxation rests on 'interpretation' or Amendment? What matter—to most—whether the 18th Amendment be on the books, and if on the books, whether it or a Volstead Act do the forbidding; whether New York has thirty-nine representatives, or fifty-two, or eighty-seven; whether Congress or the States regulate longshoremen's accident compensation; whether impeachment of judges calls for majority, two-thirds, three-fourths, or unanimous vote; whether 'to receive ambassadors' does or does not imply the power of refusing recognition to a foreign government?

Bob Jones University v. United States[182] illustrates a best answer approach based on public understanding.[183] That case considered whether a private religious school that discriminated on the basis of race qualified for tax exemption as a corporation organized for "religious, charitable, . . . or educational purposes."[184] In holding that it did not, Chief Justice Burger's majority opinion went far beyond statutory language[185] and relied on materials not formally relevant. It found such discrimination to be contrary to the national public policy against racial discrimination, declared in *Brown v. Board of Education*,[186] executive order,[187] and the Civil Rights Act of 1964. Indeed, Chief Justice Burger's opinion ultimately drew on fundamental American values beyond any of these sources.[188]

D. Identifying the Responsible Community

A critical task, obviously, is determining which communities are responsible for which issues. Performing this task ultimately entails a judgment about the division of labor in government. The overall pattern is clear: the policy community handles most issues confronting courts,[189] the political community deals with many such issues, and the public community touches only a few.[190]

Subject matter offers one clue to community responsibility. Responsibility varies depending upon whether the issue is technical, distributional, or ideological. The policy community dominates technical issues, those ancillary to larger decisions. Resolving those issues requires the specialized sub-

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[182] 461 U.S. 574 (1983).

[183] *See* Mayer G. Freed & Daniel D. Polsby, *Race, Religion & Public Policy*: Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 2 (suggesting that "the Court was busy speaking to the press, and to posterity").

[184] *See* I.R.C. § 501(c)(3) (2000) (exempting organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes").

[185] *See* Freed & Polsby, *supra* note 183, at 5 (noting that the Court did not carefully parse statutory language but instead "wrote an opinion that . . . one encountered only on the opinion pages of newspapers, a case with an obvious outcome, dictated by clear and long-standing policy"). The amicus argued that discrimination was inconsistent with the word "charitable" in the statute. *See Bob Jones*, 461 U.S. at 586 ("[E]ntitlement to tax exemption depends on meeting certain common-law standards of charity."). That argument was by no means compelling. One could maintain that a charitable purpose was but one ground for tax exemption and that Bob Jones University could qualify by serving an educational or religious purpose.

[186] 347 U.S. 483 (1954).

[187] *Bob Jones*, 461 U.S. at 592-96.

[188] *See* Robert M. Cover, *Foreward, Nomos and Narrative*, 97 HARV. L. REV. 4, 28 (1983) (arguing that the decision in *Bob Jones* was based on more than mere public policy).

[189] *See* Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057 (1995) (arguing that most noncriminal federal statutes "are not directed at ordinary citizen speakers of English, but at a small community of lawyers, regulators, and people subject to their specific regulations").

[190] *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 143-45 (1989) (describing evidence indicating that the public is ignorant of all but a few Supreme Court rulings).

stantive knowledge that defines this community. The political community gravitates towards distributional issues[191]—those conferring concentrated economic benefits[192] on groups organized around narrow interests.[193] Such groups' abilities to closely monitor legislation gives them political power.[194] The public community follows ideological issues, highly emotional questions with broad impact. Rising above the interest group politics, issues like civil rights, school prayer, and abortion engage society at large.[195]

Moreover, there are two markers of community involvement. One is the type of secondary source discussing the issue. The policy community writes the detailed analyses contained in committee reports, regulations, and judicial opinions. The political community assumes more prominence in floor statements, public speeches, and the trade press. Public attention usually emerges in the popular media.[196] A second marker is the briefing of the case. The filing of amicus briefs indicates that the issue has gained prominence.[197] The filing of such briefs by industry groups indicates political interest; whereas, the filing of briefs by ideological groups indicates public interest.

Community involvement can certainly be difficult to ascertain. In many leading statutory interpretation cases, however, relative community involvement is pretty clear. *Locke* presents a case from the policy commu-

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[191] *See* Easterbrook, *supra* note 3, at 17 (identifying private interest statutes by looking "for the indicia of rent-seeking legislation: limitations on new entry into the business, subsidies of one group by another, prohibitions of private contracting in response to the new statutory entitlements"); *see also* Eskridge, *supra* note 46, at 323-25 (describing how judicial response to statutes might vary depending upon whether costs and benefit are concentrated or distributed).

[192] Political scientists have long considered the effect of the concentration of costs and benefits upon legislation. *See* JAMES Q. WILSON, POLITICAL ORGANIZATIONS 153 (1973); *see also* RANDALL B. RIPLEY & GRACE A. FRANKLIN, CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY 21-23, 25-26 (1987); DAVID J. VOLGER, THE POLITICS OF CONGRESS (1974) (describing patterns); Theodore J. Lowi, *American Business, Public Policy, Case-Studies, and Political Theory*, 16 WORLD POL. 677, 692-95, 703-15 (1964).

[193] *See* Easterbrook, *supra* note 3, at 17 (identifying private interest laws by looking to the legislative process: who lobbied for the legislation and what deals were struck).

[194] *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 92 (1974) (politicians must produce results to appease organized interest groups). Other interests are more easily satisfied with mere statements. *See id.* at 132 ("[I]n a large class of legislative undertakings the electoral payment is for positions rather than for effects.").

[195] *See supra* note 104 and accompanying text.

[196] *See* RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 73 (1994) (reporting that journalists find newsworthy those "[c]ases with potentially far-reaching implications in the larger social and political environment"); *cf.* Pope, *supra* note 96, at 361 (identifying republican statutes by widespread and serious public discussion, direct citizen action, such as social protest, and extensive activity by voluntary associations and social movements).

[197] The filing of amicus briefs is an important factor in the granting of certiorari. *See* Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda-Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988) (concluding that the filing of an amicus brief can increase the likelihood of review by 40-50%). "Through participation as amici, organized interests effectively communicate to the justices information about the array of forces at play in the litigation, who is at risk, and the number and variety of parties regarding the litigation as significant." *Id.* at 1123.

nity. The issue of whether statutory language requiring a filing "before December 31" permitted a filing made on that date was ancillary to the overall scheme and, like most procedural issues, fell within the lawyer's expertise. Politicians do not care about such matters, unless a particular date is essential to conferring a promised benefit.[198] External markers confirm this placement. The only secondary sources discussing the filing date were the committee report and the implementing regulation. Only one of the five amicus briefs filed before the Supreme Court discussed the meaning of "December 31."[199] Industry attention focused on whether conclusively presuming abandonment from a failure to file was constitutional.

Montana Wilderness provides a good example of an issue from the political community. This issue directly involved the scope of a concentrated economic benefit granted to an organized group, the owners of private lands in national parks. External markers confirm this placement. Members of Congress wrote letters to the administration and to each other on the issue.[200] The issue did not, however, receive widespread coverage in the popular press.

Bob Jones exemplifies an issue from the public community. The special status of race and education in America makes the issue of discrimination in college highly ideological.[201] External markers corroborate public interest. After the Court granted certiorari, but before oral argument, the Reagan administration reversed its position in the case, leading to widespread criticism in the popular press.[202] The Court received twenty-five amicus briefs from churches, civil rights groups, and individuals.[203]

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[198] In this respect, *Locke* differs from *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339 (7th Cir. 1992). In that case, Judge Posner disregarded a "slip of the pen" that required action "before January 12" when it was clear that members of Congress intended to convey a subsidy in the case before the court. *Id.* at 1346 (the "amendment was intended by every member of Congress who voted for it to exempt" the defendant). By contrast, the date enacted in *Locke* still permitted the benefit.

[199] Brief of Amicus Curiae State of Nevada, United States v. Locke, 471 U.S. 84 (1985) (No. 83-1394).

[200] Members of Congress spoke directly to the issue of whether the Act applied outside of Alaska. *See* ESKRIDGE & FRICKEY, *supra* note 7, at 801, 804 (quoting statements of Representatives Udall, Sieberling, and Weaver, and a "Dear Colleague" letter from Senator Melcher).

[201] *See Bob Jones*, 461 U.S. 574, 595 (1983) ("Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education."). Furthermore, the issue was not purely policy or political. Determining the meaning of "charitable" required little knowledge of technical tax law, *see* Livingston, *supra* note 102, at 830 n.49 ("*Bob Jones University* was in many respects an atypical tax case, as it involved significant nontax policy questions and was largely devoid of tax 'context.'"), and the issue did not involve conferring a benefit on a concentrated group, so much as allocating the claims of two competing groups, racially discriminatory schools, and racial minorities.

[202] *See* Freed & Polsby, *supra* note 183, at 1-2 (describing the "public controversy" surrounding the case). For editorials, see N.Y. TIMES, Jan. 12, 1982, at A14; Jan. 19, 1982, at A26; Feb. 5, 1982, at A38; and WASH. POST, Jan 12, 1982, at A16.

[203] *See* Briefs of Amicus Curiae The American Baptist Churches in the U.S.A., The American Civil Liberties Union, The American Jewish Committee, The Anti-Defamation League of B'nai B'rith, The

III. INTERPRETIVE COMMUNITIES AND JUDICIAL AGREEMENT

The debate over the appropriate theory of interpretation blends descriptive and normative perspectives. To appreciate more fully the significance of interpretive communities, it is useful to consider two additional questions. One is "Why do judges agree on statutory interpretation?" Notwithstanding the debate over theory, courts display widespread consensus on statutory issues.[204] Interpretive communities help explain why judges find so many cases easy to decide.[205] Those communities affect a court's choice of theory, its preferences among sources of legislative history, and its decision to defer to administrative interpretation.

A. The Choice of a Theory of Interpretation

Judges show surprising agreement over the theory of interpretation applicable to a given case[206] and, in reaching such agreement, every judge at least occasionally departs from his favored theories. Justices Brennan, Blackmun, and Stevens sometimes adopt textualism,[207] whereas Justice Scalia and Judge Easterbrook sometimes adopt intentionalism.[208]

Center for Law and Religious Freedom of the Christian Legal Society, The Church of God in Christ, Mennonite, The Church of God, The Church of Jesus Christ of Latter-Day Saints, William T. Coleman, Congressman Trent Lott, General Conference Mennonite Church, The Independent Sector, The International Human Rights Law Group, Laurence H. Tribe, Lawrence Lewy, The Lawyers' Committee for Civil Rights Under Law, The National Association for the Advancement of Colored People, The NAACP Legal Defense and Educational Fund, Inc., The National Association of Evangelicals, The National Association of Independent Schools, The National Committee for Amish Religious Freedom, The North Carolina Association of Black Lawyers, The National Jewish Commission on Law and Public Affairs, The United Church of Christ, Bernard Wolfman, Bob Jones Univ. v. United States, 461 U.S. 574, 595 (1983) (No. 81-1 and 81-3).

[204] In the federal system, where most law is statutory, roughly 90% of published courts of appeals opinions are unanimous. *See* Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 856 (noting that in 1983-84, dissents were filed in 5.8% of the total cases decided by the D.C. Circuit (13% of cases decided by full opinion); in 1989-90, dissents were filed in 2.6% of the total cases (10% of cases decided by full opinion)).

[205] Judge Edwards of the D.C. Circuit, for example, finds only 5-15% of his cases "very hard," by which he means involving "some significant measure of discretion." *See* Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 390 (1983-84).

[206] *See* Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1432 (2000) (noting that Judges Posner and Easterbrook disagree with each other in only 1.1% of the cases).

[207] For Justice Brennan, *see, e.g.*, Mallard v. United States Dist. Ct. for the S. Dist. of Iowa, 490 U.S. 296 (1989); Communications Workers of Am. v. Beck, 487 U.S. 735 (1988); Honig v. Doe, 484 U.S. 305, 308 (1988); Int'l Paper v. Ouelette, 479 U.S. 481, 500 (1987) (Brennan, J., dissenting).

[208] For Justice Scalia, *see, e.g.*, Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 669-74 (1990) (appealing to purpose of statute); Blanchard v. Bergeron, 489 U.S. 87, 100 (1989) (seeking to "develop an interpretation of the statute that is reasonable, consistent and faithful to its apparent purpose"); United States v. Fausto, 484 U.S. 439, 444 (1988) (interpreting the Civil Service Reform Act by reference to its "purpose"); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) ("I have been willing, in the case of civil statutes, to acknowledge a doctrine of 'scrivener's error' that permits a court to

The leading explanation for such agreement is Professors Eskridge and Frickey's "practical reasoning" model,[209] which explains judicial agreement over theories of interpretation in terms of a "funnel of abstraction." This funnel begins with statutory text, extends through legislative intent and legislative purpose, and ends with the evolution of the statute and current policy.[210] Practical reasoning gives priority to more concrete theories.[211] A clear text creates a presumption that is overcome only if abstract factors to the contrary are "compelling."[212]

Professor Eskridge uses practical reasoning to explain how judges select a theory of interpretation in a given case. *Board of Governors v. Dimension Financial Corp.*[213] provides a situation in which statutory language proved compelling. In that case, the Supreme Court unanimously struck down regulations extending the jurisdiction of the Federal Reserve Board ("Board") to "nonbank banks." Such institutions perform banking functions, but fall outside the Bank Holding Act definition of a bank as an institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."[214] Attempting to regulate a growing segment of financial institutions, the Board extended this definition to institutions that allowed demand withdrawal and engaged in money market transactions. Contrary to their dynamic approach in *Weber*,

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give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (acknowledging that policy evaluation is "part of the traditional judicial tool-kit").

[209] This model is similar to Ronald Dworkin's view that statutory interpretation is like a chain novel in which legislature and judge write different chapters. Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 541 (1982) ("Suppose that a group of novelists is engaged for a particular project and that they draw lots to determine the order of play. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then sends the two chapters to the next number and so on."); *see also* RONALD DWORKIN, LAW'S EMPIRE 313 (1986) (explaining that a judge interpreting statutes "will treat Congress as an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own [as a judge], and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began. He will ask himself which reading of the act . . . shows the political history including and surrounding that statute in the better light. His view of how the statute should be read will in part depend on what certain congressmen said when debating it. But it will also depend on the best answer to political questions: how far Congress should defer to public opinion in matters of this sort, for example.").

[210] *See* Eskridge & Frickey, *supra* note 5, at 352 (describing funnel of abstraction); *see also* ESKRIDGE, *supra* note 3, at 56 (describing a slightly different version of funnel).

[211] *See* Eskridge & Frickey, *supra* note 5, at 353 ("For example, . . . the interpreter will value more highly a good argument based on the statutory text than a conflicting and equally strong argument based upon the statutory purpose.").

[212] *See id.* at 352 ("[W]hile an apparently clear text . . . will create insuperable doubts for a contrary interpretation if the other evidence reinforces it . . . , an apparently clear text may yield if other considerations cut against it.").

[213] 474 U.S. 361 (1986).

[214] 12 U.S.C. § 1841(c) (1970).

Justices Brennan, Marshall, and White joined Chief Justice Burger's opinion striking down the regulation as contrary to the statutory language. Professor Eskridge defends this result, finding that *Dimension Financial* presented clear statutory language not rebutted by more abstract factors.[215]

Conversely, *Green v. Bock Laundry Machine Co.*[216] provides a situation in which text proved far less compelling. That case considered the meaning of a Federal Rule of Evidence excluding proof of a prior conviction if the probative effect of such evidence was outweighed, on balance, by the prejudicial effect to the "defendant."[217] The Court unanimously rejected a purely textual reading that would have allowed civil defendants, but not civil plaintiffs, to exclude such proof.[218] Agreeing that the rule could not constitutionally differentiate between plaintiffs and defendants in civil cases and that the rule had a drafting error,[219] all the Justices, Scalia included, self-consciously rewrote the statute[220] and consulted legislative history.[221] Professor Eskridge explains *Bock Laundry* as a situation in which compelling abstract factors trumped statutory language.[222] Interestingly, the Court split over how to rewrite the statute. Writing for the Court, Justice Stevens held that Congress actually intended to limit balancing to criminal cases.[223] Dis-

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[215] *See* ESKRIDGE, *supra* note 3, at 1542 ("When the statutory text is reasonably determinate and reflects historically recent legislative deliberation, my cautious model of dynamic interpretation would not counsel further evolution of the statute to reflect changed circumstances of which the legislature was generally aware.").

[216] 490 U.S. 504 (1989).

[217] At the time, Federal Rule of Evidence 609(a) provided:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative effect of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The case also involved Federal Rule of Evidence 403. *See Bock Laundry*, 490 U.S. at 524-26.

[218] Such a rule would likely have been unconstitutional, in which case, no party, even a criminal defendant, would have been entitled to exclude a felony conviction.

[219] *See* ESKRIDGE, *supra* note 3, at 68 ("Interestingly not contested [in *Bock Laundry*] were the propositions that, as written, Rule 609 . . . was unconstitutional, that this was the result of a drafting error, and that the Court should rewrite the rule.").

[220] Scalia did claim that his rewrite did "the least violence to the text." *Bock Laundry*, 490 U.S. at 529.

[221] *See id.* at 527 (Scalia, J., concurring) ("I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify what seems to us an unthinkable disposition (civil defendants but not civil plaintiffs receive the benefit of weighing prejudice) was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word 'defendant' in the Rule.").

[222] *See* Eskridge, *supra* note 15, at 437 (describing *Bock Laundry* as an example of practical reasoning, *i.e.*, accepting most of the text's policy judgments and unprincipled distinctions while rejecting others); *see also* 490 U.S. at 430-31 (finding text not helpful).

[223] *See Bock Laundry*, 490 U.S. at 524 (concluding that Congress "intended that only the accused in a criminal case should be protected from unfair prejudice by the balance test set out in Rule 609(a)(1)").

senting, Justice Blackmun relied on the reasoning of the conference committee report and extended the balancing test to all parties in civil suits.[224]

Somewhere between *Dimension Financial* and *Bock Laundry* are cases in which text holds limited appeal. One such case is *Griffin v. Oceanic Contractors, Inc.*,[225] which considered whether a statute stating that a ship owner "shall" pay a terminated seaman two days' wages for each day the owner fails to pay back wages[226] applied even after the seaman took another job. The Supreme Court split on this issue. Pointing to statutory language, Justice Rehnquist's majority opinion held that the penalty applied.[227] Relying on the "spirit" of the statute, Justice Stevens's dissenting opinion claimed that the statute authorized tolling of damages.[228] Scholars also split on the correct result in *Griffin*. Professors Eskridge and Frickey themselves initially disagreed over the correct result in that case,[229] and Professor Eskridge changed his opinion seven years later.[230] The practical reasoning model indicates that these split opinions result from the difficulty of determining whether abstract considerations were sufficiently compelling to overcome an apparently clear text.[231]

Practical reasoning alone, however, does not explain the agreement over theory in these cases. That model contains no means for assessing clarity or attaching weight to abstract factors. Thus, it does not explain the opposite conclusions reached in *Dimension Financial* and *Bock Laundry*. Practical reasoning does not indicate that the Bank Holding Act is clearer than the Federal Rules of Evidence. Both can be read literally. Nor does it indicate why upholding the integrity of federal banking regulation is less

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[224] *See id.* (Blackmun, J., dissenting) ("[T]he reasoning of the Report suggests that by 'prejudice to the defendant,' Congress meant 'prejudice to a party.'").

[225] 458 U.S. 564 (1982).

[226] The statute provided that "[e]very master or owner who refuses or neglects to make payments in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to the two days' pay for each and every day during which payment is delayed beyond the respective periods." 46 U.S.C. § 596 (1983).

[227] *See Griffin*, 458 U.S. at 574 ("Congress intended the statute to mean exactly what its plain language says.").

[228] *See id.* at 577 n.1 (Stevens, J., dissenting) (quoting Holy Trinity Church v. United States, 143 U.S. 457 (1892)).

[229] *See* Eskridge & Frickey, *supra* note 5, at 339 n.69 ("In the end, one of us is comfortable with the outcome in *Griffin*. The other is uncomfortable, but leaning in that direction as well.").

[230] *Compare* Eskridge & Frickey, *supra* note 5, at 339 n.69 ("[I]f one concludes that the award in *Griffin* will deter maritime system-wide abuse of a relatively defenseless class of employees, that result seems quite plausible."), *with* ESKRIDGE, *supra* note 3, at 201 ("I am now inclined to agree with Justice John Paul Stevens.").

[231] Professors Eskridge and Frickey recognize this difficulty in *Griffin*. *See* Eskridge & Frickey, *supra* note 5, at 349 (explaining that the Court's result was supported by the "relatively clear statutory language, the original legislative intent, the overall statutory purpose, and (to some extent) the reasonableness of the interpretation.").

compelling than avoiding a holding of unconstitutionality.[232] Likewise, practical reasoning does not explain why *Griffin* proved so difficult. It does not explain why judges disagreed over the relative weight to be attached to a literal reading of "shall" compared to the policy avoiding harsh results.

The interpretive community account helps explain pragmatic intuitions. Interpretive communities form part of the cultural context shaping judicial opinions.[233] The communities' views filter through to judges in two ways. First, interpretive communities author the statute. Their perspective seeps through materials produced during enactment. Second, interpretive communities comprise the audience for the judicial opinion. Judges consider potential legislative responses to their decisions,[234] and those responses differ depending upon the community affected. Thus, judges distinguish the momentous[235] from the trivial.[236] They know which opinions engage the policy,[237] political,[238] and public communities.[239]

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[232] For a similar argument, see Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 408 (1989) ("Eskridge's analysis of [*Weber* and *Dimension*] as involving polar opposites in a dynamic model is open to question. The statute at issue in *Dimension* looks at least as indeterminate as that in *Weber*. Why argue against dynamic interpretation in *Dimension* but for judicial updating in *Weber*?").

[233] *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60 (1960); RICHARD A. POSNER, PROBLEMS IN JURISPRUDENCE 100 (1990) ("Thinking like a lawyer" is "neither method nor doctrine, but a repertoire of acceptable argument and a feel for the degree and character of doctrinal stability, or more generally, for the contours of a professional culture.").

[234] *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 149 (1998) (citing an empirical study finding that in nearly 60% of cases, a justice makes some comment about the preference and likely actions of other government actors); DAVIS, *supra* note 196, at 172 (reporting that over 60% of Supreme Court press corps believe that Congress or White House reaction is at a least a "somewhat important factor" in the justices' decision-making process). Even textualist judges consider the reactions of other branches. *See* United States v. Taylor, 487 U.S. 326, 346 (1988) (Scalia, J., concurring in part) (arguing that statutes should be interpreted "in a fashion which fosters that democratic process"); Schacter, *supra* note 3, at 645 (arguing that Justice Scalia and Judge Easterbrook's textualism attempts to foster democracy by encouraging better drafting and narrowing statutory law).

[235] For example, when the Court accepted a case to reconsider *Roe v. Wade*, 410 U.S. 113 (1973), it was swamped with letters and public protests. *See* EDWARD LAZARUS, CLOSED CHAMBERS 373-74 (1998).

[236] Justices regard some cases as trivial. *See* BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 113 (1996) (stating that Justice Stewart called them "dogs" or "nothing cases"); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 148 (1979) (noting that Justice Harlan called such cases "peewees"); *id.* at 425 (claiming that Justice Brennan had a scatological name for them); *id.* at 490 (relating that Justice Rehnquist had "nothing but contempt" for them).

[237] *See* DAVIS, *supra* note 196, at 172 (reporting that over half of the Supreme Court press corps believes that the legal community's potential reaction is at least "a somewhat important factor" in the Justices' decisionmaking process).

[238] *See id.* at 147 (describing the effect of amicus briefs on grants of certiorari).

[239] *See id.* (reporting that nearly half of the Supreme Court press corps believe that public opinion polls and press coverage of court are "somewhat important factors" in the Justices' decisionmaking process).

The focus on prominent cases like *Weber*[240] has largely obscured the influence of interpretative communities on statutory interpretation. Presenting a wide array of options, public issues such as civil rights often spark disagreement.[241] They inspire some to engage in dynamic interpretation[242] and encourage even traditionalists, including Justices Brennan and Rehnquist, to invoke concepts far removed from the statutory issue of the meaning of "discrimination,"[243] such as the "plight of the Negro in our economy"[244] and "equality."[245]

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[240] *See* Frickey, *supra* note 9, at 245 ("*Weber* was a very visible and important decision. In 1979, the affirmative action issue was not just on the minds of many judges, attorneys, legislators, academics, and other opinion leaders, it was a matter of general conversation."). The Court received over 25 amicus briefs from employers, employees, and civil rights groups. *See* Briefs of Amicus Curiae The Affirmative Action Coordinating Center; The American Civil Liberties Union; The American Federation of State, County and Municipal Employees; The American G.I. Forum; The Asian American Legal Defense and Educational Fund; The California Correctional Officers Association; The California Fair Employment Practice Commission; The Chicago Lawyers Committee for Civil Rights Under Law; The City of Los Angeles; The Committee on Academic Nondiscrimination and Integrity; The Congressional Black Caucus; The Equal Employment Advisory Council; The Government Contract Employees Association; The Lawyers' Committee for Civil Rights Under Law; The National Association for the Advancement of Colored People; The NAACP Legal Defense and Educational Fund, Inc.; The National Coordinating Committee for Trade Union Action and Democracy; The National Medical Association; The National Puerto Rican Coalition; The National Union of Hospital and Health Care Employees; The Pacific Legal Foundation; The Honorable Patricia Schroeder; The United Electrical, Radio and Machine Workers of America; The Washington Legal Foundation; The Southeastern Legal Foundation; The Women's Equal Rights Legal Defense Fund; United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (Nos. 78-432, 78-435, 78-436).

[241] *See* Thomas R. Hensley & Scott P. Johnson, *Unanimity on the Rehnquist Court*, 31 AKRON L. REV. 387, 404 (1998) ("While 51% of non-civil liberties cases were unanimous, only 27% of civil liberties cases unified the Justices."); *see also* C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUE, 1937-1947, at 25-31 (1948) (demonstrating that attitudes are a critical determinant of civil liberties cases), *supra* notes 104, 195 and accompanying text.

[242] *See* ESKRIDGE, *supra* note 3, at 1516; Zeppos, *supra* note 232, at 408 ("Perhaps the reason that Eskridge [argues for dynamic interpretation in *Weber* but not in *Dimension Financial* is that Eskridge] (like myself) cares more about affirmative action than he does about interstate banking."). This public quality may have persuaded Justice Marshall to join the majority, notwithstanding his textualist opinions in *Locke* and *Arkansas Best*. *See supra* text accompanying note 232; *see also* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 785 n.32 (1998) ("[T]he Justices of the Supreme Court, like many of the rest of us, likely have stronger policy preferences about abortion, affirmative action, prayer in the schools, pornography, gay rights, and the rights of those accused of crimes than about many questions of common law or statutory interpretation. . . . That being the case, the empirical analysis might conclude that legal variables . . . would have more explanatory and predictive power for non-Supreme Court constitutional cases than they do for that quite limited set.").

[243] *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, TEACHERS' MANUAL FOR CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 21 (1995) (criticizing both Brennan and Rehnquist for "taking one broad purpose and running with it"); *id.* (stating that most of the legislative history cited by Brennan is equally susceptible to a color blind reading); *id.* at 22 (noting that "at least most of" the legislative history quoted by Rehnquist has "little to do with the issue in *Weber*").

[244] *Weber*, 443 U.S. at 202 (quoting remarks of Senator Humphrey).

[245] *See id.* at 254 (Rehnquist, J., dissenting) ("For if the spirit of the Act eludes the cold words of the statute itself, it rings out with unmistakable clarity in the words of the elected representatives who made the Act law. It is *equality*.").

Most low profile cases present a narrower range of options. Judges usually agree on routine issues,[246] and the interpretative community account helps explain why. Agreement is more likely for issues involving a single community. The textualist approach adopted in *Dimension Financial* reflected the importance of the issue to the political community. The statutory exception to the Bank Holding Act conferred a concentrated benefit on organized groups.[247] External markers confirm political interest. Politicians discussed the issue,[248] as did the trade press.[249] Two industry groups filed amicus briefs on the issue.[250]

By contrast, the decision to rewrite the statute in *Bock Laundry* reflects the ease with which the issue of whether the statute "meant what it said" fell within the domain of the policy community. Legal expertise confirmed the irrationality of distinguishing between plaintiffs and defendants in civil cases.[251] That distinction was unrelated to the political compromise. The House bill allowed impeachment only with crimes involving veracity,[252] whereas the Senate bill also permitted impeachment with felony convictions.[253] The conference agreement compromised by allowing impeachment with crimes involving veracity and felony convictions for which the probative value of admission exceeded the prejudicial effect to the defendant. Likely added by staff, the word "defendant" was wholly unrelated to this deal. By contrast, the decision as to how to rewrite the statute—whether to require bal-

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[246] *See* Hensley & Johnson, *supra* note 241, at 399 ("While 44% of routine cases were unanimous, the Court achieved unanimity in only 16% of important cases."). Routine issues were those not reported by the *New York Times* or the *United States Supreme Court Reports: Lawyers Edition*. *See* THOMAS HENSLEY ET AL., THE CHANGING CONSTITUTION: CONSTITUTIONAL RIGHTS AND LIBERTIES 864 (1997); *see also* Edward N. Beiser, *The Rhode Island Supreme Court: A Well Integrated Political System*, 8 LAW & SOC'Y REV. 167, 175 (1973). Quick decisions also tend to be unanimous. *See* Hensley & Johnson, *supra* note 241, at 397 ("[W]hen the Justices spent less than three months between oral argument and the decision date, the Court ruled unanimously in 55% of its decisions. Conversely, when the Justices devoted more than three months to a case, the Court resulted in unanimity only 23% of the time.").

[247] The demand deposit language was added to exempt savings banks and industrial banks. *See* S. REP. NO. 89-1179, at 12 (1966). The requirement that banks make commercial loans was added to remove a single institution. *See* 116 CONG. REC. 25,848 (1970) (amendment by Senator Brooke to remove the Boston Safe Deposit and Trust Co.).

[248] *See* 116 CONG. REC. 25,848 (1970) (amendment by Senator Brooke).

[249] *See, e.g.*, Steve Blakely, *Non-Bank Bank Controversy Blocks Key Industry Legislation*, 44 CONG. Q. WKLY. REP. 2143 (1986); Leon E. Wynter, *Congress Is Squeezed on 'Nonbank' Issue, Growing Numbers of Firms Seek Market Entry*, WALL ST. J., Mar. 12, 1986, at A6.

[250] *See* Briefs of Amicus Curiae Independent Bankers Association of America, Sears, Roebuck and Co., Bd. of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986) (No. 84-1274).

[251] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989) ("No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant.").

[252] *See* H.R. REP. NO. 93-650, at 11 (1973).

[253] *See id.*; *see also* 120 CONG. REC. 37,076, 37,083 (1974). The conference agreement compromised by admitting crimes involving veracity and felony convictions for which the probative value of admission exceeded the prejudicial effect to the defendant.

ancing in all cases or just in criminal cases—stands closer to the political deal. Politicians clearly cared about how often felony convictions would be admitted and might conceivably have limited balancing to criminal cases.

Secondary sources confirm that the *Bock Laundry* issue fell within the policy community. The rules of evidence were initially drafted by an advisory committee appointed at the recommendation of the Judicial Conference of the United States,[254] and after deciding *Bock Laundry*, the Supreme Court itself modified the applicable rule.[255] No politician or group spoke to the disparity between plaintiffs and defendants in civil suits. The only amicus brief was filed by state attorneys general.[256]

Conversely, theoretical disagreement is more likely for issues for which community responsibility is murky. The split opinion in *Griffin* reflects the difficulty of determining the responsible community for the tolling issue. Justice Rehnquist viewed the issue as part of a political deal.[257] That community sometimes prescribes penalties exceeding any possible harm, here an award of over $300,000 for a wrongful failure to pay $412.50 in wages.[258] Justice Stevens viewed the issue as one for the policy community. Bent on avoiding absurd results,[259] that community is unlikely to allow damages so greatly exceeding compensation.[260]

On their face, both characterizations are plausible. The tolling issue was related, but not central, to a political deal. The back pay provision was intended to benefit American seamen, an organized interest group.[261] At the same time, the tolling of damages was traditionally a policy question.[262] Long established judicial practice permitted such tolling,[263] politicians were silent on the issue, and no amicus briefs were filed in the case.

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[254] *See* 490 U.S. at 504.

[255] *See* FED. R. EVID. 609(a)(1), (2) (adopted Dec. 1, 1990).

[256] *See* Brief of Amici Curiae Commonwealth of Pennsylvania et al., Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989) (No. 87-1816).

[257] *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (describing the provision as "'designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and thus to induce prompt payment when payment is possible'") (quoting Collie v. Fergusson, 281 U.S. 52 (1930)).

[258] *See id.* at 576 ("It is probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute.").

[259] *See id.* at 578 n.1 (Stevens, J., dissenting) (noting the importance of avoiding absurd results).

[260] *See id.* at 590 (Stevens, J., dissenting).

[261] The purpose of the legislation generally was "the amelioration of the condition of the American seamen," and the wage provision was "designed to secure the promptest possible penalty." H.R. REP. NO. 55-1657, at 2-3 (1898); *see also* S. REP. NO. 54-832, at 2 (1896).

[262] *See* ESKRIDGE, *supra* note 3, at 201 (noting that courts "have routinely imported equitable tolling exceptions" into statutes of limitations).

[263] *See Griffin*, 458 U.S. at 580 (Stevens, J., dissenting) (citing Pacific Mail S.S. Co. v. Schmidt, 241 U.S. 245 (1916)).

B. The Use of Legislative History

Judges also display widespread agreement over the relative importance of different sources of legislative history.[264] At the top of the hierarchy are committee reports, which receive the most citations[265] and the greatest weight.[266] In the middle are statements by representatives, which receive less weight,[267] unless made by a drafter or sponsor.[268] At the bottom are media accounts—press releases, advertising, and newspaper articles—which are seldom cited.[269]

The leading explanation for the hierarchy of legislative history is constructive notice. Committee reports receive the most weight because legis-

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[264] *See* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41-42 ("Over the years, courts looking to legislative history to explain statutory meaning developed a rough hierarchy of interpretational weight that should be given to the different elements of legislative history. Traditionally—and as a general matter—committee report explanations are considered more persuasive and reliable than statements made during floor debates or during hearings on a bill. Within the category of floor debates, statement of sponsors and explanations by floor managers usually are accorded the most weight, and statements by other committee members are next in importance. Statements by Members not associated with sponsorship or committee consideration of a bill are accorded little weight and statements by bill opponents generally are discounted or considered unreliable. Committee hearings are generally treated the same way as floor debates: Statements by sponsors or drafters are most persuasive, views of other witnesses seldom carry much weight, and fears of opponents usually are dismissed as unreliable."); Eskridge, *supra* note 26, at 636-40 (describing the recent judicial hierarchy of legislative history materials (drawing from the 1980s): committee reports, sponsor statements, rejected proposals, floor and hearing colloquy, views of nonlegislator drafters, legislative inaction, and subsequent legislative history); *see also* ESKRIDGE, *supra* note 3, at 222.

[265] *See* Carro & Brann, *supra* note 66, at 291 (noting that from 1938-1979, 45% of Supreme Court legislative history citations were to House or Senate committee reports); Koby, *supra* note 66, at 390 (finding the same pattern).

[266] *See* 2A SUTHERLAND STAT. CONST. § 48.06 (Norman J. Singer ed., 5th ed. 2000) ("Committee reports represent the most persuasive indicia of congressional intent in enacting a statute."); Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125, 1131-32 (1983) (explaining that after commission recommendations, "[c]ommittee reports are the second most reliable kind of legislative history"); Wald, *supra* note 4, at 201 ("Committee reports indeed remain the most widely accepted indicators of Congress's intent.").

[267] A longstanding rule bars consideration of member statements. *See* 2A SUTHERLAND STAT. CONST. § 48.13 ("Statements by individual members of the legislature about the meaning of provisions in a bill . . . are generally held not to be admissible as aids in construing the statute."). This rule has eroded as courts increasingly consider floor statements, *see id.* (describing increased willingness to consider statements made in legislative debates), and hearing testimony, *see* Wald, *supra* note 4, at 202 ("The worth of hearings—selectively used—seems to be increasing. . . . In many cases the best explanation of what the legislation is about comes from the executive department or outside witnesses at the hearings."); *see also* Eskridge, *supra* note 26, at 636-40.

[268] *See* Note, *A Re-Evaluation of the Use of Legislative History in the Federal Courts*, 52 COLUM. L. REV. 125, 129-30 (1952) (explaining that courts generally refuse to admit statements by individuals, but give weight to statements by drafters and legislative sponsors).

[269] *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretative Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 122 (1995) (remarking that only 2% of courts interpreting statutes adopted by popular initiative considered media reporting or advertising relevant).

lators are most likely to notice and accept the views of persons closest to the legislation.[270] According to this view, legislators are less likely to heed member statements and are unlikely even to notice media descriptions.

Constructive notice, however, is a poor explanation of the hierarchy. First, that theory does not explain legislator behavior. Legislators seldom read committee reports. Written by staff, such reports may not be read by even a single legislator.[271]

Nor does constructive notice explain judicial behavior. First, that theory does not explain why courts routinely favor drafter's statements over materials more likely to have been noticed by the persons voting for the bills. For example, judges give greater weight to commission recommendations than to staff reports written by persons directly accountable to legislators.[272] Similarly, in interpreting referenda and public initiatives, courts ignore likely notice by considering accompanying explanatory material,[273]

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[270] *See* Zuber v. Allen, 396 U.S. 168, 186 (1969) ("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report."); *see also* 2A SUTHERLAND STAT. CONST. § 48.06 ("[M]ost members of Congress are likely to consult the committee report in order to gain an understanding of the purpose and effect of a bill before they cast their votes."); Eskridge, *supra* note 26, at 638 (suggesting that sponsor statements receive weight because sponsors "are the Members of Congress most likely to know what the proposed legislation is all about, and other Members can be expected to pay special heed to their characterizations of the legislation").

[271] Justice Antonin Scalia and Judge Kozinski both recognize this fact. *See* Wallace v. Christensen, 802 F.2d 1539, 1560 (9th Cir. 1986) (Kozinski, J.) ("Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports."); Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) ("I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill.").

This recognition may underlie the recent willingness to consider floor statements, which at least reflect the intent of actual legislators. Indeed, Justice Scalia's argument that legislators do not read committee reports relied upon a colloquy on the Senate floor. *See Hirschey*, 777 F.2d at 7 n.1. The increasing use of floor statements suggests that the theory for using legislative history might be shifting from constructive to actual intent. The problem with relying on actual intent is that floor statements reflect only the beliefs of one person, not the entire chamber.

[272] For legislation originating from an outside commission, the accompanying description is most important. *See* Dickerson, *supra* note 266, at 1130-31 (explaining that reports of official bodies charged with finding legislative solutions are the most reliable type of legislative history); 2A SUTHERLAND STAT. CONST § 48.09 (Norman J. Singer ed., 5th ed. 1992) (describing the well-settled rule that a report of a commission on a revision of statutory law is evidence of legislative intent and that such report is entitled to greater weight than the report of a standing committee). Reporters' notes for uniform laws, for example, receive great weight. *See id.* § 48.11 ("Official commentary on the Uniform Commercial Code has been cited as 'powerful dicta' and 'a most appropriate source' of law."). Even Justice Scalia relies on advisory committee notes. *See* Hohn v. United States, 524 U.S. 236, 255 (1998) (Scalia, J., dissenting) (relying on advisory committee note for meaning of federal rule of appellate procedure); United States v. Owens, 484 U.S. 554 (1988) (relying on advisory committee note for meaning of federal rule of evidence).

[273] *See* 2A SUTHERLAND STAT. CONST., *supra* note 266, § 48.19 (remarking that explanations and informative materials on a proposed initiative are considered relevant legislative history for purposes of its construction after enactment).

but not media accounts.[274] Finally, notwithstanding their central position in the political deal, conference reports receive fewer citations[275] and less weight[276] than committee reports.

Second, constructive notice does not explain longstanding judicial willingness to examine materials that could not have been noticed by the enacting legislators. Courts traditionally consider postenactment staff descriptions of statutes, which cannot provide notice to enacting legislators.[277] Indeed, postenactment staff statements apparently receive more weight than those of representatives themselves. A legislator's sworn testimony has long been inadmissible on the issue of congressional intent.[278]

Third, constructive notice does not explain the occasional use of legislative history by textualist judges. Justice Scalia considers legislative history to confirm that Congress did not intend an absurd result,[279] and Judge Easterbrook consults legislative history to determine the meaning of technical language.[280] Constructive notice does not explain why textualists are less concerned about manipulation in these situations.

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[274] *See* Schacter, *supra* note 269, at 130 ("Put simply, the hierarchy of interpretive sources that courts consult in the asserted service of locating popular intent is roughly *inverse* to the hierarchy of informational sources that voters consult most regularly in ballot campaigns.").

[275] *See* Carro & Brann, *supra* note 66, at 291 (showing that from 1938-1979, 2% of Supreme Court legislative history citations were to House or Senate conference reports).

[276] *See* Costello, *supra* note 264, at 47-50 (ranking conference committee action and reports below committee reports in hierarchy of materials).

[277] *See* 2A SUTHERLAND STAT. CONST. § 48.06 (explaining that committee reports discussing previously enacted statutes are "'entitled to some consideration as a secondarily authoritative expression of expert opinion'") (quoting Bobsee Corp. v. United States, 411 F.2d 469 (5th Cir. 1969)). For example, in interpreting tax legislation, courts regularly examine the General Explanation prepared by staff of the Joint Committee on Taxation after enactment. *See* Michael Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of "Subsequent" Tax Legislative History*, 11 AM. J. TAX POL'Y 91, 103 (1994) ("[C]ourts have almost uniformly been willing to consult the Blue Book.").

[278] *See* SUTHERLAND STAT. CONST. § 48.16 ("In construing a statute the courts refuse to consider testimony about the intent of the legislature by members of the legislature which enacted it."); *see also* City of Spokane v. State, 89 P.2d. 826, 828-29 (Wash. 1939) (holding legislator affidavits inadmissible on legislative intent); *cf.* Western Air Lines v. Bd. of Equalization, 480 U.S. 123, 130 n.* (1987) (refusing to consider lobbyist affidavit).

Another example of judicial willingness to examine materials not seen by the enacting legislators is *Kosak v. United States*, 465 U.S. 848 (1984), in which the Supreme Court relied upon an internal Department of Justice memorandum never introduced into the legislative record. *Id.* at 857 n.14, 863 (Stevens, J., dissenting) ("There is no indication that any Congressman ever heard of the document or knew that it even existed."). *See generally* Note, *The Value of Nonlegislators' Contributions to Legislative History*, 79 GEO. L.J. 359 (1990).

[279] *See supra* note 221.

[280] *See In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (arguing that legislative history "may show, too, that words with a denotation 'clear' to an outsider are terms of art, with an equally 'clear' but different meaning to an insider"); Cont'l Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers (Indep.) Pension Fund, 916 F.2d 1154, 1158 (7th Cir. 1990) (relying on a floor manager's definition that used a term of art "in the customary way").

The interpretive community account better explains the use of legislative history. The hierarchy of legislative history reflects the origins of the materials in different communities. Courts favor evidence emanating primarily from the policy community. That community authors commission recommendations, committee reports, conference reports, and sponsor statements. Furthermore, preferences among these materials reflect their proximity to the policy community. Commissions are typically drawn from eminent members of the policy community; committee reports are written by professional staff, albeit at the direction of members;[281] conference reports are staff descriptions of member decisions; and sponsor statements are often, though not necessarily, written by staff.[282]

The preference for materials from the policy community reflects the role that community plays in most legal issues. Deeply immersed in the statutory language with which courts grapple,[283] this community simply has more to say about issues typically confronting judges. Furthermore, this community's cohesion permits it to reach consensus over the reasoned analysis most usable by courts. These factors explain the great weight assigned advisory committee notes.[284]

By contrast, evidence from the political community—individual legislator statements, press releases, hearing statements—generally receives less weight. This community operates at a managerial level, further removed from statutory language and the daily decisions facing courts.[285] Furthermore, judges have greater difficulty utilizing evidence from the political community. Such evidence does not represent the considered consensus of a community guided by reasoned argument, but only one viewpoint in a pluralistic process. Without a vote, it is uncertain whether a statement reflects the views of that community.

Thus, interpretive communities explain the present-law anomaly according postenactment staff statements more weight than legislator testimony. Postenactment staff statements at least represent the reasoned

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[281] *See* Brudney, *supra* note 3, at 49 ("It is widely recognized that congressional staff play the major role in drafting legislative history."); *see also* C. LAWRENCE EVANS, LEADERSHIP IN COMMITTEE 127-34 (1991); KOFMEHL, *supra* note 101, at 118-26; Costello, *supra* note 264, at 137.

[282] *See* Brudney, *supra* note 3, at 52 n.206 ("[F]loor statements by the bill manager and other leading sponsors also are likely to be drafted by committee staff."); *see also* KOFMEHL, *supra* note 101, at 123-24.

[283] *See* Brudney, *supra* note 3, at 53 ("The same actors who draft legislative history are involved in drafting statutory language.").

[284] *See* Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring) ("Having been prepared by a body of experts, the Notes are assuredly persuasive scholarly commentaries—ordinarily *the* most persuasive—concerning the meaning of the rules. But they bear no special authoritativeness as the work of the draftsmen."). The preference for materials from the policy community also explains the willingness to consider internal memoranda never introduced into the legislative record. *See Kosak*, 465 U.S. 848.

[285] *See* Zeppos, *supra* note 24, at 1312 (proposing that while only a small proportion of legislators read committee reports, "this would seem to be equally true of the text of the bill") (footnote omitted).

consensus of an ongoing community. In contrast, legislator statements are not representative outside the legislative process.[286]

The interpretive community account also illuminates the textualist use of legislative history. Textualist resistance to legislative history assumes that such history emanates from the political community. "Manipulation" is a problem only if there exists the competing interests distinctive of that community.[287] Thus, textualists are more willing to consider legislative history for nonpolitical issues. Take, for example, Justice Scalia's reliance on legislative history to confirm that Congress did not intend an absurd result. Utter silence indicates that the issue lacked political interest. Similarly, Judge Easterbrook's examination of the legislative history of technical language reflects the fact that such language seldom engages the political community.

Finally, materials from the public community receive even less weight. This community is usually far removed from issues facing courts.[288] Although theoretically accessible, the public perspective rarely bears on statutory interpretation.[289] The public has at best a nodding acquaintance with statutory language. Furthermore, media accounts lack authority. The diversity of the public community weakens the claim of any text to being representative. Together, the distance of the public community from legal issues and the lack of authority help explain why judges interpreting referenda consult explanatory materials, but not media descriptions.

C. Reliance on Administrative Interpretation

Finally, judges display widespread agreement over when to defer to administrative interpretation.[290] Such agreement is not readily understood in terms of legal doctrine. Prior to *Chevron*, judges faced two conflicting

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[286] *See* Posner, *supra* note 131, at 275 ("The deal is struck when the statute is enacted. If courts paid attention to subsequent expression of legislative intent not embodied in any statute, they would be unraveling the deal that had been made; they would be breaking rather than enforcing the legislative contract.").

[287] Manipulation means "to change by . . . unfair means so as to serve one's own advantage." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 708 (10th ed. 1993). That word, therefore, presumes persons with differing interests. Manipulation cannot occur if the legislature is a unitary actor or deliberative forum, for in those situations there is no "other" to disadvantage.

[288] This is true even of high profile bills. In describing the Civil Rights Act of 1991, for example, Professor Schacter notes that "despite the extensive press coverage the 'quota' controversy received, little of the legal complexity was—or perhaps could have been—captured in the media's characterizations and coverage of the debate." Schacter, *supra* note 269, at 166.

[289] It has more bearing, however, on foundational issues—thus, the reliance on the Federalist papers in constitutional interpretation. *See generally* William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301 (1998).

[290] *See* Gregory E. Maggs, *Reconciling Textualism and the* Chevron *Doctrine: In Defense of Justice Scalia*, 28 CONN. L. REV. 393, 413 (1996) (finding that, despite his extreme views, Justice Scalia usually sided with the majority in *Chevron* cases); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1005-06 (finding that circuit courts issue a single opinion in 87% of administrative law cases).

rules:[291] one requiring deference to administrative interpretation;[292] the other authorizing independent judgment.[293] *Chevron* ostensibly resolved this conflict by formulating a two-step test. The court must first ask whether Congress addressed the question before the court. If so, congressional intent controls. Second, if Congress did not address the question, the court must ask if the agency interpretation is a permissible construction of the statute. If so, the interpretation controls.[294]

This two-step test, however, does not adequately explain the situations in which courts defer to agency interpretations.[295] Take, for example, the divergent results reached in *Chevron* and *Dimension Financial.* In *Chevron*, the Court determined that Congress had not addressed whether the term "stationary source" referred to an entire plant and found permissible the EPA's interpretation of that term. In *Dimension Financial*, it determined that Congress had addressed whether the term "bank" referred to money market funds and found the Federal Reserve's construction of that term unreasonable. These unanimous, yet opposing, opinions reflect an influence outside the *Chevron* framework. Indeed, close reading reveals that the

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[291] *See* Pittston Stevedoring Corp. v. Dellaventua, 544 F.2d 35, 49 (2d Cir. 1976) (explaining that, with respect to deference to agency interpretations of statutes, "there are two lines of Supreme Court decisions on this subject which are analytically in conflict"), *aff'd sub nom.* Northeast Marine Terminal Operating Co. v. Caputo, 432 U.S. 249 (1977); KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 375 (1976) ("[T]he Supreme Court has long maintained two lines of cases on the scope of review of applying law to undisputed or established facts. In one line, the Court substitutes judgment and in the other it uses a reasonableness or rational basis test."); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 563-64 (1985); Llewellyn, *supra* note 4, at 404 ("After enactment, judicial decision upon interpretation of particular terms and phrases controls," but "[p]ractical construction by executive officers is strong evidence of true meaning.").

[292] *See, e.g.*, Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

[293] *See, e.g.*, Barlow v. Collins, 397 U.S. 159, 166 (1970) ("[W]here the only or principal dispute relates to the meaning of the statutory term . . . the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [agency], but by judicial application of canons of statutory construction.").

[294] The Court wrote:

> When a court reviews an agency's construction of the statute that it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43(1984) (citations omitted).

[295] Although *Chevron* makes deference the default rule, empirical studies show little effect on deference at the Supreme Court. *See* Merrill, *Executive Precedent, supra* note 27, at 984 (stating that an empirical study of Supreme Court decisions found "no discernable relationship between the application of the *Chevron* framework and greater acceptance of the executive view").

Court applied the framework quite differently in the two cases. In *Chevron,* the Court inquired into whether Congress had addressed the question by asking whether Congress had "directly spoken to the precise question at issue" and examining legislative history.[296] In *Dimension Financial,* it conducted that inquiry by asking whether the statute was "clear and unambiguous" and focusing exclusively on statutory language.[297] Applying the *Chevron* approach to *Dimension Financial* might have altered the result in that case. In a sense, Congress did not "directly" speak to the treatment of money market funds because such funds did not exist when the exceptions to the Bank Holding Act were enacted.

Furthermore, the Court applied the second step quite differently in the two cases. In *Chevron,* the Court found the EPA interpretation reasonable because the scheme was "technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involve[d] . . . conflicting policies."[298] In *Dimension Financial,* the Court adopted a narrow view of reasonableness, finding the agency interpretation unreasonable because it conflicted with specific statutory language.[299] Had the Court utilized the *Dimension Financial* approach in *Chevron,* it might have reached a different conclusion. The EPA's interpretation of "stationary source" contradicted prior case law defining that term.[300]

An appreciation of interpretive communities helps explain judicial agreement over the deference owed agency interpretation. First, the weight attached to agency determinations diminishes for political decisions. Such issues are not susceptible to the reasoned analysis in which agencies excel. Second, the weight attached to agency determinations diminishes with their proximity to the legal community. The closer the question to traditional legal expertise, the less the need to rely on outside authority.

Both tendencies underlie the conflicting results reached in *Chevron* and *Dimension Financial.* The issue in *Dimension Financial* was more political. Over the years, Congress had enacted exceptions conferring concentrated benefits upon specific industries. This political quality makes text especially appealing in *Dimension Financial.* By contrast, Congress showed no interest in defining the term "stationary source."[301]

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[296] 467 U.S. at 842, 851-53.

[297] 474 U.S. 361 (1986).

[298] 467 U.S. at 865 (citations omitted).

[299] 474 U.S. at 373.

[300] Circuit court precedent had already defined "stationary source" as excluding plantwide application, at least for programs enacted to improve air quality. *See* Ala. Power v. Costle, 636 F.2d 323, 402 (D.C. Cir. 1979); ASARCO Inc. v. EPA, 578 F.2d 319, 326-27 (D.C. Cir. 1978).

[301] *Chevron,* 467 U.S. at 845 ("Congress did not have a specific intention on the applicability of the bubble concept in these cases.").

The question of plantwide application fell below the political radar screen.[302]

Furthermore, to the extent that it involved policy, the issue in *Dimension Financial* was more legal than the one involved in *Chevron*. Lawyers regularly encounter "commercial loans" and "legal rights,"[303] but not "stationary sources." Small wonder, then, that judges would find a plain meaning in the Bank Holding Act, but not in the Clean Air Act.

IV. INTERPRETIVE COMMUNITIES AND THE RULES GOVERNING STATUTORY INTERPRETATION

The interpretive community account bears not only on questions about the appropriate theory or why judges reach agreement. It also bears on the question: "What rules of interpretation should courts adopt?" Interpretive communities shape widely held norms for statutory interpretation, the most prominent of which is representative democracy.[304] Political theorists have long valued representative democracy for the decisions it produces.[305] John Stuart Mill regarded democracy as the government by the best qualified because the individual "is the only safe guardian of his own rights and interests."[306] James Madison argued that representation refined public views[307]

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> Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

Id. at 865.

303 *See* BLACK'S LAW DICTIONARY 947, 1323 (7th ed. 1999) (defining "commercial loan" and "legal right").

304 *See* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 345 (1997) ("For decades, democratic legitimacy has served as the principal touchstone of statutory interpretation theory."); Schacter, *supra* note 3 (describing scholarly positions on statutory interpretation in terms of democracy).

305 *See generally* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 330-37 (1997) (describing why democracy produces high quality decisions). Another tradition values democracy because the process itself is morally valuable, regardless of the ultimate decisions. *See id.* at 323-30. Regarding representation as a concession to necessity, *see id.* at 339, that tradition has little to say about representative decisionmaking.

306 JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861), *reprinted in* JOHN STUART MILL, UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 187, 224 (H.B. Acton ed., J.M. Dent & Sons 1972); *see also* HERBERT SPENCER, *Representative Government—What Is It Good For?*, *in* THE MAN VERSUS THE STATE 331, 375 (Liberty Classics 1981) (1892) (A "man will protect his own interests more solicitously than others will protect them for him. Manifestly, where regulations have to be made affecting the interests of several men, they are most likely to be equitably made when all those concerned are present, and have equal shares in making of them.").

by adding expertise.[308] Accordingly, a representative "must act independently in his constituents' interest and yet not normally conflict with their wishes."[309] Constituent opinion assumes greater importance for issues requiring little knowledge.[310]

The interpretive community account grounds theoretical accounts of representative democracy in the "ways and attitudes of varied people" that comprise our "working Constitution."[311] Governance involves a chain of authority. Sovereignty resides in the public community, the persons ultimately affected by governmental decisions. The public community entrusts decisions to the political community.[312] Responding to the national mood as expressed in the media and public opinion polls, the political community makes trade-offs among competing goods and delegates the remaining issues to the policy community to "work out" over time.[313] Representing the public,[314] the policy community selects among a relatively narrow range of options, relying on expertise to determine the public good.

Accordingly, representative democracy directs judges to adopt the perspective of the community responsible for the issue. As Felix Frankfurter observed, "If a statute is written for ordinary folk, it would be arbitrary not

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[307] Madison claimed that a representative government would "refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." THE FEDERALIST NO. 10, at 126 (James Madison) (Isaac Kramnick ed., 1987).

[308] *See* THE FEDERALIST NO. 53, at 328 (James Madison) (Isaac Kramnick ed., 1987) ("No man can be a competent legislator who does not add to an upright intention and sound judgment a certain degree of knowledge of the subject on which he is to legislate.").

[309] HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 165 (1967).

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> The more a theorist sees political issues as questions of knowledge, to which it is possible to find correct, objectively valid answers, the more inclined he will be to regard the representative as an expert and to find the opinion of the constituency irrelevant. If political issues are like scientific or even mathematical problems, it is foolish to try to solve them by counting noses in the constituency. On the other hand, the more a theorist takes political issues to be arbitrary and irrational choices, matters of whim or taste, the less it makes sense for a representative to barge ahead on his own, ignoring the tastes of those for whom he is supposed to be acting. If political choices are like the choice between, say, two kinds of food, the representative can only please either his own taste or theirs, and the latter seems the only justifiable choice.

Id. at 211.

[311] Llewellyn, *supra* note 76, at 26.

[312] *See* STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 210 (1985) ("The people must delegate responsibility for operating and monitoring the legitimacy of the legal system in its details to a smaller community of persons.").

[313] *See* Breyer, *supra* note 67, at 859 ("[The legislative] process requires each legislator to rely upon staff, in the first instance to separate the matters that are significant from those that are not; it requires each legislator to make decisions about, and to resolve with other legislators, each significant matter; and it requires each legislator further to rely upon drafters and negotiators to carry out the legislator's decisions.").

[314] *See* PITKIN, *supra* note 309, at 116 (recognizing that in a democracy all officials might be deemed "representatives" because all agencies of the government are servants of the sovereign people).

to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read with the minds of specialists."[315] This means that public issues should be decided by reference to the views of the public community, that political issues should be decided by reference to the views of the political community, and that policy issues should be decided by reference to the views of the policy community.[316]

Though derived from representative democracy, this approach also furthers[317] another[318] widely held norm for statutory interpretation—the rule of law,[319] which protects against anarchy, allows people to plan their affairs, and limits official arbitrariness.[320] As Professor Fallon observed, the rule of law consists of multiple strands:[321] originalism, which connects judicial opinions to democratically accountable legislatures;[322] formalism, which provides private actors with clear prescriptions to guide behavior;[323] and legal process, which roots law in a current normative consensus.[324] Justice

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[315] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947). The entire statement reads:

> Statutes are not archeological documents to be studied in a library. They are written to guide the actions of men. As Mr. Justice Holmes remarked upon some Indian legislation "The word was addressed to the Indian mind." If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read with the minds of specialists. (citation omitted).

[316] *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 114 (1996):

> What matters is for the judge to form a view of [purpose] that is continuous with the real world of discourse and conflict from which that fragment of law came. Moreover, the view should recognize the contestable and factional quality of each of the interests, concerns, and assumptions to which it appeals They count not because they are the best and wisest but because they won, and were settled, earlier down the road of lawmaking. Deference to literal meanings and shared expectations is simply the limiting case of a more general commitment to respect the capacity of parties and movements to win in politics, and to encode and enshrine their victories in law.

[317] *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 37 n.187 (1997) ("Although democratically accountable lawmaking is not strictly necessary for the Rule of Law, it is reasonable to anticipate that the elements of the Rule of Law . . . are likely to be most fully realized when applicable rules and principles enjoy the support of democratic majorities or have been adopted through democratic processes.").

[318] *See* Gebbia-Pinetti, *supra* note 304, at 236, 266, 315 (describing legal system values as a second foundation for statutory interpretation).

[319] Lon Fuller defined "law" by reference to eight criteria: generality, publicity, prospectivity, clarity, noncontradictoriness, capability of being followed, stability, and congruence between norms stated and norms as applied. *See* LON L. FULLER, THE MORALITY OF LAW 33-39 (rev. ed. 1964).

[320] *See* Fallon, *supra* note 317, at 8.

[321] *Id.* at 6 ("The Rule of Law is best conceived as comprising multiple strands. . . . It is a mistake to think of particular criteria as necessary in all contexts for the Rule of Law. Rather, we should recognize that the strands of the Rule of Law are complexly interwoven, and we should begin to consider which values or criteria are presumptively primary under which conditions.") (italics omitted).

[322] *See, e.g.*, RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 19-20 (1987).

[323] *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989).

[324] *See, e.g.*, HART & SACKS, *supra* note 17, at 3-6.

Frankfurter's observation furthers all three strands. It connects judicial opinions to legislatures by identifying the issues of greatest concern to legislators. It provides private actors with clear prescriptions by identifying the audience requiring guidance.[325] It roots law in consensus by identifying the communities in which consensus should be sought.[326]

Justice Frankfurter's approach may conflict with some absolutist conceptions of the rule of law. Some originalists may limit the policy community's authority to work out details over time, and some formalists may limit the use of specialized language. If, however, Professor Fallon is correct, and each strand, standing alone, is an incomplete account of the rule of law,[327] then the interpretive community account furthers that value.

Justice Frankfurter's precept provides a means for assessing rules of interpretation. In a world in which most issues fall below the political radar screen, rules adopting the policy perspective are useful guidelines, applicable to most issues. Rules adopting other perspectives apply to fewer issues. Rules adopting the political perspective for policy issues are misleading.

A. Useful Guidelines: Rules Adopting the Policy Perspective

Rules adopting the policy perspective are useful guidelines because most issues facing judges are delegated to the policy community. Purposive interpretation, therefore, is usually the appropriate theory of interpretation. Its assumption of "reasonable persons pursuing reasonable ends reasonably" captures the congressional expectation that the policy community will work out details consistent with the political deal. This expectation gives courts wide leeway to modify the original enactment for unforeseen circumstances.

The expectation that courts would work out the details authorizes the Court's decision to rewrite the statute in *Bock Laundry*. It is clear that the political community did not intend to distinguish between plaintiffs and defendants in civil suits. Furthermore, it is likely that Congress left the issue of how to rewrite the statute to the policy community. The congressional focus on criminal cases seems more the product of accident than of political compromise. Thus, in rewriting the statute, the Court should have adopted Justice

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[325] Thus, formalism does not necessarily require adopting plain meaning. *See* Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1059 (1995):

> [T]he concept of the "rule-of-law" is . . . frequently employed to describe the proposition that "citizens ought to be able to read the statute books and know their rights and duties." Today, of course, . . . legal rules are not communicated to the ordinary citizen "by their verbal formulation in the statute books.". . . Where non-criminal statutes do apply to the citizenry, they usually do so via administrative regulations . . . or concern special areas of law that no ordinary citizen would attempt to comply with without legal advice. Lawyers, unlike ordinary speakers of English, are likely to be familiar with the usual means of communication in the sub-community—the statute's background and legislative history. (footnotes omitted).

[326] *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23-24 (1938) (arguing that professional expertise provides a rule of law for administrative decision making).

[327] Fallon, *supra* note 317, at 24-36. Justice Scalia, for example, subscribes to both originalism and formalism, which sometimes conflict. *See id.* at 28, 30.

Blackmun's policy perspective, which would have extended balancing to civil as well as criminal cases. That approach was adopted in the later Supreme Court revision of the rule[328] in which Congress acquiesced.

The expectation that courts would work out the details undermines the Court's opinion in *Griffin*.[329] The silence on the issue of tolling damages after reemployment is telling evidence that the political deal reached no further than doubling damages.[330] The failure of Congress to speak to the issue indicates political acquiescence to judicial practice. To quote Arthur Conan Doyle, "the fact that the dog did not bark can itself be significant."[331] Subsequent practice in the political community suggests that tolling was consistent with the legislative deal.[332]

Purposive interpretation is not the only rule adopting the policy perspective. Various doctrines of interpretation[333] adopt this perspective as well. One such doctrine is the traditional hierarchy of legislative history. By pointing toward the policy community and away from public understandings, that hierarchy highlights the materials most likely relevant to courts. Another such doctrine is the canon assigning specialized meaning to technical terms,[334] generally appropriate because it incorporates the vocabulary of the policy community. A third such doctrine is the canon reading statutes *in pari materia*[335] (that is, along with others relating to the same subject matter), which assumes the ongoing life typical of the policy community. Finally, the canons avoiding redundancies[336] and reading statutes

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[328] *See* FED. R. EVID. 609(a)(1), 609(a)(2) (effective December 1, 1990).

[329] Another factor cutting against the Court's opinion is that narrowing the political deal mitigates flaws in the legislative process. *See infra* text accompanying note 355.

[330] *See* ESKRIDGE, *supra* note 3, at 201 ("The history of the statute suggests that Congress did not expect such draconian recoveries when it made relatively minor amendments to the statute in 1898, and the statute's purpose was just as much to compensate seamen as to deter employers from wrongdoing.").

[331] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 589 (1982) (Stevens, J., dissenting) (quoting A. CONAN DOYLE, *Silver Blaze, in* THE COMPLETE SHERLOCK HOLMES 383 (1938)).

[332] *See* ESKRIDGE, *supra* note 3, at 201 ("[E]quitable tolling of the double wages period . . . was widely accepted within the relevant interpretive communities (shipowners, insurers, labor organizations) during this century.").

[333] *See* ESKRIDGE & FRICKEY, *supra* note 7, at 633 (distinguishing between theories and doctrines of interpretation).

[334] *See* Llewellyn, *supra* note 4, at 404 ("Words are to be taken in their ordinary meaning unless they are technical terms or words of art," but "[p]opular words may bear a technical meaning and technical words may have a popular signification.").

[335] *Id.* at 402 ("Statutes *in pari materia* must be construed together."). This principle also applies to borrowed statutes, *see* Zerbe v. State, 578 P.2d 597 (Ala. 1978), and subsequent statutes, *see* 3 SUTHERLAND STAT. CONST. § 49.11 (Norman J. Singer ed., 5th ed. 2000).

[336] *See* Llewellyn, *supra* note 4, at 404 ("Every word and clause must be given effect.").

ejusdem generis (that is, an enumeration limits general words)[337] are useful because they assume a rational actor speaking with a single voice.[338]

B. Limited Principles

1. Rules Adopting the Political Perspective. Rules adopting the political perspective are limited principles, applying to unusual situations in which the political community opined on the issue. In such cases, Congress expects a particular result, not necessarily a reasonable one. Accordingly, in these situations, purposive interpretation should give way to theories aimed at discerning a particular result. Imaginative reconstruction of the "deal" does so by replaying the circumstances of enactment, and plain meaning does so by encouraging the political community to state its views clearly.[339] Both theories narrow judicial latitude.

The expectation of particular results supports Judge Norris's detailed exploration of the legislative record in *Montana Wilderness*. At the same time, this expectation undermines Justice Blackmun's opinion in *Weber*. Regarding the issue of affirmative action as a practical problem of administration and relying on agency interpretation and judicial precedent, Justice Blackmun treated the question as one for the policy community. While such treatment appeals to lawyers,[340] it does not accord with the living Constitution. In America, affirmative action is no mere policy matter left to specialists.

Similarly, generally useful doctrines of interpretation become less so for issues from the political community. The hierarchy of legislative history, for example, weakens for issues outside the policy community and thus should be regarded as describing only likely relevance, not weight. A floor statement can rebut a committee report if the issue fell within the political community.[341] The statement itself, along with subject matter and other markers, would indicate such involvement.

Likewise, some canons of construction do not apply to political issues. For such issues, the canon giving words a technical meaning should give way to the one assigning words ordinary meaning.[342] Take, for example,

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[337] *See id.* at 405 (stating that general terms "may be limited by specific terms with which they are associated" and "[w]here general words follow an enumeration they are to be held as applying only to persons and things of the same general kind or class specifically mentioned (*ejusdem generis*).").

[338] *See* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1200 (defending *ejusdem generis* because it "reflects the speaker's intention").

[339] *See supra* text accompanying notes 164-66.

[340] *See* Eskridge, *supra* note 19; Frickey, *supra* note 9, at 245, 259; *see also* RONALD DWORKIN, *How to Read the Civil Rights Act, in* A MATTER OF PRINCIPLE 316, 327 (1985) (arguing that Brennan's result reflects "the best political justification for the statute").

[341] *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 721 (1997) (criticizing the hierarchy of legislative history for giving committee reports more weight than member statements).

[342] *See* Llewellyn, *supra* note 4, at 404 (describing canons conferring ordinary meaning on statutory language).

Nix v. Hedden.[343] In deciding whether a tomato was a fruit or a vegetable for tariff purposes, the Court in that case rejected the botanical definition of fruit as the pulp associated with a seed, and instead looked to common parlance which regards fruit as a sweet plant served as dessert.[344] In the same way, the canon reading statutes *in pari materia* becomes less persuasive for political issues.[345] The political community's volatility reduces the chance that its views would carry over from statute to statute.[346]

Finally, the canons avoiding redundancies and reading terms *ejusdem generis* lose power for the political community. That community's distance from statutory language makes it far more tolerant of redundancies.[347] For instance, during enactment of the Civil Rights Act of 1964, Senator Dirksen demanded[348] explicit statutory language stating that Title VII of the bill did not mandate quotas for minorities,[349] notwithstanding the fact that such language was likely superfluous.[350] Likewise, *ejusdem generis* loses credibility for issues from the political community.[351] That community often lacks an overall intention that relates general language to enumerations. Indeed, the lack of such intention supports the canon *expressio unius* (that is, the expression of one thing excludes the other).[352] In bargaining between opposing interests, the expression of one thing usually excludes another.[353]

2. Rules Adopting the Public Perspective. Rules adopting the public perspective are very limited principles, applying only in the rare situations in which the political community fails to give voice to public understandings. When the political machinery breaks down, democratic values permit

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[343] 149 U.S. 304 (1893).

[344] *Id.*

[345] *See* Llewellyn, *supra* note 4, at 402 ("A statute is not *in pari materia* if its scope and aim are distinct or where a legislative design to depart from the general purpose or policy of previous enactments may be apparent.").

[346] *See* Posner, *supra* note 131, at 274 ("If some statutes . . . reflect the pressure of narrow interest groups rather than any coherent view of the public interest, it is perilous for courts to use one statute to illuminate the meaning of another. There is no assurance that the particular constellation of political pressure that produced the first statute was also at play when the second was adopted.").

[347] *See* Llewellyn, *supra* note 4, at 404 (explaining that language may be rejected as surplusage "[i]f inadvertently inserted or if repugnant to the rest of the statute").

[348] *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 450 (1966).

[349] *See* 42 U.S.C. § 2000e-2(j) (2000) (providing that nothing in the Civil Rights Act requires granting preferential treatment because of race).

[350] Section 703(j) was arguably unnecessary because Section 703(a) already prohibited discrimination on the basis of race. *See* ESKRIDGE & FRICKEY, *supra* note 7, at 22 (describing many amendments as "cosmetic").

[351] *See* Llewellyn, *supra* note 4, at 405 ("General terms are to receive a general construction," and "general words must operate on something.").

[352] *See id.*

[353] *Cf.* Easterbrook, *supra* note 3, at 16 ("The more detailed the law, the more evidence of interest-group compromise.").

the judiciary to leapfrog the legislature, modifying or imposing legislative mandates in the name of popular sovereignty.[354]

The best-established rules adopting the public perspective are the canons governing strict and liberal construction. These canons apply widely but with limited impact, affecting statutes at the margin. The democratic justification for these canons is that they mitigate systemic imperfections in the legislative process. Strict construction cures over-responsiveness to organized groups,[355] and liberal construction increases the power of underrepresented interests.[356]

The difficulty, of course, is identifying the statutes deserving strict or liberal construction.[357] *Weber* and *Bob Jones* are difficult[358] in part because people argue over whether civil rights statutes deserve strict or liberal construction.[359] Civil rights statutes might be viewed as conferring economic benefits on an organized group at the expense of society at large.[360] Justice Scalia, in *Johnson v. Transportation Agency*, for example, used the diffuse interests of white men to justify a narrow reading of Title VII.[361] Such a view, however, runs counter to the history of race relations in America. Notwithstanding their discrete status, racial minorities are not privileged, but marginalized. Furthermore, Americans do not regard racial equality simply as an

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[354] *See* UNGER, *supra* note 316, at 117-18 ("The ideal of popular self-government usually finds its best judicial defense in the modesty of the standard practice . . . . [Nevertheless, there are] circumstances in which the judges may properly take it upon themselves to cut through a Gordian knot in the law with their swords of constructive interpretation. They may do so under the promptings of the ideal of popular self-government.").

[355] *See supra* text accompanying note 171 (discussing *Montana Wilderness*).

[356] One example is the tradition of reading statutes in favor of Indians. *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1177-78 (1990) (describing the tradition of preserving Indian rights from congressional encroachment, unless Congress has spoken clearly on the issue).

[357] Doctrinally, the question is often whether a court should apply strict construction to statutes in derogation of the common law and liberal construction to remedial legislation. *See* Llewellyn, *supra* note 4, at 401 ("Statutes in derogation of the common law will not be extended by construction," but "[s]uch acts will be liberally construed if their nature is remedial."); *see also id.* at 402 ("A statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right or action will not be construed as having a retroactive effect," but "[r]emedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction.").

[358] Technically, these cases did not liberally construe civil rights acts. No such statute applied in *Bob Jones*, and *Weber* narrowly construed the Civil Rights Act of 1964. Both cases, however, increased the power of groups arguably underrepresented in the legislature.

[359] *See generally* DWORKIN, *supra* note 340, at 327; Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991).

[360] *See* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 428 ("[D]iscrete and insular minorities are exactly the groups that are likely to obtain disproportionately large benefits from the political process.").

[361] *See* Johnson v. Transp. Agency, 480 U.S. 616, 676-77 (1987) (Scalia, J., dissenting) (noting that extension of *Weber* would accommodate the demands of organized groups at the expense of unknown, unaffluent, unorganized individuals).

economic issue involving a narrow group, but as an ideological issue impacting all of society.

Canons governing strict and liberal construction are not the sole means by which courts draw on public opinion to bypass the legislature. A court can ignore the governing statute and develop its own rules based on widespread cultural understandings. Such development is obviously more adventurous than mere liberal construction, but it may be democratic if it gives voice to preferences slighted in the legislative process. Cultural understandings may, however, defy translation into legal language. Public opinion often coalesces around fuzzy symbols[362] rather than the sharply bounded categories more prominent in legal reasoning.

The legitimacy of developing rules based on the public perspective ultimately turns on how well courts discern popular preferences.[363] In *Bob Jones*, the Court proved right. Racial segregation was widely accepted when Congress enacted section 501(c)(3) in 1894.[364] By 1983, however, segregation in education was widely recognized as incompatible with equal opportunity. The result in *Bob Jones* proved remarkably noncontroversial over time. In *Weber*, the court may have been wrong. The ideal of equal opportunity is ambiguous with respect to affirmative action in employment. For blacks, affirmative action may be essential to assuring equal opportunity; for whites, affirmative action may foreclose such opportunity. Thus, beneath the ideal is a deep social division that undermines any judicial resolution of the issue.[365]

In developing rules based on the public perspective, courts must recognize that opinion changes over time. Issues sometimes fall out of the public limelight. At the turn of the century, for example, public outrage at concentrations of wealth precipitated the enactment of the Sherman Act;[366] and in limiting that Act's prohibition of "every contract . . . in restraint of trade"[367] to unreasonable restraints of trade, the Supreme Court's opinion in *Standard Oil v. United States*[368] "gave rise to a crisis of opinion such as only a hand-

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[362] Popular symbols create the consensus necessary to mobilize mass support. *See* COBB & ELDER, *supra* note 100, at 28 (arguing that symbols provide the vehicle through which diverse motivations, expectations and values are synchronized to make collective action possible); STONE, *supra* note 85, at 125 (1988) (noting that ambiguity of symbols "allows highly conflictual issues to move from stalemate to action.").

[363] *See* UNGER, *supra* note 316, at 118 (describing judicial activism as "a gamble for support," and observing that its claims for legitimacy "are greatly strengthened" when reformers "can appeal to a broad-based current of opinion in society").

[364] *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (establishing separate but equal doctrine).

[365] Rarely does a judicial decision itself shape public opinion. *See* MARSHALL, *supra* note 190, at 154 (concluding that few Supreme Court decisions change public opinion).

[366] *See* David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1224 (1988) (attributing the Sherman Act to "pervasive public outrage over the great trusts, and popular demand for the restoration of a balance of economic power in American society").

[367] 15 U.S.C. § 1 (1999).

[368] 221 U.S. 1 (1911).

ful of the Court's decisions have provoked."[369] Over the century, however, this outrage subsided,[370] and the Sherman Act today falls largely within the domain of lawyers and economists, neither of whom ever supported an absolute prohibition.[371] The Act is now widely recognized as falling within the policy community.[372]

At the same time, issues sometimes gain in public prominence. Take, for example, *Braschi v. Stahl Associates*,[373] which considered whether a rent control statute that protected members of a deceased tenant's "family" covered a gay tenant's partner. Gay rights were not a public issue in the 1940s when the statute was enacted.[374] By 1989, however, gay rights had received considerably more attention and fell within the public community.[375]

C. Misleading Rules

1. The Additional Weight Accorded Statutory Precedent. Rules adopting the political perspective for issues usually delegated to the policy community are positively misleading. One such doctrine accords greater weight to precedents interpreting statutes than to those developing the com-

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[369] WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 253 (1965).

[370] *See* RICHARD HOFSTADTER, *What Happened to the Antitrust Movement?*, *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 189 (1965).

[371] *See* LETWIN, *supra* note 369, at 76-77 (observing that economists believed efforts to limit combinations were futile, and lawyers believed the common law was an adequate remedy). Robert Bork finds in the Act an intent to prohibit inefficient combinations, *see* Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7, 10 (1966) (finding economic efficiency to be the purpose behind the Sherman Act), a belief limited to economists, *see* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 88 (1982) (arguing that legislators who enacted the Sherman Act did not know that monopolies caused allocative inefficiency).

[372] *See supra* note 153 (describing Posner and Easterbrook's views); *see also* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982) (arguing that the antitrust laws delegate authority to the judiciary and executive).

[373] 543 N.E.2d 49 (N.Y. 1989).

[374] *See id.* at 52 ("[T]he term 'family' is not defined in the rent-control code and the legislative history is devoid of any specific reference to the non-eviction provision."). The rent control statute was enacted in 1946, *see* Emergency Housing Rent Control Law of 1946, L. 1946, ch. 274, codified as amended at N.Y. UNCONSOL. LAWS §§ 8581-8597 (McKinney 1987), and the policy of not evicting family members dates back to that period. *See, e.g.*, Park East Land Corp. v. Fikelstein, 299 N.Y. 70 (N.Y. 1949). The regulation at issue in the case was originally issued in 1962. *See* New York City Rent, Rehabilitation and Eviction Regulation sec. 56(d).

[375] Statutes prohibiting discrimination on the basis of sexual orientation were not enacted until the 1980s. *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 286-87 (1994). In *Braschi*, the court received seven amicus briefs. *See* Briefs of Amicus Curiae The Association of the Bar of the City of New York; The City of New York; Family Service America; The Gay Men's Health Crisis, Inc.; The Lambda Legal Defense and Education Fund; The Legal Aid Society of New York City; Community Action for Legal Services; Inc., Braschi v. Stahl Ass'n Co., 543 N.E.2d 49 (N.Y. 1989) (No. 02194-87). In fact, the New York State legislature ultimately codified the Court's holding. *See* Rent Stabilization Code, N.Y. Comp. Codes R. & Regs. Tit. 9, 2520.6(o)(2) (1990).

mon law.[376] That doctrine assumes that by failing to act, Congress adopts existing judicial interpretation.[377] Scholars debate the merits of this assumption. Professor Eskridge argues that there are substantial obstacles to political mobilization.[378] Congress cannot overturn every decision lacking majority support.[379] Conceding that fact, Professor Marshall nonetheless argues that an absolute rule of stare decisis would increase congressional oversight of judicial opinions.[380]

The interpretive community account reveals a deeper problem with a rule according special weight to statutory precedents: The political community pays little attention to judicial interpretation.[381] Very few judicial opinions receive attention outside the policy community, which standing alone has little influence upon the legislative agenda.[382] Furthermore, it is hard to believe that the judiciary could change this state of affairs. Concerned chiefly with re-election, politicians are unlikely to be swayed by a rule of construction. Thus, the doctrine giving extra weight to statutory precedents makes erroneous assumptions regarding community responsibility. The distance of most precedent from the political community leaves the rule granting additional weight to statutory interpretation without credible foundation. Unlike other rules departing from the legislative perspective, the rule is not

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[376] *Compare* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988) (criticizing the presumption against overruling statutory precedents), *with* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory* Stare Decisis, 88 MICH. L. REV. 177 (1989) (taking the contrary position).

[377] *See* Eskridge, *supra* note 376, at 1397 ("The traditional argument for the super-strong presumption is that once the Court interprets a statute, Congress is the institution competent to change that interpretation."); Marshall, *supra* note 376, at 184 ("The conventional explanation for the heightened role of stare decisis in statutory cases is that congressional failure to enact legislation reversing a judicial decision indicates Congress's approval of the Court's interpretation of an earlier statute.").

[378] *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 94 (1988). *See generally* John Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737 (1984).

[379] Professor Eskridge observes, for example, that notwithstanding their majority status, white men have not convinced Congress to overrule *Weber*. *See* Eskridge, *supra* note 376, at 1410-11.

[380] *See* Marshall, *supra* note 376, at 210.

[381] *See* HARRY WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 11 (1990); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) (claiming that "most Supreme Court decisions never come to the attention of Congress"). Professor Eskridge has shown that the number of congressional overrides increased from 1967 to 1990 and that almost half of the Supreme Court decisions are considered in oversight hearings. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338, 343 (1991). Still, only 7% of Supreme Court decisions are overridden, *id.* at 350, and staff interest may account for much of the hearing activity, *id.* at 339 (attributing increased attention to growth in congressional staff). Moreover, as Eskridge concedes, few circuit court cases receive congressional attention. *Id.* at 343, n.29 (citing study by Robert Katzman indicating that staff was unaware of 12 of 15 significant statutory cases decided in the D.C. Circuit in 1989).

[382] Public community interest is critical to congressional action. *See* Joseph Ignagni et al., *Statutory Construction and Congressional Response*, 26 AM. POL. Q. 459, 477 (1998) (concluding that Congress is most likely to respond to Supreme Court disposition of salient issues).

based on judicial responsibility to protect the rule of law.[383] In fact, the rule abdicates judicial responsibility in the name of legislative supremacy.

2. The Chevron *Doctrine.* Another misleading doctrine is the two-step test announced in *Chevron*.[384] Prior to that case, judicial deference to administrative decisions ranged from great to none, depending on the presence of various factors.[385] The *Chevron* two-step test revolutionized[386] the law by making the decision to defer an "all-or-nothing matter"[387] and deference to agency interpretation "the default rule."[388] This test rendered obsolete the traditional factors used to assign weight to agency interpretations[389] and dramatically shrank the judicial role.

The basis for this revolution is found in the Court's new theory for deference.[390] *Chevron* broke new ground by basing deference on agencies' political accountability.[391] This new rationale, if true, would justify *Chevron*'s revolution. Political determinations are all or nothing because they are not

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[383] The canon avoiding constitutional issues, for example, departs from likely legislative understandings, but may nonetheless serve the rule of law. Although Congress probably intends to legislate to the extent of its power, the canon protects the judicial function. *See* HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 211 (1967) ("The strongest basis for the rule is . . . that the Supreme Court ought not to indulge in what, if adverse, is likely to be only a constitutional advisory opinion.").

[384] 467 U.S. 837 (1984).

[385] *See* Diver, *supra* note 291, at 562 n.95 (listing factors cited by the Supreme Court in deciding whether to defer to administrative interpretations).

[386] *See* Merrill, *Executive Precedent, supra* note 27, at 976 (stating that *Chevron* "contained several features that can only be described as 'revolutionary'") (quoting Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986)); *see also* ESKRIDGE & FRICKEY, *supra* note 7, at 861 ("The conventional wisdom in administrative law is, or at least until recently was, that *Chevron* was a revolutionary decision that ushered in a new period of greater deference to agency interpretations of statutes they are charged with enforcing.").

[387] Merrill, *Executive Precedent, supra* note 27, at 977 ("[T]he two-step structure makes deference an all-or-nothing matter. . . . In effect, *Chevron* transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch.").

[388] *Id.* ("As a result [of *Chevron*], independent judgment now requires special justification, and deference is the default rule.").

[389] *See id.* (arguing that the *Chevron* "framework appears to exclude any examination of the multiple factors historically relied upon by courts [in deciding whether to defer to agency interpretations of statutes]. . . . [N]one of the traditional factors fits under step one or step two of the new framework.").

[390] *See id.* at 978 ("In addition to its novel framework, *Chevron* also broke new ground by invoking democratic theory as a basis for requiring deference to executive interpretations.").

[391] *See* 467 U.S. at 865-66 ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

susceptible to reasoned criticism. Furthermore, political accountability provides a uniform reason favoring agency interpretation.[392]

The political accountability rationale, however, misidentifies the responsible community. Political accountability is critical only to issues within the political community. Most agency decisions fall below the political radar screen. The vast majority come from the policy community, with the political input occurring only at the most general level. Therefore, agencies seldom rise above courts in the chain of authority. They are usually equal.[393] Courts and agencies draw from different policy subcommunities, each with unique expertise.[394]

Thus, the interpretive community account supports pre-*Chevron* law, which based deference on expertise.[395] Most agency interpretations do not pose an all-or-nothing choice; they are susceptible to reasoned analysis and critique by courts.[396] Furthermore, the weight to be accorded agency decisions is not uniform, but variable, depending upon the strength of the underlying reasoning. Many of the traditional factors acknowledge this fact. Courts give more weight to administrative interpretations that fall within the agency's specialized knowledge[397] and are well-reasoned[398] and less weight to interpretations contradicted by other agencies.[399]

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[392] *See* Merrill, *Executive Precedent*, *supra* note 27, at 978 ("In order to make deference a general default rule, the Court had to come up with some *universal* reason why administrative interpretations should be preferred to the judgments of Article III courts. Democratic theory supplied the justification: agency decisionmaking is always more democratic than judicial decisionmaking because all agencies are accountable (to some degree) to the President and the President is elected by the people.").

[393] *See id.* at 1008-09 (comparing judges and agencies to courts from coordinate jurisdictions).

[394]

> Executive interpreters have greater expertise on matters that are highly technical or complex; they have more familiarity with the overall structure of a statutory program, and with the policies followed under these programs; and they are more accountable to the public. On the other hand, courts are more insulated from political pressures than agencies; their members are more likely to be selected for their legal abilities than are agency heads; they may be able to hire better law clerks; and they may have more time to do research and write opinions, if only because they are exempt from the statutory deadlines often imposed on agencies.

Id. at 1009.

[395] *See* ESKRIDGE & FRICKEY, *supra* note 7, at 860 (noting that deference to agency interpretations of law is traditionally based on expertise). *Chevron* itself acknowledged the importance of expertise. The Court alluded to the "great expertise" of the agency and noted that "judges are not experts in the field." 467 U.S. at 865.

[396] *See* Merrill, *Executive Precedent*, *supra* note 27, at 998 ("*Chevron* almost guarantees that in every case the independent views of the judiciary will be given either too much or too little weight, and concomitantly, that the views of the agency will be given either too little or too much deference.").

[397] *See, e.g.*, Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984).

[398] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (explaining that the weight accorded administrative interpretation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade").

[399] *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 664-66 (2d ed. 1984) (discussing case where agencies adopted conflicting positions on the meaning of a statute).

This means that the *Chevron* framework should apply rarely, if at all. It is questionable whether that doctrine should have applied in *Chevron* itself. Even if the issue of plantwide application was political when the case was brought,[400] it is unclear whether the President's decision to ease industry standards deserved deference. In our system, the President serves a national constituency that often transcends distributional politics.[401] Conferring concentrated benefits on narrow groups clashes with this role. Indeed, judges traditionally respected agency decisions *because* they are insulated from partisan pressures.[402]

Whatever its applicability to *Chevron* itself, the framework is poorly suited to most cases. Most administrative interpretations receive little political input. The Court may be recognizing this bad fit by limiting,[403] reformulating,[404] and ignoring[405] *Chevron*.

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[400] By lowering emissions standards, the regulation was distributional in that it benefited industries at the expense of the public. Political interest is also evident in the shift in EPA positions that occurred with a change in Administrations. *See Chevron*, 467 U.S. at 857-58. Finally, several amicus briefs were filed in the Supreme Court. *See* Briefs of Amici Curiae The American Gas Association, The Commonwealth of Pennsylvania, The Mid-America Legal Foundation, The Pacific Legal Foundation, The United Steelworkers of America, Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) (No. 82-1005).

[401] The President's high visibility and broad constituency makes him least vulnerable to interest group pressure. *See* STEVEN KELMAN, MAKING PUBLIC POLICY 83-87 (1987) (ascribing a President's public spiritedness to voters' conception of the presidency); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 169 (1974) ("Since presidents can be held individually accountable for broad policy effects and states of affairs, they are likely to go about their business with a vigorous insistence on instrumental rationality.").

[402] *See* ESKRIDGE & FRICKEY, *supra* note 7, at 860 (noting that deference to agency interpretations of law is traditionally based on "neutrality," *i.e.*, insulation from "partisan" pressures). The traditional factors favor interpretations that are insulated from political factors by giving weight to interpretations that are long-standing, *see, e.g.*, United States v. Clark, 454 U.S. 555, 565 (1982); Haig v. Agee, 453 U.S. 280, 291 (1981), or contemporaneous with enactment of the statute, *see* Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

[403] *See* Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130-31 (1990) (holding *Chevron* inapplicable when the Court has already interpreted the statute); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (holding *Chevron* inapplicable to agency litigating positions); Edward J. DeBartolo Corp. v. Fla. Gold Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988) (relying on canon avoiding constitutional issues rather than the *Chevron* rule); INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987) (holding *Chevron* inapplicable to a "pure question of statutory construction"). The Court has backtracked on some of these exceptions. *See* Rust v. Sullivan, 500 U.S. 173 (1991) (refusing to follow *DeBartolo)*; NLRB v. United Food & Commercial Worker Union, Local 23, 484 U.S. 112, 133-34 (1987) (Scalia, J., concurring) (stating that *Cardoza-Fonseca* is no longer being followed by the Court).

[404] *See* Merrill, *Executive Precedent, supra* note 27, at 990-92 (describing how the first step in the *Chevron* test, which originally required an examination of "specific intention" on the "precise issue" at hand, has been modified as requiring a determination of the plain meaning of the statute as a whole).

[405] Professor Merrill has shown that the Court has adopted its framework in only 36% of its cases from 1984 to 1990, while citing traditional factors in 37%. *See* Merrill, *Executive Precedent, supra* note 27, at 981.

V. CONCLUSION

Much legal scholarship on statutory interpretation focuses on the theory appropriate to hard cases. In debating the choice between intent, text, and best answer in cases such as *Weber*, scholars appeal to divergent, apparently incompatible, models of the legislature.

This Article makes three grand claims. The first is that government involves three interpretive communities, each with its distinctive behavior and sphere of influence. The public community reacts from cultural stereotypes; the political community negotiates and votes; the policy community reasons analytically. The public's impact is strongest at the general level; the policy community's impact is strongest at the level of detail.

The second claim is that interpretive communities affect how judges decide cases. Judges tend to adopt the theory of interpretation appropriate to the community responsible for the issue before them. They look to text for political issues and intent for policy issues. Judges recognize the policy community's immersion in statutory detail by citing committee reports more often than other sources of legislative history. Judges recognize the importance of the policy community in the administrative state by deferring to agency resolutions of technical issues.

The third claim is that interpretive communities should affect how judges decide cases. Each community claims legitimacy in a representative democracy. Accordingly, judges should adopt rules of interpretation appropriate to the community responsible for the issue before them. Because most such issues are technical, this generally means adopting rules appropriate to the policy community. Rules presuming political involvement, like the *Chevron* two-step test, are usually misguided.

These claims cast a new light on statutory interpretation scholarship. They suggest that the current debate is overdrawn. Courts do not face stark choices among theories of interpretation and models of the legislature. Each theory and model is valid. The rub comes in determining which theory applies when. In practice, statutory interpretation depends more on contextualized understandings than on absolutist claims.

Furthermore, these claims suggest that current priorities are awry. High profile cases like *Weber* are intellectually stimulating, but atypical of judicial dockets. Most cases lack such notoriety. Recognition of interpretive communities presents a more accurate, if less dramatic, picture of statutory interpretation.