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Purposeless Construction

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Introduction

The Supreme Court's statutory construction has become increasingly "purposeless"—unrelated to the purposes that motivate Congressional enactment. A venerable canon of statutory construction counsels courts to construe statutes to effectuate their purposes.[1] Although the Court continues to refer to this "goals canon," its influence has markedly declined.[2] The Court has offered plausible reasons to give statutory goals little weight in statutory construction cases. Congress never pursues its goals to the exclusion of all competing considerations.[3] As a result, determining whether the proper resolution of a given issue should advance a statutory goal often depends on how much weight to give competing considerations that also play a role in the statute. Accordingly, the Court increasingly emphasizes the "plain language" of the provisions directly addressing the question before it, rather than broad statutory goals.[4] This literal approach reflects the influence of public choice theory, which treats statutes as amalgams of compromises among special interests, rather than as schemes to achieve public interest goals.[5] The Court, through parsing of directly relevant text, may seek to effectuate the bargains embodied in the legislation.[6] In spite of these quite plausible arguments for purposeless construction, I argue that the Court should give more weight to statutory goals, properly identified and conceived, **[end of page 1]** than it has in recent years.[7] This Article develops a new argument for that position and a new approach to carrying out purposeful construction based on democratic theory. Statutory goals, especially those set out in the legislative text or frequently proclaimed in public, tend to reflect public values to a greater extent than other statutory provisions. Politicians carefully choose goals for statutes that "sell" the statute to the public. In order to do this, they must announce goals for the statute that reflect public desires. Elected officials, whatever their foibles, have enormous expertise in understanding their constituents' desires.[8] Accordingly, announced statutory goals generally reflect widely held views of what the law should be.[9]It follows that when statues are ambiguous or silent on the issues before the Court, construing them to conform to their goals serves democratic values, by allowing law to reflect the electorate's desires. Of course, courts should ordinarily give effect to statutory provisions that reflect considerations that limit the vigor with which a statute pursues its overriding purpose, including concessions to special interests.[10] But if the scope of such a limit is ambiguous, democratic values favor giving statutory purposes significant weight.

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[1] *See* NORMAN J. SINGER & J.D. SHAMBIE SINGER, 3 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 58:6 (2011) (referring to construction to accomplish a statute's purpose as "ancient wisdom").

[2] *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2006-2010 (2009) (explaining that in the past two decades the Court has shifted toward textualism and away from purpose).

[3] *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 647 (1990) (stating that "no legislation pursues its purposes at all costs") (quoting Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam)) (internal quotation marks omitted).

[4] *See, e.g.*, Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 75-77 (1995) (expressing reluctance to engage an argument "based on legislative purpose where the text alone yields a clear answer"). *Cf.* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (evaluating the Court's movement toward textualism at the expense of some kinds of context).

[5] *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 426 (1988) (stating that public choice theory has undermined "the traditional notion of a coherent legislative purpose"); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 880-82 (1987) [hereinafter, *Jurisprudence*] (associating public choice theory with the idea that legislation represents a compromise among private interests because legislatures cannot act purposefully); *see generally* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); WILLIAM RIKER, THE THEORY OF POLITICAL COALITIONS (1962).

[6] *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

[7] *Cf.* Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-52 (1986) (advocating adherence to statutory purpose as an antidote to rent-seeking).

[8] *See* David M. Driesen, *Distributing the Costs of Environmental Health and Safety Regulation*, 32 B.C. ENVTL. AFF. L. REV. 1, 78 (2005) (pointing out that public officials "owe their office, at least in part, to their understanding of public desires.")

[9] *Cf.* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 94-95 (2010) (arguing that purposeful construction serves democratic values, because voters can hold legislators accountable for the goals in statutes).

[10] *Accord*, Macey, *supra* note 7, at 257 (arguing for this approach because judicial decisions enforcing special interest bargains may publicize these outcomes, thereby raising the costs to politicians of enacting special interest provisions).

Some very recent decisions suggest that the Court, after several decades of purposelessness (with exceptions here and there), may be ready to consider reviving purposeful construction. In *Zuni Public School Dist. No. 89 v. Department of Education*, the Court began its discussion of distribution of federal aid to school districts with an examination of the Federal Impact Aid Act's "background and basic purposes."[11] It ultimately found the statute's history and purpose dispositive in light of ambiguous statutory language.[12] The Court gave even more weight to purpose in a case decided just last term, *Kasten v. Saint-Gorbain Performance Plastics Corporation*.[13] In that case, the Court interpreted the phrase "filed any complaint" as encompassing oral complaints because of the Fair Labor Standards Act's purpose, thereby allowing an anti-retaliation case to go forward.[14]Yet, the vigorous dissent in *Zuni*, a 5-4 decision, suggests that this revival faces an obstacle in concerns about the judicial "creativity" that purposeful construction **[end of page 2]** engenders.[15] Justice Scalia, writing for four Justices, linked the weight given statutory purpose to "policy-driven interpretation" and a "tendency" of judges to assume that Congress "must have meant" what the judge thinks it "should have meant."[16]The democratic theory of purposeful construction developed in this Article addresses this concern by demanding a narrow and rigorous approach to the delineation of statutory goals. This approach focuses primarily on the goals animating entire statutes, rather than the subsidiary purposes of individual provisions.[17] For the democratic theory of purposeful construction does not posit that the purposes of statutory details enjoy the presumption of public support that should apply to a statute's overarching purpose. Although all provisions have their purposes, subsidiary provisions' purposes are not holistic goals that consistently have the democratic pedigree justifying their special consideration in statutory construction.[18]In addition to narrowing judicial discretion by narrowly defining statutory goals, this Article defends a rigorous approach to their identification. This approach emphasizes reliance on statutes' stated goals when they exist and on careful consideration of statutory language and other aids to construction in identifying goals when statutes lack goals statements.[19] In other words, this approach applies the techniques of purpose's supposed enemy, textualism, to the delineation of purposes whenever possible. The idea that courts should construe statutes to effectuate their goals is hardly novel. The goals canon has a long history and the legal process school made it a central element of its approach to statutory interpretation in the 1950s.[20] Some leading contemporary scholars also embrace purposeful construction.[21] This Article's response to public choice theory, one of the elements of the Court's abandonment of purpose that I address, builds on Professor Jonathan Macey's claim that **[end of page 3]** even if the stated purpose of the statute merely disguises a special interest bargain, judges should construe the statute in keeping with its stated purpose in order to advance the public interest.[22] This Article, however, has a different focus than Macey's, emphasizes a different rationale, and comes to more fine-grained conclusions. Macey focuses on defending the traditional approach to statutory interpretation *in toto* against Judge Easterbrook's suggestion that courts should enforce hidden special interest bargains underlying legislation.[23] Far from focusing on the goals canon, as I do, he emphasizes canons frequently juxtaposed with the goals canon— the canons

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[11] 550 U.S. 81, 90 (2007).

[12] Id. at 93, 99.

[13] 131 S. Ct. 1325 (2011).

[14] Id. at 1330-31, 1336 (declaring that the statute's purpose makes only an interpretation favoring oral complaints permissible).

[15] *Cf.* Compucredit Corp. v. Wanda Greenwood, 132 S. Ct. 665, 676 (2012) (Ginsburg, J., dissenting) (protesting in vain that enforcing arbitration clauses in credit card contracts to bar suits enforcing the Credit Repair Organization Act does not serve that Act's purpose).

[16] *See Zuni*, 550 U.S. at 108-09, 117 (Scalia, J. dissenting); *see also* Setser v. United States, 132 S. Ct. 1463, 1466-1479 (2012) (showing a Scalia-led majority engaged in textualist reading, and a Breyer dissent emphasizing statutory purpose).

[17] *See* SINGER & SINGER, *supra* note 1, § 46.5 (characterizing a statute as "animated by one general purpose," which serves as a "key" to interpreting "subsidiary provisions"); FRANCIS MCCAFFREY, STATUTORY CONSTRUCTION § 75 (stating that the court should gather the law's "predominant purpose . . . from the whole act").

[18] *See, e.g.*, Dolan v. United States Postal Service, 546 U.S. 481, 490-91 (2006) (discussing the purposes of exceptions to the sovereign immunity waiver in the Federal Tort Claims Act); United States v. Smith, 499 U.S. 160, 167 (1991) (discussing the purpose of § 9 of the Federal Tort Claims Act); Weinberger v. Wiesenfeld, 420 U.S. 636, 648-49 (1975) (discussing the purpose of section 402(g) of the Social Security Act). *Cf.* Holloway v. United States, 526 U.S. 1, 18 (1999) (Scalia J., dissenting) (claiming that limitations upon the means of achieving policy objectives are "no less a 'purpose' of the statute" than the statute's policy objective).

[19] *See generally* Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 398 (1942) (noting that "[i]n modern times it has become increasingly common to set forth the purpose . . . in the preamble").

[20] *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1201 (tent. ed. 1958) (stating that statutory construction should serve statutory purpose).

[21] *See, e.g.*, BREYER, *supra* note 9, at 94-95 (arguing for purposeful construction); Macey, *supra* note 7, at 250-52 (same).

[22] *See* Macey, *supra* note 7, at 250 (linking a stated statutory purpose to public values).

[23] *See* id. at 235-40 (characterizing Easterbrook's argument as one that enforces the original bargain between legislators and the special interest group and contrasting it with the "traditional approach").

emphasizing plain meaning and strict construction of statutes derogating from the common law.[24] Although Macey's argument has normative appeal,[25] it does not satisfactorily answer the objection that public regarding construction of special interest bargains stands in tension with democratic theory. My argument above, however, shows why this conclusion is consistent with democratic theory.[26] Finally, my focus on the goals canon, the full range of arguments against it, and the democratic rationale for it leads to fine-grained conclusions about how to better implement the goals canon absent from Macey's general defense of traditional interpretation of some special interest statutes.This Article begins with an account of purposeful construction's rise and fall. It explains the tradition of construing statutes to effectuate their purposes and documents the Supreme Court's departure from this tradition in recent years.The next part explains why this decline occurred. This account emphasizes doubts about purpose's capacity to resolve specific statutory construction issues, public choice theory, textualism's displacement of contextualism, and anxiety about judicial activism. The final part argues for more purposeful construction. It begins by developing an account of the democratic value of an emphasis on purpose. It then defends this account against a view of statutes as the product of special interest bargains and on the basis of its contribution to statutory coherence. Finally, this part explains how a rigorous approach to purposeful construction can address concerns about judges improperly reading their own values into statutes. This approach relies on a largely literal approach to finding **[end of page 4]** statutory goals designed to counteract the judicial tendency to identify any plausible value relevant to a statute as a statutory goal.

The Rise and Fall of Purposeful Construction

To make this project manageable, this account of purposeful construction's rise and fall focuses on Supreme Court decisions. At the same time, the secondary sources cited indicate that this limited review captures in broad outline the tendencies prevailing in lower courts as well, which often take their cue from the Supreme Court.[27]

The Purposeful Construction Tradition

Although purposeful construction enjoys a venerable tradition, that tradition has waxed and waned over the years. This account begins with a description of what Karl Llewelynn calls the Grand Style of statutory interpretation, a tradition continuing into the middle of the 19th century of construing statutes freely to implement their purposes.[28] During the succeeding *Lochner*-era—named after a leading decision exemplifying judicial activism in using the Constitution to defeat progressive legislation—the Court sometimes eschewed purposeful construction, favoring readings that "limited or even eviscerated" democratically enacted legislation.[29] The post-*Lochner* era, however, witnessed a revival of purposeful construction, as the Court increasingly accepted the legitimacy and even primacy of democratically enacted statutes. During much of the 19th century discussion of statutory purpose frequently influenced Supreme Court resolution of cases interpreting ambiguous statutes.[30] *Holy Trinity Church v. United States*, however,

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[24] *See* id. at 264-65 (characterizing the "plain meaning rule" as "the best example of a valuable canon" and then identifying the canon favoring strict construction of statutes in derogation of the common law as protecting the common law from special interest "encroachment").

[25] *See* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turns its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 564-65 (1992) (describing Macey's position favoring purposeful construction as promoting "Madisonian notion . . . of how legislation *should* work") [emphasis in original]; *see also* Radin, *supra* note 19, at 407 (favoring purposeful construction because a statute functions as "an instruction . . . to accomplish a definite result").

[26] William Eskridge argues more generally that considering context fits democratic theory better than a wholly textualist approach. *See* William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1548-49 (1998) (book review) (suggesting that a "cooperative partner" approach that takes into account the "purpose of the enterprise, other goals pursued by the principal, and common values" serves democracy better than the new textualism). But he has not made the specific argument I make hear, that purpose is more likely to reflect popular will than statutory details.

[27] *Cf.* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750, 1754 (2010) (noting that textualism has taken hold in some states).

[28] *See* 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, 396, 400 (1950) (identifying this style with the time period of 1820-1850).

[29] Id. (calling this style the "Formal Style" of the period 1880-1910). My own account claims that this Lochnerian "Formal Style" continued beyond 1910.

[30] *See, e.g.*, Pennington v. Coase, 6 U.S. (2 Cranch) 33, 54 (1804) (Marshall, J.) (using purpose to resolve a conflict between two statutory provisions); U.S. v. Anderson, 76 U.S. 56, 66 (1869) (construing a statute liberally in light of its goal of compensating union loyalists residing in the south whose property was confiscated during the civil war). *See generally* Jones v. Guaranty and Indemnity Co., 101 U.S. 622, 626 (1879) (announcing the rule that remedial statutes will be liberally construed to effectuate their purposes). HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS, § 33 (2nd ed. 1911) (stating that "every statute is to be construed with reference to" its purpose).

provides a famous example of a willingness to advance a statute's purpose at the expense of plain language.[31] In that case, the Supreme Court held that a statute prohibiting importation of foreigners to "perform labor or service of any kind" did not apply to a minister imported from England.[32] The Court conceded **[end of page 5]** that the prohibition's language encompassed ministers, but declined to give the prohibition a literal construction in light of the statutory purposes.[33]*Holy Trinity Church* illustrates not just the application of purpose in a radical way to defeat plain meaning, but also problems of identifying and even defining statutory purpose. At times, the Court uses the term purpose as a synonym for the statute's overarching general goal, but at other times it uses the term "purpose" as a synonym for the legislative intent respecting the specific issue before the Court (the minister question).[34] This Article's democratic theory focuses primarily on a statute's overall goal. In addition to revealing a conceptual confusion that lies at the heart of the jurisprudence of purpose,[35] the case illustrates the opportunities and problems involved in identifying purpose. The Court begins with rather reliable evidence about the statute's main goal, since both the title of the Act and committee reports support the Court's characterization of that goal.[36] The Court, however, ultimately emphasizes its own values to support the idea that the statute must not be read to reach ministers. It rejects imputing a "purpose of action against religion" to Congress, because "this is a religious people."[37] That statement becomes the launching point for a long review of law and history aimed at placing religion at the heart of the American experience.[38] This exegesis powerfully suggests that Justice Brewer, the opinion's author, finds interference with religion distasteful. Hence, this case suggests that judges can reliably identify a statutory goal, but that a broad concept of purpose and an undisciplined approach to its identification can lead judges to read their own values into statutes.**[end of page 6]** [39]*Holy Trinity Church*, however, exemplifies an unusual case where the Court employs statutory purpose in the teeth of contrary text.[40] More typically, the 19th century Court employed purpose to resolve statutory ambiguity.[41] During the late 18th and the 19th century, courts created a counter-canon–the rule that statutes in derogation of the common law should be strictly construed.[42] Later, judges began using this canon with increasing frequency and ever more

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[31] 143 U.S. 457 (1891).

[32] *See* id. at 457-58, 472 (setting out the statute's text and the Court's holding).

[33] Id. at 463-465, 472 (discussing the statute's purposes and then concluding that a literal construction would go beyond the purpose of remedying the identified evil).

[34] *See* id. at 463-65 (following a fairly general discussion of purpose with a finding of "no purpose of action against religion").

[35] *See, e.g.* Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57, 61 (1934) (using purpose as a synonym for intent with regard to a specific issue before the court).

[36] *See Holy Trinity Church*, 143 U.S. at 463-65 (discussing references to committee reports of both houses of Congress and the Act's title). Adrian Vermeule argues that the Court's conclusion about Congressional intent with respect to ministers misconstrued the legislative history. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1845-50 (1998) (showing that the legislative history is more complicated than the Court's opinion suggested and arguing that it shows that the Court was wrong). *Cf.* Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 922-940 (2000) (agreeing that the legislative history is complicated, but finding it supports the Court's result). But even Vermeule agrees that the Court characterized the statute's overall goal correctly. *See* Vermeule, *supra*, at 1846, 1850-51 (agreeing that the Court correctly identified the statute's purpose as halting importation of manual labor in order to protect American labor, but stating that the statute was not "narrowly tailored to its purposes"); *see also* Eskridge, *supra* note 26, at 1538-39 (book review) (finding that the legislative history supports the Court's characterization of purpose).

[37] *Holy Trinity Church*, 143 U.S. at 465.

[38] *Id*. at 465-471; *see* Vermeule, *supra* note 36, at 1860 (describing Justice Brewer's exegesis on this point as "fervent and one-sided" and reflecting his personal views about religion).

[39] *See* Chomsky, *supra* note 36, at 906 (discussing the "general belief" that Justice Brewer imposed "his own meaning" on the statute's words).

[40] *See* id. at 946-947 (finding use of purpose to trump clear text "rare", but not unprecedented); Crooks v. Harrelson, 282 U.S. 55, 59-60 (1930) (declaring that the Court departs from literal meaning to advance a statute's purpose only "under rare and exceptional circumstances"); *see, e.g.* Caminetti v. U.S., 242 U.S. 470, 484-85 (1917) (declining to narrow a statute to reflect its supposed purpose and declaring that a court must enforce a statutes according to its terms when those are plain); State Refrigerating Co. v. Sulzberger, 157 U.S. 1, 37-37 (1895) (declining to allow a "supposed policy of Congress" to trump plain meaning).

[41] *See, e.g.*, Pennington v. Coxe, 6 U.S. (2 Cranch) 33, 54 (1804) (Marshall, J.) (using a statute's "object" to resolve an apparent conflict between two statutory provisions).

[42] *See* Ross v. Jones, 89 U.S. 576, 591 (1874) (construing statute of limitations narrowly so as to make it inapplicable, as in derogation of common law); Douglas v. Lewis, 131 U.S. 75, 85 (1888) (stating that "statutes, if in derogation of the common law . . . should be construed strictly"); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 401 (1908) (finding the "first announcement" of this canon in this country in a 1797 case); Gooch v. Oregon Short Line R.R. Co. 258 U.S. 22, 24 (1922) (noting the reluctance of courts to construe statutes modifying the common law "beyond the direct operation of the words" even though new law can reflect new policy); *see generally* Llewellyn, *supra* note 28, at 401 (finding "two opposing canons on almost every point"). *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION 27

telling effect.[43] Legislatures sometimes responded by directing courts to construe statutes liberally to advance their purposes.[44] In the early 20th century, the Court continued to apply the goals canon, but sometimes refused to do so in ways that triggered dissents from Justices concerned about judicial interference with legislative goals.**[end of page 7]**[45] The *Lochner*-era Court famously adopted an expansive view of economic rights and created due process restraints based on that view.[46] Under this view, legislation frequently interfered with common law rights, thereby triggering strict construction in order to avoid the constitutional issues that the Court's due process jurisprudence created.[47] The *Lochner*-era Court's activism in construing statutes in ways that undermined their purposes contributed to the Court's poor reputation. Most infamously, the Court construed antitrust statutes as authorizing injunctions prohibiting labor actions.[48] This line of cases began with largely literal construction of the antitrust statutes, which ignored their main purpose—to restrain large business combinations.[49] When Congress **[end of page 8]** responded to this expansive purpose-ignoring construction by passing a Clayton Act provision aimed at curtailing the labor injunction, the Lochner-era Court construed the curtailments exceedingly narrowly, thus making them ineffectual in realizing their

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(1997) (arguing that Llewellyn's juxtaposition of completing canons only shows that canons are not absolute, not that they contradict each other directly).

[43] *See* SCALIA, *supra* note 42, at 27 (stating that "the conservative courts of the 1920s and 1930s" used this canon "to devastating effect"); *see, e.g.,* Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907) (stating that common law rights will be preserved unless doing so renders a statute nugatory); Shaw v. R.R. Co., 101 U.S. 557, 565 (1880) (construing statutes governing negotiable instruments narrowly to preserve common law exceptions); *see also* Panama R. Co. v. Rock, 266 U.S. 209, 211-15 (1924) (interpreting a civil code provision authorizing recovery for any "offense or fault" causing damage as not authorizing a wrongful death action, because no such action lay at common law); Cope v. Cope, 137 U.S. 682, 685 (1891) (noting that courts generally construe statutes permitting illegitimate children to inherit narrowly to forbid inheritance by "the fruits of adulterous intercourse" as illegitimate inheritance is in derogation of the common law). *Cf.* Jamison v. Encarnacion, 281 U.S. 635, 640 (1930) (stating that the rule requiring strict construction of statutes "in derogation of the common law" does not authorize defeat of "an obvious legislative purpose"); Johnson v. Southern Pac. Co., 196 U.S. 1, 16-18 (1904) (declining to apply the "dogma" of strict construction to a statute abrogating assumption of risk, because doing so contravenes the law's purpose to promote safety).

[44] Cal. Civ. Code § 4 (1872) (directing the courts to construe the California Civil Code "liberally" to "effect its objects and to promote justice"); Northern Pac. R.R. Co. v. Herbert, 116 U.S. 642, 658 (1885) (discussing a statute instructing courts to employ the goals canon and not to employ the canon counseling strict construction of statutes derogating from common law); *see* Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 449-52 (1950).

[45] *See, e.g.,* Dewey v. U.S., 178 U.S. 510, 522 (1900) (dissenting opinion) (arguing that a statute awarding bounties to seamen capturing enemy vessels should be "construed liberally" in view of its "object"); H. Hackfield & Co. v. U.S., 197 U.S. 442, 450-52 (1905) (using the leniency canon to exonerate a ship's captain from statutory penalties for failing to return illegal immigrants, in spite of that result's tension with the statutory purpose); Grogan v. Hiram Walker & Sons, 259 U.S. 80, 91-96 (1922) (dissenting opinion) (stating that the purposes of prohibition did not require its extension to foreign commerce in liquor, notwithstanding the statutory language containing no limitations); Fairport, Painesville & Eastern R.R. Co. v. Meredith, 292 U.S. 589, 594-95 (1934) (declining to use limited statutory purpose of federal safety standards for railroads to limit recovery in negligence action predicated upon violation of the federal statute); *see also* Crowell v. Benson, 285 U.S. 22, 94 (1932) (dissenting opinion) (objecting to a construction of a worker's compensation act as requiring a *de novo* trial in district court because it partially defeats the act's purpose). *Cf.* Helvering v. New York Trust Co., 292 U.S. 455, 464-467 (1934) (using legislative purpose to resolve a tax case); Karnuth v. U.S., 279 U.S. 231, 243-44 (1929) (construing an immigration statute authorizing temporary visits "for business" as not applying to visits to seek employment in light of Immigration law's purpose of protecting domestic labor); International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1920) (extending worker's compensation to stevedores employed on ships in order to fulfill the statutory purpose); Fleischmann Const. Co. v. U.S., 270 U.S. 349, 360-62 (1926) (construing a statute of limitations for claims of suppliers of materials for federal works liberally to effectuate the statute's purpose of compensating suppliers); Hamilton v. Rathborne, 175 U.S. 414, 419 (1899) (using purpose to help resolve ambiguity in statutes governing a married women's right to bequeath property).

[46] *See, e.g.,* Lochner v. New York, 198 U.S. 45. 53 (1905) (declaring that a restraint on bakers' hours "interferes with the right of contract" and therefore violates due process)

[47] *See, e.g*. American Steel Foundries v. Tri-Cities Central Trades Council, 257 U.S. 184, 204 (1921) (declaring that an employer has a property right in access to the place of employment as against picketers); Gompers v. Bucks Stove & R. Co., 221 U.S. 418, 436-39 (1911) (suggesting that the Sherman antitrust act should be construed as prohibiting boycotts in order to protect property rights); Loewe v. Lawlor, 208 U.S. 274, 295-96 (1908) (declaring a common law right to trade "kept free from unreasonable obstruction" in justifying a labor injunction); Chesapeake & Potomac Tel. Co. v. Manning, 186 U.S. 238, 246-47 (1902) (construing a law setting telephone rates narrowly because of a presumption against legislative intent to interfere with private business); Douglas v. Lewis, 131 U.S. 75, 85-87 (1888) (Fuller, J.) (using the principle that statutes in derogation of the common law should be strictly construed to resolve ambiguity in a statute of seisin for the purpose of maintaining freedom of contract with respect to real estate transactions).

[48] *See* Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 TEXAS L. REV. 919, 919-20 (1988) (describing the Court's condemnation of labor activities under the Sherman Act as a very "successful union-busting device[]"); E. BERMAN, LABOR AND THE SHERMAN ACT, 11-51 (1930) (arguing that Congress did not intend the Sherman Act to apply to labor). *Cf.* Howenkamp, *supra,* at 950-51 (arguing that the Sherman Act purposes included restraints on labor activity based on Congress' failure to include a labor protective amendment in the final bill, even though that exemption passed the Senate on a voice vote).

[49] *Loewe*, 208 U.S. at 292 (declaring a union a "combination in restraint of trade" under the Sherman Act); Lawlor v. Loewe, 235 U.S. 522, 534-36 (1914) (affirming a jury verdict convicting the United Hatters union of combination and conspiracy under the Sherman Act); Bedford Cut Stone Co. v. Journeyman Stone Cutters Ass'n, 274 U.S. 37, 55 (1927) (finding that a secondary boycott "falls within the terms of the Anti-Trust Act").

purpose.[50] *3. Purpose's Post-Lochner Revival* -In 1950, Karl Lewellyn wrote, "the courts have regained . . . a cheerful acceptance of legislative policy choice."[51] As part and parcel of that "cheerful acceptance" of elected officials' work product, the Court put renewed emphasis on purposeful construction.The Court repudiated the line of cases authorizing labor injunctions and emphatically embraced purposeful construction in justifying this repudiation.[52] The Court stated that the Clayton Act "must not be read in a spirit of *mutilating* narrowness," instead, the Court must give "`hospitable scope' to Congressional purpose even when meticulous words are lacking."[53] It frankly acknowledged that prior judicial construction had "frustrated" the Clayton Act's "broad purpose."[54] And it discussed House Judiciary Committee statements accusing the Court of rendering the Clayton Act "ineffectual" in accomplishing its purpose and a Senate Judiciary Committee Report characterizing labor injunctions under the antitrust statutes as "abuses of judicial power." [55]The Supreme Court associated the *Lochner*-era interpretive tradition with hostility to legislation in *Securities and Exchange Commission v. Joiner*, a case expansively construing the definition of a security under the Securities Act of 1933.[56] In that case, the Court stated that "[s]ome rules of statutory construction come down to us from sources that were hostile to the legislative process,"[57] an apparent reference to the canons that statutes in derogation of the common law shall be strictly construed and that courts **[end of page 9]** construe statutes narrowly to avoid constitutional issues.[58] It then expressly "subordinated" these rules to the "doctrine that courts will construe the details of an act in conformity with its dominating general purpose . . . and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."[59] This articulation of the goals canon makes construction to effectuate a "dominating purpose" a general rule of statutory construction, not just a rule applied only to "remedial" legislation.[60] Furthermore, the opinion holds that purpose should dominate many other potentially conflicting canons of construction.[61] Although most opinions in the post-war era employed purpose to resolve issues left open by ambiguous text, some decisions went further. For example, in *United States v. American Trucking Ass'ns*[62] common carriers unsuccessfully relied on the Motor Carrier Act's language authorizing the Interstate Commerce Commission to establish "maximum hours of service of employees" to justify regulation of their employees (which would trigger an exemption from the obligation to pay overtime under the Fair Labor Standards Act).[63] The Court relied primarily on the statutory purpose to justify the conclusion that the Commission lacked the authority to regulate the maximum hours of employees whose duties do not implicate safety concerns.[64] In so doing, the Court held that it might override plain meaning to avoid "unreasonable" results "plainly at variance with

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[50] *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1920) (construing law limiting labor injunctions narrowly to enjoin a labor action); *Tri-Cities*, 257 U.S. 184 (1921) (enjoining picketers under an anti-trust law); *see generally* James M. Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 891-92 (1930) (discussing judicial mutilation of the Clayton Act); Howenkamp, *supra* note 48, at 964-65 (explaining that use of the labor injunction actually expanded after passage of the Clayton Act because the Court made a private right of action available against labor).

[51] *See* Llewellyn, *supra* note 28, at 400.

[52] *See* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) (upholding picket of employer refusing to promote black employees); Milk Wagoner Drivers' Union v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940) (upholding picketing of businesses that had been non-union and then became employers of members of a rival union); United States v. Hutcheson, 312 U.S. 219 (1941) (upholding a strike by a labor union demanding recognition as against a competing union); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 325-31 (1938) (reversing injunction against union picket under the Norris-LaGuardia Act).

[53] *See Hutcheson*, 312 U.S. at 235 (citation omitted).

[54] *See* id. at 235-36.

[55] *See* id. (discussing H.Rep. No. 669, 72d Cong., 1st Sess., at 3); *Milk Wagon Drivers*, 311 U.S. at 102 (discussing S. Rep. No. 163, 72nd Cong., 1st Sess., at 6)

[56] 320 U.S. 344 (1943).

[57] Id. at 350.

[58] The Court delicately refrained from impugning any *Lochner*-era cases directly, citing instead to secondary authority to support its accusation of judicial hostility to legislation. *See* id. at 350 n. 7. The account of the Lochner-era tradition of statutory construction above, however, supports my inference about which "rules of statutory construction" the Court meant to impugn in this passage.

[59] Id. at 350-51.

[60] *Accord* Haggar v. Helvering, 308 U.S. 389, 394 (1940) ("*All* statutes must be construed in light of their purpose") (emphasis added).

[61] *See Joiner*, 320 U.S. at 350-55 & n. 8 (elevating the goal's canon over the *ejusdem generis* and *expressio unius est exclusio alterius* canons and the rule of lenity).

[62] 310 U.S. 534 (1940).

[63] *See* id. at 539-41 (discussing the language governing Commission authority, the exemption from the FLSA and the truckers' petition for rulemaking establishing maximum hours).

[64] *See* id. at 542-44, 552 (discussing purpose and then concluding that the power to regulate maximum hours is "limited to those employees whose activities affect the safety of operation").

the policy of the legislation as a whole."[65] In choosing to vindicate the statute's purpose at the expense of literalism, the Court recognized the danger of "judges' own views" influencing their conclusions about legislative purpose.[66] But it advocated a "lively appreciation of [this] danger" as the "best assurance" of escape from the "threat" of judicial activism. **[end of page 10]** [67]Even though much of its opinion treated purpose as a synonym for specific intent, it articulated a presumption that favors allowing the entire statute's underlying purpose to govern.[68] But it articulated an exception to the rule that statutory purpose should govern when a "different purpose is plainly shown."[69] The Court defined its entire task as that of discovering purpose, remarking that determining the meaning of a few words divorced from context "would not contribute greatly to the discovery" of a statute's purpose.[70] Purposeful construction remained the rule not the exception through the early 1980s.[71] Furthermore, it often had bite, frequently used to resolve cases that posed potentially open issues.[72] Since purpose mattered, the Court often began its treatment of **[end of page 11]** a difficult statutory issue with a discussion of a statute's overall goal.[73] In the wake of *Joiner's* criticism of strict construct of statutes derogating common law, the use of that particular approach to avoiding purposeful construction waned.[74] But as memory of the *Lochner*-era's statutory construction vices faded, the Court became somewhat less vociferous about its support for purposeful construction. So, for example, in 1967, when the Court revisited the question of how to construe the meaning of the term "security" it applied the goals canon to support a liberal construction, as it had in *Joiner*, but defined the canon as the narrower doctrine that "*remedial* legislation," not

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[65] *Id.* at 543; *accord* N.E. Rosenblum Truck Lines, 315 U.S. 50, 53, 55 (1942) (discussing the purpose of common carrier regulation before explaining that the Court will not follow the statute's plain meaning because it is "at variance with the policy of the legislation as a whole"); Markham v. Cabell, 326 U.S. 404, 406-09 (1945) (declining to read exemption from World War I era statute authorizing creditor suits to get at assets seized from wartime enemies literally, because doing so would interfere with the Act's purpose with respect to claims arising from World War II). *Cf.* National Labor Relations Bd. v. Lion Oil Co., 32 U.S. 282, 289 (1957) (holding that a construction of the National Labor Relations Act that serves none of its aims "is to be avoided unless the words Congress has chosen clearly compel it").

[66] *American Trucking*, 310 U.S. at 544 (recognizing the "danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views.").

[67] Id.

[68] *See* id. (emphasizing "appraisal of the purposes as a whole of Congress").

[69] *See* id.

[70] *See* id. at 542.

[71] *See* Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 608 (1979) (defining the Court's task in "all cases of statutory interpretation" as "interpret[ing] the words of . . . statutes in light of the purposes Congress sought to serve"); FTC v. Fred Meyer, Inc., 390 U.S. 341, 349 (1968) (stating that the Court "cannot, in the absence of an unmistakable directive, construe the Act in a manner that runs counter to the broad goals that Congress intended to effectuate"); Perry v. Commerce Loan Co., 383 U.S. 392, 399-400 (1966) (stating that the "Court would have little hesitation in giving effect to legislative purpose" even if a "literal reading" cut the other way); U.S. v. Shirey, 359 U.S. 255, 260-61 (1959) (declaring "the general purpose . . . a more important aid to meaning than" any rule of logic or grammar); 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951) (stating that regard for the Food, Drug, and Cosmetic Act's purposes "should infuse construction of this legislation") [citation omitted]; U.S. v. Congress of Indus. Org., 335 U.S. 106, 112 (1948) (characterizing Congressional purpose as "a *dominant* factor in determining meaning") (emphasis added); United States v. Zazove, 334 U.S. 602, 610 (1948) (stating that ambiguous statutory provisions "are to be construed liberally to effectuate the beneficial purposes that Congress had in mind"); *see, e.g.*, Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 841-44 (1986) (construing Commodities Exchange Act jurisdiction over reparations proceedings to reach counterclaims even though this raises constitutional problem, because to do otherwise would defeat the statutory purpose); Herman & MacLean v. Huddleston, 459 U.S. 375, 381-91 (1983) (implying a cause of action for securities fraud and applying a preponderance of evidence standard to serve the statutory purpose of protecting purchasers of securities); TVA v. Hill, 437 U.S. 153, 175-179 (1978) (extensively discussing the Endangered Species Act's purpose); Burns v. Alcala, 420 U.S. 575, 580, 591 (1975) (debating whether conferring benefits upon unborn children serves the purposes of the Aid to Families with Dependent Children program); Lines v. Frederick, 400 U.S. 18, 19 (1970) (the Bankruptcy Act is to be construed whenever reasonably possible to effectuate the Act's general policy of giving the debtor a new opportunity in life);Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968) (both the majority and dissent frame their positions in terms of statutory purpose); Cox v. Roth, 348 U.S. 207, 243-44 (1955) (holding that a seaman's tort suit under the Jones Act survives the tortfeasor's death because this result serves the Congressional purpose of benefitting and protecting seamen).

[72] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 416-424 (1975) (creating a general rule that trial courts must exercise their authority to provide a back pay remedy under Title VII, because of its remedial purposes); Central Tablet Mfg. Co. v. U.S., 417 U.S. 673, 681-84 (1974) (describing a revenue statute's "clear purpose" as the "one guiding fact" when Congress had not considered the issue before the Court); U.S. v. Bryan, 339 U.S. 323, 335-40 (1950) (using the purpose of a statute generally prohibiting use of Congressional testimony as evidence in a criminal trial to avoid giving it literal effect); Federal Security Adm'r v. Quaker Oats Co., 318 U.S. 218, 230-35 (1943) (finding very questionable regulations reasonable because they fit a statutory purpose of avoiding consumer confusion); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 573-74, 577-78 (1942) (holding that a weekly wage for irregular hours averaging more than 40 hours a week violated the Fair Labor Standards Act, because the Act has a purpose of discouraging long hours); Haggar Co. v. Helvering, 308 U.S. 389, 392-96 (conforming a statutory text to its purpose by construing the text creatively).

[73] *See, e.g.*, U.S. v. Board of Comm'rs of Sheffield, Ala., 435 U.S. 110, 118 (1978) (beginning analysis of a voting rights case with a review of the Voting Rights Act's purpose and structure); *Perry*, 383 U.S. at 394-97 (discussing the 1937 Bankruptcy Act revision's purposes before discussing its text); Walling v. Helmerich & Payne, 323 U.S. 37, 40 (1944) (discussing the Fair Labor Standard Act's purposes at the outset of its statutory discussion); U.S. v. N.E. Rosenblum Truck Lines, 315 U.S. 50, 53, 55 (1942) (discussing common carrier regulation's purpose before explaining that the Court will not follow the statute's plain meaning because it is "at variance with the policy of the legislation as a whole").

[74] *See generally* Ross, *supra* note 25, at 564.

necessarily all legislation, "should be construed broadly to effectuate its purposes."[75] Still, "virtually all descriptive canons" remained "subject to refutation . . . when a contrary legislative purpose appears."[76] **[end of page 12]**

The Decline of Purposeful Construction

The Rehnquist Court gradually began to abandon purpose.[77] Citations to the goals canon began to appear frequently in dissents.[78] As many commentators have noted, the Court became increasingly textualist, purporting to resolve cases by discovering directly applicable provisions' "plain meaning", often with no resort to statutory purpose at all.[79] Although the Court remained, as a formal matter (and occasionally in reality), willing to consider purpose to resolve statutory ambiguity, it often either neglected purpose entirely or gave it little weight.[80] The Court began developing the ideas that led it to deemphasize purpose in cases where purpose collided with plain language. For example, in *Bd. of Governors of the Federal Reserve System v. Dimension Financial Corporation*, the Court addressed the question of whether the Federal Reserve Board could regulate non-bank banks under the Bank Holding Company Act of 1956.[81] The statute defined banks as institutions accepting "deposits that the depositor has a legal right to withdraw on demand" and only authorized the regulation of banks.[82] Taken literally, this language did not authorize regulation of institutions that offered "NOW accounts," which functioned just like regular checking accounts but formally did not confer a right to on demand withdrawal.[83] Confronted with the argument that this formalist approach violated the statute's purpose, Chief Justice Burger, writing for the Court, rejected purposeful construction while expressing skepticism about purpose's utility.[84] A year later, in *Rodriguez v. United States,*[85] the Court echoed this skepticism toward purposeful construction in a *per curiam* opinion addressing a question resolved conclusively by clear text and legislative history, where a resort to purpose would likely have proven unavailing even during the era beginning with *Joiner.*[86] The Court continued to acknowledge that in exceptional cases a statute's purpose might trump plain meaning, but it only rarely allowed it to do so.[87] **[end of page 13]** The Court later started rejecting resort to statutory

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[75] *See* Tcherepnin v. Knight, 389 U.S. 337, 335-36 (1967) (applying this narrower canon to the nearly identical definition of security in the Securities Act of 1934); *see also* Cox v. Roth, 348 U.S. 207, 210 (1955) (stating that "welfare legislation is entitled to a liberal construction to accomplish its beneficent purposes") (citation omitted). *Cf.* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197-201 (1976) (eschewing liberal construction of the Securities Acts of 1933 and 1934 to further its "remedial purposes" in favor of an inference from operative language).

[76] Ross, *supra* note 25, at 573; *see, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193, 201-202 (1979) (rejecting a literal construction of "discrimination in employment" because prohibition of voluntary affirmative action would "bring about an end completely at variance with the purpose" of the Civil Rights Act of 1964) (citations omitted).

[77] Although much of this abandonment of purpose occurred during Rehnquist's years as Chief Justice, one cannot easily pin down a precise down a precise moment. *See* William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 837-38 (1985) (detecting a loss of faith in purpose in Supreme Court decisions predating Justice Rehnquist's appointment as chief justice in 1986).

[78] *See, e.g.*, Sutton v. United Airlines, 527 U.S. 471, 496-97, 504 (1999) (dissenting opinion) (relying on the canon that remedial statutes should be liberally construed to effectuate their purposes); Chapman v. United States, 500 U.S. 453, 473 (1991) (dissenting opinion) (urging the Court to use statutory purpose to resolve ambiguity in the phrase "mixture or substance" in a statute banning illicit drug use and sales); Hallstrom v. Tillamook County, 493 U.S. 20, 36 (1989) (dissenting opinion) (expressing the view that failure to literally comply with a citizen suit notice provision should be cured by a stay rather than dismissal in order to serve the statutory purpose); Garcia v. United States, 469 U.S. 70, 80-83 (1984) (dissenting opinion) (reading a prohibition on stealing government property narrowly in light of a statutory purpose of merely protecting postal workers); Am. Tobacco Co. v. Patterson, 456 U.S. 63, 80-81 (1982) (Brennan, J., dissenting) (invoking Title IV's purposes of prohibiting discrimination to justify reading an exemption for seniority schemes literally and narrowly). *Cf.* Communications Workers of Am. v. Beck, 487 U.S. 735, 747-754 (1988) (Brennan, J.) (prohibiting the expenditure of union funds on matters unrelated to collective bargaining largely because doing so violated the statutory purposes served by mandatory union dues collection).

[79] *See, e.g.*, Cooper Indus. v. Aviall Services, 543 U.S. 157, 167 (2004) (finding no need "to consult" CERCLA's purpose because of the text's "clear meaning"); *Chapman*, 500 U.S. at 461-62 (finding that the term "mixture or substance" unambiguously makes blotter paper part of an LSD tab for purposes of calculating a sentence for drug distribution based on weight).

[80] *See, e.g.*, Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 541 U.S. 246 (2004) (not mentioning the Clean Air Act's purpose of providing healthful air quality in deciding whether its preemption provision invalidates local clean fuel fleet standards); Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 698 (1995) (using the Endangered Species Act's stated purpose to confirm an argument based on plain meaning and deference to an administrative agency); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 572 (1982) (using purpose to confirm a textual reading). *see generally* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 4 COLUM. L. REV. 527, 544 (1947) (finding that canons "rarely arouse controversy" in the abstract, but "[d]ifficulties emerge when canons compete").

[81] 474 U.S. 361, 363 (1986).

[82] Id. (citing 12 U.S.C. § 1841(c)).

[83] *See* id. at 367.

[84] Id. at 373-74.

[85] 480 U.S. 522 (1987) (*per curiam*).

[86] *See* id. at 525-26.

[87] *See* Mansell v. Mansell, 490 U.S. 581, 592 (1989) (characterizing the rule allowing departures from a literal meaning that would wholly thwart a statute's "obvious" purpose as a "daunting standard"); Hallstrom v. Tillamook County, 493 U.S. 20, 28-29 (1989) (declining

purpose in contexts where a statute contained genuine ambiguity.[88] For example, in *Arlington Central School District Board of Education v. Murphy*, the Court construed a provision allowing parents successfully litigating under the Individual with Disabilities Education Act to recover "costs" as excluding awards of expert witness fees.[89] Confronted with the argument that refusing prevailing parents expert fees defeated the Act's stated goal of ensuring that children with disabilities obtain appropriate education, the Court declined to give this goal any weight.[90] The increasingly textualist Court also became reluctant to acknowledge ambiguities, thereby further shrinking the space for purposeful construction. *MCI v. American Telephone and Telegraph Company*[91] offers a good example of this tendency. It posed the question of whether the Federal Communication Commission's (FCC's) authority to "modify any requirement" of section 203 of the Federal Communications Act allowed the FCC to waive rate filing requirements for "nondominant" long distance carriers in the wake of the emergence of competition in telecommunications.[92] The term "modify" might encompass any sort of change, in which case a waiver of rate filing would be permissible, or instead might apply only to minor changes, making a waiver of this key statutory requirement illegal.[93] In an earlier age, the Court might well have resolved this ambiguity by examining whether abolishing rate filings served or disserved the statutory objective of providing rapid and efficient service at "reasonable" prices.[94] Justice Scalia, however, writing for the majority used "rigid literalism" (in the dissent's view) to read the term "modify" as only permitting minor changes, relying heavily upon the frequency of narrow definitions among the dictionaries he consulted.[95] Thus, an expansive literalism **[end of page 14]** made ambiguity disappear, thereby precluding a debate about whether the agency's interpretation advanced the statute's purpose.[96]The modern Court often uses expansive literalism to eclipse a debate about whether statutory purpose resolves a statutory ambiguity.[97] The Court increasingly gives contestable meaning to vague statutory terms and then dismisses arguments based on purpose on the grounds that a statute's "vague notions of a statute's 'basic purpose'" cannot "overcome the words of its text regarding the *specific* issue under consideration."[98] The modern Court, however, also avoids giving purpose any weight in cases where not even its most aggressive textualists squarely claim that the statute's "plain meaning" provides useful guidance.[99] In several cases, the Court has faced the question of how to interpret statutes of limitations found in civil rights statutes, which use the date an "alleged unlawful employment practice occurred" as a trigger for a filing deadline.[100] The term "unlawful employment practice" could

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to excuse noncompliance with notice requirement in citizen suit provisions as a rare case where literal compliance frustrated the statutory purpose). *Cf.* General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581, 586-590 (2004) (eschewing a literal construction of the Age Discrimination in Employment Act as contrary to its purpose of protecting the old).

[88] *See, e.g.*, Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 209-221 (2002) (reading the ambiguous term "equitable relief" narrowly to bar a suit to enforce a benefit plan's provisions that would serve ERISSA's purposes).

[89] 548 U.S. 291, 303 (2006).

[90] Id. A similar issue arose in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991). The *Casey* Court held that a statutory provision authorizing an award of "attorney's fees as part of the costs" did not authorize fees compensating for the costs of employing expert witnesses. *See* id. at 85 n. 2, 102. Congress superseded this holding. *See* Landgraf v. U.S. Film Products, 511 U.S. 244, 251 (1994) (explaining that the Civil Rights Act of 1991 superseded *Casey* by "providing that an award of attorney's fees may include expert fees").

[91] 512 U.S. 218 (1994).

[92] *See* id. at 220 (characterizing the question as whether the FCC could "make tariff filing optional for all non-dominant long-distance carriers," and then discussing the increased competition that led the FCC to make it optional).

[93] *Compare* id. at 225-26 (emphasizing a "connotation" of incremental change and addressing a split in dictionary meanings) *with* id. at 240 (dissenting opinion) (claiming that modifications can be "narrow or broad").

[94] *See* id. at 235 (dissenting opinion) (setting out this statutory goal).

[95] *See* id. 225-228 (Scalia, J) (discussing various dictionary definitions); id. at 235 (dissenting opinion) (accusing the Court of "rigid literalism").

[96] *See* Eskridge, *supra* note 36, at 1546-47 (finding this statute subject to "two plausible readings"). *Cf. MCI*, 512 U.S. at 238 (noting that the FCC found rate filing inimical to price and competition and innovation); Park 'N Fly v. Dollar Park and Fly, 469 U.S. 189 (1985) (featuring a debate between the majority and the dissent about whether allowing defense of a trademark infringement suit on the grounds that the mark is merely descriptive serves statutory purposes).

[97] *See, e.g.*, H. Miles Foy III, *On Judicial Discretion in Statutory Interpretation*, 62 ADMIN. L. REV. 291, 305-08 (2010) (explaining that the Court's decision in *Chapman* purported to resolve a question that statutory text did not answer on plain meaning grounds); Duncan v. Walker, 533 U.S. 167, 187-190 (2001) (dissenting opinion) (showing that the statute the Court analyzes is ambiguous and that policy analysis or a resort to purpose provide the only ways to resolve the ambiguity); *see also* Johnson v. U.S., 592 U.S. 694, 723 (2000) (Scalia, J. dissenting) (characterizing the Court's "obligation" as to "go as far in achieving the general congressional purpose as the text of the statute fairly prescribes-and no further"). *Cf.* Lawson v. Suwannee Fruit & Steamship Co., 336 U.S. 198, 200-01 (1949) (interpreting the term "disability" according to its ordinary meaning rather than according to its statutory definition in order to avoid results at odds with the statutory purpose).

[98] *See, e.g.*, Mertens v. Hewitt Associates, 508 U.S. 248, 261 (1993).

[99] *See* Lorance v. AT & T Technologies, 490 U.S. 900, 906 (1989) (Scalia, J.) (recognizing that it would be possible to construe the civil rights statutes of limitations trigger as occurring when discrimination's "concrete effects" are felt).

[100] *See* Ledbetter v. Good Year Tire & Rubber Co, 550 U.S. 618, 623-24 (2007) (citing 42 U.S.C. § 2000e-5(e)); *Lorance*, 490 U.S. at 904 (same).

refer to a paycheck paying a female employ less than comparable male employees or to each discriminatory decision about pay increases (which would tend to furnish evidence of discriminatory intent).[101] The majority consistently resolved these issues by focusing on discrete long past events with no references to the civil rights statutes' purpose of combatting discrimination, in spite of vigorous dissents relying squarely on that purpose.[102] Congress amended the statute **[end of page 15]** several times in response to these decisions to avoid the frustration of Congressional purpose the Court's crabbed construction had created.[103] When the Court discussed purpose, it sometimes continued its predecessors' undisciplined approach.[104] *Chevron v. Natural Resources Defense Council,*[105] for example, reviewed a lower court ruling that had relied squarely on purpose (and structure) in reading the Clean Air Act as prohibiting the use of a plant-wide definition of the term "stationary sources" in areas in violation of air quality standards.[106] Although the Court fully appreciated the ambiguity of the statutory definition of stationary source, it devoted only a short paragraph to the question of purpose, which animated the ruling it reviewed.[107] In doing so it did not mention the statutory goals section, which emphasizes achievement of air quality.[108] Instead it relied exclusively on legislative history, which posited a purpose not stated in the statute itself.[109] The Court, while frequently characterizing a statute's basic purpose as a "vague notion", sometimes neither cites nor discusses the language in the statute setting out a statute's general purpose.[110] **[end of page 16]** As a formal matter, the *Chevron* Court did not repudiate the use of purpose in statutory construction in cases reviewing agency action. Indeed, it limited deference to agencies to cases where the statute remained ambiguous after applying "traditional tools of statutory interpretation," presumably including the goals canon.[111] Even though *Chevron* recognized that statutory goals might trump agency interpretation

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[101] *Ledbetter,* 550 U.S. at 624-625 (referencing these theories); *Lorance,* 490 U.S. at 905-906 (contrasting a change in a seniority system and its application in practice as potential events triggering the statute of limitations).

[102] *See Ledbetter,* 550 U.S. at 646 (dissenting opinion) (finding treating the "actual payment of a discriminatory" as an employment practice "more respectful of Title VII's remedial purpose"); *Lorance,* 490 U.S. at 913-15 (dissenting opinion) (claiming that making the application of a discriminatory seniority system the trigger of the statute of limitations serves the statutory purpose of advancing "equal opportunity").

[103] *See Ledbetter,* 550 U.S. at 652 (dissenting opinion) (pointing out that Congress superseded *Lorance* in the 1991 civil rights act); Schuler v. PricewaterhouseCoopers, LLP, 595 F.3d 370, 375 (D.C. Cir. 2010) (recognizing that Congress superseded *Ledbetter* in the Lilly Ledbetter Fair Pay Act of 2009).

[104] *See, e.g.,* Holloway v. U.S., 526 U.S. 1, 6-9 (1999) (identifying a statutory purpose of providing a significant deterrent to "a type of criminal activity that was a matter of national concern," something that might be said of any federal prohibition); Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 459 (1989) (emphasizing the Federal Advisory Committee Act's supposed purpose "to reduce wasteful expenditures" on advisory committees without considering committee reports' statements of purpose). Sedima v. Imrex Company, 473 U.S. 479, 498-99 (1985) (discussing RICO's purposes without identifying them); Commissioner of Internal Revenue v. Engle, 464 U.S. 206, 233-36 (1984) (dissenting opinion) (explaining that the majority had found a sole statutory purpose to encourage domestic oil production by relying on isolated statements of legislators opposed to the legislation and ignoring statutory provisions cutting back subsidies); Washingtonian Pub. Co. v. Pearson, 306 U.S. 30, 41 (1939) (declaring that an interpretation of the Copyright Act prohibiting suits unless the copyright holder has deposited a copy of the work would "defeat" the enactment's "broad purpose" without specifying that purpose).

[105] 467 U.S. 837 (1984).

[106] *See* id. at 841-42 (characterizing the D.C. Circuit has holding that a plant-wide source definition in nonattainment areas, because of the Act's purpose of improving those areas' air quality).

[107] *See* id. at 859-63 (discussing the text, legislative history, and finally "the policy concerns that motivated the enactment").

[108] *See* id. at 863 (discussing the enactment's motivation without citing any statutory provision); 42 U.S.C. § 7401(b) (setting out the Clean Air Act's goals).

[109] *See Chevron,* 467 U.S. at 863 (stating that "the history plainly identifies the policy concerns that motivated the enactment"). The Court identified "allowance of reasonable economic growth" as a policy motivating enactment. Id. But the statute itself states: "The purposes of this subchapter are . . . to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(1). Industry lawyers may argue that the reference to "productive capacity" in this statement endorses economic growth as a Clean Air Act goal. But as this sentence treats the increase in peoples' "productive capacity" as a result of air quality enhancement, the better interpretation would be that the Act aims to promote productive capacity by keeping people healthy enough to work at full strength. In any case, the Court did not even discuss the tension between its reading of the legislative history and the statutory text.

[110] *See, e.g.,* Greene v. Fisher, 132 S. Ct. 38, 43 (2011) (Scalia, J.) (characterizing the Antiterrorism and Effective Death Penalty Act's purpose as guarding against extreme malfunctions of criminal justice without mentioning the Act's stated purpose); Williams v. Taylor, 529 U.S. 420, 436 (2000) (ignoring the Antiterrorism and Effective Death Penalty Act's stated purposes in favor of the judicial policies of comity, finality, and federalism); Mertens v. Hewitt Associates, 508 U.S. 248, 261 (1994) (characterizing an argument based on ERISSA's purpose of protecting plan participants as a vague notion without citing 29 U.S.C. § 1001(b), which makes that ERISSA's primary purpose); Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S 607, 641, 691 (1980) (showing that the plurality opinion purported to divine the Occupational Safety and Health Act's purpose without expressly considering its stated purpose); Mastro Plastics Corp. v. National Labor Relations Bd., 350 U.S. 270, 279-80 (1956) (characterizing the preservation of a competitive business economy a declared congressional policy even though the National Labor Relations Act's statements of policy do not explicitly include this purpose); *see also* Don E. Williams Co. v Commissioner of Internal Revenue, 429 U.S. 569, 579 (1977) (discussing an "apparent policy behind" several statutory provisions without citing any material to support this convenient characterization).

[111] *See Chevron,* 467 U.S. at 842-43 n. 9 (declaring that the Court remains responsible for determining the law if its content is clear from application of "traditional tools" of statutory construction); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative*

in an appropriate case, its cavalier treatment of stated statutory goals should have made an attentive reader wonder if the Court really took statutory goals seriously anymore

Reasons For Purposeful Construction

This part discusses the reasons for purposeless construction's growth: increasing doubt about purpose's utility, public choice theory's growth, literalism's rise, and textualists linking of purposeful construction to judicial overreaching in turn. This part provides only the background necessary to understand how the democratic theory of purposeful construction addresses the primary reasons for purposeless construction. Those looking for detailed assessment of public choice theory and literalism's merits should consult the literature cited in the notes.

Doubts About Purpose's Utility

Chief Justice Burger's opinion for the Court in *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*[112] attempted to justify the Court's then nascent practice of ignoring purpose. He expressed skepticism about purpose's capacity resolve statutory issues: Application of the "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means of effectuating that intent, the final language of the legislation may **[end of page 17]** reflect hard fought compromises. Invocation of the "plain purpose of legislation" at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents effectuation of congressional intent.[113]A year later, the Court echoed this theme in *Rodriguez v. United States*, stating that "no statute pursues its purposes at all costs."[114] Because legislative choice involves determining which values not to sacrifice in pursuit of a particular objective, one cannot assume, wrote the Court, that "*whatever* serves the statutory purpose must be the law."[115] These opinions develop what one might call the "competing considerations" rationale for not allowing purpose to trump plain statutory language. This rationale, however, while persuasive in most instances where litigants seek to invoke purpose to persuade judges to circumvent plain meaning, does not help very much in resolving statutory ambiguity.[116] In cases where specific statutory language does not resolve the issue before the Court, judges inevitably must either give effect to a statute's overarching policy or to some competing consideration the judge discovers in the statute. For example, in the civil rights cases discussed above, the Court chose to emphasize the value of repose over vindication of discrimination claims by construing a statute of limitations narrowly.[117] Recognition of competing considerations' existence does not tell us how to address them.

Public Choice Theory

The emphasis on legislation as a compromise found in *Dimension Financial Corporation* and similar cases, echoes public choice theorists' claims. Public choice theory raises questions about the value of construing statutes to effectuate their goals by challenging the view of statutes as embodying rational pursuit of public interest goals.[118] For public choice theory's proponents argue that statutes frequently represent bargains serving special interests.[119] Public choice theory teaches that those sharing narrow interests can organize more easily to protect their interests than the broader public can to protect widely shared interests and values.[120] As a result, politicians fear special interests' capacity to influence elections and tend to enact legislation serving their interests. Public choice scholars paint a picture of statutes as embodiments of bargains **[end of page 18]** meeting various rent seekers' demands. From this

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Policymaking, 118 YALE L. J. 64, 76 (2008) (describing application of the goals canon to determine if Congress has an intent on an administrative law question before the Court as "uncontroversial").

[112] 474 U.S. 361 (1986).

[113] Id. at 373-74.

[114] 480 U.S. 522, 525-26 (1987).

[115] Id. at 526 [emphasis in original].

[116] *Cf.* Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1710 (2012) (declining to allow statutory purpose to overcome plain text only permitting actions against "individuals" under the Torture Victims Protection Act., because no statute "pursues its purposes at all costs").

[117] *See* Ledbetter v. Good Year Tire & Rubber Co., 550 U.S. 618, 630-31 (2007) (noting that statutes of limitation serve a value of repose in justifying its narrow construction of one).

[118] *See* Kalt & Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 279 (1984).

[119] *See* Easterbrook, *supra* note 6, at 547 (describing legislation as a compromise among legislators serving special interests).

[120] *See* MANCUR OLSON THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

perspective, the notion that legislators rationally pursue public purposes seems naïve.[121]Public choice theory has led some commentators to favor making enforcement of the original bargain between rent seekers the objective of statutory interpretation.[122] They argue that if statutes reflect bargaining among special interests then democratic theory supports statutory interpretations faithful to the underlying bargains.This approach encourages judges to adopt a crabbed form of literalism.[123] Their belief that legislatures do not rationally pursue public interests and instead enact special interest bargains leads them to construe statutes narrowly.[124] Hence, cynicism about the legislative process makes purposeless construction seem sensible.[125]

Literalism's Rise

The modern Court's decreased reliance on purpose also reflects an increased faith in "plain meaning" as a guide to statutory interpretation.[126] Following plain meaning does not formally preclude using statutory purpose to resolve textual ambiguities, and the Court's foremost textualist, Justice Scalia, admits that context, including statutory purpose, can inform statutory interpretation.[127] Nevertheless literalism has tended to eclipse statutory purpose, because the Court's particular brand of literalism includes an **[end of page 19]** enormous reluctance to see ambiguity where many scholars and some of the less formalist Justices find it.[128]The Courts' leading textualists believe that adherence to plain language somehow constrains judicial discretion.[129] Many scholars, however, have expressed doubt about the plain meaning approach.[130] They find that many cases coming before the Supreme Court address issues that the statutory text does not clearly resolve.[131] Also, in examining the work product of Justice Scalia and others most often

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[121] *See, e.g., Hayes*, 555 U.S. at 435 (Roberts, J., dissenting) (declining to give weight to purpose the Federal Gun Control Act's sponsor attributed to the Act because legislation is the product of compromise). The *Hayes* dissent nicely illustrates how influential this view of legislation as the result of compromise has become, because the *Hayes* dissenters invoke this view even though no affirmative evidence in the legislative history suggests that any interest supported a view contrary to that of the sponsor. *See* id. (speculating that some representatives "might have disagreed" about the reach of a prohibition without citing any evidence that even one legislator did).

[122] *See* Easterbrook, *supra* note 6, at 544 (urging textualism in interpreting statutory bargains); J. Buchanan, *Contractarian Political Economy and Constitutional Interpretation;* Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975); *cf.* Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 774-77 (1987) (arguing for a common law approach to antitrust statues).

[123] *See* Farber & Frickey, *Jurisprudence*, *supra* note 5, at 880 (characterizing Judge Easterbrook's public choice approach as "reminiscent of the hoary maxim that statutes in derogation of the common law should be strictly construed").

[124] *See* Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction,* 17 HARV. J. L. & PUB. POL'Y 401, 439-445 & n. 218 (1994) (showing that Scalia frequently chooses a meaning from plausible "plain" meanings that narrows a statute's scope and that literalism has long served as a weapon against legislative power).

[125] *See* Farber & Frickey, *Jurisprudence*, *supra* note 5, at 873-74 (associating legal scholarship on public choice with a "negative view of government" and "deep distrust of legislatures")

[126] *See* Karkkainen, *supra* note, 124, at 401 (stating that Justices Scalia, Thomas, and Kennedy have adopted a "plain meaning approach" to statutory construction); William N. Eskridge, Jr., *supra* note 4, at 656-66 (discussing the increased influence of Justice Scalia's "new textualism"); Jonathan R. Siegel, *Naive Textualism in Patent Law*, 76 BROOKLYN L. REV. 1019, 1020 (2011) (claiming that the Court's patent law jurisprudence has shifted from a "richly contextual approach" to a "naive" textualist approach based on dictionary meanings).

[127] *See* United States v. Fausto, 484 U.S. 439, 444, 449 (1988) (Scalia, J.) (claiming that Court finds an answer to the statutory question before it by examining purpose, text, and structure).

[128] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 521 (characterizing himself as one who "finds more often . . . that the meaning of a statute is apparent from its text and from its relationship to other laws"); *see, e.g.*, United States v. Turkette, 452 U.S. 576, 580 (1981) (noting that there is no "errorless test for identifying . . . 'plain' or 'unambiguous' language") (quotation marks in original); *see, e.g.*, Cooper Indus. v. Aviall Services, 543 U.S. 157, 167 (2004) (finding no need "to consult the purpose of CERCLA" because of the text's "clear meaning"). *Cf.* Helvering v. Hammel, 311 U.S. 504, 507 (1941) (consulting the dictionary to establish that the word "sale" has "many meanings" and stating that its meaning here "depends on the purpose with which it is used in the statute . . .").

[129] *See* Zuni Public School Dist. No. 89 v. Dep't of Educ. 550 U.S. 81, 110 (2007) (Scalia J., dissenting) (contrasting "policy-driven interpretation" with interpretation based on text).

[130] *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29 (2006) (pointing out that most scholars do not associate themselves with textualism); Eskridge, *supra* note 36, at 1513 (stating that "the new textualism [Scalia's approach] has few defenders in academe").

[131] *See, e.g.* Eskridge, *supra* note 26, at 1535 (pronouncing himself "less persuaded" of textualism's determinacy than Scalia).

associated with the plain meaning school, they do not find evidence that the approach consistently constrains judicial choice, as its advocates claim.[132] In any case, textualism's rise has supported purposeful construction's decline.[133]

Anxiety About Judicial Activism

For the most part, purposivist and textualist scholars agree that courts should take purpose into account at least in resolving statutory ambiguity, and some of the Supreme Court's pronouncements about how it interprets statutes, in spite of its turn away from purpose, echo this consensus.[134] But textualism's advocates on the Court associate **[end of page 20]** allegiance to statutory purpose with a "disturbing . . . . tendency" of judges to assume that "Congress must have meant" what the judge think it "*should* have meant."[135] Karl Llewellyn, hardly a modern textualist, likewise concluded that courts engaged in purposeful construction inevitably shape the "net result" creatively.[136] Hence, anxiety about purposeful construction's subjectivity together with faith in textualism's capacity to constrain judicial discretion has contributed to purposeless construction's growth.

Toward Purposeful Construction

This part argues for greater reliance on statutory goals in construing statutes. It begins by explaining that reliance upon statutory goals serves democracy, because statutory goal statements generally speak to widely held public values. It also explains how purposeful construction tends to make law coherent. It defends this positive view of purposeful construction as an aid to democracy and coherence against the salient objection stemming from public choice theory, that statutes reflect the results of special interest bargaining, rather than the electorate's values. Finally, it develops a rigorous approach to identifying and employing statutory purposes in statutory construction in order to address concerns about judicial activism.

A Statutory Purpose's Democratic Value

I begin with a foundational question: Why do courts follow statutes at all? Why should judges not instead simply resolve the case before them in accordance with their own wisdom and sense of justice? The answer stems from the view that statutes embody democratic outcomes. Courts must follow statutes because they reflect the "will of the people."[137] The courts regularly rely on this view in explaining why they defer to legislatures on a host of matters.[138] Although the Constitution says nothing explicitly about how Courts should interpret cases arising under statutes, the Constitutional provisions making laws dependent on **[end of page 21]** passage by an elected legislature support the inference that Courts must follow statutes.[139] Accordingly, the rhetoric judges employ in interpreting statutes reflects

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[132] *See, e.g.*, Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process,* 12 CARDOZO L. REV. 1597, 1634 (1991) (questioning Justice Scalia's textualism's sincerity and consistency); Food and Drug Admin. v. Brown and Williamson Tobacco Co., 529 U.S. 120, 126, 161 (2000) (choosing not to allow the FDA to regulate nicotine in tobacco, even though its governing statute authorizes it to regulate articles intended to affect "any function of the body"); Babbitt v. Sweet Home Chapter for Communities for a Great Oregon, 515 U.S. 687, 714-722 (1995) (Scalia J., dissenting) (creatively reading a prohibition on taking species to avoid the "unfairness to the point of financial ruin" that he sees in preventing destruction of the specie's habitat); *see also* Circuit City Stores v. Adams, 532 U.S. 105, 131-33 (2001) (Stevens, J., dissenting) (arguing that the Court employed textualism to advance its own preference for binding arbitration of employment contracts in the teeth of a contrary statutory purpose); Eskridge, *supra* note 36, at 1533-35 (showing that plausible new textualist arguments are available on both sides of the debate over whether *Holy Trinity Church* was properly decided).

[133] *See* Eskridge, *supra* note 36, at 1532 (stating that the "new textualist" usually will not consider "general statutory purpose").

[134] *See* Molot, *supra* note 130, at 3 (noting that textualists consider context and purposivists consider plain meaning); John F. Manning, *What Divides Textualists from Purposivists?*,106 COLUM. L. REV. 70, 75-76 (2006) (agreeing that textualists treat statutory purpose as a "relevant ingredient of statutory context").

[135] *Zuni*, 550 U.S., at 117 (Scalia, J. dissenting).

[136] *See* Llewellyn, *supra* note 28, at 400.

[137] *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995) (linking fidelity to the legislature in statutory construction to "allowing popularly elected officials, *presumed to be accountable to their constituents,* to make policy decisions.") (emphasis added).

[138] *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 787 (1986) (White, J., dissenting) (describing statutes as "representing the democratically expressed view of the people"), *majority opinion overruled on other grounds by* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 882 (1992); U.S. v. Lee Yen Tai, 185 U.S. 213, 222 (1902) (describing a federal statute as expressing the "will of the people of the United States"); Union Pac. Ry. Co. v. Goodridge, 149 U.S. 680, 690 (1893) (describing a statute as "depending upon the will of the people for its very existence").

[139] *See* Eskridge, supra note 4, at 670 (pointing out that the Constitution does not directly indicate "the method the Court must follow when interpreting federal statutes");U.S. CONST. art. I, §§ 1-2, 7; art. III, § 2; amend. XVII.

anxiety about making sure that they do not usurp the legislature's function in reflecting public views.[140] This view of statutes as embodying the people's will, however, relies, to some degree, upon a fiction. Voters do not vote for statutes, except for state laws proposed as a referendum or initiative.[141] Instead, under the Constitution, they elect representatives who do vote on statutes.[142] These representatives cannot possibly know the electorate's views about every detail of the many statutes they enact. Indeed, in most cases the representatives do not themselves know exactly what the statutes they vote to enact say, since many of them devote long hours to raising funds and delivering constituent services.[143] Nor can voters easily hold individual legislators accountable for details in an elaborate statutory scheme, which frequently reflect compromises among a host of competing interests. Democratic theory does not necessarily demand that voters dictate elected representatives' positions on statutes. The founders conceived the Senate especially as embodying a civic republican model of democracy, where representatives exercised their own considered judgment about what the public interest required.[144] Yet, to the extent that representatives do not know the provisions they vote upon those provisions do not reflect the will of the people even in the attenuated sense of reflecting elected representatives' views about what constituents' or the nation's best interests require. Still, the idea that statutes reflect the people's will is not a complete fiction. Elected representatives know that opponents may bring up their votes on legislation in an election and seek to use unpopular votes to defeat them.[145] Conversely, politicians may seek **[end of page 22]** credit for statutes serving useful purposes.[146] And legislative debate about the wisdom of a vote will often be conducted in terms of whether the vote advances valuable public purposes. Hence, representatives vote on and discuss statutes with the public's likely reaction in mind.[147] Furthermore, elected politicians, in spite of their many foibles, generally understand the electorate's views and interests extremely well. The need to periodically run for office makes their jobs depend upon their understanding these views sufficiently well to appeal to a majority of voters. Those who do not understand public sentiment well enough to appeal to it generally cannot obtain or retain an elected office. For that reason, statements of legislative purpose articulate goals that embody important public values.[148] Thus, for example, the Clean Air Act states that it aims to protect public health and the Clean Water Act states that it aims to protect aquatic ecosystems.[149] The Fair Labor Standards Act expressly seeks to provide minimum standards to protect workers' well-being.[150] The Truth in Lending Act specifically seeks to assure "meaningful disclosure of credit terms" to promote "informed use of credit."[151]These purposes have genuine public value and would appeal to much of the public. Often, these goals reflect broad agreement among elected representatives about public values.[152] They do not often engender the same degree of controversy as may arise in the crafting of the means of meeting these goals

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[140] *See* Schacter, *supra* note 137, at 594 (linking allegiance to legislative supremacy with fear of judicial lawmaking compromising democracy and undermining the rule of law); *see, e.g.*, U.S. v. Locke, 471 U.S. 84, 95 (1985) (arguing that "deference to the Supremacy of the legislature" requires literal application of a filing deadline).

[141] *See* Jayne Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy,* 105 YALE L. J. 107, 113 (1995) (explaining that voters enact referenda, referred to the populace by the legislature, and initiatives, created by voters, directly).

[142] *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation,* 135 U. PA. L. REV. 1479, 1528 (1987) (contrasting direct and representative democracy).

[143] *See* Schacter, *supra* note 141, at 165 (discussing the failure of legislators to read the bills they enact and to rely on proxies for their information). *Cf.* Zuni Public School Dist. No. 89 v. Dep't of Educ. 550 U.S. 81, 116 (2007) (Scalia, J. dissenting) (claiming, incorrectly, that when a statute passes "we know for certain [that] both Houses of Congress . . . agreed upon . . . the text"). It is much more likely that Congressmen agree to legislation based upon their staffers' or committee summaries of what the legislation is likely to accomplish. *Cf.* id. at 120-21 (Scalia J., dissenting) (conceding that Members of Congress, rather than analyzing the text, probably assumed that the language reflected prior administrative practice).

[144] *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,* 74 VA. L. REV. 275, 280-81 (1988) (discussing Madison's conception of divided government based in part of a politically responsive house and a more deliberative Senate); *see generally* David M. Driesen, *Toward a Duty-Based Theory of Executive Power,* 78 FORDHAM L. REV. 71, 103 (2009) (discussing the founders' ideal of "disinterested leadership").

[145] *See generally* Jonathan R. Siegel, *The Institutional Case for Judicial Review,* 97 IOWA L. REV. 1147, 1172 (2012) (discussing the Tea Party's advancement of legal issues in the general election).

[146] *See* BREYER, *supra* note 9, at 95.

[147] *See* Daniel A. Farber & Philip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee,* 66 TEXAS L. REV. 1013, 1016 (1988) (pointing out that ideological voting implies that ideology will influence legislator's behavior).

[148] *See, e.g.*, Freeman v. Quicken Loans, 132 S. Ct. 2034, 2034 (2012) (noting that the Real Estate Settlement Procedures Act's stated purpose it to eliminate kickbacks or referral fees that raise the cost of real estate settlements).

[149] *See* 42 U.S.C. § 7401(b)(1); 33 U.S.C. § 1251(a).

[150] *See* 29 U.S.C. § 209(a).

[151] *See* 15 U.S.C. § 1601.

[152] *See* DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF LAW 57 (2012) (suggesting that society frequently can agree about desirable goals).

in detailed statutory provisions.[153] Accordingly, statements of a statute's purpose reflect elected officials' views about what the public values. Congress passes a statute with the stated purpose of protecting public health because its members believe that their constituents value public health. We do not, however, encounter statutes that state purposes inimical or even tangential to values the public consciously embraces. A statement of statutory purpose reflecting widely held public values proves possible because at a high degree of generality, the public does share some values. Thus, the public knows that it wants environmental protection and public health, even if it does not know what level of reductions it wants from coal-fired power plants for a given pollutant.[154] So, politicians have no direct known public views to draw on in creating many statutory details, although they may, at times, allow their sense of public values to **[end of page 23]** influence their choices about such matters.[155] Hence, with respect to statutory purpose, the idea that a statue reflects the will of the people is much less of a fiction than it is for many of the accompanying detailed statutory provisions.[156] Even if statements of purpose did not reflect the electorate's views they are much more likely to reflect legislators' judgments about sound values than statutory details. Textualists' claim that language that legislators have not read accurately and reliably reflects their will requires quite a leap of faith.[157] But legislators usually do know the basic purposes of the bills they vote to enact.[158] Although many statutory provisions will reflect bargains among the few legislators who actually know what they say, the goals will likely represent the will of the whole legislature.[159] It follows that when courts construe statutes to effectuate their stated purposes, they act democratically. They further the constitutional project of having statutes reflect public views and values. Justice Breyer develops a somewhat different argument for purposeful construction as democratically desirable. He argues that purposeful construction makes legislators accountable for statutes that do not work well.[160] Conversely, purposeless construction makes it difficult for voters to determine whether to blame lawmakers or judges for bad outcomes.[161] This argument depends upon a fairly optimistic view of electoral politics. It assumes that voters will not only consider what values a legislator favored, but also how well a statute operated in practice, and further, that when the debate goes to this level of depth, the electorate will consider legal process in deciding whom to hold accountable for any statutory failings. Without completely ruling out the possibility of this occurring every now and then, the argument advanced here—that legislators articulate purposes with the electorate's values in mind—offers a much stronger democratic rationale for purposeful construction than a rationale predicated on such an optimistic view of electoral politics.[162] **[end of page 24]**

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[153] *See* ID. (claiming more disagreement about means than ends).

[154] *Cf.* Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, 77 Fed. Reg. 22392 (proposed April 13, 2012) (to be codified at 40 C.F.R. part 60).

[155] *See* David M. Driesen, *Two Cheers for Feasible Regulation: A Modest Response to Masur and Posner*, 35 HARV. ENVTL. L. REV. 313, 340-42 (2011) (explaining that the "feasibility principle" reflected in numerous statutory provision reconciles potentially conflicting public values).

[156] *See* H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 216 (stating that legislators do know the purposes statutes they vote on even when they do not know the details).

[157] *See* Zuni Public School Dist. No. 89 v. Dep't of Educ. 550 U.S. 81, 116 (2007) (Scalia, J. dissenting) (claiming, incorrectly, that when a statute passes "we know for certain [that] both Houses of Congress . . . agreed upon . . . the text").

[158] *See generally* Richard Biffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1363 (1985) (book review) (stating that legislators rely on colleagues, the party caucus, or lobbyists in deciding how to vote on bills, rather than on reading them).

[159] One might wonder whether special interests might manipulate statutory purposes if they influenced statutory interpretation. But even during times when statutory purposes were important they tended to reflect public interests. *See* Macey, *supra* note 7, at 233 (noting that obtaining overt special interest legislation is costly because of risks to politicians).

[160] *See* Breyer, *supra* note 9, at 95 (stating that "If the courts have interpreted the statute in accordance with the legislator's purpose, there is no one to blame but the legislator.")

[161] Id. (stating that voters "do not know whom to blame" if judges rely upon "text-based methods alone to interpret a statute").

[162] Justice Breyer's argument not only requires an assumption that voters understand legal process, it also requires an assumption that they understand it in a very particular and incomplete way. Breyer's assumption that purposeful construction leads to electoral accountability for outcomes only works if voters do not know that poor executive branch implementation can defeat a well-designed statute. And his assumption that purposeless construction defeats accountability relies upon an assumption that voters do not know enough about the specifics of the judicial role to apportion blame properly. In assuming a somewhat sophisticated voter with very specific blind spots, Breyer employs reasoning reminiscent of the Court's decision in *New York v. United States*, 505 U.S. 144, 168-69 (1992) (assuming that voters would somehow know whom to hold accountable when state officials made unpopular policy choices in order keep federal funds, but not when federal officials compel state officials to carry out federal programs), which commentators have convincingly debunked. *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law*, 111 HARV. L. REV. 2180, 2201-02 (1998) (noting that federalism is more confusing for voters than a unitary system); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law*, 95 COLUM. L. REV. 1001, 1062-63 (1995) (finding blame allocation easier in a commandeering context than in any other context).

Coherence

The traditional view of the legal process school demands that courts assume that statutes reflect pursuit of public purposes. This assumption supports the goals canon, as construing statutes to effectuate their purpose tends to make individual provisions contribute to achievement of the statute's primary goals. As Karl Llewellyn once wrote, "If a statute is to make sense, it must be read in light of some assumed purpose."[163] Purposeful construction, therefore, enhances statutory coherence.[164] Under its influence, courts make statutes into more coherent schemes for the accomplishment of specified goals than they might otherwise be.[165]Coherence in turn helps legitimate law.[166] To the extent we treat statutes as coherent schemes for accomplishing public ends, the law commands respect and obedience. Hence, judges when they create rationales for statutory construction tying particular results to public objectives motivating Congressional enactment increase the likelihood of faithful administration of the law, public acceptance of the law, and compliance with the law. Some commentators have also maintained that coherence adds predictability. When we treat statutes as mere hodge-podges of disparate provisions, it becomes very difficult to predict how courts will construe any particular provision.[167] A sensitive appreciation of the law's objectives and how its provisions may contribute to that objective can make **[end of page 25]** the direction of statutory construction resolving ambiguities more predictable than it might otherwise be.[168] Consider, for example, the role of purpose in the Court's effort to define the jurisdictional reach of the Clean Water Act. That Act authorizes EPA to regulate "navigable waters" defined as "waters of the United States."[169] This definition is ambiguous with respect to wetlands, because the boundary between water and dry land is indistinct.[170]The Court first confronted the wetlands jurisdiction issue toward the end of the purposeful construction era.[171] It authorized jurisdiction over wetlands based on the statutory purpose of protecting aquatic ecosystems.[172] Under this approach, EPA was basically free to regulate projects that might harm water's ecological integrity and to refrain from regulating other projects, making the statute reasonably coherent. The Court, however, revisited this issue during the purposeless construction era.[173] Giving purpose little weight, the Court instead used a combination of federalism values and literalism to address the jurisdictional term's reach.[174] Neither literalism nor federalism, however, provides coherent guidance to how to limit the sorts of wetlands EPA might regulate. Most obviously, the degree of federal interference with state land use authority does not vary with the type and location of wetland, so federalism provides no concrete guidance to the limits of wetlands jurisdiction. Literalism led the Court to insist on giving some meaning to the phrase "navigable waters" independent of that given to "waters of the United States."[175] But the results the Court purports to justify with this literalism have no connection with navigability at all, because one cannot give that phrase any real meaning without reading the broader term, "waters of

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[163] *See* Llewellyn, *supra* note 28, at 400.

[164] *Cf.* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 88 N.Y.U. L. REV. 1, 51, 54 (1991) (claiming that public choice theory makes enactment of a statute "meaningless" and therefore offers no guidance to interpretation); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 550-51 (1992) (showing that a strictly literal approach that ignores context would produce unintended results, but an understanding of purpose facilitates coherent communication).

[165] *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 374 (1991) (defining vertical coherence as including congruence between the statutory text and its purpose).

[166] *See* id. (associating coherence with a rooted tradition); RONALD DWORKIN, LAW'S EMPIRE 52-53, 100-01 (1986) (associating identification of a purpose with politically justifying law).

[167] *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006) (divided opinion).

[168] *Cf.* South Carolina v. Regan, 465 U.S. 367, 376, 398 (1984) (showing a split in the Justices opinions about the purpose of a restraint on injunctions against tax collection).

[169] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985).

[170] *See id.* at 132 (characterizing the proper definition of "waters" in light of transitional areas like wetlands as "far from obvious").

[171] *See* id. at 131 (addressing the issue of jurisdiction over adjacent wetlands).

[172] *See* id. at 132-34 (explaining this purpose and why it justified finding the agency's decision to exercise jurisdiction over adjacent wetlands reasonable).

[173] *See* Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U.S. 159, 162 (2001) (SWANCC) (adjudicating jurisdiction over sand and gravel pits providing migratory bird habitat); Rapanos v. United States, 547 U.S. 715, 729 (2006) (adjudicating jurisdiction over wetlands not adjacent to a natural waterway).

[174] *See SWANCC*, 531 U.S. at 171-74 (insisting that the term "navigable waters" cannot be read out of the statute and interpreting the statute narrowly to avoid a constitutional problem under the Commerce Clause).

[175] *See* id. at 171.

the United States," out of the statute.[176] In the end, the Court could not muster a majority for any test governing the jurisdictional issue, producing widespread chaos in the effort to protect wetlands and no clear guidance.[177] Even when a purposeless construction produces a bright line rule, **[end of page 26]** however, that rule will often seem arbitrary if the directly relevant text is ambiguous and the rule does not serve the statute's purpose.[178]

Public Choice Theory's Challenge

Although public choice theory embodies a useful corrective to the naïve view of statutes as only embodying rational pursuit of a public objective, it does not defeat either my descriptive account of legislation or the normative point favoring purposeful construction. Let us begin with description. Careful public choice theorists do not go so far as to claim that every provision of every statute reflects a special interest bargain.[179]They describe their findings about special interest influence in terms of tendencies and probabilities.[180] Hence, acceptance of public choice theory does not yield the conclusion that statements of statutory purpose reflect bargains among special interests.[181]Statements of purpose may, as argued above, reflect public values.[182] Furthermore, at least some operational provisions of statutes may reflect, in whole or in part, an effort to realize public goals.[183]Careful students of legislation reject the notion that public choice theory completely explains all legislation. As William Eskridge writes, "Unorganized interests may still have an impact if their preferences are strong and widely held, for public opinion itself works as an important constraint on legislative action."[184] Furthermore, legislators usually care about sound policy and establishing a good reputation among their peers,**[end of page 27]**whether they define sound policy ideologically or technocratically.[185]Commentators have identified the Civil Rights Act of 1964, environmental law, and the 1986 tax reform as examples of laws resistant to a public choice explanation.[186] More recently, Republican reluctance to raise the debt ceiling in spite of pleas from the business community to do so reflects an ideological view that sound

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[176] *See* id. at 180-81 (dissenting opinion) (accusing the majority of undoing the deletion of "navigable waters" that Congress carried out in order to add the "waters of the United States" definitional phrase). Justice Scalia seeks to give navigability effect by insisting on continuous, rather than intermittent, flow. *See Rapanos*, 547 U.S. at 733-34. But a continuous flow may be non-navigable and an intermittent flow navigable. Navigability depends upon volume, not upon duration.

[177] *See Rapanos*, 547 U.S. 715 (grappling with the jurisdictional issue without producing a majority opinion).

[178] *See, e.g.*, Foy, *supra* note 97, at 305-08 (describing the reasons given for reaching conclusions about whether the term "mixture" includes the blotter paper in an LSD tab as "so thin that the judgment looks almost arbitrary").

[179] *See* Richard A. Posner, *Statutory Interpretation-in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 809 (1983) (describing interest groups as "determin[ing] or at least *influenc[ing]"* legislatures' preferences) [emphasis added]; Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 351 (1988) (pointing out that the public choice literature recognizes that legislators rely on personal value judgments and that the debate in that literature focuses on the degree of value judgments' influence).

[180] *See* Eskridge, *supra* note 144, at 286.

[181] *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 195-96 (1986-87) (noting that a document may reflect a single purpose even if its drafters had "a variety of motives and expectations"). *Cf.* Frank Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 828 n. 57 (1982) (noting that even if the drafters' as a group "have no consistent intent" the "written product . . . may have a structure that governs questions of interpretation").

[182] *See* Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 196 (1988) (stating that special interests have less influence on legislation's "general nature" than on details of implementation and enforcement).

[183] *See, e.g.*, Driesen, *supra* note 8, at 77 (arguing that the feasibility principle found in many detailed statutory provisions reflects Congressional reconciliation of public values favoring environmental protection and employment).

[184] Eskdrige, *supra* note 144, at 287; *accord* K. SCHLOTZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 317, 402 (1986) (arguing that interest group's influence "can range from insignificant to determinative" and that government officials sometimes champion the public interest).

[185] *See* Eskridge, *supra* note 1, at 320; Farber & Frickey, *Jurisprudence*, *supra* note 5 at 889, 897 (mentioning the "demonstrated importance of ideology" and claiming that making good public policy sometimes serves as a goal of elected representatives).

[186] *See* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 571 (2001) (finding environmental law's existence difficult to square with a public choice theory); Eskridge, *supra* note 144, at 321 (finding public choice theory unsatisfying as an explanation of these statutes). It has become fashionable to speak of environmental groups as special interest groups. Yet, environmental groups represent an interest in environmental quality that practically all citizens share—a general, not a special, interest. Public choice theory would lead to the conclusion that organizing those with such a broadly shared interest would prove much more difficult than organizing industries with a stake in any particular regulation. So, environmental law does appear inconsistent with public choice theory.

Similarly, identifying blacks, the primary beneficiaries of the Civil Rights Act of 1964, as a special interest group seems dubious. Although blacks did organize themselves and white allies to help secure passage of the act, in general, the group consists of a large number of relatively powerless people spread out across the country. Hence, they are the sort of powerless diffuse group that one expects would have great difficulty organizing, not a powerful concentrated group that faces small transaction costs in pulling together. The subsequent decline of blacks' influence on the legislative process provides evidence that one should think of the civil rights movement as a temporary mass mobilization, not as a typical special interest case.

governance requires using the debt ceiling issue as leverage to spur spending cuts, not catering to special interests.[187] The ultimate resolution reflected reconciliation of differing views about what the public interest required as well as the influence of special interests supporting lifting the debt ceiling.Although commentators have sometimes tended to assume that some legislation simply caters to special interests and other legislation serves public purposes, a better view may be that legislation typically embodies a mixture of both pursuit of public purposes and bargains serving special interests.[188] Such an account would reconcile the views politicians hold of themselves as faithful public servants with observations that they spend a lot of time talking with lobbyists for special interests and that some statutory provisions serve special interests better than public interests.[189] On this account, politicians often try to serve public purposes and lobbyists try to convince them that provisions favoring their clients' interests serve public purposes.[190] The resulting **[end of page 28]** legislation may reflect mixtures of public and private interests at least as often as pure private interest bargains or dedicated pursuit of public interests without regard to private interests.[191] Moreover, since almost all legislation empowers some actors at the expense of others, pursuit of public interests usually benefits some private interests as well. For example, raising the debt ceiling benefitted the general public as well as the businesses that lobbied for this action. In any case, as long as one accepts the notion that legislation's stated purposes often (or always) reflect public values, it follows that the normative case for purposeful construction remains robust. My argument above shows why his conclusion is consistent with democratic theory.[192] The statutory purposes reflect widely held values and thus electoral opinion. Special interest provisions do not. Hence, purposeful construction serves democratic values. This argument becomes stronger when one keeps the goals canon's limitations in mind. Nobody argues nowadays that a statute's goals should normally usurp directly applicable provisions' plain meaning.[193] Rather, the goals canon offers a method of construction when the statute proves vague about the point before a court. Hence, it generally comes into play not to contradict clear legislative intent, but to address questions the legislation either fails to explicitly address or addresses ambiguously. One might ask why courts should ever implement explicit language serving special interests in light of democratic theory. Several justifications exist. First, conforming law to a statute's plain meaning, at least where it is sufficiently clear, helps make the law more stable and predictable than it would be if courts regularly felt free to depart from plain meaning in provisions serving special interests.[194] Second, in practice courts may have difficulty distinguishing special interest from public regarding statutory provisions.[195] This difficulty implies that a failure to heed plain meaning in provisions that a court regards as serving special interests would create very widespread instability and litigation, since litigants could not reliably predict which statutory provisions a court would view as serving special interests. This problem of distinguishing special interest **[end of page 29]** bargains from public regarding ones also means that judicial rulings ignoring statutes' plain meaning could defeat public interests and therefore interfere with democratic judgments balancing competing public interests.[196] Finally, the Constitutional provision making bills surviving bicameralism and presentment into

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[187] *See* Binyamin Appelbaum, *After Aiding Republicans, Business Groups Press Them on Debt Ceiling,* N.Y. TIMES A 16 (July 27, 2011) (discussing business groups' lobbying to raise the debt ceiling).

[188] *Accord* Lee, *supra* note 182, at 198 (claiming that "ideological conviction and narrow economic interest interact . . . to determine political outcomes"); Farber & Frickey, *Jurisprudence, supra* note 5, at 889-90 (arguing that legislators have mixed motives).

[189] *See* Abner J. Mikva, *Foreword,* 74 VA. L. REV. 167, 167-68 (1988) (former Congressman Mikva states that the politicians he has known try to make good public policy and are rarely "rent-seeking" egoists).

[190] *See* Eskridge, *supra* note 165, at 360 (noting that private economic interest groups "go through ideological processes" to choose arguments that might persuade legislators that they have "good reasons" for their positions);); Lee & DeBow, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey,* 66 TEX. L. REV. 993, 1004 (1988) (stating that private interest must "cloak" their appeals to politicians in "public interest rhetoric" in order to obtain "special privileges").

[191] *Cf.* Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory,* 74 VA. L. REV. 471, 476 (1988) (pointing out that special interest provisions can sometimes benefit social welfare).

[192] William Eskridge argues more generally that considering context fits democratic theory better than a wholly textualist approach. *See* Eskridge, *supra* note 36, at 1548-49 (suggesting that a "cooperative partner" approach that takes into account the "purpose of the enterprise, other goals pursued by the principal, and common values" serves democracy better than the new textualism). But he has not made the specific argument I make here, that purpose is more likely to reflect popular will and considered judgment than statutory details.

[193] *Cf.* City of Lincoln, Nebraska v. Ricketts, 297 U.S. 373, 376 (1936) (stating that "[w]e give . . . words their natural significance unless that leads to an unreasonable result *plainly* at variance with the *evident* purpose of the legislation) [emphasis added]

[194] *See* Eskridge, *supra* note 165, at 373 (associating following plain meanings with "rule of law values" such as predictability and certainty).

[195] *See* Macey, supra note 191, at 472 (characterizing the task of distinguishing rent seeking from public interest enhancement as "extremely difficult"); Farber & Frickey, *Jurisprudence, supra* note 5, at 909 (stating that the distinction between special interest and public interest legislation is "highly value-laden and political).

[196] *See* Farber & Frickey, *Jurisprudence, supra* note 5, at 908-11 (arguing that allowing the judiciary to review statutes more stringently to make sure that they reflect public values would lead judges imposing their own values on society).

laws implies that the Courts must give them effect unless they violate some other Constitutional provision.[197] Hence, requiring construction of ambiguous provisions to conform insofar as possible to a statute's purpose serves the democratic values underlying the Constitution's bicameralism and presentment requirements. But giving effect to plainly written specific provisions that may limit pursuit of those purposes makes the law reasonably stable and avoids inadvertent interference with democratic decisions about balancing competing public goals. Giving effect to specific provisions derogating from a statutory purpose while employing statutory purpose to resolve ambiguities requires appreciation of ambiguity.[198] When judges choose one of several possible meanings to transform a case about interpreting an ambiguous statutory provision into a plain meaning case,[199] they consciously or unconsciously may thwart democracy. Instead, when a provision has several plausible meanings judges should generally choose the meaning advancing statutory goals, lest the judge either deliberately or unconsciously give effect to her own policy preferences at the expense of democracy.

A Rigorous Approach to Statutory Goals

This section shows that a rigorous approach to purposeful construction helps implement democratic values and address concerns about judicial overreaching. It also helps justify pursuit of statutory goals even when doing so does temper the pursuit of a statute's subsidiary policies. This rigorous approach has two elements: a narrow definition of statutory goals and a methodology for identifying them. 1. *A Narrow Definition of Statutory Goals* - The democratic rationale for purposeful construction usually applies only to a statute's main overarching goal. While occasionally a single provision of a statute, such as the anti-injunction provision of the Clayton Act, may reflect popular agitation sufficient to make the democracy rationale apply to its construction, usually the general public will neither know nor care about many specific statutory provisions. Hence, the democratic theory outlined above generally demands that we define a statute's goal narrowly as a statute's principal goal, not as every purpose served by its many provisions.This approach addresses conceptual confusion about what a statutory goal is in the first place. Courts might refer to any conceivably relevant policy consideration as a **[end of page 30]** statutory goal.[200]This approach maximizes the number of goals that might be found in a statute and heightens anxiety about judicial overreaching.[201] An intermediate approach, found in many decisions, implicitly defines statutory purposes slightly more narrowly as any policy consideration Congress favorably considered in enacting the statute.[202] This intermediate approach derives multiple goals from the purposes of any provision found in the statute or that any member of Congress might have identified in passing the statute.[203] A narrow definition of a statutory goal refers to a purpose motivating the entire statute's enactment. It usually leaves out purposes of individual parts of a statute.[204]The narrow approach comports with the democratic theory developed earlier, because that theory does not claim that the public normally has a discoverable opinion about statutory details or that each detail of a statute serves public values. Each of these details has its own purpose no doubt.[205] But there

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[197] *See* U.S. CONST. art. I, § 7; *see also* U.S. CONST. art. III, § 2.

[198] *See, e.g.*, Kasten v. Saint-Corbain Performance Plastics Co., 131 S. Ct. 1325, 1331-1333 (2011) (establishing the ambiguity of the word "filed" with respect to oral complaints before considering purpose's role).

[199] *Cf.* Duncan v. Walker, 533 U.S. 167, 187 (2001) (Breyer, J. dissenting) (showing that a provision of the Antiterrorism and Effective Death Penalty Act of 1996 lacks a singular plain meaning).

[200] *See, e.g., id.* at 190 (dissenting opinion) (equating a statutory purpose with the dissenting justices' views of what Congress "would have intended" if it properly understood the policy problem before the Court). In citing this dissent as an example of the approach I criticize, I do not mean to cast aspersions on the procedure of using policy analysis to resolve statutory ambiguities, which is what this dissent does. *See* id. at 185-87 (showing that under the majority interpretation federal petitions that get dismissed because of a failure to exhaust state remedies can produce a loss of an opportunity to get a hearing). I criticize, however, the characterization of these policy considerations as statutory purposes.

[201] *See* Karkkainen, *supra* note 126, at 424 (pointing out that judges can find "policies they favor" when imputing purposes to statutes); Posner, *supra* note 179, at 819 (cautioning judges not to "automatically assume that legislators had the same purpose that he would have had if he had been in their shoes").

[202] *Cf.* Burlington Northern R. Co. v. Oklahoma Tax Comm'n, 481, U.S. 454, 457, 461 (1987) (identifying both the stated Congressional policy of facilitating railroad rehabilitation and its chosen means, a ban on discriminatory state taxation, as statutory purposes).

[203] *See, e.g., Duncan*, 533 U.S. at 190-91 (Breyer, J., dissenting) (equating statutory purposes with a particular policy underlying a single provision).

[204] *Cf.* Engine Mfrs. Ass'n v. South Coast Air Quality Management District, 541 U.S. 246, 261 (2004) (dissenting opinion) (discussing the Clean Air Act preemption provision's purpose); Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 129-131 (1985) (discussing the purposes of variances under the Clean Water Act with no reference to the statute's stated overarching goals).

[205] *See* Chesapeake & Potomac Tel. Co. v. Manning, 186 U.S. 238, 243 (1902) (pointing out that the "general purpose of a proviso" is to provide an exception to a general rule); *see, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964) (discussing the purpose of a statutory provision authorizing regulation of proxy statements); Costello v. Immigration and Naturalization Serv., 376 U.S. 120, 125 (1964)

is no special democratic reason to conform ambiguous statutory provisions to these many publically unknown (and sometimes nefarious) purposes. This does not mean that the Court should ignore these subsidiary purposes in construing statutes.[206] Indeed, on occasion, some of these provisions will enjoy substantial public support and be known to the general public. But the special canon counseling construction of statutes to effectuate their purposes would have more **[end of page 31]** democratic legitimacy if confined, at least in most cases, to statutes' overall goals, which regularly reflect public goals.[207] Supreme Court precedent supports the idea that this narrow approach justifies giving statutory purpose substantial weight. Recall that the *Joiner* case[208] represented a high water mark of sorts for the goals canon, expressing it as a rule for all statutes, not just remedial statutes, and elevating the goals canon above competing canons. *Joiner*, however, did not apply this treatment to just any sort of purpose. Rather, it applied this treatment to the statute's "*dominating* purpose,"[209] an apparent reference to the major purpose animating the entire Securities and Exchange Act of 1933. Of course, one can find many cases where the Court construes statutes to conform to subsidiary purposes.[210] But still, the Court's emphasis on "dominating purpose" in one of the few cases where the Court explicitly made the goals canon general and elevated it above a series of competing canons supports the idea that a narrow interpretation of statutory purpose helps justify giving that purpose substantial weight. This narrow approach also has the virtue of adding coherence to the law.[211] It demands that courts consider the overall objective of a statute, which may embody a very complex scheme with many elements, and favor constructions that advance the statute's overall objective.[212] This creates a hierarchy and sets up a single purpose or a limited set of purposes at the head of the hierarchy. The canon, properly applied, does not have the power to eliminate all contradictions. But this narrow approach tends toward increased coherence. 2. *A Rigorous Approach to Goal Identification* - While this improvement in conceptual clarity serves democratic theory, it does not do enough to address anxiety about judicial overreaching. Courts need to employ a rigorous approach to identifying statutory goals in order to limit judges' tendency to read their favorite goals into a statute.

When a statute contains explicit statements about its purposes, the Court should generally treat these statements as a complete catalogue of the statute's goals.[213] It **[end of page 32]** should not assume that the statute has any other goals, even though it will contain provisions serving purposes that are not statutory goals in the narrow sense.[214] Absent a statement of purpose, judges should assume that the statutory title states a major purpose of legislation.[215] Titles, after

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(discussing the purpose of section 241(a)(4) of the Immigration and Nationality Act of 1952); Metropolitan R.R. Co. v. Moore, 121 U.S. 558, 564 (1886) (discussing the purpose of a particular provision in an intricate statutory scheme).

[206] *Cf.* International Broth. of Teamsters v. U.S., 431 U.S. 324, 348-354 (1977) (upholding a seniority system perpetuating discrimination at odds with Title VII's overall purpose, because the purpose of section 703(h) is to preserve bona fide seniority systems).

[207] *See* United States v. American Trucking Ass'ns, 310 U.S. 534, 544 (1940) (calling for "emphasis" on appraising general purposes in "analyzing the meaning of clauses or sections of general acts").

[208] Securities and Exchange Commission v. Joiner, 320 U.S. 344 (1943).

[209] Id. at 350-51 [emphasis added].

[210] *See, e.g.*, Pattern Makers' League of North America, AFL-CIO v. N.L.R.B., 473 U.S. 95, 102 (1985) (focusing on the National Labor Relation Act's "purpose" of preserving union control of its own affairs, when that is a purpose of a proviso in one subsection); Maurer v. Hamilton, 309 U.S. 598, 611 (1940) (holding that states could prohibit vehicle carriers because of the purpose of section 225 of the Motor Carrier Act included preservation of state regulatory authority over vehicle size and weight). *Cf.* Mitchell v. Robert DeMario Jewelry, 361 U.S. 288, 292-93 (1960) (showing that the overall aim of the Fair Labor Standards Act to create minimum labor standards supports an inference that the Act's prohibition on retaliatory discharge serves the purpose of fostering compliance with the Act's labor standards).

[211] *Cf.* Cipollone v. Liggett Group, 505 U.S. 504, 514 (1992) (pointing out that the Federal Cigarette Labeling and Advertising Act's has two stated goals, which can conflict).

[212] *See* Radin, *supra* note 19, at 407 (conceiving of a statute as a "grand design" to achieve a single purpose); Frankfurter, *supra* note 80 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 4 COLUM. L. REV. 527, 538-39 (1947) (equating purpose with a single aim).

[213] *See, e.g.*, Reynolds v. United States, 132 S. Ct. 975, 986 * (2012) (Scalia J., dissenting) (stating that the majority's use of legislative history to reinforce its acknowledgment of the stated purposes' salience is unnecessary); Mims v. Arrow Financial Services, 132 S. Ct. 740, 745 (2012) (relying on Congressional findings to establish the Telephone Consumer Protection Act's purpose); Kasten v. Saint-Corbain Performance Plastics Co., 131 S. Ct. 1325, 1333 (2011) (discussing the stated purpose of the Fair Labor Standards Act); Samantar v. Yosef, 130 S. Ct. 2278, 2285 & n. 7, 2289 (2010) (declining to find a purpose of conferring official immunity when the statutory statement of purpose only referenced sovereign immunity); Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219-220 (1981) (focusing on the Truth In Lending Act's express purpose of promoting informed use of credit by requiring "meaningful disclosure of credit terms"); U.S. v. Turkette, 452 U.S. 576, 589 (1981) (focusing on RICCO's stated purpose). Some statutory goal statements, however, explicitly state that they have purposes in addition to the listed one, thereby authorizing judicial inference of non-listed purposes. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214 (1996) (an Act to deter terrorism, provide justice for victims, provide for an effective death penalty, and *for other purposes*) [italics added].

[214] *Cf.* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876-77 (1930) (pointing out that in principle statutes' purposes can be conceived of at varying levels of generality). Giving effect to stated purposes avoids this problem for the most part.

[215] *See* Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (using a statute's purpose as described in its title to interpret a specific statutory issue); FTC v. Mandel Bros., 359 U.S. 385, 388-89 (1959) (using the statute's title along with its legislative history to

all, signal what the statute aims to accomplish and therefore reflect politicians' views about what the public values.[216] This literal approach will help head off many judicial attempts to conform the statute to the judges' preferred policies.[217] This is a real danger because judges are technocrats with no special knowledge of public opinion. They may occasionally identify goals that do not reflect widely held public values, but instead reflect the values of the elite of which we lawyers are largely a part.[218] Stated goals in statutes, however, will often reflect relatively competent Congressional judgment about what the electorate values. **[end of page 33]**

This literalism involves a shift in emphasis relative to the prior jurisprudence on purpose. The Court sometimes attributes its own purpose to statutes while ignoring statutory statements of purpose.[219] Furthermore, the Court often seems to turn to legislative history first, rather than to a stated declaration of purpose or policy.[220] And at times, it invokes statutory purpose without even identifying the purpose it purports to use as an aid to construction.[221] Some statutes, however, do not contain explicit goal statements. Judges must tread carefully in extrapolating goals from these statutes.[222] In doing so, they should aim to identify goals that animate the statute as a whole, not just parts of it, and that likely serve as sensible public justifications for the entire statute.[223]

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elucidate its purpose); Southern R. Co. v. Crockett, 234 U.S. 725, 731 n. 1 & 735 (1914) (construing a safety statute broadly to advance the purpose stated in its title); *see generally* Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 529 (1947) (stating that courts may use titles and captions to elucidate an ambiguous statute); United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) (stating that the Court will consider a title to resolve ambiguities because the "[w]here the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived"). *Cf.* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004) (holding that a caption within a statute cannot undo the plain language of the statute itself).

[216] *See generally* Miggins v. Mallot, 169 Md. 435, 440 (1936) (stating that "the title, in conjunction with the body of the act, brings out" the act's purpose with "resounding clarity").

[217] *See* Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L. REV. 117, 121, 133-34 (1995) (discussing judges' tendency to read their preferred goals into a statute); *See, e.g.*, Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 297, 323-24 (2006) (dissenting opinion) (stating that "interpreting language in light of the statute's purpose" is essential to avoiding "the substitution of judicial for legislative will"). *Cf.* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 63 (1994) (opining that approaches to statutory interpretation should "confine judges" so they perform as "faithful agents, not independent principals"); Llewellyn *supra* note 28, at 400 (associating construction in light of an "assumed" purpose with judges shaping the "net result" creatively).

[218] *See* Karkkainen, *supra* note 126, at 424 (pointing out that judges can find "policies they favor" when imputing purposes to statutes); Posner, *supra* note 179, at 819 (cautioning judges not to "automatically assume that legislators had the same purpose that he would have had if he had been in their shoes"); *see, e.g.* Williams v. Taylor, 529 U.S. 420, 436 (2000) (ignoring the Antiterrorism and Effective Death Penalty Act's stated purposes in favor of the judicial policies of comity, finality, and federalism). *Cf.* Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J. PUB. L. & POL'Y 137, 143 (1994) (suggesting that the Court should, "perhaps . . . exercise its discretion in accordance with the emerging consensus among the dominant political elites in society").

[219] *See infra* notes 109-110.

[220] *See, e.g.*, Fireboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 211 & n. 4 (1964) (relying on legislative history to establish the National Labor Relation Act's purpose even though the statute contains findings and a policy declaration to the same effect). A reading of the Court's jurisprudence over the years finds much more frequent use of legislative history than statutory purpose statements. *See, e.g., infra* note 225. To some extent this reflects the lack of legislative goal statements in some statutes, but it also does reflect a habit of turning to the legislative history first. *See, e.g., Fireboard*, 379 U.S. at 211 & n. 4.

[221] *See, e.g.*, Sorrells v. U.S., 287 U.S. 435, 446 (1932) (declaring entrapment contrary to the prohibition law's purpose, with identifying what purpose it violates). *See also* id. at 456 (dissenting opinion) (accusing the majority, which invoked statutory purpose without identifying one, of "judicial amendment").

[222] *See, e.g.*, Office of Worker's Compensation Programs v. Newport News Shipbuilding and Dry Dock Company, 514 U.S. 122, 131 (1995) (declining to assume that the Longshore and Harbor Worker's Compensation Act has adequate compensation of workers as its sole purpose). *Cf.* Takao Ozawa v. U.S., 260 U.S. 178, 190-94 (1922) (inferring from a statutory provision applying naturalization to free white persons and Africans, a public policy against naturalizing Asians, even though legislative history focused on the purpose of naturalizing permanent residents who speak or understand English and can read).

[223] *See, e.g.*, Kosak v. United States, 465 U.S. 848, 868 (1984) (Stevens, J. dissenting) (distinguishing between the purpose of the statute as a whole and purposes of exceptions to its general policy).

And courts must consider the entire statutory text,[224] legislative history, and structure in identifying a statute's unstated goals.[225] Awareness of the problem Congress meant to address also should play a large role.[226] **[end of page 34]**

My inclusion of legislative history as a potential aid to the discovery of purpose will trigger an objection from those who oppose the use of legislative history as an aid to statutory construction generally, such as Justice Scalia.[227] My approach to goal identification differs from the approach frequently taken by the Court in the past, precisely in its text-first approach. It looks first to statutorily identified goals and, when those are absent, relies on operational provisions' text and structure as a major means of identifying unstated goals. Yet, when these techniques do not suffice, my approach does call for consideration of legislative history. Invocation of legislative history (when necessary) in this context of goal identification ameliorates one concern of legislative history opponents, the concern that the use of legislative history frequently involves selective use of contradictory materials.[228] This problem is much less likely to arise in seeking to identify a statute's overall goal than when courts use legislative history to seek Congressional intent on some detailed issue.[229]An entire literature exists on this question of whether one should use legislative history in interpreting statutes, and I cannot in this space thoroughly address all of these issues. The major constitutional objection stems from the notion that legislative history should not function as "an authoritative indication of a statute's meaning," because it is not subject to the Constitution's bicameralism and presentment requirements.[230] This criticism, as many commentators have pointed out, is overdrawn.[231] When a Court uses legislative history to understand Congressional goals in passing a statue, it uses that history and the goal it identifies as an aid to understanding the text that Congress enacted. It does not substitute the goal or the legislative history identifying it for the text when it **[end of page 35]** uses the goal to figure out how to construe an ambiguous text. If the Constitution prohibits consulting unenacted legislative history as an aid to statutory construction, it would likewise prohibit use of a dictionary as an aid to construction, since Congress does not enact dictionaries.[232] Those who imagine that the Constitution forbids even a peek at the legislative history on a general and often non-divisive question—that of identifying a statute's overarching goal—can and should, nevertheless, embrace goal identification based on either statutory goal statements or reasonable inferences from statutory text and structure.[233]The democratic theory supporting purposeful construction also suggests that courts should, when seeking to identify a statute's purpose, give

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[224] United States v. Evans, 333 U.S. 483, 483-45 (1948) (inferring a purpose to criminalize harboring illegal aliens from statutory language).

[225] *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 304 (1990) (arguing that legislative history must inform findings of statutory purpose lest judicial assumptions about sound public policy substitute for Congressional policies); Radin, *supra* note 19, at 423 (claiming that when the preamble to a statute does not reveal its goal, "the legislative report that accompanies a statute often will"); Chesapeake & Potomac Tel. Co. v. Manning, 186 U.S. 238, 245-246 (1902) (stating a "rule" that courts should "discover" a statute's "purpose from the language used in connection with the attending circumstances") (citation omitted); *see, e.g.*, Johnson v. U.S., 529 U.S. 694, 708-09 (2000) (using a Senate report to divine the purpose of authorizing supervised release); Kosak v. United States, 465 U.S. 848, 858 (1984) (using legislative history to establish the purposes of exceptions to the waiver of sovereign immunity in the Federal Tort Claims Act); United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 185 (1980) (Brennan J. dissenting) (deriving purpose from committee reports); Fist Nat. Bank of Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252, 257-61 (1966) (establishing banking law's policy of competitive equality between state and national banks through legislative history); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 573-74, 577-78 (1942) (relying on the objective stated in a Presidential message initiating the statute and echoed in committee reports); United States v. Raynor, 302 U.S. 540, 543-546 (1938) (relying on the history of prior legislative enactments to establish the purpose of a statute aimed at preventing counterfeiting).

[226] *See* Interstate Commerce Commission v. J. T. Transportation Co, 368 U.S. 81, 107 (1961) (characterizing "an appreciation of the mischief that Congress" sought to alleviate as "[t]he starting point for determining legislative purpose"); *see, e.g.*, U.S. v. Tohono O'Odham Nation, 131 S. Ct. 1723, 1730 (2011) (inferring a purpose from the facts giving rise to the statute at issue); Circuit City Stores v. Adams, 532 U.S. 105, 124-129 (2001) (Stevens, J., dissenting) (showing that since the Federal Arbitration Act was enacted to overcome a reluctance to enforce *commercial* arbitration clauses, Congress probably did not intent it to apply to *employment* contracts); Ngiraingas v. Sanchez, 495 U.S. 182, 187-188, 192 (1990) (holding that since 42 U.S.C. § 1983 was aimed at mischief in the south, it does not apply to territories).

[227] *See* SCALIA, *supra* note 42, at 29-37 (explaining why he opposes use of legislative history).

[228] *See* id. at 36 (characterizing the use of legislative history as an exercise in picking out your friends in a crowd).

[229] *Cf.* id. at 32 (arguing that almost all issues reaching the Court "involve points of relative detail compared with the major sweep of the statute in question" and therefore involve issues that legislative history cannot correctly resolve because there is no legislative intent on these details).

[230] *See* id. at 35 (arguing that committee reports are not authoritative because not voted upon by Congress).

[231] *See* Eskridge, *supra* note 4, at 671-73 (arguing that as legislative history does not alter legal rights and duties, their use does not violate the bicameralism and presentment requirements).

[232] See id. at 672 (analogizing a prohibition on consulting legislative history to a prohibition on consulting dictionaries). *Cf.* Fed. Aviation Comm'n v. Cooper, 132 S. Ct. 1441, 1449, 1450 n. 4 (2012) (using dictionaries an interpretive aids).

[233] *Cf.* R.R. Comm'n of Wis. v. Chicago, Burlington, and Quincy R. Co., 257 U.S. 563, 585-589 (1922) (declining to use legislative history on a particular issue to upset a construction derived from the statutes' stated purpose and the natural meaning of the directly relevant provision).

some weight to statements made to the public that explain a statute's aim, as these likely will reflect public values.[234] It follows that courts should consider and give weight to materials often considered extrinsic to formal legislative history, such as statements made in press conferences, to reporters, and on websites designed to sell incumbent Congressmen to voters. Indeed, courts should consider how the press defines the legislation's purpose, as this may indicate why the public found the legislation worthy of sufficient support (or at least non-opposition) for it to pass. Doing so gives weight to the democratic reasons for giving statutory purpose special weight, its tendency to reflect public values. At the same time, courts will have to employ the usual tools for distinguishing Congressional intent from the intent of individual members. If a large variety of members identify the same purpose for legislation in public statements, then a court may justifiably accept that purpose if congruent with the legislation's actual language. But courts should not give weight to idiosyncratic statements of individual representatives, even public statements. The approach advocated above forces judges to confront the possibility that the legislature had purposes different from those a judge finds sensible, instead of allowing **[end of page 36]** judges to effortlessly attribute their own purposes to the legislature.[235] By doing so, it helps encourage appropriate judicial humility by inviting judges to consider a legislature's goal and to conform their interpretation, insofar as fairly possible, to that goal.[236] No approach to statutory interpretation, however, can wholly prevent judges from basing their decisions on their own policy preferences instead of the legislature's.[237]This approach also helps reconcile the aims of dynamic statutory theory with the need to preserve law's integrity and legitimacy. Proponents of dynamic theories of statutory interpretation reject an "archaeological" theory of statutes that unearths their entire meaning through examination of statutory text and history.[238] They insist that statutes evolve in order to address new circumstances.[239] They therefore see a judge's role as including sensible adaptation of a statute to contemporary circumstances.[240] Even those who accept the descriptive point that statutes necessarily evolve over time find the normative implications of dynamic theory troubling.[241] This theory seems to demand that judges make up new law from whole cloth when new circumstances arise.[242] Judges can easily substitute their own elitist values for those of the public when they seek to adapt **[end of page 37]** statutes to new

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[234] *See* Lynch v. Dep't of Labor and Industries, 145 P. 2d 265, 270 (Wash. 1944) (holding that courts may consider statements made to voters in interpreting "legislation enacted through initiative or referendum"). *Cf.* Schacter, *supra* note 141, at 131-38 (discussing voters' reliance on media sources to inform their votes about initiatives and referenda and finding court's failure to consider these sources in discerning popular intent "unseemly"). In the context of campaigns designed to influence voters' choices about initiatives and referenda, however, reliance on media sources may increase the problem of indeterminacy. Id. at 144-45. While this problem should be less serious in the context of explaining the purpose of legislation after its enactment, it may arise in the context of highly public discussion of pending legislation. Accordingly, judges should consider these sources "when reasonably accessible, direct, and uncontroverted" in helping illuminate the statutory purpose, but not in all cases. Id. at 145. Schacter also raises the problem of manipulation of such informal legislative history to strategically influence courts. Id. I am not persuaded that this is a serious problem in either the direct or indirect democracy context. In the indirect context, the concern of this Article, legislators will be far more concerned about appealing to popular values in order to secure future votes than about influencing courts. If this problem does arise, one will tend to see discordant statements about purpose, which, as Schacter points out, courts should avoid relying upon.

[235] *See* Eskridge & Frickey, *supra* note 237, at 891-92 (portraying grappling with legislative purpose as a form of judicial modesty contrasted with an attitude that cavalierly dismisses purpose in order to implement a judge's policy preferences).

[236] *See generally,* Frankfurter, *supra* note 80, at 534 (characterizing "humility of function as merely the translator of another's commands" as a "theme of our Justices"); United States v. American Trucking Ass'ns, 310 U.S. 534, 544 (1940) (stating that "a lively appreciation of the danger" that judges' own views may unconsciously influence their "conclusion as to legislative purpose" provides "the best assurance of escape" from this threat).

[237] *See* Eskridge, supra note 36, at 1549 (pointing out that "all interpretive methodologies . . . present the willful judge with discretionary choices"); Landis, *supra* note 50, at 890-91 (explaining that "strong judges prefer to override the intent of the legislature" and that "no science of interpretation can ever hope to curb their propensities"); *see, e.g.*, Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616, 632, 677 (1987) (discussing whether civil rights law has a purpose of remedying past discrimination or of establishing a "color-blind and "gender-blind" workplace). *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 STAN. L. REV. 321, 364 (1990) (admitting that objective criteria often cannot establish the correct statutory interpretation does not give the judge "unconstrained freedom" in reaching results).

[238] *See* Eskridge, supra note 144, at 275 (employing the term "archeological approach" to describe statutory interpretation based on unearthing the enacting legislature's original intent); Eskridge, supra note 142, at 1479-80 (questioning a theory based on the intent of the enacting legislature on the grounds that courts ought to consider changes that have occurred since enactment in addressing ambiguities that arise); Frankfurter, *supra* note 80, at 536 (stating that "statutes are not archaeological documents" but instead intended as guides to action); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (arguing that judges should have the power to revise obsolete statutes).

[239] *See* Eskridge, supra note 142, at 1494, 1497 (stating that "when societal conditions" and the legal context "change in ways not anticipated by Congress" these changes will influence statutory interpretation).

[240] Id. at 1480 (asking rhetorically if judges should not ask what a statute "ought to mean" in terms of present society's "needs and goals").

[241] *See* id. at 1523-44 (discussing the countermajoritarian difficulty with dynamic statutory interpretation).

[242] *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 304, 325 (1988) (Scalia, J. concurring in part and dissenting in part) (expressing concerns that allowing judge's to ignore statutory language when new circumstances change its effects would lead to "rewriting" statutes to fit "judicial predilections").

circumstances.[243] By demanding that judges remain tethered to law's purposes, we encourage them to make decisions faithful to public values whenever possible, even when those values differ from their own.[244] Furthermore, while the circumstances statutes address can easily change in ways that make specific provisions irrelevant or hopelessly ambiguous, broad public values articulated in enacted statutes can remain relevant over a very long period of time. Hence, attention to purpose increases the capacity of judges and administrative agencies to adapt statutes while maximizing the role of public values and therefore the democratic legitimacy of their decisions.[245]

An Example and Some Caveats

Ledbetter v. Goodyear Tire & Rubber Co.,[246] one of the civil rights statute of limitations cases discussed earlier, provides a good vehicle for illustrating the democratic theory of purposeful construction and exploring its value. In that case, the Court had to interpret an ambiguous phrase, an "alleged unlawful employment practice" in order to identify the proper trigger for a statute of limitations for an employment discrimination claim.[247] Treating each individual paycheck paying Ledbetter less than men in a comparable position as the triggering employment practice would bring her claim within the statute of limitations.[248] The Court, instead, decided to treat each pay raise decision as an "alleged unlawful employment practice" and therefore found her claims time barred.[249]Since the Court could reasonably interpret "alleged unlawful employment practice" either as referring to each pay raise decision or to discriminatory pay checks, the statutory text did not itself resolve this case.[250] Under the approach outlined above, **[end of page 38]** the Court should have identified and considered the Equal Pay Act and Civil Rights Act's overall goal in light of the ambiguous statutory text, since such a goal likely enjoyed widespread popular support. The majority declined to do so, treating Ledbetter's arguments based on statutory purpose as policy arguments inappropriate for judicial consideration.[251] The dissenting Justices, however, did consider the statutes' overall goals, but without specifically identifying what purpose they found in the statutes.[252] While this failure may have not have mattered much to this case, the rigorous approach developed above requires the Court to specify the statutory purpose and to use largely literal methods to do so whenever possible. The Equal Pay Act explicitly states that its purpose is to prohibit wage discrimination on account of sex, so this constitutes that statute's purpose.[253] The Civil Rights Act's statement of purpose focuses primarily on voting rights and public accommodations and says nothing directly about discrimination in the workplace.[254] It does, however, indicate that the statute has "other purposes," thereby making this a case where a court may appropriately impute to Congress purposes beyond the explicitly mentioned one. The statute's structure and text reveal an additional purpose of remedying discrimination in the workplace, including sex discrimination.[255] Hence, the Court should have considered purpose of stopping wage discrimination on the basis of sex in construing the statute of limitations. The majority, while refusing to pay attention to policy arguments based on the statute's overall purpose, considered the policy underlying the directly applicable provision, the statute of

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[243] *See* SCALIA, *supra* 42, at 22 (associating dynamic statutory interpretation with the theory that judges make law mean what they think it ought to mean); Eskridge, *supra* note 142, at 1537-38 (discussing this concern).

[244] *See* id. at 1542 (justifying dynamic interpretation of a statute based on its original purpose of protecting workers).

[245] *See* id. at 1544 (declaring the Hart and Sacks "purpose-of-the-statute approach" similar to the dynamic approach); *see, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 304, 315-16 (1988) (Brennan, J. dissenting in part and concurring in part) (finding that the purpose of a tariff act provision protecting trademarks helps justify finding ambiguity in a statute's literal language, thus allowing an administrative agency latitude in evolving the statute). In saying this, I do not mean to deny that in some cases purpose proves difficult to discern at a sufficient level of detail to help resolve a case. *See* Eskridge, *supra* note 142, at 1548 (citing the problem of the Court purporting to rely on statutory purpose, when it is in fact making its own policy judgment).

[246] 550 U.S. 618 (2007).

[247] Id. at 623-24 (discussing the statute of limitations provision).

[248] *See* id. at 624 (explaining that this was one of Ledbetter's theories).

[249] *See* id. at 628-29 (explaining that "Ledbetter should have filed an EEOC charge within 180 days" of each "discriminatory pay decision.")

[250] *See supra* note 97, at 301 (finding that that the relevant language of the statute "shed no light" on the issue before the *Ledbetter* Court). For the most part, the Court purported to rely on precedent to justify its decision. *See* id. at 625-629, 633-39. Analyzing its precedential arguments will not help to illuminate this Article's theory. *Cf.* id. at 646-656 (dissenting opinion) (showing that prior precedent does not convincingly explain the majority's result).

[251] Id. at 641.

[252] Id. at 646 (identifying the pay check theory as "more respectful of Title VII's remedial purpose" than the pay-setting decision theory).

[253] *See* Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (June 10, 1963)

[254] *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (July 2, 1964).

[255] 42 U.S.C. § 2000e-2(a)(1).

limitations. It pointed out that "statutes of limitations serve a policy of repose."[256] And it linked this policy to concerns that a liberal construction of the statute of limitations might make it hard to marshal intent evidence, which may predate the paycheck by many years.[257]The dissent, by contrast, focused heavily on concerns about remedying employment discrimination. It pointed out that pay disparities often develop over the years through many incremental decisions about raises.[258] At the same time, female employees may initially lack information about how their raises compare with those vouchsafed similarly situated men.[259] It expressed concern that the majority's approach of treating each decision about a raise as a discrete act would leave the average discrimination victim, who would be disinclined to litigate until a disparity became too large and egregious to deny or ignore, without a meaningful remedy. An ambiguous statute forces the court to make a policy decision.[260] The Court does not explain why it prefers adopting an expansive construction of the special interest **[end of page 39]** concession embodied in the statute of limitations to giving greater play to the statute's public purpose.[261] Acceptance of the paycheck theory would not read the "policy of repose" out of the statute. The statute of limitations would still cut off claims 180 days after an employee received her last discriminatory pay check, so that retirement, a long maternity leave, or moving to another employer would soon relieve the employer of any possible liability for sex discrimination. The question the Court faced involved a policy choice between effectuating the Act's purpose more broadly and broadening an exception to the Act's attempt to realize its overall purpose. The democratically grounded purposeful construction theory demands that the Court give primacy to the public purpose goal in such a case. The law embodies an antidiscrimination goal because that goal enjoys widespread public support. It is doubtful that the public knows about, let alone has strong views about, the statute of limitations. This does not mean that the Court should ignore the statute of limitations. It just means that it should analyze arguments that Goodyear's proposed construction would tend to interfere with the statute's goal of remedying discrimination. If it found that Goodyear's proposed construction tended to defeat statutory goals, it should not accept it unless absolutely necessary to the retention of a policy of repose.[262] The majority may have very good policy reasons for preferring expanded "repose" to expanded remedies, but its decision should ultimately defer to the people's will, not to its own policy preferences.[263] Although purposeful construction provides strong guidance in a case like *Ledbetter*, where the statutory purpose relevant to the case is clear, purposefulness does not always provide such clear direction. The Court's affirmative action cases, for example, raise more fine-grained issues of statutory purpose than *Ledbetter* does.[264] For they raise the question of whether the Civil Rights Act's antidiscrimination norm demands colorblind decision-making or instead aims to remedy historic oppression based on race (and other **[end of page 40]** factors).[265] In cases like this, the stated purpose of ending discrimination arguably does little to resolve salient issues.[266] In some cases, Congress states its purposes at too great a level of generality to help in resolving the case or provides insufficient evidence to permit courts to discern the enactment's overall purpose at all.[267] In other words, just

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[256] *See Ledbetter*, 550 U.S. at 630.

[257] Id. at 626.

[258] Id. at 645.

[259] *See* id.

[260] *See* Foy, *supra* note 97, at 292-93, 318-19 (explaining that when, as in *Ledbetter*, statutory text does not resolve the issue, the judge must explain the reasons for her discretionary choice).

[261] *Cf.* Radin, supra note 19, at 408 (stating that courts must justify "a judgment which restricts or frustrates" a statute's purpose). I characterize a statute of limitations as a special interest concession, because it serves the interests of large businesses. *Cf.* Hishon v. King & Spalding, 467 U.S. 69, 78 n. 11 (1984) (explaining that Congress exempted small businesses from Title VII of the Civil Rights Act). The lobbying power of big business justifies this characterization, but a statute of limitations does serve legitimate purposes. Some might be inclined to characterize the purpose of ending discrimination as a special interest purpose. But since Title VII's prohibition on employment discrimination applies to sex discrimination and, as interpreted by the Supreme Court, discrimination against whites as well as blacks, it protects every American.

[262] *See generally* Radin, *supra* note19, at 399-400 (stating that while procedural limitations must be observed, "considerable latitude" is "highly desirable" since "the achievement of a purpose is after all the main thing").

[263] *Cf.* Foy, *supra* note 97, at 303 (noting that the *Ledbetter* Court "split cleanly along ideological lines").

[264] *See, e.g.*, General Dynamics Land Systems, Inc. v. Cline, 541 U.S. 581, 586-90 (2004) (upholding discrimination against the young as consistent with the statutory purpose of protecting the old); Johnson v. Transportation Agency, Santa Clara County, California, 592 U.S. 694 (1986) (approving an affirmative action plan for hiring women); United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding voluntary affirmative action); Griggs v. Duke Power Co., 401 U.S. 427 (1971) (holding that a job classification system could violate Title VII because it excludes white people from employment);

[265] *See* Eskridge, *supra* note 142, at 1489 (claiming that it is plausible to interpret "discrimination" as demanding colorblindness or as aimed only at "invidious" discrimination against disadvantaged groups).

[266] *See* id. at 1491 (describing *Weber* as bedeviled by two conflicting purposes, creating a color-blind society and creating more jobs for blacks).

[267] *See, e.g.*, Costello v. Immigration and Naturalization Serv., 376 U.S. 120, 125-26 (1964) (finding the "generalized purpose" of the statutory subsection before the Court "does little to promote resolution of the specific problem before us); United States v. Evans, 333 U.S. 483 (1948) (holding that the statute's purpose of criminalizing harboring of illegal immigrants does not provide useful guidance in construing a

as text can be ambiguous with respect to one issue or another, so can purpose. Still, purposeful construction often can provide useful guidance in answering a statute's many unanswered subsidiary questions, if the Court applies a rigorous approach to discerning what Congress sought to accomplish when it chose to enact a statute.

Conclusion

Some recent decisions suggest that the Justices may yet regain the "cheerful acceptance of legislation" that marked some of their predecessors' efforts.[268] When it does, it will no doubt embrace purposeful construction, thereby serving democratic values, enhancing the law's coherence, and showing becoming judicial modesty. Yet, purposeful construction need not reject literalism's contribution nor resurrect the vice of seeing purpose everywhere. Instead, the Court should embrace the narrow and rigorous approach to purposeful construction developed here in order to maximize allegiance to democratic decisions while limiting judicial tendencies to read their own values into statutes. **[end of page 41]**

statutory ambiguity regarding the penalty for this crime); *see generally* U.S. v. First Nat. Bank of Detroit, Minn., 234 U.S. 245, 259-60 (1914) (finding the Congressional policy in passing legislation "often an uncertain thing" not furnishing a stable "ground for statutory interpretation"). *Cf.* Eskridge, *supra* note 142, at 1491 (describing purpose in a fine grained way to escape the uselessness of purpose described at a higher level as avoiding "discrimination" in an affirmative action case).

[268] *See, e.g.,* Kasten v. Saint-Corbain Performance Plastics Co., 131 S. Ct. 1325, 1330 (2011) (declaring that the Court interprets the whole text in light of the statute's purpose); Zuni Public School Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 92 (2007) (employing legislative purpose to clarify a statutory puzzle).