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Statutory Interpretation and the Public Interest

by Zacharia Nethercot*

This article argues that judges should apply a “public interest” standard when exercising their discretion in interpreting statutes. This standard provides judges sufficient guidance, yet, more than other standards, allows their decisions to take into account both the public will and additional protections for underrepresented populations. In this way, the judge will arrive at the most legitimate decision possible.

Section I explores the limits of judicial discretion within which such a standard could operate. In Section II, the author fits “public interest” into the context of the judiciary's role in democratic theory. Section III outlines some progressive concepts useful in defining the “public interest.” Two California cases examined in Section IV illustrate how the standard can be applied to statutory interpretation problems. Finally, in Section V, the author demonstrates how a “public interest” standard can strengthen protection for the rights of women and other underrepresented people.

INTRODUCTION

Many legal theorists have attempted to explain what legitimizes the exercise of judicial authority, and/or how judges should make decisions. In this article, I will argue that judges should, within the constraints of their power, interpret statutes to best serve the public interest. The “public interest” principle can be contrasted to theories such as Justice Scalia’s “textualism,” Ronald Dworkin’s “fit,” or Judge Bork's “neutral principles.”

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1. Trying to summarize these viewpoints in three sentences or so can only do a
Scalia, Dworkin, Bork, and many other legal theorists appear to base their theories on assumptions something like these:

1. Judges are unelected or purposely insulated from the democratic process, so they are presumptively unrepresentative of popular opinion.
2. In order to exercise power legitimately judges must avoid relying upon their own subjective opinions.
3. Something (the theorists disagree about what) serves or should serve as a constraint on judges using their subjective opinions. These constraints legitimize the exercise of power because the judge’s actions are constrained by some external force rather than her own subjective opinion.

Critics such as Stanley Fish argue that this paradigm is flawed because there is no such thing as a true objective standard against which a judge may measure her opinion. Precedent, text, and other external matters can be understood only through interpretation and therefore do not provide theoretical constraints on judges. If judges are constrained by precedent, the constraint is self-imposed and therefore subjective. Since there are no truly objective constraints, the judge must search elsewhere for legitimacy for the exercise of her power.2

My approach is to recognize these criticisms and attempt to build a model of judicial decision-making that can be justified as being, if not legitimate per se, at least the most legitimate model possible under the circumstances. I believe that developing and following a public interest model of statutory interpretation is an effective method for increasing judicial legitimacy.

I limit my argument for a public interest standard in statutory interpretation to those areas within a judge’s discretion. In Part I, I examine where those areas of discretion lie. Theoreticians disagree about what is or is not discretionary. Dworkin, for example, argues that for every legal question there is theoretically a correct answer, and it is up to the judge to try to find that answer. Dworkin would deny the judge any discretion, granting her only the ability to make good faith mistakes. H. L. A. Hart, representing positivism, might look at the discretionary area as where the law runs out, requiring the judge to legislate from the bench. Discretion might also arise from the “hard” cases where there are equally plausible arguments on both sides.

I will use “discretionary” in a practical manner, to denote the areas where a judge’s opinion will be accepted as the law governing the case.

disservice to the authors cited, and for this I ask their forgiveness.

To understand the extent of these discretionary areas, it is important first to understand the external, power-based constraints on judging.

A potential weakness of a public interest model of statutory interpretation is that the concept may be too vague to provide conclusive answers in difficult cases. In Part II, I will argue that the public interest concept can be meaningful when put into context. In particular, I will examine the relationship between the public interest and the judicial role in democratic theory. I will argue that a theory of democracy based on consent (as opposed to majority will) provides a strong rationale for the exercise of judicial power, especially when that power is exercised to protect or build the consent of the governed. The fear that the interpretation of statutes in the public interest will lead to an overly vague standard is thus addressed, at least in part, by understanding the judiciary’s role as a democratic institution.

Even if public interest is not a fatally vague concept, ascertaining what the public interest is can still lead to difficult political and ideological questions. In Part III, I will posit some progressive concepts that can be useful in ascertaining the public interest. These concepts can be seen, in light of the democratic theory discussed in Part II, as “consent maximizers.” The judiciary, by using these concepts in discretionary decisions, can help to improve the functioning of our far-from-perfect democracy. Thus, I argue that the judiciary should answer “political” questions by taking a progressive viewpoint, seeking to use government and the law as a way to make the world a better place for society as a whole and for future generations. By doing so, the judiciary will be exercising power in the most legitimate fashion possible.

In Part IV, I will use two California cases (one “good,” one “bad”) to illustrate how courts can use the concept of public interest in statutory interpretation. One case achieves beneficial results by relying on a sound conception of the public interest. The other case ignores the concept of the public interest, leading to absurd and detrimental results.

Finally, in Part V, I use a third California case to demonstrate how a public interest standard for statutory interpretation is compatible with the need to remedy the historical discrimination faced by women in the legal system. I argue that a broad, comprehensive theory, such as the public interest, can provide even more protection to women than a narrower focus on strictly gender-based laws prohibiting discrimination.

METHODOLOGY

My goal is to construct a theory of statutory interpretation and invite criticism of the construct I present. However, in discussions with readers of the first draft of this paper it became clear that without a minimum knowledge of some of the theoretical debates and issues the reader would
find the paper difficult to understand. Therefore I have chosen some examples of other prominent theories of statutory interpretation to provide context. It is not my purpose in this article to critique particular theorists in detail, nor to summarize their theoretical constructs.

My concerns over methodology have led me to adopt a non-traditional approach toward citations and footnotes. Citations to “authority” in a scholarly discussion of an issue do not necessarily advance knowledge about the issue examined. I perceive a variety of misconceptions and problems in citing to authority. First, just because somebody has said something does not make it true. Second, the fact that somebody may have said something that an author is saying now does not make what the author is saying any less her own thoughts on the matter. Finally, because of a history of exclusion of women and minorities from the legal profession, citations to “authority” most likely means citations to white, male “authority.” This has the unfortunate consequence of perpetuating male-dominated legal theory.

Law journal format many times discourages the expression of both innovative and common sense ideas by requiring citation to relevant “authority.” Innovative reasoning must by definition require an appeal to the reader as authority. If there was any “authority” the reasoning would not be innovative. Common sense reasoning can usually find “authority” to cite. However, by definition, common sense relies on the proposition that “anybody [reasonable person] who thought about it would think so.” Therefore, the critical authority is once again the reader.

On this basis, the main authority I appeal to in this article is the reader. If the concepts put forward make “sense” to the reader and help to develop clarity of thought on the matters discussed, then my statements are validated by the only authority with which I am concerned.

My footnotes are thus limited to references that I believe may be of use to the reader. The footnotes refer either to works I know about that cover areas I cannot fully develop in this article or to pieces that will give the reader a chance to make her own assessment of the facts of the matter discussed. I will also cite the works of authors whose concepts I attack, so that the reader may determine whether my reasoning is more persuasive. The reader is given the chance to avoid the difficulty of losing her place in the text because there is nothing in the footnotes other than suggested additional readings and “if you don’t believe me, read it for yourself” citations.

To help those who wish to pursue particular legal theories further, I have included a selected bibliography. The bibliography may also help provide context for those who want one-sentence summaries of various schools of theory to provide a context for understanding this article.
I. POWER-BASED CONSTRAINTS ON STATUTORY INTERPRETATION

Because my argument for adopting a public interest standard refers to its benefits when used within the discretionary power of the judge, it is important to determine what constrains the ability of a judge to interpret statutes. Here I am referring to specific, external restraints that compel judges to act in ways they might not otherwise act. It is important to recognize and understand these constraints on power, because they function quite differently for a Supreme Court justice than for a trial court judge.

Three major constraints on a judge's ability to interpret statutes are: higher authority, limits on time, and limits on information. These constraints are interrelated. Higher authority refers to a person or group who can either remove a judge from power and replace her, or make the judge's exercise of interpretation futile by reversing that interpretation. Additionally, a higher authority may have the ability to promote (increase the power of) the judge. A judge dedicated to serving the public interest must balance the need to interpret statutes in the public interest against the benefits of occupying a position of higher power.

Lower courts are thus constrained by the knowledge that a particular ruling would most likely be overturned by the higher courts and therefore would be futile. Additionally, many lower-court judges are elected or removable by impeachment. The group able to remove a lower-court judge should also be considered higher authority. The high courts are constrained by threat of removal and the possibility that an order may not be enforced by the executive branch.

Limits on time force judges to consider where their energy would best be spent. A forceful, well-thought-out opinion is futile if it is overturned. Thus, in allocating time a judge should balance the possibility of being overturned against the possibility of spending time on an area where there is greater likelihood of an interpretation being accepted. In a similar fashion, a high-court judge should consider the possibility of legislative action that reverses an interpretation (a court could ignore the legislature, but in doing so risks removal).

Limits on information are, in modern jurisprudence, directly related to limits on time. There are often so many cases and articles potentially related to an issue that a judge could not read them all and still reach a timely decision. In considering procedural motions a judge may need to limit her time, and consequently the amount of information considered; however, gathering information is critical for a judge to accomplish her goals in interpreting statutes. The particular information a judge uses can have a major impact on her interpretation. Although external limits on
information exist (e.g. national security issues), the main limit on information is how much time a judge has to seek out the information available.

These three constraints are, in practice, quite substantial. Removal may be exercised for failure to meet expectations. People may expect judges to act like "judges" as defined by tradition and the legal community. Heeding tradition is in this way responding to higher authority. Tradition and precedent are not, however, the sole touchstones of expectations.

The California Supreme Court’s experience with issues surrounding the death penalty illustrates powerfully the need for judges to understand the question of higher authority. Three members of the court (Bird, Grodin and Reynoso) failed to be reconfirmed by California voters primarily because of their failure to rapidly implement the death penalty authorized by voter initiative.

Ronald Dworkin might argue that the task of the California Supreme Court would be to come to decisions that achieve the best "fit." This "fit" would be based on the relevant statutes, precedents, and constitutional precepts, as well as the principles behind them. The facts of the case would be fit, like a jigsaw puzzle piece, into this pre-existing framework. In this way, the court would attempt to achieve a consistent and meaningful body of interpretive law.

The California court in many ways followed Dworkin’s model. They attempted to fit the death penalty initiative into the body of California and United States jurisprudence. Achieving "fit" was no simple task in light of the United States Supreme Court’s decision in Furman v. Georgia,3 in which each justice wrote a separate opinion on the constitutionality of the death penalty. The attempt to achieve "fit" was, by the account of Justice Grodin, a good-faith effort. But this did not save the justices from the wrath of the voters, who wanted murderers put to death immediately.

In this situation, the court was faced with two distinct higher authorities: the U.S. Supreme Court and the California voters. One wielded the power of declaring the initiative unconstitutional, rendering the California court’s interpretation futile. The other wielded the power of voting the justices out of office. Using a power-based analysis, the court might have been better advised to write an opinion it believed would be overturned than to face removal. Justice Grodin argued powerfully for the independence of the judiciary, the need to allow justices to hear arguments and come to reasoned conclusions without considering possible election results. But the voters either did not hear or did not accept these arguments.

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Justice Grodin was acting in his well-reasoned judgment of the public interest (following a model that resembles Dworkin's "fit"). This judgment ran up against the constraints of power, however, and he was voted out of office. This illustrates the difficulty of following a theory of interpretation that does not account for the constraints of power and why I limit my argument herein to discretionary decisions of judges. What is discretionary must be developed in each specific context based on the existence of external, power-based constraints.

II. THE PUBLIC INTEREST AND DEMOCRATIC THEORY

A broad concept such as the public interest, if not further defined, is open to the charge that judicial determinations will be based on the personal value preferences of individual judges instead of the democratic body politic. It is important that the judicial process be subjected to democratic control. However, the notion of democratic control is not inherently in conflict with the public interest standard.

To explain why, I begin this section with a general discussion of the notion of objectivity and the ways in which objectivity fits into democratic theory. I then discuss democratic theory and the problems in adducing and providing expression for the individual, minority and majority perceptions that compose the public interest. Because of these problems, it is necessary to examine democratic delegation theory and separation of powers as ways to implement the public interest in the democratic process, particularly in questions of statutory interpretation. Finally, I discuss the implications for determining the public interest in a system of unequal distribution of information and wealth. Given the inequities in our system and the need to build consent in order to improve democracy, I conclude that judges can help ensure that the most disempowered in our society are included in the democratic process by applying a public interest standard when exercising their discretion in interpreting statutes.

Legal theorists such as Robert Bork might argue that a public interest standard is too subjective, and that interpretations should be based on more "objective" or "neutral" principles. The problem with this argument is that objectivity and neutrality are not only unattainable chimeras, but they can also serve as shibboleths, distinguishing those who share in the alleged "objective" belief from those who do not share the "objective" position.

Judges can, however, determine contextual objectivity, which can be

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defined as consensus within the context. The concept of contextual objectivity recognizes that within certain historical periods, those individuals in a society who exercise political power agree that certain beliefs are objectively true. For instance, eight of the nine Justices on the United States Supreme Court of the late 1800's believed that "objectively," the Fourteenth Amendment did not prohibit "separate but equal" schools for blacks and whites. Today, it is well settled that "separate but equal" violates the Fourteenth Amendment. This change in jurisprudential position does not make the concept of "equal protection" too subjective to be useful. Instead, it indicates the significance of the context that underlies and validates our current constitutional interpretation.

Underlying the socio-historical context of any judicial determination of "objective truth" is a particular set of preferences. The underlying and more important issues of statutory interpretation are whose preferences should govern an interpretation and how those preferences are determined. Somebody’s or some group’s preferences are always embodied in the law. In Plessy v. Ferguson, for example, the white majority’s preference for racial separation determined the "objective truth" that separate education based on race did not violate the Fourteenth Amendment.

Relying on precedent or other so-called "neutral" principles does not allow a judge to avoid the issue of preferences. Why should a judge base her decision on what a past judge wrote in an opinion about a similar issue? Why should a judge base her decision on the preferences of the writer of a legislative committee report? These are not inherently "neutral" principles. Some set of preferences underlie these choices.

By referring to a public interest standard, however, these questions about the use of precedent can be better answered. Generally there are good reasons for a judge to consider precedent. The presumption is that the previous judge carefully considered the issue and came to a well-reasoned decision based on the information available. In addition, there is a strong public interest in maintaining a stable legal system.

I argue for a complex democratic theory that recognizes the value of precedent, but does not follow it blindly. Instead, and more significantly, this complex democratic theory would rely on the concept of the public interest to guide it in statutory interpretation. The public interest can best be understood within the context of democratic theory. Because democratic theory is based on letting the body politic decide, a concept of the public interest based on democratic theory can be objective within the context of the body politic. This is a much larger context than past judges who wrote judicial opinions. Thus, Judge Bork’s alleged "neutral princi-

lems," such as precedent or "original intent," are neither more objective nor more useful than the public interest standard in attaining the goal of democracy.

Democratic theory posits that people know best what is good for themselves. The proof adduced is usually that nobody has yet come up with a better system. The caveat "when fully informed" is many times added, particularly when complex decisions involving long-term consequences are involved, as illustrated by some Latin American countries' experiences with hyperinflation. In these countries, had each person been "fully informed," it is most likely that they would have voted for different policies. Democratic theory can take this information gap into account. The main point is that ascertaining the public interest involves finding out what the people think is best (the "popular will").

Problems are encountered in ascertaining the "popular will." The basic problem is aggregating "will," especially because thoughts are based on information, which, if unavailable, may make the thought an inaccurate reflection of a person's "will." A complex democratic theory recognizes that any democratic process results in only an approximation of the public will. The success of a democracy can be determined by how close an approximation the process achieves.

A simplistic majoritarian theory dictates that a majority vote would always be the best approximation of the public will. However, such a theory is subject to serious criticism. The basic criticism of majoritarian democratic theory is that it carries the seeds of its own destruction. Nothing prevents the majority from voting to strip the minority of voting rights (this was a major problem in the French Revolution).

A more complex majoritarian theory would take this into account and put such majority decisions out of bounds through constitutional protections requiring super-majority (i.e. two-thirds) votes for some decisions. This might be justified by distinguishing the concept of "temporary" majorities. The argument would be that over time, a majority would not support the action, and the super-majority vote is required to protect the majority over time from the majority of the moment.

Another brand of democratic theory starts from consent, or attaining the consensus of the democratic body politic. The Declaration of Independence is a powerful statement of consent theory. The Constitution's preamble, as well as the Bill of Rights, reflects a strong base in consent theory. Consent theory begins with the proposition that unanimous decisions are the best approximation of the popular will. However, because unanimity is seldom if ever possible, but some government action would be better than none, people must consent to some decisions they would

not have made by themselves. If the system as a whole is better than viable alternatives, then there is in some sense consent to an adverse decision. But if someone believes that her fundamental rights are violated by a decision, then the consent of that person no longer exists. The body politic has the choice of recognizing that right or becoming a smaller and less valid body.

Consent theory runs into some difficulty in dealing with crime and punishment. It is difficult to argue that criminals consent to their punishment. Arguments may be made that some type of pre- or post-punishment consent exists, but this leads into convenient fictions. Alternatively, crime can be understood as an attempt by the purported criminal to destroy the consent of another member of the body politic. Punishment of the criminal which results in the body politic becoming smaller does not make the body less valid, because growing smaller in the situation was inevitable.

This analysis leads to a balance of consents, such as the right of the victim to live versus the right of the killer to act unfettered by societal norms. In striking this balance we may factor in the completely extinguished consent of the victim, as well as the partially extinguished consent of those who operate out of fear when dealing with the killer, and conclude that punishing murder may well save as much consent as possible. Because punishment always destroys some consent, however, a concern for procedural protections for criminal defendants is consistent with consent theory, as is the rule of construing criminal statutes narrowly.

Criminalizing abortion, on the other hand, would not be consistent with consent theory. It would destroy the consent to the system of all those pregnant women who believed that they had a fundamental right to control when and whether they would bear children. Yet such a law would not save enough consent to offset the loss of consent suffered by these women. It is difficult to argue that a fetus can have meaningful thought that could be considered consent. Even granting such consent, criminalizing abortion could not increase consent within the system because no one else could possibly fear that they would be aborted. Consent theory would thus distinguish abortion from murder.

"Public choice" theory bears mention here, although properly viewed it is not a theory of democracy at all. "Public choice" theory examines the interaction between the strength of various group interests and decisions of legislatures. "Public choice" theory has demonstrated effectively that decisions of the legislature do not represent the choice of the majority of voters as much as the choice of those groups that apply the most pressure on a particular issue. "Public choice" theory is thus very helpful in analyzing the quality of our current governmental system. However, there is little, if anything, normative to be gained from "public choice" theory. The normative argument for "public choice" theory is, at best,
that since this is the way things are done, this is the way things should be done. At worst, the argument is that protecting the powerful is a worthwhile goal.

Neither majoritarian nor consent theories seem completely satisfactory. However, the goal of total consent is the more appealing of the two. Progressive theory would recognize the goal of total consent as an unobtainable perfection, but still pursue the goal as a means to improve the current governmental system.

Both majoritarian and consent theories have historically had to confront the issues of best approximation, delegation, and representative democracy. In ancient Athens, it was possible to call all the citizens together to debate and pass laws. From a practical standpoint, this is not possible in modern democracies. There are just too many people to get everybody together in one place. Thus, modern democracies have had to elect representatives to approximate how the majority of people would have voted. However, such systems of representative democracy have always been flawed by the corruption, lies and misrepresentations of at least some of the representatives. Constitutional systems can be seen as at least a partial response to the need to control such abuses. How well a system controls abuses can have a major impact on how closely that system approximates what all citizens would have decided, had that been possible.

With the telecommunications revolution, we have reached a stage where instantaneous public reaction could be had for every governmental decision, whether “judicial,” “legislative,” or “executive.” Voting by two-way cable television is certainly within technological capability. Issues of statutory interpretation could be decided by such a vote. (A similar idea would have judges consult polls as authority for a statutory interpretation.) While such ideas are most likely beyond the established power constraints in our governmental system and thus impracticable, they bear discussing as illustrations of the need for a complex democratic theory that includes delegation theory.

Democratic delegation theory can be based on the realization that no single person has the time or information available to decide every issue adequately, even if she had the desire to do so. This is true regardless of technological advancements. In effect, a system of decision-making by two-way cable voting would mean that people who did not have time to participate would not be represented at all. Decisions would be made mostly by retired people and the unemployed. The need to delegate decisions is therefore essential to a functioning democracy.

Systems of elected representatives and separation of powers are justified in democratic theory because they provide the best approximation of the popular will. The popular will becomes not just an aggregate of popu-
lar impression derivable from poll results, but the will of the people properly informed and adequately deliberating. This by nature must be constructed. A legislature or a court may be able to give us the best expression of this will. Therefore, delegation of authority by the people is in this way not just a necessary evil, but can have a positive value for improving democracy. The basic problem with delegation is the need for trust in the decision-makers. This problem is best solved by supporting officials who work hardest to implement the public interest. One way for a delegator to determine whom to trust is to examine the potential decision-maker's positions on issues with which the delegator is familiar. If the position and reasoning are persuasive, then there is good reason to believe that the same type of reasoning will be used to achieve satisfactory positions on issues with which the delegator is unfamiliar.

Separation of powers can be justified under delegation theory by the need for specialization. Consideration of consent theory in conjunction with delegation also serves to further develop our understanding of the role of separation of powers in our governmental system. Consent theory posits that consent to a system is partly based on that system's fair and equal treatment of all people. Many decisions must be made by majority vote. However, procedures that ensure equal treatment of minorities increase consent and thus promote better democracy. The legislature, being subject immediately to the will of the majority, may be more concerned with protecting the majority than with the consent of minority interests. Separation of "judicial" from "legislative" is therefore particularly important to ensuring fair and equal treatment.

The judiciary is purposely insulated from the will of the majority, the better to check and balance the tendency of the legislature to cater to the majority. Separation of powers theory leads to the conclusion that the judiciary is fulfilling its most essential role in protecting the interests of the least powerful minorities. In interpreting statutes, the judiciary plays an important role in helping legislation better approximate the "public will" than might be developed by simple majority vote.

Two models of the relationship between the judiciary and the legislature may be put forward in regard to statutory interpretation. In one, the people delegate authority to the legislature, which then delegates authority to the judiciary by passing laws. In the second, the people delegate certain powers to the legislature and other powers to the judiciary. The two methods are graphically illustrated as follows.
tion arises in situations in which the enacting legislature engaged in a serious consideration of the issue and thus, more than anybody else, based its decision on the most information available. In this way, the presumption would be that the intent expressed was the best approximation of the "public will" and thus the public interest. Yet when the legislature did not engage in a serious consideration of an issue at the time, there is no reason to believe that the "public will" will be approximated well — let alone in the best fashion possible — through "imaginative construction."

Additionally, Posner has already assumed that the legislature accurately reflected the will of the people and that this will has not evolved or changed over time. If a judge's goal is to have her interpretation reflect the current public interest, Posner's method will be a worse approximation than if she were to "imaginatively construct" the intent of the current legislature. If the judge constructs anything, she should construct the public interest directly, as the fundamental purpose of the legislature is to represent the people. Thus, Posner's "imaginative reconstruction" is less democratic than alternative methods based on the second model.

Under the second model, the power to interpret statutes is delegated directly to the judiciary. This model can be either conservative or progressive, depending on the purpose of the direct delegation. Scalia's textualism would fit into the second model, as he might argue that the courts should act only when given a clear command by the text of a statute and not attempt to ascertain any hidden or implied intent of the legislature. This theory limits the ability of the judiciary to serve the interests of the legislature or the people by making judicial action more difficult.

A public interest model would see the direct delegation of power to the judiciary as designed partly to protect minorities from unfair enforcement and partly to ascertain the public will on a matter that was not fully or clearly expressed by the statute. Under this version of the second model, the judiciary's duty would be to best serve the people. Legislative intent would be important, as it would presumably be the best available reflection of the popular will, but the judiciary would have an additional duty to ensure that the law is fairly enforced and enforceable. Under the first model, once a law was passed, it would not matter how unfair or discriminatory an interpretation of the law would be, as long as that was what the legislature intended. Under the second model, a law reinstituting slavery, for example, could be declared void as contrary to public interest, as it violates fundamental rights and destroys consent, even absent a written constitution.

In applying democratic theory to statutory interpretation in the United States, it is important to emphasize that the United States is far from a
I. Vertical Delegation

people
(all power over statutes)

legislature
(interpret, enforce statute enacted)

judiciary

verdict

The vertical delegation model would make the judiciary the servant of the legislature, responsive only to the command of a majority of the legislature. The judiciary would have no independent duty to the people except as required by specific constitutional clauses. Since each statute would be a discrete delegation of power, questions of interpretation would best be answered by looking to the intent of the legislature that passed the statute. The model is conservative in that the intent behind a statute will not be able to change with the change of context over time.

The problem with the first model is that it adopts uncritically the presumption that the popular will is most accurately reflected by the legislature that enacts the statute to be interpreted. This presumption leads to the conclusion that the intent of the enacting legislature should be the guiding principle of statutory interpretation. Judge Posner takes this reasoning a step further and argues that when the intent of the enacting legislature cannot be adequately ascertained (i.e. because the issue did not exist at the time), judges should “imaginatively reconstruct” the intent of that legislature. The court would try to imagine what the enacting legislature would intend if it were in session at the time of the interpretation. 7

The mistake here is that the presumption in favor of the enacting legislature loses all its purported force when it is clear that the enacting legislature did not contemplate an eventuality. Since Posner would “imaginatively reconstruct” the intent of the enacting legislature, he would achieve only an approximation of that intent. The force of the presump-

II. Separation of Powers

people

legislature
(enact statutes)

judiciary

verdict

(interpret & enforce statutes)

perfect democracy, especially a consent-based democracy. Much governmental structure was developed at a time when women and minorities were disenfranchised. In addition, property requirements and literacy tests prevented poor people’s voices from being heard in the development of many of our laws.

An examination of our current democracy under consent theory shows that the power of wealth greatly diminishes the quality of the approximation of the public will by our legislatures. In an ideal democracy each will must be given equal weight and properly be taken into account. People's electoral choices are, however, by necessity determined by the information they receive. Currently, the information received depends on which candidate can raise the most money. Additionally, electoral rules do not create incentives for informed and comprehensive debate of issues. Finally, the U.S. education system almost completely fails to teach people how to make intelligent electoral choices. The result of these democratic inadequacies is that the least powerful (financially and educationally) tend to be the worst represented by the current democratic process. Judges, by interpreting statutes in ways that empower the least powerful, can work to improve the functioning of the democracy and better serve the public interest.

III. ASCERTAINING THE PUBLIC INTEREST: SOME PROGRESSIVE CONCEPTS

As developed in Part II, the judiciary can help make the system more democratic by using a consent-based model of democracy to help define the public interest for use in interpreting statutes. By taking this progressive approach, the judiciary can increase the legitimacy of its exercise of power. Instrumental progressive concepts can be validated by determining whether they move society toward the goal of maximum consent.

I propose the use of these progressive concepts: “empowerment,” “human potential,” “self-esteem,” “respect for the value of diversity,” and, above all, a willingness to critically question tradition in order to find ways to improve the functioning of society. Progressive thinking generally keeps one eye on the present and the other on the future, using the past to illuminate the road to the future. The concepts presented herein are in no way meant to be exclusive. They are, however, meant to provide a broad framework that is generally compatible with progressive thinking and additional progressive concepts.

“Empowerment” involves teaching, organizing, and providing tools to people so they can gain more control over the decisions (by both business and government) that affect the quality of their lives. As people gain equal power within the constraints of their potential, the representative quality of a democracy is increased. Class actions are a good example of
how the courts can empower the people. Rules of court that make \textit{In Pro Per} representation easier also empower people.

Empowerment is always a relative inquiry. People in power do not need empowerment. Empowerment exists only to the extent that it fosters equality within the constraints of "human potential." Actions that appear to be empowering but that are not directed toward creating equality may instead create unfair advantage.

Striving for certainty in legal interpretation should not be seen as an argument against adopting a public interest standard in statutory interpretation. Certainty finds a comfortable place under the banner of empowerment. Certainty can provide "notice" to people, and thus empower them. Certainty can also provide more efficient dispute resolution, thus allowing fuller development of human potential with the time saved by the parties to a dispute. However, certainty that the application of the law will deny relief to a party who has by general consensus been unjustly harmed is not a worthwhile goal. Certainty must therefore be weighed with regard to the overall public interest and empowerment.

"Human potential" involves the realization of the inherent potential of each individual through the individual's participation in society. Maximizing human potential is a powerful tool for improving the quality of our democracy by increasing the quality of consent. "Self-esteem" (known as "pride" in the lesbian and gay community) is necessary to achieve full human potential. Self-esteem involves people believing in their inherent worth and their ability to participate valuably in society. Invidious discrimination destroys self-esteem. The judiciary thus has good reason to actively interpret statutes to prevent invidious discrimination, thereby serving the public interest by increasing human potential.

"Respect for the value of diversity" ("diversity" for short) involves recognizing and accepting that which is unique in human beings. "Diversity" is in itself an important value because diversity increases the information available by increasing the viewpoints presenting information. Condemning people simply for being different destroys the human potential for progress. Respect for diversity requires that there be valid reasons — free from unfair prejudice or stereotyping — for disagreeing with a viewpoint. A problem arises in accepting or respecting viewpoints that argue for intolerance, because such viewpoints are designed to destroy diversity. Like the question of balancing consent for the purpose of criminal law, respect for diversity requires some balancing when faced with intolerant viewpoints.

Respect for "human dignity" involves the realization that society and civilization are improved when people are treated so as to achieve their full human potential. All human beings have dignity which must be protected. Even if a person has lost much of her dignity through the vicissi-
tudes of life, whatever dignity that remains should be fostered and protected. Protecting human dignity is a critical role for the courts, as this is not a value that receives adequate attention in a majoritarian system. Therefore, when interpreting statutes that affect the poor and powerless, courts are well advised to give these statutes a broad, liberal construction.

There is certainly room for debate and discussion within the context of these "progressive" concepts (and these are not exclusive), but these concepts can form useful guideposts when heading toward a more specific inquiry into what is or is not in the public interest.

IV. CASE STUDIES: RIGHT AND WRONG STATUTORY INTERPRETATIONS

I have chosen two cases as examples of how courts can use the concept of the public interest in statutory interpretation. Both are recent California decisions, one by the California Supreme Court, the other by the California Court of Appeal, First District. First, I argue that Justice Tobriner, writing for a unanimous California Supreme Court in 1970, decided In re Cox\(^8\) correctly, using principles consistent with the public interest. Making those principles more explicit helps to further illuminate why the case was properly decided. Second, I argue that Judge Smith, writing for a 2-1 majority on a state court of appeal in 1987, decided Anderson v. San Francisco Rent Stabilization & Arbitration Bd.\(^9\) incorrectly, ignoring a relevant inquiry into the public interest and instead relying on highly questionable traditional tools of statutory interpretation.

Cox confronted questions of the interpretation of the Unruh Civil Rights Act.\(^10\) At the time the case was decided, the Act stated:

> All persons within the jurisdiction of this state are free and equal, and no matter what their race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

> This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every race, color, religion, ancestry or national origin.

Mr. Cox was arrested at a shopping center in San Rafael for refusing to leave when he was ordered to do so by a security guard. Mr. Cox

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claimed that he was a paying customer and was being discriminated against because of his association at the shopping center with a friend who had long hair, unconventional dress, and unpopular political beliefs. The question for the court was whether the Unruh Act covered such discrimination.

Traditional rules of statutory interpretation might have led the court astray. In particular, the “plain meaning” rule and the rule of *expressio unius* might have led the court to decide that the type of discrimination Cox complained of was not covered by the Act. The plain meaning rule is described by a well-known hornbook this way: “If the words of an enactment, given their ordinary and proper meaning, are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain the legislative intent.”

The rule of *expressio unius*, according to the same hornbook, is that “the expression of certain things in a statute necessarily involves exclusion of other things not expressed.”

The court might have reasoned that the list of prohibited discrimination was exclusive and that this was the “plain meaning” of the statute. Justice Tobriner, however, did not follow this reasoning.

The court looked first to the history of the Unruh Act. The Unruh Act was passed as an amendment to the former code section that codified the common-law duties of common carriers and innkeepers, including the duty to serve all paying customers. In 1923, the legislature extended the Act to cover “places where ice cream or soft drinks of any kind are sold for consumption on the premises.” Under the 1923 version, Cox most likely would have been covered. The court held in *Stoumen v. Reilly* (1951) that the 1923 version covered discrimination against homosexuals. In *Cox*, the court reasoned:

The Legislature enacted the 1959 amendment subsequent to our decisions in *Orloff* and *Stoumen*. Neither of those cases restricted discrimination to “race, color, religion, ancestry or national origin” — the particular incidents of discrimination specified in the 1959 amendment. We must, of course, presume that the Legislature was well aware of these decisions. We cannot infer from the 1959 amendment any legislative intent to deprive citizens in general of the rights declared by the statute and stanchioned by public policy. “Without the most cogent and convincing evidence, a court will never attribute to the Legislature the intent to disregard or overturn a sound rule of public policy.” Although we recognize that a Legislature that contemplated civil rights legislation

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12. Id. Statutes § 115.
in the late 1950's or early 1960's would have been particularly concerned with the plight of racial minorities within the United States, the prosecution has not presented one shred of legislative history which would suggest an intent to disregard the sound rule of public policy enunciated by this court in our *Orloff* and *Stoumen* decisions.

The nature of the 1959 amendments, the past judicial interpretation of the act, and the history of legislative action that extended the statutes' scope, indicate that identification of particular bases of discrimination — color, race, religion, ancestry, and national origin — added by the 1959 amendment, is illustrative rather than restrictive. Although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit all arbitrary discrimination by business establishments.\(^1\)

While it is clear that the court carefully considered the public interest, witnessed by the court's reliance on "public policy," the conclusion that the legislature intended the court to interpret the Unruh Act to cover the complaint of Mr. Cox rings a bit hollow. There was no direct evidence, such as legislative history, of such an intent on the part of the legislature. More likely, the legislature did not consider this issue at all.

Given that the intent of the legislature was inadequately ascertainable, democratic consent theory, as developed in Part II of this article, would help to explain the decision in *Cox*. According to this theory, the judiciary is fulfilling its most essential role when protecting the interests of the least powerful minorities. The court's interpretation of the Unruh Act would thus have much less to do with the intent of the legislature than with the court fulfilling its duty to the people of California. Additionally, progressive concepts, as developed in Part III of this article, would argue for the *Cox* court's interpretation. The concepts of empowerment, human potential, self-esteem, and diversity all argue for broad and liberal interpretation of anti-discrimination legislation.

As illustrated above, courts do consider the public interest when interpreting statutes, and this is beneficial. Developing and deepening our understanding of the public interest is therefore valuable in reaching the best results in interpreting statutes. However, sometimes courts rely on an inadequate understanding of the public interest. By blindly applying traditional rules of statutory interpretation, they reach the wrong results. This is the case in *Anderson v. San Francisco Rent Stabilization & Arbitration*

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14. *Cox*, 3 Cal. 3d at 215-16 (citations omitted).
Anderson concerned interpretation of an ordinance authorizing San Francisco's residential rehabilitation loan program, commonly known as RAP (rehabilitation assistance program). The question was whether the RAP ordinance should be construed "to allow borrowers to pass through to tenants, under a prescribed rent formula, increased 'monthly rent payments' secured by the property at the time the loan [was] made, including payments unrelated to the rehabilitation of the property." (emphasis added). The court held that the RAP ordinance, properly construed, should allow landlords to pass through all loan payments to tenants. According to the majority, the court was supposed to "construe ordinances by the same rules we apply to statutes." Also according to the majority: "[T]he central question for us is whether the superior court correctly interpreted the term 'monthly loan payments' as restricting pass-throughs [in the rent charged] to rehabilitation-related loans."

In addition to presenting the issue of interpreting statutory language at the time it was written, this case also presents the issue of changed circumstances. In this situation, Judge Posner argues we should "imaginatively reconstruct" the intent of the enacting legislature. After San Francisco authorized the RAP program, the Board of Supervisors enacted a rent control ordinance. According to the majority of the Anderson court, "we have to remember that in 1974, when RAP came into existence, there was no city-wide rent control. A landlord could pass on as much debt service as the market allowed." It is also a political reality that the 1974 Board of Supervisors would not have voted for any rent control, while the 1987 Board supported the ordinance in effect at the time.

In interpreting the RAP ordinance, the court did not consider the presumption, posited by consent theory, that statutes should be construed to protect the poor and least powerful. Nor did the court follow progressive concepts that would have required it to interpret the ordinance to protect the diversity of San Francisco neighborhoods.

Yet both of these ideas were part of the policies in the RAP ordinance. According to the ordinance, the general purpose was "to improve the condition of housing and the quality of life in San Francisco . . . . It shall be the policy of RAP to maintain the existing diversity of San Francisco's neighborhoods, to encourage the existence of low and moder-
ate income housing." The state authorizing statute stated: "[T]he local agency shall take every possible action to prevent displacement of all residents as a result of the operation of the residential rehabilitation program." Additionally, landlord borrowers could "buy out" of the RAP rent limitations by prepaying the loan, or if the base rents were unreasonably low, petition the administrator for an increase.

The result of the Anderson court's decision was absurd. According to the dissent, "By participating in the RAP program [landlords] are free to precipitously raise rents to whatever level is necessary to shift to their tenants the burden of repaying as much debt as their property will secure, regardless of the purpose for which the borrowed funds were obtained or used." Under the majority's interpretation, "all a RAP borrower's personal credit expenses, such as the repayment of an automobile [Mercedes-Benz] loan could be passed through to tenants."24

Making matters worse, the later-enacted rent control statute gave landlords a strong incentive to mortgage to the hilt and take out a RAP loan. Thus, they could institute rent increases far beyond what would have been allowed by the rent control ordinance. Independent evidence confirms this. Two unappealed (but properly decided) cases "evidently involved property owners who refinanced their property to the hilt just before taking out a RAP loan, planning to take advantage of the pass-through and perhaps to avoid the rent control ordinance."25

Instead of relying on a properly developed concept of the public interest, the court relied on traditional rules of statutory interpretation that deserve to be questioned. The court relied in particular on "legislative intent," the "plain meaning" rule, and implicated the rule of expressio unius. The court reasoned:

"The fundamental rule of statutory construction is that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. Certainly the court is not at liberty to seek hidden meanings not suggested by the statute or by the available extrinsic aids."

The ordinance says that increased costs in the form of "monthly loan payments" can be passed on to the tenant after re-

22. Id.
23. Id. at 1353.
24. Id. at 1352.
25. Id. at 1342.
habilitation. The words are clear. Adding to them the limiting phrase "to finance rehabilitation" is permitted only if the ordinance, its legislative history or available extrinsic evidence requires it.\(^{26}\)

Even on the basis of the traditional tools of statutory interpretation, the right decision could have been reached. However, the court’s refusal to make relevant and helpful inquiries into the public interest made it much easier for the court to arrive at the wrong decision.

As far as ascertaining legislative intent, I would prefer Judge Posner’s "imaginative reconstruction" to the purposeful blindness of the Anderson majority. The majority argued that since the Board of Supervisors intended for RAP landlords to be able to pass-through all loan payments (there was no question at the time that they could pass-through all non-RAP-related loans), we should consider that to be the intent of the Board even though the rent control ordinance would normally not permit such pass-throughs. Posner’s "imaginative reconstruction" would at least ask that we mentally reconstitute the old Board and ask it whether, in light of the loophole that RAP could create in rent control, unrelated loan pass-throughs should be allowed. However, given that the Board that enacted RAP was hostile to rent control, the answer might still be yes. I would certainly prefer to look to the intent of the later board that enacted the related rent control ordinance. But I would feel most comfortable asking in what way the public interest would best be served, doing my best to ascertain as much information as possible about the potential effects of various interpretations. If the current Board of Supervisors disagreed, it could change the statute based on the information available.

V. STATUTORY INTERPRETATION
AND THE RIGHTS OF WOMEN

Unfortunately, after twenty years of beneficial results, the California Supreme Court has turned its back on its interpretation of the Unruh Act in \textit{In re Cox}. As argued in Part IV, the public interest was well served by the interpretation of the \textit{In re Cox} court. \textit{Harris v. Capitol Growth Investors XIV}\(^{27}\) reverses this interpretation and is another example of a "bad" interpretation.

\textit{Harris v. Capitol Growth Investors} also illustrates how a public interest standard in statutory interpretation can gain increased protection for the rights of women. The plaintiffs in \textit{Harris}, Muriel Jordan and Tamela Harris, were female heads of low-income families whose income consist-

\(^{26}\) \textit{Id.} at 1344 (citations omitted).
ed solely of public assistance benefits. They represented a class challenging Capitol Growth Investors' requirement that prospective tenants show that their gross "earned income" be equal to or greater than three times the rent. The plaintiffs complained that this selection method was arbitrary under the Unruh Act because although they could not meet the requirement, they were financially able to pay the rent.

The record in the lower courts demonstrates that this policy was aimed particularly at excluding women on AFDC. The "earned income" policy was especially blatant because whether the income came from work, a trust fund, pension benefits, or AFDC, the color of the money was equally green. The requirement had virtually nothing to do with the tenant's ability to pay. The "gross income" requirement (although not argued in the lower courts) also had the effect of excluding a certain number of people on public assistance. The landlord's concern about ability to pay would have been much better effected by examining disposable (after-tax) income. This is significant because many forms of public assistance are non-taxable.

The main issue, as the case worked its way through the system, was the requirement of "three times rent." Because the case was decided on demurrer, the landlords conceded that the plaintiffs themselves may have had the financial ability to pay the rent. However, the landlords argued that this requirement was a valid predictive mechanism, and therefore reasonable as a matter of law. The trial court agreed with the landlords on the "three times rent" requirement and with the plaintiffs on the "earned income" requirement. The landlords then agreed to drop the "earned income" requirement, so that on appeal the only issue presented was the "three times rent" requirement.

The Court of Appeal, following In re Cox and its numerous progeny (all holding that the Unruh Act applied to all arbitrary discrimination), correctly reversed. The court held that the reasonableness of a three times rent requirement was a factual question and could not be decided on demurrer. More to the point in this case, the landlords had not demonstrated that tenants who earned more than three times rent were any more reliable than tenants who earned less. Under the Court of Appeal ruling, the plaintiffs could have argued that there were much better ways of screening out irresponsible tenants, including prior rental history.28

The California Supreme Court rejected the decision of the Court of Appeal, significantly limiting the scope of the Unruh Act. While not overruling the specific holdings of In re Cox and its progeny, the court disagreed with the interpretation that the Unruh Act applied to all arbi-

trary discrimination. The *Harris* court reached this holding even though the broad interpretation had been applied for twenty years, and the legislature had amended the statute a number of times without trying to change that interpretation. In fact, legislative history showed that when the statute was amended, some legislators voted for the amendments only after being assured that they would not affect the Supreme Court's interpretation.

The court used the traditional doctrine of *ejusdem generis* (general words following an enumeration refer to that enumeration) in a highly questionable manner. The court found that there was a common element between the classes listed in the statutes and those classes subsequent court decisions held to be covered under the Act. The court concluded that the Unruh Act, though not limited to the specific classes enumerated, was limited to discrimination based on "personal characteristics." While it is not particularly clear what this means, the court was very clear that it does not include discrimination based on income. (How having long hair is a "personal characteristic" while being poor is not is beyond my comprehension).

*Harris v. Capitol Growth Investors* vividly illustrates the need to adopt a public interest standard in statutory interpretation and how adopting such a standard allows the concerns of women to be heard by the legal system. The Unruh Act specifically bans discrimination based on sex. In our current socioeconomic system, however, laws banning facial discrimination do not protect the needs of women.

Since women, and particularly women with children, are more likely than other segments of society to be poor and disempowered, general interpretations that benefit the poor and unpopular redound to the benefit of women. Because the *In re Cox* court properly interpreted the Unruh Act to ban all arbitrary discrimination, the court of appeal felt compelled to give Muriel Jordan and Tamela Harris a hearing. Unfortunately, the current California Supreme Court ignored not only progressive concepts based on the public interest but also traditional doctrines such as *stare decisis* and legislative ratification. Instead, using even more questionable "traditional tools" of statutory interpretation, the court abandoned the sound rule of public policy announced by the *In re Cox* court, denying Muriel Jordan, Tamela Harris, and many other women in similar situations the chance to find decent housing.

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29. *Harris*, 52 Cal. 3d at 1148.
30. See *Harris*, 52 Cal. 3d at 1178 n.1 (Broussard J., dissenting).
CONCLUSION

Judges should, within the constraints of their power, interpret statutes to best serve the public interest. Reference to democratic theory and progressive concepts can help better to ascertain the public interest in difficult cases of statutory interpretation. While, in general, courts adequately ascertain the public interest through traditional principles, there is much room for improvement. Continued questioning can help make that improvement possible.

Using a public interest standard can help increase the rights of women. Examining women's concerns can be a valuable method of ascertaining the quality of consent within the system. Since women's voices have previously been excluded from the legal profession, it is clear that major improvements in consent can be made by developing legal theory that is consistent with the concerns of women. The concerns of women are similar in this way to the concerns of all disempowered groups within our society. A theory of interpretation that incorporates the concerns of women should provide strong compatibility with the needs of other disempowered groups and even help provide better dispute resolution in the typical male v. male context. I believe that a public interest standard for statutory interpretation provides this compatibility within the framework of providing the most legitimate possible model for judicial decision-making.

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31. I apologize in advance to Mr. Fish for putting him in this category. However, this is my article, not his.