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Statutes That Are Not Static – The Case of the APA

Peter L. Strauss*

... [T]he lesson of the past two hundred years is that we will do well to be on our guard against all-purpose theoretical solutions to our problems. As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved. The function of law, in a society like our own, is altogether more modest and less apocalyptic. It is to provide a mechanism for the settlement of disputes in the light of broadly conceived principles on whose soundness, it must be assumed, there is a general consensus among us. If the assumption is wrong, if there is no consensus, then we are headed for war, civil strife, and revolution, and the orderly administration of justice will become an irrelevant, nostalgic whim until the social fabric has been stitched together again and a new consensus has emerged. But, so long as the consensus exists, the mechanism which the law provides is designed to insure that our institutions adjust to change, which is inevitable, in a continuing process which will be orderly, gradual, and, to the extent that such a thing is possible in human affairs, rational. The function of the lawyer is to preserve a skeptical relativism in a society hell-bent for absolutes. When we become too sure of our premises, we necessarily fail in what we are supposed to be doing.

When we think of our own or of any other legal system, the beginning of wisdom lies in the recognition that the body of the law, at any time or place, is an unstable mass in precarious equilibrium. The study of our legal past is helpful to lawyers and judges and legislators in the same way that the study of recorded games is helpful to a chess player. But the principal lesson to be drawn from our study is that the part of wisdom is to keep our theories open-ended, our assumptions tentative, our reactions flexible. We must act, we must decide, we must go this way or that. Like the blind men dealing with the elephant, we must erect hypotheses on the basis of inadequate evidence. That does no harm—at all events it is the human condition from which we will not escape—so long as we do not delude ourselves into thinking that we have finally seen our elephant whole.¹

Judges interpreting statutes evidence a certain ambivalence whether they are interpreting the texts before them as artifacts whose meaning was fixed as of their date of enactment, or as present-day texts whose meaning may be shaped by subsequent events – whether intervening judicial decisions,

* Betts Professor of Law, Columbia University. My thanks are owing to Columbia colleagues, participants in the University of San Diego Workshop on Statutory Interpretation and other early readers, Daniel Farber, Phillip Frickey, Gerard Lynch and John Manning among them, who have provided many helpful insights and suggestions; any deficiencies that remain are mine alone.

¹ Grant Gilmore, *The Ages of American Law* 109-110 (1977).

or the adoption of new statutes (as distinct from amendments, an easy case) whose instructions bear on the issues they present. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*² stridently referred the meaning of the Administrative Procedure Act's rulemaking provision back to the political compromise struck at its enactment in 1946; the opinion insisted that judges are not free to vary its terms by common-law improvisations based on their reasoning about the procedural needs of contemporary rulemaking. *Motor Vehicle Mfrs' Assn v. State Farm Mutual Auto Ins. Co.*³ almost as impatiently dismissed the argument that judicial standards for reviewing agency rulemakings are those that prevailed when the APA was enacted (equating review of rulemaking with highly permissive review of economic legislation), rather than the "hard look" understandings that had grown up in the 1970s, primarily in the D.C. Circuit. The particular tension has long been a puzzle for administrative law scholars; yet it seems to reflect a general unease about how judges ought best interpret Congress's words as they age.

This essay is offered as a modest contribution to these debates. Reflecting Gilmore's epigram at the head of these pages, it argues that in its very occasional⁴ forays into the construction of particular statutes, whenever the Supreme Court is considering a return to original understandings it should accord substantial weight to contemporary consensus the profession and lower courts have been able to develop in interpreting law. Drawing as well on a similar tension in the writings of

² 435 U.S. 519 (1978); see also *Dickinson v. Zurko*, 527 U.S. 150 (1999).

³ 463 U.S. 29 (1983).

⁴ See Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 *Colum. L. Rev.* 1093 (1987).

Dean Roscoe Pound,⁵ it suggests that judges might usefully distinguish between congressional preferences reflected in subsequent statutes, and their own preferences developed in and through the common law. *Vermont Yankee* repudiated common-law development of the APA's required rulemaking procedures on the basis simply of judicial preferences or sensibilities, but that need not entail a repudiation of developments grounded in subsequently enacted statutes. From this perspective, it is argued, one could regard a move that understands earlier statutes in the light shed by later ones as statutory interpretation, not common-law innovation. From this perspective, such a move, linking judicial to demonstrable congressional preferences, is the less problematic.

I. Theory: Considering the Congressional-Judicial Dialog

Professors Cass Sunstein and Adrian Vermeule have recently demonstrated at length that considerations of institutional capacity, and of the possible dynamic effects of a chosen approach on the future behaviors of the institutions concerned, are central to any inquiry about statutory interpretation.⁶ That is, one must analyze the place and functioning both of legislators and of their possible interpreters; one must do so in the framework both of the ends of the legal system – predictability of general outcome *and* justice in individual cases – and of the dynamic workings of the political order within which they operate. And one must do so free of “the nirvana fallacy – the juxtaposition of an idealized picture of [one institution’s] capacities with a grudging picture of the capacities of other actors in the interpretive system.”⁷ Their ostensible critic and sometime colleague

⁵ See TAN *infra*.

⁶ Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions*, 101 Mich.L.Rev. 885 (2003).

⁷ At 905.

Judge Posner, basically agreeing with their root propositions, has reminded us that in this most real of all possible worlds, one must perform these analyses in relation to the actualities of the American political system, not some idealized or hypothetically possible alternative. Interpretation is at best a secondary characteristic of that system. It cannot be choices about statutory interpretation styles or their dynamic effects, he argues, that have been

the cause of our tricameral legislative system (tricameral because the veto power makes the President in effect a third house of Congress), our 200-year-old Constitution whose authors were sages but not seers, our federal system that overlays federal law on the legal systems of fifty different states, our weak, undisciplined political parties, [our long acceptance of the use of common law processes as appropriate means for defining legal duties], our system of appointing or electing judges from other branches of the legal profession, including the academic branch, rather than making judging a career, and the division of governmental powers between the legislative and executive branches. In a [typical European] parliamentary system [judging is a lifetime career,] the executive is selected by and answerable to the legislature, which usually is effectively unicameral. The result is a very great centralization of government power, which the United States lacks [These differences are] not because of [our choices regarding] statutory and constitutional construction by judges⁸

That is, attention to the institutional capacities of interpreters and writers, and of the dynamic interactions between them, must occur within the framework of the political institutions and culture we share; and, as Judge Posner points out, such attention has long characterized the literature.

Fully accepting the necessity for institutional/dynamic analysis of statutory interpretation, this essay seeks to place it in a context that honors three additional considerations: our long-standing political acceptance of judicial lawmaking (i.e., commonlaw processes and the associated system of *stare decisis*); our democratic commitment to the political superiority of legislation; and the proposition that both legislation and caselaw development are *primarily* self-regarding. That is, to

⁸ Richard A. Posner, The Institutional Dimension of Statutory and Constitutional Interpretation. 101 Mich.L.Rev. 952, 961 (2003).

expand briefly upon the third of these, legislators are primarily concerned with influencing the legislative and not the judicial process; and judges, correspondingly, are primarily concerned in their lawmaking with the internal habits and constraints of judicial, not legislative, process. That legislators may cock an eye to how judges behave, and vice versa, is secondary to their culture.⁹ In the system of *stare decisis*, judges draw on the *past* decisions of hierarchically superior courts when reasoning by analogy in unprovided cases; save in the most extraordinary of circumstances, they predict the future only from these past deposits of action – not, as such, what they think a superior court likely to do, independent of these indicators. Similarly it is in the nature of a court to draw on the past actions of the (hierarchically superior) legislature in reasoning to a conclusion about a matter not clearly provided for, rather than to predict, as such, what the contemporary legislature might be expected to do about the matter. The greater volatility of legislatures makes this conventional

⁹ Compare Adrian Vermeule, *The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory*, Chicago Public Law and Legal Theory Working Paper No. 49, http://ssrn.com/abstract_id=449860 (visited November 23, 2003). Vermeule persuasively calls attention to the difficulties presented if one assumes that a judicial approach to interpretation that would be desirable if all judges adopted it for all time is therefore desirable for each individual judge (since we can understand that not all judges will adopt identical interpretive approaches, at any one time or, especially, across time), the fallacy of division; and, conversely, that an approach that might be desirable for a particular judge at a particular time is therefore desirable for all judges at all times (since the attractiveness of the approach for the individual judge may lie precisely in the balance it offers to an empirically unstable mix of approaches), the fallacy of composition. Arguably, however, Vermeule overstates the legislative-judicial interface, as if it were primary to the functioning of both institutions; he is insufficiently attentive to the ways in which a common law culture works within the judiciary to produce approximate concord in relation to judicial law-making tasks, and the ways in which a culture of legislating works to similar ends within legislatures.

That both cultures could be corroded – prove unreliable – is undeniable, and one can certainly point to indicators that it is occurring – the discipline of precedent and commitment to consistency being arguably overwhelmed as courts of appeal assert the luxury of rendering decisions that they prohibit counsel from relying upon and testing in future litigation, even as empirical indicators of partisan patterns of decision appear, see Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: a Preliminary Investigation*, <http://www.law.uchicago.edu/academics/publiclaw/resources/50.crs.voting.pdf>, (visited Nov. 26, 2003); the accountability of legislative behaviors similarly disappears in the face of thousand-page statutory drafts presented without realistic opportunity for reading much less debate, filled with special interest provisions for which no legislator may be willing to acknowledge responsibility. Yet this possibility could hardly be a matter of indifference to any member of our polity; and Vermeule’s approach risks suggesting that this outcome is objectively inevitable, and not subject to influence by social and cultural norms. Cf. Peter L. Strauss, *Educating Citizens*, 87 *Corn.L.Rev.* 690 (2002).

judicial regard for the significance of past resolutions and instructions the more important. Policies that have been established, not those that might be, are the central consideration.

The institutional/dynamic perspective captures a certain dialogic quality in the workings over time of legislatures and courts. Whether by common-law reasoning alone or by interpretation, courts develop law by the percolation and development of principle through hierarchically organized judicial systems that bring uncertainties into increasingly focused and prominent view. Legislatures similarly respond to social controversies which rise to the surface. Outside the special ambit of constitutional concerns, which will not trouble us here, legislative modification (one might say, correction) of common law or interpretive results has a conversational quality.¹⁰ Even assuming a certain legislative volatility and the slack created by institutional obstacles to new legislation,¹¹ one would expect judicial responsiveness to legislative signals to generate less new legislative business than judicial resistance to them, or even ignoring of them. Low levels of legislative effort to modify judicial outcomes signal judicial success from this institutional perspective; when levels of effort are high, when it appears that Congress repeatedly works to modify or correct judicial outcomes in a given area of concern, that may be taken as a sign of institutional failure. Given the normative superiority of legislative over judicial output, I suggest, patterns of repeated struggle between legislators and interpreters ordinarily suggest interpretive failure; patterns of acceptance of

¹⁰ For an unusually attentive (and unanimous) Supreme Court opinion in this respect, see *Jones v. R. R. Donnelley & Sons Co.*, ___ U.S. ___ (May 3, 2004).

¹¹ Legislatures may fail to act not only because judges have correctly identified the policies that would actually be enacted, but merely because they have found a decision point within the area of slack legislative veto-gates provide. See, e.g., Mathew McCubbins, Roger Noll & Barry Weingast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 *Law & Contemp. Prob.* 3 (1994) and TAN *infra*.

interpretive outputs, albeit less strongly, success.¹²

Scholars writing about judges interpreting statutes disagree about much, yet generally agree on some propositions. Apart from questions of constitutionality, few assert that judges are superior or even equal law-makers to the legislature. Propositions embodied in legislation must dominate judicial preferences. Courts fighting or displacing legislative judgments, unless warranted by such concerns as ordinarily we associate with the Constitution,¹³ are acting beyond their proper sphere. In an ideal state, judicial interpretations would never, in themselves, perturb legislative deliberations. In the ongoing back-and-forth between the rule-generation that is legislation and rule-application that is adjudication, the appliers' success in implementing the instructions they have received would be reflected in a lack of need for reiteration of the instructions. A metaphor of "faithful servant" is often used; and that metaphor does not fit an actor constantly quarreling with, manipulating, or second-guessing her instructions, or imposing on them linguistic preferences that are personal to the

¹² Note 9 supra. These are proposed measures of system dynamics only, not of justice achieved. Nazi judges may have interpreted German statutes in ways that extended their anti-semitic reach considerably; but there is no sign that the German government or (at the time) Volk found this objectionable. Conversely, some judges in apartheid South Africa employed formalist techniques to frustrate its legislation; this normatively praiseworthy, even heroic activity was, from a systemic, institutional perspective – and the perspective of the Boers who then dominated South Africa's political institutions – highly inappropriate.

¹³ The point is put in this guarded way to recognize that in some contexts, such as citizenship issues, courts recognizing plenary congressional authority have nonetheless developed widely accepted interpretive approaches favoring quasi-constitutional individual claims. E.g., *Girouard v. United States*, 328 U.S. 61 (1946). One could think that in these cases courts are responding to primary norms of justice, rather than systemic considerations, cf. n. 12 above. In *Girouard*, for example, the majority relies on strong, constitutionally grounded First Amendment values in overruling prior statutory interpretations that (because they dealt with immigration and citizenship) were concededly within Congress's power; the dissent, written by a Justice who had dissented fervently from the initial statutory readings, relied on the institutional consideration that Congress had had the Court's earlier rulings forcefully called to its attentions, had had several occasions to correct any error, and in reenacting the language concerned had failed to do so.

servant rather than a fair reflection of the master's usage.¹⁴ The properly subordinate status of judges in this respect is not at issue.

The “faithful servant” metaphor may express the inferiority of judicial lawmaking, the necessary subordination of judicial judgment to legislative instructions, but it is imperfect in a number of important respects. Inevitably (because time is a limited resource and because language and foresight are imperfect), and sometimes not to their credit (that is, to avoid resolving problems they actually do identify but choose for political or other reasons not to deal with), legislatures “write with stubby crayons.”¹⁵ A good deal of that imprecision is attributable to the fact that, as many have pointed out, describing a legislature as “a” master is incoherent;¹⁶ the United States Congress acts through the votes of its 535 members, whose agreement even on the language it enacts is never better than formal.¹⁷ As important, the judicial servant has no continuing relationship with the enacting body, through which understandings might emerge over time; its original master has departed the scene. The legislature that writes goes out of session, and the judges who apply its instructions

¹⁴ “Like a union that works to rule, a judge who uses the methodology of strict textualism steps out of the proper subordinate status to unfaithfully frustrate the legislation that the judge is institutionally bound to further. Strict textualism reflects not the obedience that the court owes to the legislature, but an improper and indeed arrogant move by a subordinate to assume a role that is equal or even dominant to that of his master.” Melvin A. Eisenberg, *Strict Textualism*, 29 *Loyola of L.A. L. Rev.* 13, 37-38 (1995); see also Peter L. Strauss, *The Common Law and Statutes*, 70 *U. Colo. L. Rev.* 225, 250-52 (1999). None of this is to deny that there may be extraordinary circumstances in which the judge's obligations to higher principle command such obstructionism, cf. n. 12 above, but in such circumstances there must be reasons that command disobedience.

¹⁵ Gerard E. Lynch, “What Judges Do, Part I,” in Peter L. Strauss, *Cases and Materials on Legal Methods* 644 (prov. ed. 2003).

¹⁶ That is, the legislature is a multitude not an individual, hardly capable of having either an objective single intention or an objective single understanding regarding the texts it adopts, even before we begin to consider the further complications introduced by bicameralism and the usual need for executive approval. See, e.g., Max Radin, *Statutory Interpretation*, 43 *Harv. L. Rev.* 863-870-71 (1930).

¹⁷ Consider, for example, massive omnibus budget reconciliation legislation reaching the floor of Congress in unreadable reams of assembled papers, into which members have often enough slipped important – or trivial – provisions. Cf. *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 866 and 867 n.2 (Stevens, J., dissenting 1986).

generally do so while a different legislature is sitting; in the interim, legislative politics may have changed, new and unforeseen problems may have arisen, and the general legal framework may also have changed, as by the enactment of new statutes. The actions of this new legislature are influenced by contemporary politics – importantly including the usual necessity of securing presidential or gubernatorial support for any new legislation, as well as overcoming the many internal barriers that may be raised to success. Perhaps most important, then, is that the judiciary’s new nominal “master” is limited in its possibilities for response. The friction in the legislative system makes it likely that a range of possible judicial interpretations of the existing legislation will be left undisturbed – that is, today’s legislators will not succeed in forming the coalitions necessary to successful legislative business for all deviations from their constructive wishes, but only some of them. Judges cannot be controlled by the enacting legislature (which no longer exists); and they have effective power to deviate to some degree from the instructions a contemporary legislature would hypothetically give them.

How, then, is one to maintain the ethos of judicial subservience? Perhaps it is appropriate to begin by noticing an artificiality in the question, later returned to – that it focuses attention on interpretation to the exclusion of other judicial law-declaring functions, notably those associated with the common law.¹⁸ Separating the realms of “[judicial] judgment” and “[political] Will”¹⁹ is a general problem in relation to a judiciary entrusted with resolving legal questions not yet answered, in a manner that will command the future. The general resolution, satisfying or not, is framed self-

¹⁸ And, as Melvin Eisenberg has noted, the similar questions that arise in the context of the private “law” created by contract. *The Emergence of Dynamic Contract Law*, 88 *Calif.L.Rev.* 1745, 1749 (2000).

¹⁹ *The Federalist* No. 78 (A. Hamilton); that, empirically, one may doubt the completeness of the separation across many if not all arenas of legal dispute, see Sunstein et al., n. ? above, does not undercut the aspiration or its normative thrust..

referentially, in relation to the culture and obligations of judges and judging rather than their connections to any external institution – whether to the legislature or directly to the people in some political sense. Nonetheless, legislative creation of a text is conventionally taken to frame the issue in a distinctive way, and for the moment at least this essay will proceed in that light.

In asking how the ethos of subservience to the legislature (legitimately expressed political will) may be maintained, it is perhaps appropriate to note that perceptions that the courts had been failing to do so animated the constitutional crises of the New Deal ... and resulted in the adoption, for a time, of apologetic techniques of interpretation so assiduous in their attention to the details of congressional business as arguably to corrupt the legislative process. By elevating the importance of legislative history materials, the courts encouraged participants in the legislative process to attempt to achieve through the creation of “legislative history” ends that they may not have had the capacity to shepherd through the legislative obstacle course of bicameralism and presentment.²⁰ This outcome – reaction to which substantially explains the present judicial caution in using legislative history materials – suggests the importance of the interactive quality of the judicial-legislative relationship. Legislatures learn from the techniques judges use, and adapt their approaches to them,

²⁰ See John Manning, *Textualism as a Non-Delegation Doctrine*, 97 *Colum. L. Rev.* 673 (1997). This essay is not the place in which to explore the continuing arguments over the proper place (if any) of legislative history in statutory interpretation, and so does not engage Prof. Manning’s extensive scholarship on textualism, as such. See also, e.g., *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1 (2001). The statement in text should not be taken as a statement about the frequency with which participants in legislative processes attempt to influence judges and other outsiders through legislative history, relative to their efforts to influence those processes themselves. Many have remarked on the institutional purposes served by legislative history, and the institutional safeguards favoring internally-regarding uses. Internally-regarding legislative history materials can illuminate the “masters’” understanding of an adopted text, revealing problems identified, considerations addressed (and overlooked), understood purposes and expected effects, etc. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *U.S.C. L. Rev.* 845 (1992). Yet one can deny neither the possibility of manipulative (i.e., externally-regarding) uses nor the added incentives given for such manipulation by close judicial attention to the resulting materials.

and vice versa.²¹

No technique judges might use in interpretation will either defeat this dialogic quality or eliminate the area of slack created by the institutional/political obstacles to legislation, which an unprincipled judge might exploit to pursue private ends.²² Take, for example, the ostensible self-denial of rigid formalism. A court taking this approach will address only the words the legislature has adopted, given meanings appropriate to that time, and leaving to future legislatures – courts have no business “making law” – the correction of any problems that result. It should be obvious nonetheless that the court’s interpretation inevitably does “make law”; a meaning that was not previously known as certain has now been fixed.²³ And, as history has taught, the meaning assigned by the court may be insupportably narrow, propelled by its own sense of appropriate outcome or policy.²⁴ That interpretation, too, will “stick” despite its palpable inadequacy unless the obstacles to new legislation can be overcome. Legislatures repeatedly faced with the problems thus presented,

²¹ Adrian Vermeule, *The Cycles of Statutory Interpretation*, 69 *U.Chi.L.Rev.* 149 (2001).

²² In Judge Posner’s words, “the irresponsible judge will twist any approach to yield the outcomes that he desires and the stupid judge will do the same thing unconsciously.” Richard Posner, *Statutory Interpretation*, 50 *U.Chi.L.Rev.* 800, 817 (1983). It is hardly my purpose to substitute for the “nirvana fantasy,” text at n. 7 above, however, the cynical proposition that judges and legislators will inevitably pursue ends more selfish than the culture in which they have grown up prepares them for. See *Educating Citizens*, n. 9 above. Granted that we must prepare for the reality that men are not angels, James A. Madison, *The Federalist* #51, to assume that we *must* have so selfish a state is to invite that state.

²³ The Supreme Court has given this proposition particularly emphatic form, *Neal v. United States*, 516 U.S. 284 (1996). This is not a necessary outcome; judges in civil law systems profess a much looser attitude toward their earlier readings of statutory text. Yet the habitual disciplines of common law courts make it an understandable one.

²⁴ *Johnson v. Southern Pacific Co.*, 117 F. 462 (8th Cir. 1902), reversed 196 U.S. 1 (1904), is a classic example from the United States’ earlier formalist period, cf. Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1133 ff. (Eskridge & Frickey eds. 1994); more recently, the Court-congressional struggles over reimbursement of prevailing party expenses in public interest litigation, such as *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991), cf. Philip Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 *Minn.L.Rev.* 241, 264-67 (1992) and Alexander Aleinikoff and Theodore Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia University Hospitals, Inc. v. Casey*, and *Due Process of Statutory Interpretation*, 45 *Vand.L.Rev.* 687 (1992); see also *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

and attempting to avoid them for the future, may find their time consumed by the enactment of statutes of exquisite prolixity – and corresponding incomprehensibility to the common public.

The British spirit of civil liberty induced the English judges to adhere strictly to the law, to its exact expressions. This again induced the law-makers to be, in their phraseology, as explicit and minute as possible, which causes such a tautology and endless repetition in the statutes of that country that even so eminent a statesman as Sir Robert Peel declared, in parliament, that he "contemplates no task with so much distaste as the reading through an ordinary act of parliament."²⁵

Francis Lieber's observations about the impacts of nineteenth century judicial formalism, just quoted, are a part of the exposition that established the "faithful servant" metaphor in our rhetorical vocabulary on the subject of statutory interpretation. Despite its ambiguities, the metaphor captures important aspects of the problem in its larger dimension: the necessary subservience of judges to legislative instruction, and the enduring and interactive character of the legislative-judicial relationship across a wide range of subjects. It suggests, as well, a measure of success in the relationship – that the servant does not act to create friction in the relationship; it self-consciously takes the attitude of a fiduciary rather than an opportunist toward the inevitable slack in its instructions.

For some, this proposition could raise important political and institutional questions. At what point might the consistently successful decisions of the "servant" serve to defeat the discipline or responsibility of his master? Could they permit his master to avoid having to give instructions at

²⁵ Francis Lieber, *Legal and Political Hermeneutics* 28-31 (1839). Judicial (mis)behaviors are not the only ones that can inspire such reactions. Members of the legislature presumably think executive branch and agency officials also ought to be acting as "faithful servants." It is not hard to understand some recent Congresses' extraordinary prolixity in legislation as, at least in part, a reaction to patterns of enforcement by executive branch and agency officials that, in an era often characterized by "divided government," disappoint these expectations.

all,²⁶ and even permit her a certain degree of laziness or evasion of responsibility. Since the metaphoric master here is also a servant – of the electors – and may herself be held accountable by *her* masters, to an extent the judicial “servant” may not, his uninstructed resolution of issues arguably serves to defeat the intended political controls on her behavior. Making the legislature decide issues is good for democracy, this argument runs – the judicial servant is answering to a different master (the sovereign people) in refusing to do what is “properly” the legislature’s business.²⁷

Then there is the problem of differentiating between reasoning by analogy from the instructions actually given, and purporting to anticipate what a contemporary legislature might do about the problem not directly provided for. This is a tension not easy to resolve – a matter perhaps of internal discipline or characterization. In the Progressive Era, Roscoe Pound inveighed one year in the *Columbia Law Review* against “spurious interpretation,” that “puts a meaning into the text as a juggler puts coins ... into a dummy’s hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process ... an anachronism in an age of legislation.”²⁸ Yet the following year, his essay in the *Harvard Law Review* championed as the most desirable way for judges to “deal with a legislative innovation” receiving a statute

“fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by

²⁶ Consider, for example, the Nineteenth Century judicial development of the fellow servant exception to a principal’s responsibilities for his agent’s torts; legislative address of the issues dealt with by such holdings as *Priestly v. Fowler*, 150 Eng. Rep. 1030 (Exch. Pleas 1837) and *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. (4 Met.) 49 (1842) did not begin for decades.

²⁷ Cf. David Schoenbrod, *Power Without Responsibility* (1993).

²⁸ Roscoe Pound, *Spurious Legislation*, 7 *Colum.L.Rev.* 379, 381 (1907).

analogy in preference to them.”²⁹

This openness to dynamic interpretation was the way, he argued, to which “the course of legal development upon which we have entered already must lead us.” One may suppose the two positions consistent, but difficult, in just the ways suggested here.

The argument that judges following Pound’s second, ideal course will weaken the legislative process by dealing imaginatively and sympathetically with the statutes in hand, one colleague has suggested, smells of the lamp. One may perhaps be excused for thinking that on those few occasions when judicial developments have genuinely engaged public sentiment, on abortion say, the public has not been discouraged from holding their legislators to account by the fact that judges have reached a conclusion. In general, however, and from the perspective of this essay, the modal case is not a matter in high controversy, but one of those issues of detail we could not reasonably expect politicians will be held to answer for.³⁰ Perhaps judicial opinion will tip the balance on a closely contested issue – less likely as a product of its mere existence than of its reason – but if it does then what the public presses for will have been changed, and it is unclear legislative responsibility will have been defeated. Given our taste for incumbency, and the volume of legislative business, the argument that judicial decision corrodes democracy is weak at best.

A similar question has been bruited for years as a matter of constitutional law, the “delegation” question, and it has been argued along similar lines. Aren’t there policy judgments so fundamental that they must be resolved by the legislature and cannot lawfully be left to others – in this case, executive (agency) rather than judicial officials? In theory the answer to this question is that such

²⁹ Roscoe Pound, *Common Law and Legislation*, 21 *Harv.L.Rev.* 383, 385-86 (1908).

³⁰ See Gilmore, n. 1 above.

limits do exist; in practice courts have been unable to articulate meaningful, judicially administrable standards for enforcing them. No one seriously argues that matters of every-day routine must be legislatively resolved, and very few situations have provoked even individual judicial expressions of doubt about the adequacy of legislative effort. If it is not hard to imagine judicial reluctance to become complicit in legislative evasions of responsibility for major issues, judicial insistence that *all* issues be legislatively resolved would be insupportable. As with delegation, minute judicial attention to what is “properly” the legislature’s business is inconsistent with the judicial subservience that constitutes agreed ground. It threatens constant political struggles and imposes on the legislature a definition of its task impossible to fulfill. And, again, a judicially administrable standard for distinguishing what the legislature must decide from what it may leave to others is not readily constructed.

Sharing the concerns Sunstein and Vermuele have expressed for institutional approaches to interpretive issues, I conclude that a properly functioning judiciary, like Lieber’s faithful servant, should rarely, by its own actions, create business for a contemporary legislature. Ordinarily – that is, absent the justifications that might be provided by an unjust order, or reliable and important indications that judicial initiative would affirmatively encourage legislative ducking of responsibility for political issues of central importance – the optimal interpretive approach is the one that least often produces legislative business, because its declarations what the law “is” so well match contemporary understandings about the law. An interpretive approach is suboptimal to the degree it requires the diversion of legislative resources from contemporary social problems with which the legislature might have to deal independent of judicial actions, to matters that were not in significant social controversy prior to judicial interpretation – that is, to social problems created by

interpretation.

This measure addresses the dynamics of legislative-judicial interaction in relation to the results of adjudication, not its implications for internal legislative processes. Much of the current literature about statutory interpretation and the problem of legislative history discusses the matter as if there were a single statute, whose meaning had been fixed at the moment of enactment. Implicitly if not explicitly, the question for the court is finding that meaning, and the issues for debate concern what (if any) bearing to give to the statute's language, purpose and political history in performing that task. To the extent these commentators worry about feedback between the interpretive and legislative process as a possible consideration influencing these interpretive choices, they present the issue in terms of singular statutes, similarly viewed. Thus, Daniel Rodriguez and Barry Weingast recently argued for careful judicial attention to the political compromises that may have persuaded moderates to support a controversial statute, in preference to linguistic approaches that ignore these undertakings, or purposive styles that might tend to privilege the views of the statute's ardent congressional supporters. "When courts fail to respect legislative bargains," they urge, "moderates are deterred from compromise" and the result may be to "make[] historic social legislation less likely." Yet very few statutes are controversial in this way; and for those that are, it would be hard to establish that legislative action is much influenced by general expectations about how courts will treat the hidden (implicit) deals they may embody.³¹

Note too that this perspective accepts a "fire alarm" view of legislative activity that fits more

³¹ For a persuasive argument that, as a normative matter, legislation would be improved were courts to ignore the possibility of such deals, and treat statutes strictly in terms of their explicit public-regarding purposes, see Jon Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model, 86 Colum.L.Rev. 223 (1986).

comfortably with Anglo-American than continental legislative traditions.³² Most often for us (as is probably also the case in fact if not in theory on the continent) legislation shares with litigation the quality of responding pragmatically to a single distinct social problem that has emerged against the backdrop of contemporary law revealed to be inadequate in some particular; much less frequently does legislation attempt a comprehensive and theoretically grounded synthesis of an entire domain of law. It is typically a reaction to a particular social problem, rather than an effort to organize all aspects of legal relations in a coherent way. This quality produces much of the work and feel of American statutory interpretation. As the legislature has rarely sought reconciliation of the statute it enacts with the existing body of statutory law, it is the judge who faces the work of reconciliation, of creating coherence (or at least as much of it as the legislative texts will permit).³³

Correspondingly, this perspective makes little distinction between the traditional domains of statutory and common law. If judges framing the common law of torts or contracts depart significantly from contemporary expectations, that will produce legislative business just as judicial [mis]applications of an aging statute will. Both because of its institutional commitment to precedent (i.e., the views of ages past) and because the appellate judiciary tends to be elderly, common law will generally follow rather than lead social change. For the same reason, some degree of legislative modification of the common law's content is only to be expected; but judicial resistance to such changes has at times created the need for more (and perhaps more comprehensive) legislation than

³² See text at n. 8 above.

³³ In the words of Harlan Fiske Stone, “to realize ... the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication.” *The Common Law in the United States*, 50 *Harv.L.Rev.* 4 (1936). The dominating contemporary view is that realizing this vision would be, at best, a Sisyphean task, that coherence in fact is not to be found.

thoughtful judicial attention to contemporary legislative purposes and trends would have required.³⁴ Such friction is, in my judgment, a paradigmatic example of “diversion of legislative resources from contemporary social problems with which the legislature might have to deal independent of judicial actions, to matters that were not in significant social controversy prior to judicial interpretation – to social problems created by interpretation.” Common law generation, like statutory interpretation, is an activity that occurs subordinate to the legislative enterprise and in constant “conversational” contact with it. Both are susceptible of imposing higher or lower costs on the hierarchically superior legislative enterprise, and in both cases those costs reflect a heightened level of social controversy to which judicial law-finding (i.e., judicial law-making) contributes. For both, worries about judges pursuing their own ends are often voiced; and for both the best we may be able to hope for – with some reassurance from history – is the “taught tradition”³⁵ that the judiciary’s task is to seek the best fit with the American project as reflected in the existing body of contemporary law, taken as a whole.

Here, then, the focus is not on the compromises that permitted enactment of a particular controversial statute, but on a more general proposition: that the legal framework as a whole changes as a statute ages – not only because the statute itself may previously have been interpreted, but also as common law develops and as new statutes are enacted. On occasion, attention to these changes will lead a court to adopt an interpretation of particular language in an aging statute that is quite different from the original enactors’ likely understanding, yet consistent with those changes and thus unlikely to provoke social controversy. Conversely, in certain cases a court can understand that its

³⁴ As, when legislatures began at last to react against the fellow servant doctrine, and other elements developed by common law courts in relation to workplace injury.

³⁵ Roscoe Pound, *Economic Interpretation and the Law of Torts*, 53 *Harv.L.Rev.* 365, 374 (1940); and see Gilmore, n. 1 above.

insistence on the meaning that can be attributed to the original enactors will likely serve to distract legislative attention from independently existing social problems to one that this interpretation will have generated.

Note that this claim is a relatively weak one. Its focus, as all judicial focus, is primarily retrospective – on what past legislatures and courts have provided; although trends in those provisions may unmistakably, in themselves, reveal the irreversible erosion of some principle, only that demonstrable erosion, not anticipation of what a hierarchically superior court or legislature might choose, can justify the abandonment of that principal. In other settings, attention to change will indicate no clear trend, or reveal an existing social controversy courts will lack the confidence or sense of political place to resolve. Thus, the claim made here does not exclude the proposition that some issues are better left to legislatures. But other issues, it is here asserted, *can* appropriately be resolved by courts, even courts aware that, in the absence of the contemporary developments on which it relies, a different interpretation would better fit the statute’s language.

Note, too, that the claim assumes a legal surface marked by relatively uncontroversial general consensus at the time of judicial decision. Its postulate was, “[t]he optimal interpretive approach is the one that least often produces legislative business, because its declarations what the law ‘is’ so well match contemporary understandings about the law.” But this way of putting it assumes a degree of cohesion in contemporary assessment that may often be wanting. Another distinguished group of political science and legal scholars, John Ferejohn, Neeta Ghandi, and William Eskridge, are developing an analysis of what they call “strategic” interpretation – again centered on federal civil rights statutes – that focuses attention on the practical barriers to legislative correction of judicial (mis)interpretations. As they have persuasively shown us, the requirement that President, House

and Senate must agree on the text of any new legislation, and the fact that any legislative act imposes as an opportunity cost that other action must be foregone, in effect create an area of slack within which courts can frame their interpretations without having to fear legislative correction. They reasonably characterize this interpretive space as one within which judges are in effect free to pursue their personal agendas. What is “strategic” about judges’ use of the opportunities thus presented is that their interest in preserving the legitimacy of their function in the public’s eye over the longer term should lead them to forego interpretations that would serve their personal ideological preferences, but likely produce a public uproar and be successfully reversed. This explains Justices’ occasional votes “against” stereotype; they maximize their opportunities to make interpretations a neutral observer might think best explained by ideological preference, it is argued, by doing so only when it is “safe.”

This way of framing matters, completely understandable in conventional “public choice” terms, has the effect of bringing Holmes’ famous aphorism about the “bad man” and the law to bear on judges. Its premise is that the interest of judges lies in understanding what they can get away with in advancing their personal ideologies – maximizing that space by strategically foregoing those preferences that in all probability they could not successfully implant in the law for the longer term, and thus appearing to deserve public reputations for objectivity and freedom from political agenda. The authors present an imaginative and rigorous analysis of Supreme Court decisions interpreting the Civil Rights statutes, that appears to demonstrate just such trimming of judicial sails when congressional and presidential politics augur (or have recently demonstrated) likely correction of the Justices’ preferred ideological bent, and no such trimming when they do not.

Their essay and this one share the perspective that much interpretation occurs in the context of

current understandings about the law and sound policy – what Professor Eskridge has long labeled “dynamic statutory construction.” Where they differ is in disposition to start with Holmes’ cynical acid or not. Their analysis constructs a general theory about interpretation on a foundation shaped by the most difficult of cases – interpretation of statutes like the Civil Rights Act, caught up with the deepest political struggles and divisions of our time – in the most political of courts, the Supreme Court. Here, the supposition is that such a data set is rather distorting.³⁶ Descriptively, cases in the Supreme Court are the most difficult our legal system considers, getting there only through the obstacles and expense of repeated litigation and, finally, the Court’s affirmative choice to hear *this* dispute rather than others of the thousands hopefully presented to it on petitions for the writ of certiorari. Normatively, a judge whose motivation is to maximize the slack within which to pursue her personal ideology is a “bad judge” in the same sense that Holmes’s inquirer about the common law was a “bad man”; one should be aware of her existence, even take some sensible precautions against her,³⁷ but understand that the general success of the system depends on the general predominance of “good” men and women who do not test it in this way, who generally seek the center rather than the fringe.

³⁶ Daniel Farber makes a similar point in his contribution to the rich symposium on Eskridge’s work to be found in “Issues in Legal Scholarship - Dynamic Statutory Interpretation,” at www.bepress.com, Earthquakes and Tremors in Statutory Interpretation: An Empirical Study of the Dynamics of Interpretation 18 (2002). “[T]he opinions that are likely to come to a law professor’s mind as typical are likely to be quite different from those that a judge or litigator would find typical.” At 15-16. After a thoughtful and detailed empirical exploration of citation frequency for two Terms’ statutory interpretation cases, Prof. Farber found that the Supreme Court opinions most frequently cited in the academic literature involved “discrimination” and other politically “hot” issues (e.g., abortion counseling restrictions); the cases most often cited by judges involved important procedural issues (e.g., the burden of proof in certain bankruptcy procedures). At 11-12 and 15; nn. 48-49 and 51-52. The academic citation patterns probably reflect considerations that move the public generally – are a marker for political importance; the judicial citation patterns may reflect issues having a greater operation-of-the-legal-system importance. If one explored the two sets independently, as neither of us has yet done, one might well find different techniques being habitually employed, or different levels of controversiality (as expressed by dissent frequency, the incidence of 5-4 splits, etc.). Cf. Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 S.Ct.Rev. 231, 254.

³⁷ See Madison, n. 22 above

The more usual interpretive problem, this essay posits, does not involve politically explosive issues. It arises in routine not exceptional cases; it requires ordinary lawyers and judges to reach conclusions that inevitably (and desirably) are grounded in their contemporary understanding of the legal order as a whole, as well as the specifics of the particular issue before them. In this context, as my colleague and U.S. District Court Judge Gerard Lynch remarked in an informal paper he presented discussing a then-recent opinion of his,³⁸ professional consensus about a point of interpretation is a stabilizing element.

By the time three [district court judges] had adopted [a particular interpretation of a narrow statutory point,] it would be, as Arlo Guthrie tells us, a movement. More important, at some point it would almost certainly be “the law.” Whether Scalia, or Easterbrook, or Posner, would think it the correct outcome, until and unless some bold litigant managed to challenge the consensus by taking the issue to a higher court, most lawyers would advise clients against a claim that flew in the teeth of the “universal consensus” of the decided cases.

It’s not a question academics are likely to write about. It’s not likely to reach the Supreme Court (note that while the statute has been interpreted seven or eight times by trial-level courts and the Appellate Division, nobody’s ever pushed the issue as far as the Second Circuit or New York’s Court of Appeals). It would just be, for lawyers and their clients, the law.

For such issues, one need hardly add, legislative forces are unlikely to gather ... unless the eventual invocation of a higher court produces results so discordant with the evolved consensus as to reveal a problem where none had previously been perceived.

The claim being advanced here is a modest one – only, that the evolution of law subsequent to a statute’s enactment is an appropriate element for consideration in interpreting it, and that judges should be cautious in their interpretations against reaching results that are more, rather than less, likely to require legislative correction given currently prevailing policy frameworks. Consistent

³⁸ “What Judges Do, Part I,” discussing *Collette v. St. Luke’s-Roosevelt Hospital*, 132 F.Supp. 2d 256 (2001).

directions taken by Congress since enactment of a statute, and apparently uncontroversial developments in judicial interpretation, are both important data sets bearing on the question how to interpret. They operate properly as constraints on a judge's formal freedom to choose among the various meanings a particular statute's language leaves open. "Legislators too often write with stubby crayons."

From Abstract to Concrete

These propositions can perhaps be illustrated by attention to the interaction of two statutes that show few traces of the congressional infighting that characterized the Civil Rights Act of 1964 – the Administrative Procedure Act of 1946 [APA], and the Freedom of Information Act of 1966 [FOIA]. Although the APA was preceded by a lengthy period of study and development,³⁹ it was not significantly debated as legislation and it passed both houses of Congress without dissent. FOIA, similarly, was enacted after a good deal of consultation between the executive and legislative branches, but without significant intra-congressional controversy.⁴⁰ For both statutes, the records suggest, virtually all legislators were ardent supporters; ardent opponents were few if any, and conciliating legislative moderates was neither very visible nor apparently necessary. Congress demonstrated the strength of its commitment to FOIA, in particular, when – in reaction to what it perceived as slow agency (and, to an extent, judicial) compliance – it strongly reiterated the policies of the FOIA in 1974 amendments and in the Government in the Sunshine Act of 1976.

Among the innovations of the APA was its articulation in what is now 5 U.S.C. §553 of a

³⁹ Walter Gellhorn, Symposium on the 50th Anniversary of the APA: Birth Pangs of the Administrative Procedure Act, 10 Admin. L.J. Am. U. 51 (1996).

⁴⁰ The vote in the House was yeas 308, nays 0, not voting 125. 112 Cong. Rec. 13 661 (June 30, 1966). The Senate vote was not recorded, itself a signal of consensus.

uniform procedure for notice-and-comment rulemaking. The procedure included the following provisions for notice, never since amended:

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

In neither the 1947 Attorney General’s Manual (frequently used by courts as a near-definitive marker of legislative meaning) nor the pre-enactment legislative history does the discussion of these provisions suggest an expectation about notice different from what these words convey – that notice could validly be rather general and unspecific about the rule being proposed. Note in (3) the repeated use of the disjunctive “or” to describe the necessary content of “notice” so far as the substance of the proposal was concerned. “[E]ither the terms *or* substance of the proposed rule *or* a description of the subjects and issues involved.” It would have been surprising to have been told, in 1946, that a necessary condition of valid rulemaking was that agencies disclose – in advance of the opportunity for comment this notice serves to announce – the scientific data or reports known to them, and on which the rulemaking being proposed would be likely to rely.

The APA contained no provisions by which people could require agencies to disclose any scientific data or reports they possessed. Such provisions first entered the statute books in 1966, twenty years later, with the adoption of FOIA. FOIA enabled “any person” to require an agency to “make ... promptly available” to her all “records” that her “request ... reasonably describes.”⁴¹

⁴¹ 5 U.S.C. §552(a)(3)(A).

Limited exemptions were stated, but one may say summarily here that these exemptions would reach few if any records containing scientific data or reports an agency would consult in connection with rulemakings. The 1974 amendments to FOIA reflected Congress's strong perception that agencies had proved too resistant to FOIA disclosure generally, by adding that even if an exemption were available for *some* material in a given agency record, "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."⁴² A FOIA request for "all scientific data or reports known to the agency to be relevant to its proposed rulemaking on X announced in the Federal Register of [date]" would surely fit the statutory terms, "reasonably describes." Anyone, whether a participant in rulemaking or not, would be able to use FOIA to obtain those records.

"Whether a participant in rulemaking or not" is an important qualification to the last sentence. As a statutory matter, FOIA created a stand-alone remedy. It neither required a requester's participation in some other administrative proceeding (or any other demonstration of need for the documents requested, beyond curiosity about them) nor gave special standing to such participation. The courts early and uncontroversially denied the existence of any linkage between FOIA requests and other administrative proceedings. While FOIA itself required very prompt agency response to requests (a promise frequently broken, and not much enforced), parties who tried to use FOIA as a discovery tool quickly found that doing so earned them no right to the postponement of the proceedings they hoped to use their findings to influence.⁴³ A requester needn't demonstrate need

⁴² 5 U.S.C. §552(b).

⁴³ *N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 142, 144 (1975) ("Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action (continued...)

in order to invoke FOIA; yet neither could she invoke the utility of FOIA in connection with other proceedings to delay their moving forward. They were independent of one another. These conclusions sat well with Congress, which has not revisited them.

During the same period as saw enactment of FOIA and its reinforcing amendments, federal agencies were making increasing use of APA rulemaking procedures. To a degree unanticipated in 1946, because associated with an explosion of new statutes enacted from the mid-60's onward, they were using rulemaking to resolve issues for which scientific and technical data and reports had great salience – what parameters for the elements of a nuclear power plant would assure that it could operate with safety to the public? what parameters of time, temperature and salinity in processing smoked fish would protect the public against botulism? did the state of technology permit prompt implementation of measures to reduce automobile exhaust emissions of pollutants? should automobiles be required to contain seat-belts or other protective apparatus and, if so, what devices, how tested, would qualify? This increasing use of rulemaking procedures led, in turn, to frequent invocations of the courts for rulemaking review. The decade 1966-1976 was marked by many important decisions in the Supreme Court and the circuit courts interpreting the APA, most often in the direction of heightened public participation and heightened judicial control.

The Supreme Court's contributions included decisions facilitating pre-enforcement review of rulemaking,⁴⁴ expansively defining the standing necessary to obtain judicial review,⁴⁵ and

⁴³ (...continued)
and not to benefit private litigants.”) (citations omitted); *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91 (D.C. Cir. 1972).

⁴⁴ *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

⁴⁵ *ADAPSO v. Camp*, 397 U.S. 150 (1970).

expansively characterizing the scope of review appropriate to decisions, like notice-and-comment rulemaking, that were not decided on the basis of a trial-like record.⁴⁶ Of each of these decisions, one could report (a) it reflected an available but not inevitable interpretation of the statutory language; (b) that the interpretation almost certainly fell outside the expectations of the APA's enactors, expectations reflected in the approximately quarter-century of intervening practice under the statute;⁴⁷ (c) that the interpretation "made sense" in light of the emergence of rulemaking as a central policy-making tool, also unexpected in 1946; and (d) that the decision won prompt acceptance, necessitating no legislative correction. While academic and judicial critiques of each have emerged over time⁴⁸ as its consequences have appeared, one would be hard-pressed to find these critiques reflected in Congress's occasional recent efforts to amend the APA. These (unenacted) legislative drafts have tended to build upon, not to seek retreat from, the judicial developments.⁴⁹

In the courts of appeals, particularly the District of Columbia circuit, the APA's skeletal provisions for notice-and-comment procedures in rulemaking were also revisited. For example, litigation tested when notice may have been insufficient, because changes occurring as a

⁴⁶ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁴⁷ E.g., *Colorado Interstate Gas Co. v. Federal Power Com.*, 209 F.2d 717, 723-24 (10th Cir. 1953), *rev'd on other grounds*, 348 U.S. 492; *California Citizens Band Ass'n v. United States*, 375 F.2d 43, 49 (9th Cir. 1967), *cert denied*, 389 U.S. 844 ("a notice of rule making is sufficient if it provides a description of the subjects and issues involved.").

⁴⁸ E.g., Jerry Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games and Accountability*, 57 *Law & Contemp. Prob.* 185 (1994); Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Action Affecting the Community*, 39 *U.C.L.A. L. Rev.* 1251 (1992).

⁴⁹ E.g., *Regulatory Reform Act*, S. 1080, 97th Cong. (1981), which passed the Senate by a vote of 94-0 but never made it through the House; also S. 343, 104th Cong. (1995). See Robert W. Hahn, *Achieving Real Regulatory Reform*, 1997 *U. Chi. Legal F.* 143 (1997); William W. Buzbee, *Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single Statute Regulatory Reform*, 5 *N.Y.U. Env'tl L.J.* 298 (1996).

consequence of comments filed by the public gave the adopted rule a character that could not fairly have been anticipated from its description in the initial Federal Register proposal.⁵⁰ The obligations of review, that would presently echo through the Supreme Court’s recasting of the standard of review for informal (i.e. non-record) adjudication,⁵¹ contributed to judicial examinations of the statements of basis and purpose required to accompany rulemakings far more intense than one might think called for by language describing the necessary qualities of such statements as “general and concise”;⁵² these examinations could nonetheless be readily understood as a reaction to the emerging contemporary significance of rulemaking on technologically complex and economically significant matters.

Of particular importance to this discussion, reviewing courts focusing on the relationship between “facts” and agency judgments began to speak about the necessary conditions for the testing of the factual conclusions on which rulemaking rested – the extent to which judges would take responsibility for assuring the reasonableness of agency judgments on such matters; whether it was necessary that agency data be revealed so that commenters could respond to the agency’s account of the state-of-the-world; and, further, if there was to be such an opportunity for such testing, what the procedures for that testing should be. One can hardly doubt the quality of judicial innovation occurring here. In testing the adequacy of the factual grounding for challenged *legislation*, judges had learned to ask only if the enacting legislature *could* have found a state of facts that would lend support to its policy judgment; and the standard citation for rulemaking review, dating from the early

⁵⁰ *Wagner v. Volpe*, 466 F.2d 1013 (3d Cir. 1972).

⁵¹ *Citizens to Preserve Overton Park*, n. 46 *supra*.

⁵² E.g., *Automotive Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

New Deal, embraced the same standard.⁵³ It would be hard to find in the APA's text a repudiation of this approach. Now, for rulemakings, courts began to demand considerably more.

Congress was a participant in these developments, albeit less directly than would have made the developments uncontroversially statutory in character. The Freedom of Information Act (and its subsequent amendments, and expansion into the Government in the Sunshine Act) voiced a strong and unequivocal commitment to information exposure, but (as earlier remarked) this was a commitment not explicitly linked to rulemaking as such. In statutes establishing particular, important rulemaking regimes, Congress increasingly provided for what came to be called "hybrid" rulemaking procedures, that seemed a great deal more like judicial and less like legislative procedures.⁵⁴ For OSHA and for EPA, in many if not all contexts, Congress specified the basis for judgment (e.g., "best available technology") in ways that highlighted specific and disputable factual findings the agency would be required to make; it provided enhanced procedures (including oral hearings and testimony) for deciding these issues; and it specified the more demanding "substantial evidence" standard for judicial review of the results, that is usually associated with on-the-record proceedings.

When they encountered these special statutory provisions directly, courts had little difficulty understanding that they imposed more rigorous standards on both agency proceedings and judicial

⁵³ *Pacific States Box and Basket v. White*, 296 U.S. 176.

⁵⁴ E.g., the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act of 1975, P.L. 93-637, which was the subject of extensive study and recommendations by the late Administrative Conference of the United States, see Recommendations 79-1, 79-5, and 80-1 and their supporting reports in Administrative Conference of the United States, Recommendations and Reports 1979 and 1980, 44 Fed.Reg. 38,817 (1979), 45 Fed. Reg. 2,307 and 46,772 (1980) .

review.⁵⁵ There was also an observable tendency to generalize these special provisions, however, at least to the kinds of rulemakings that shared with EPA and OSHA rulemakings the characteristics of relatively high economic stakes for industry, technical questions of considerable uncertainty, and the possibility of major health and safety consequences for the public.⁵⁶ Moreover, in articulating the requirements of particular interest here – the agency’s obligation to share with the public, in time for the comment process, the data that it would consider in deciding whether to act – the courts invoked neither special statutory language nor the APA. They framed these obligations on the basis of the judiciary’s own assessment what an acceptable fact-finding process entailed, often invoking concepts of due process or fundamental fairness.⁵⁷

Three D.C. Circuit decisions involving aspects of the Clean Air Act were prominent in this particular development. *Kennecott Copper Corp. v. EPA*,⁵⁸ written by Judge Harold Leventhal early in 1972 (not long after the Supreme Court’s redefinition of the scope of judicial review)⁵⁹ involved secondary ambient air quality standards for sulfur oxides. Congress had assigned the D.C. Circuit special responsibilities to review challenges to such standards. The court said these responsibilities entailed a requirement that the agency explain its reasoning *to it* in a manner that gave a “sufficient indication of the basis on which the Administrator reached” a result not obviously supported in the rulemaking record. While the requirement was to explain agency reasoning, rather than to give

⁵⁵ See, e.g., *Industrial Union Department, AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).

⁵⁶ E.g., *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977).

⁵⁷ *Id.*

⁵⁸ 462 F.2d 846 (D.C. Cir. 1972).

⁵⁹ *Citizens to Preserve Overton Park*, n. 46 above.

notice of data to the parties, meeting the requirement would cause the EPA to be considerably more public about its data, and the manner in which it reasoned about it, than it had previously been.

Just a year later, Judge Leventhal wrote again in *International Harvester Co. v. Ruckelshaus*,⁶⁰ a lawsuit challenging the EPA Administrator's refusal to suspend the coming into effect of new automobile emission standards for a year. Now – thanks to *Kennecott* – in possession of a fuller explanation of the agency's reasoning, he concluded that the Administrator had not successfully shown that effective control technology would be available in time for compliance with the standards, and remanded for further, urgent proceedings on this issue. Reaching this conclusion required the court to write pages of reasoning from the record and from the explanations given by the Administrator; it characterized this extended reasoning as necessary and “hopefully perceptive, even as to the evidence on technical and specialized matters, ... to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.”⁶¹ Unsatisfied after its review, the court sought supplementation of the record. It remarked in the course of doing so that “in the interest of justice and mutual regard for Congressional objective, the parties should have opportunity on remand to address themselves to matters not previously put before them by EPA for comment.” This, Judge Leventhal's opinion said, should include a chance for the parties to respond to and challenge a technical appendix EPA had created subsequent to its decision, with “some opportunity for cross-examination.”⁶²

These conclusions – which included sharp limitations on that opportunity to cross-examine –

⁶⁰ 478 F.2d 615 (D.C. Cir. 1973).

⁶¹ At 648.

⁶² At 649.

were very much the product of the particular statutory provisions under which the EPA was acting, not the APA. They began to acquire more general significance, however, with a concurrence by Chief Judge David Bazelon presenting the problem as a general one for administrative law. Chief Judge Bazelon thought he lacked the “technical know-how” to engage in a “substantive evaluation of the Administrator’s assumptions and methodology.”⁶³

Whether or not traditional administrative rules [distinguishing between administrative adjudication and administrative rulemaking] require it, the critical character of this decision requires at the least a carefully limited right of cross-examination at the hearing and an opportunity to challenge the assumptions and methodology underlying the decision.

The majority's approach permits the parties to challenge the Administrator's methodology only through the vehicle of judicial review. I do not think this is an adequate substitute for confrontation prior to the decision. I reach this position not only out of concern for fairness to the parties . . . but also out of awareness of the limits of our own competence for the task. The petitioners' challenges to the decision force the court to deal with technical intricacies that are beyond our ken. These complex questions should be resolved in the crucible of debate through the clash of informed but opposing scientific and technological viewpoints.⁶⁴

Four months later, in *Portland Cement Ass’n v. Ruckleshaus*,⁶⁵ Judge Leventhal again addressed the question of party awareness, during the course of rulemaking, of the data and reports on the basis of which EPA proposed to act under the Clean Air Act. This case involved a rule EPA had adopted a few weeks prior to the court’s decision in *Kennecott Copper*, to set Clean Air Act “stationary source” standards for cement plants. A petition for review of the rule had already been filed in the D.C. Circuit when the opinion in *Kennecott Copper* was announced. Reading *Kennecott Copper* led EPA to publish a “supplemental statement” in the cement case. This supplemental statement gave

⁶³ At 651.

⁶⁴ At 651-52.

⁶⁵ 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

“a more specific explanation of how [the Administrator] had arrived at”⁶⁶ its cement plant rule. After receiving the supplemental statement, one of the affected companies, presumably using FOIA,⁶⁷ obtained the details of test results the statement referred to; it then successfully moved the Court of Appeals for a remand of the record to the EPA, to permit it to comment on these tests. It filed its comments; the agency added them to the certified record; and EPA then returned the record to the court without more – without issuing any response of its own or further explanation of its reasoning. This noticeably annoyed the court, which found the agency’s explanation of its rule inadequate.

Again, the matter was very much caught up with the particular requirements of the Clean Air Act. In reversing, the court reasoned largely in terms of what would be necessary to permit the judicial review called for by that act, a review that “requires enough stepping in technical matters to determine whether the agency ‘has exercised a reasoned discretion.’”⁶⁸ Yet the court twice addressed the APA’s general procedural requirements for notice-and-comment rulemaking:

Written comments were submitted as requested, and as required by the APA § 4(c), 5 U.S.C. § 553(c). Obviously a prerequisite to the ability to make meaningful comment is to know the basis upon which the rule is proposed.⁶⁹

and

It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.⁷⁰

⁶⁶ At 379.

⁶⁷ This seems inevitable, but a variety of efforts to determine the fact – including relevant FOIA requests – have thus far proved unproductive..

⁶⁸ At 402, citing Judge Leventhal’s earlier opinion in *Greater Boston TV v. FCC*, 444 F.2d 841, 850, cert. denied 403 U.S. 923 (1971).

⁶⁹ At 393 n. 67.

⁷⁰ At 393.

Within three years, these dicta had become “obvious” – and general – propositions about rulemaking. Thus, in 1977 the Second Circuit would refuse to enforce a 1970 FDA regulation setting health standards for the processing of fish with the decisive observation that

although we recognize that an agency may resort to its own expertise outside the record in an informal rulemaking procedure, we do not believe that when the pertinent research material is readily available and the agency has no special expertise on the precise parameters involved, there is any reason to conceal the scientific data relied upon from the interested parties. As Judge Leventhal said in *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (1973): "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that [in] critical degree, *is known only to the agency*." (Emphasis added.) This is not a case where the agency methodology was based on material supplied by the interested parties themselves. *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (1973). Here all the scientific research was collected by the agency, and none of it was disclosed to interested parties as the material upon which the proposed rule would be fashioned.⁷¹

Note that the FDA had adopted the challenged rule using ordinary APA notice-and-comment procedures, rather than statutorily created special procedures and review standards like EPA's; and it had done so two years before *Kennecott Copper* (the *first* of these decisions). Judge Leventhal's dicta were apparently not creative judicial law-making, but simple common sense. In 1977, too, Professor Richard Stewart would describe the requirement that a rulemaking agency “be prepared to expose the factual and methodological bases for its decision and face judicial review on a record that encompasses the contentions and evidence of the Agency and its opponents” as elements of an uncontroversial and evidently desirable “paper hearing” procedure, “a procedural *tertium quid*.”⁷²

One could *not* call uncontroversial Chief Judge Bazelon's preference for more adversary process,

⁷¹ We recognize the problem posed by Judge Leventhal in *International Harvester*, *supra*, that a proceeding might never end if such submission required a reply ad infinitum, *ibid*. Here the exposure of the scientific research relied on simply would have required a single round of comment addressed thereto.

United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 251 (2d Cir. 1977).

⁷² Richard Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Administrative Decisionmaking: Lessons From the Clean Air Act*, 62 *Iowa L. Rev.* 713, 731-33 (1977).

as more reflective of judicial limitations.⁷³ His dispute with Judge Leventhal about how judges could best review agency resolutions of such technical matters remained a bone of contention between them,⁷⁴ and Professor Stewart characterized his views as “far more controversial.”⁷⁵

When Chief Judge Bazelon found a panel to adopt his view, seeming to require the Nuclear Regulatory Commission to engage in more exacting procedures in a rulemaking on the highly volatile and technologically complex issues of the nuclear fuel cycle, the Supreme Court emphatically repudiated him.⁷⁶ Stressing the original intent of the APA’s provisions, and the impermissibility of judicial embroidery on the procedures it entailed, the Court’s language appeared to place all the previous decade’s developments in jeopardy:

In 1946, Congress enacted the Administrative Procedure Act, which as we have noted elsewhere was not only "a new, basic and comprehensive regulation of procedures in many agencies," *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), but was also a legislative enactment which settled "long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest." *Id.*, at 40. Section 4 of the Act, 5 U.S.C. §553 (1976 ed.), dealing with rulemaking, requires in subsection (b) that "notice of proposed rule making shall be published in the Federal Register ...," describes the contents of that notice, and goes on to require in subsection (c) that after the notice the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." ... [G]enerally speaking this section of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them

⁷³ P. 32 above.

⁷⁴ *Ethyl Corp. v. EPA*, 541 F.2d 1, 66 (Bazelon, C.J.), 68 (Leventhal, J.) (D.C. Cir. en banc), cert. denied 426 U.S. 941 (1976).

⁷⁵ 62 Iowa L. Rev. at 731.

⁷⁶ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). The reader is entitled to know that I was General Counsel of the Nuclear Regulatory Commission at the time of the D.C. Circuit announced its decision, and participated in writing the government’s brief in the Supreme Court.

if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.

...

Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *FCC v. Schreiber*, 381 U.S., at 290, quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S., at 143. ...

[Reviewing the 1946 legislative history in some detail, the Court uncontroversially found] little doubt that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed.

There are compelling reasons for construing §4 in this manner. In the first place, if courts continually review agency proceedings to determine whether the agency employed procedures which were, in the court's opinion, perfectly tailored to reach what the court perceives to be the "best" or "correct" result, judicial review would be totally unpredictable. And the agencies, operating under this vague injunction to employ the "best" procedures and facing the threat of reversal if they did not, would undoubtedly adopt full adjudicatory procedures in every instance. Not only would this totally disrupt the statutory scheme, through which Congress enacted "a formula upon which opposing social and political forces have come to rest," *Wong Yang Sung v. McGrath*, 339 U.S., at 40, but all the inherent advantages of informal rulemaking would be totally lost.

...

Finally, and perhaps most importantly, this sort of review fundamentally misconceives the nature of the standard for judicial review of an agency rule. The court below uncritically assumed that additional procedures will automatically result in a more adequate record because it will give interested parties more of an opportunity to participate in and contribute to the proceedings. But informal rulemaking need not be based solely on the transcript of a hearing held before an agency. ... [T]his sort of unwarranted judicial examination of perceived procedural shortcomings of a rulemaking proceeding can do nothing but seriously interfere with that process prescribed by Congress.

Had Judge Leventhal as well as Chief Judge Bazelon, the uncontroversial as well as the controversial, thus been repudiated? And if not, now that attention had been drawn specifically to the language of the APA, how could Judge Leventhal's conclusions be justified? Despite the emphatic fervor of the Court's language, the ensuing years have seen no retrenchment on the proposition that agency data important to proposed rulemaking is to be revealed in the comment process. Sidestepping the rhetorical difficulties, the Court seemed to concede the survival of

Professor Stewart's *tertium quid* when, five years later, it engaged in quite searching review of the Department of Transportation's technological bases as it considered a rulemaking involving the requirement that automobiles contain passive restraints to protect their passengers.⁷⁷

While the survival of the *tertium quid* may be uncontroversial and unthreatened, neither the opinions nor the literature generally have articulated a means of ascribing this result to Congress – of presenting it as the exercise in statutory interpretation to which the *Vermont Yankee* Court understandably says the judiciary is limited. Perhaps, one could say, this is simply another of the common law's inelegances – that these judicial interpretations, however unjustifiable in statutory terms, had become so engrained that the eggs could not be unscrambled. The Bazelon view remained controversial; it could be repudiated. But Judge Leventhal's elegant constructions did not elicit the same level of controversy and a court seeking to undo them would be unraveling too much.

To make the argument in this way is nonetheless to place the result outside the statute, to justify it simply as a judicial creation rather than as the derivative of legislative process. Here, rather, the suggestion is that by 1972, and certainly after the FOIA amendments of 1974, the APA's provision for rulemaking procedures (Section 553) could no longer be viewed as, simply, the product of the judgments made in enacting it in 1946. In particular, what distinguishes Judge Leventhal's propositions from Chief Judge Bazelon's and permits us to see them, at least in retrospect, as APA justified,⁷⁸ is the generality and strength of the congressional judgments embodied in FOIA. Congress never generalized its judgment that some high-consequence rulemakings should employ

⁷⁷ *Motor Vehicle Mfrs Assn v. State Farm Mutual Automobile Ins Co.*, 463 U.S. 29 (1983).

⁷⁸ The decisions themselves, it is worth recalling, involved a statute, the Clean Air Act, that set rulemaking procedures for the EPA and judicial review standards for the court of appeals that in themselves represented a considerable elaboration of the simple notice-and-comment procedures of the APA.

the hybrid procedures, verging on the judicial, that Chief Judge Bazelon sought generally to enforce; but the legislative proposition that agencies must share scientific data and studies in its possession with the interested public – even if not directed in terms to rulemakings – was inescapable, uncontroversial, and undifferentiated. A court enforcing that proposition could do so with considerable confidence that a contemporary legislature would regard it as the implementation of its own policy judgments, not as a judicial innovation of questionable merit.⁷⁹

Of course this is easier to argue in 2003 than it may have been to see in the 1970s, and it is perhaps easier to argue for the developments respecting APA rulemaking notice than some others. The text of the APA is unmistakably permissive, requiring only “notice” defined loosely as we have seen, an opportunity to comment whose dimensions were explicitly left to agency discretion, and a “concise, general” statement of basis and purpose. Could a judge accepting that required procedures are a matter for legislative not judicial judgment have satisfied herself at the time that changes in the general statutory framework warranted the *tertium quid*’s demanding interpretations of these statutory requirements?

In the early part of the Twentieth Century, progressive legal scholars and judges, reacting to the narrowness with which some judges at the time were treating the statutes emerging with increasing volume and political force from federal and state legislatures, counseled courts to treat statutes comparably to the way in which they treated common-law precedent. For Dean Roscoe Pound, “the orthodox common law attitude towards legislative innovations” was “not only [to] refuse to reason from [a statute] by analogy and apply it directly only, but also give to it a strict and narrow

⁷⁹ Sunstein and Vermeule, n. 6 above at 917-18, contrast the APA, for which congressional oversight has been at best episodic, with other statutory frameworks such as tax law, that are characterized by continuous, detailed legislative supervision of judicial outcomes. Neither setting is, for them, outside the framework of interpretation, although they understandably expect judicial awareness of congressional engagement to be a factor for consideration.

interpretation, holding it down rigidly to those cases which it covers expressly.” Accepting that more liberal courts already were willing to give statutes a “liberal interpretation,” he foresaw – he sought – a day when they would “receive [a statute] fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them.”⁸⁰ Benjamin Cardozo, in *The Nature of the Judicial Process*, extolled the willingness of judges on the codified continent to “supply omissions, correct uncertainties and harmonize results with justice through a method of free decision” that “sees through the transitory particulars and reaches what is permanent behind them.”⁸¹ And for Justice Stone, as well, realizing “the ideal of a unified system of judge-made and statute law woven into a seamless whole by the processes of adjudication” entailed treating statutes “as starting points for judicial law-making comparable to judicial decisions.”⁸²

The Freedom of Information Act is, from this perspective, a considerably different source of instruction than particular statutes creating special procedures for particular agencies. Embodying a general and strenuously reiterated policy of government obligation to make data in its possession public, with only limited exceptions and with extraordinary indifference to the nature of the citizen’s

⁸⁰ Roscoe Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383 (1908). Recall that this proposition must live with Pound’s repudiation of “spurious interpretation,” p. 13 above, and in the framework of his commitment to the “taught tradition” of the law, p. 18 above. He did not imagine it as a call to judicial adventurism.

⁸¹ Benjamin N. Cardozo, *The Nature of the Judicial Process*, 16-17 (Yale U. Press 1921). *See also* François Géný, *Méthode d’Interprétation et Sources en Droit Privé Positif* (1899). Géný was among the first to effectively challenge the mechanical interpretation of statutory codes, arguing for “free scientific research” which would take legislative purpose and policy, along with the overall social context, as essential factors in understanding and developing the application of a statute. Géný’s ideas continue to flourish in such fields as the study of formalism and conceptualism in legal process and doctrine, the scope and legitimate projection of legislation, the source of decision-making that rightly lies outside the scope of legislation, and the legal realist study of the process of law-making.

⁸² Harlan Fiske Stone, *The Common Law in the United States*, 50 Harv.L.Rev. 4 (1936).

claim, it provides an unmistakable source of the character Pound, Cardozo and Stone evoked. Whatever rulemaking “notice” may have entailed to the drafters of 1946, in the changed rulemaking environment of the 1960s FOIA both invited its reshaping and served to give the judge confidence that her reshaping better fit the general framework of contemporary law. The Congresses that adopted FOIA and its amendments were of course not the legislators of 1946; but they were legislators crafting a considerably more contemporary set of instructions to the judiciary, also relying on the judges’ faithfulness as servants of the law as they understand it to be. And judicial understandings are – properly – compounded of contemporary understandings of the judgments recent Congresses have made, the areas of difficulty that have emerged in recent law-administration, and the like. Courts need not have expected thorough revision of all laws arguably affected by laws like FOIA. That is not the manner in which Congress works or could credibly be made to work. “Congressmen do not carry the statutes of the United States around in their heads any more than judges do.”⁸³

Just because there has been neither hesitation nor inconsistency in recent congressional action, FOIA is a particularly easy setting in which to make an argument like this one. The last-quoted comment, per contra, was made in a context where one could think the congressional signals less clear. The issue was whether successful litigants against government authority in civil rights litigation are entitled to reimbursement of their expenses for expert witness assistance as well as their attorneys fees. Congress had sometimes provided explicitly for reimbursement of experts, and sometimes had used a formula such as “reasonable attorneys fees as a part of the costs,” not specifying what the other costs might be. These expressions had occurred as elements of an

⁸³ *Freidrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989)(per Posner, J.).

extended judicial-legislative “argument” about proper reimbursement policies in which attorneys’ fees appeared to be the central element at first, and limitations on other permitted costs emerged only with time.⁸⁴ The specific references to expert witness fees multiplied as those limitations did, and tended to cluster in legislation developed by legislative committees with environmental responsibilities. This is not the place to chronicle that dispute or its outcome.⁸⁵ Note, however, in the following passage from the majority opinion sharply repudiating the last-quoted comment⁸⁶ a certain ambivalence between dynamic and static approaches to interpretation:

This argument profoundly mistakes our role. Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?) but because it is our role to make sense rather than nonsense out of the corpus juris. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently. ... Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the better disposition. But that is not for judges to prescribe. We thus reject this last argument for the same reason that Justice Brandeis, writing for the Court, once rejected a similar (though less explicit) argument by the United States:

⁸⁴ *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240 (1975); *Education for All Handicapped Children Act of 1975*, 20 U.S.C. §1415(e)(2); *Civil Rights Attorneys Fees Award Act of 1976*, 42 U.S.C. §1988; *Rehabilitation Act Amendments of 1978*, 29 U.S.C. §794a(b); *Maher v. Gagne*, 448 U.S. 122 (1980); *Smith v. Robinson*, 468 U.S. 992 (1984); *Handicapped Children’s Protection Act of 1986*, 20 U.S.C. 1415(i)(3)(B); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989); *West Virginia University Hospitals, Inc. v. Casey*, 489 U.S. 83 (1991); *Civil Rights Act Amendments of 1991*, 42 U.S.C. §1988(c); *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

⁸⁵ See Alexander Aleinikoff & Theodore Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, *West Virginia Hospitals, Inc. v. Casey*, and *Due Process of Statutory Interpretation*, 45 *Vand. L. Rev.* 687 (1992); *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) is a quite recent revisiting of the matter in a compelling context.

⁸⁶ *West Virginia University Hospitals, Inc. v. Casey*, 489 U.S. 83, . (1991).

[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 250-251 (1926).⁸⁷

No more violence would have been done to statutory words – particularly in the context of the judicial practice common when they were enacted and the subsequent legislative history – by treating expert witness fees as an element of permission to award “reasonable attorneys fees *as part of the costs*” than not. The remark that

where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy, and to treat alike subjects that different Congresses have chosen to treat differently

is in my judgment better understood as a commitment to the Court majority’s strong policy preferences, frequently reiterated in its “dialogue” with Congress over the years, than as a necessary proposition about the language Congress had used or the choices it had advertently made. And the Court’s quotation from Justice Brandeis, with its accompanying footnote, seems to retract the preceding remarks’ seeming openness to dynamic interpretation building on subsequent legislation; it appears grounded in the proposition that statutes must be treated as “static” documents, the product only of the Congress that enacted them. A “faithful servant,” observing repeated instructions of the same general nature but increasing specificity, could conclude that it had been his interpretation of the “earlier enactment,” not the enactment itself, that had been “parsimonious” – the “more generous

⁸⁷ WVUH at least asks us to guess the preferences of the enacting Congress. JUSTICE STEVENS apparently believes our role is to guess the desires of the present Congress, or of Congresses yet to be. "Only time will tell," he says, "whether the Court, with its literal reading of § 1988, has correctly interpreted the will of Congress." The implication is that today's holding will be proved wrong if Congress amends the law to conform with his dissent. We think not. The "will of Congress" we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment. Otherwise, we would speak not of "interpreting" the law but of "intuiting" or "predicting" it. Our role is to say what the law, as hitherto enacted, is; not to forecast what the law, as amended, will be.

policy” of later laws being not a new thought, but a further specification of earlier instructions.

Of course courts will encounter difficulties in distinguishing congressional responses on the order of “what the hell?” from “oops.” Nonetheless, acknowledging that the judicial responsibility is to Congress’s judgments (not to what the judge herself prefers as “the better disposition”), it is submitted that the judicial obligation is to try. And if the judge finds herself in repeated conversations of this character, she ought to entertain the thought that her understandings have been deficient – indeed, perhaps animated by the same choice of her own preferences as this passage so emphatically repudiates.

Particularly at the Supreme Court level, the certiorari function has converted Justice Brandeis’ proposition into an amiable fiction that conceals the Court’s considerable and disruptive law-making power.⁸⁸ The language quoted from *WVUH* refers to “a statutory term presented *to us* for the first time” (emphasis added). Yet under the present realities that presentation will ordinarily be greatly delayed in relation to its presentation in the legal order. Indeed, the delay may be substantially ascribable to choices by parties *and the Court itself* that the matter does not warrant the Court’s attention. Brandeis uttered his dictum before the business of federal courts had become dominated by statutes, before their dockets had exploded, and before the certiorari function had taken effect. The dominant characteristic of particular statutory issues in the Court today is that they are very infrequently, and usually tardily, presented. The Court’s certiorari choices, like the contemporary Congress’s legislative choices, are driven by the disputes that are live and important at any given moment. If the uncontroversial is not “presented to us,” it nonetheless becomes a part of the living law known to lawyers advising clients, to Congress choosing its legislative opportunities, to agencies

⁸⁸ See Strauss, n. 4 above.

deciding how to make procedural choices, and to lower courts that cannot so easily evade the responsibilities of decision. Were the Court honestly to face the implications of its reservation of authority to choose which statutory issues to consider, it might conclude that its refusal to credit intervening statutory and lower court case-law developments, more than its insistence on a static view, “profoundly mistakes” its proper contemporary role.