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Statutory Construction: Keeping a Respectful Eye on Congress

Louis Fisher*

Federal courts fashion various canons and guidelines for statutory construction, relying on rules and conventions to interpret and decide the meaning of a statute. This article takes an institutional look at the record of federal courts in performing that function. How well do they respect the prerogatives of other political centers, especially Congress, and avoid unnecessary and potentially damaging collisions with another governmental branch? Intelligent and prudent statutory construction carries with it a sensitive peripheral vision to the rights and duties of Congress and to the larger legal and political system. Part of statutory interpretation is to “decide whether or not a particular decision favoring one side of a dispute should be left to the legislature (or agency).” When deciding the meaning of a statute, courts should “[r]espect the position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the constitution under which it exercises its powers.” But, at times judges seem so preoccupied with the minutiae of the canons of statutory construction, or with their desire to do good, that they lose sight of institutional interests.

Many of the canons of statutory construction—ranging from the “plain meaning rule” to the “rule of lenity”—appear to have a static quality. For example, courts “do not resort to legislative history to cloud a statutory text that is clear.” Under the principle of lenity, any ambiguity in a criminal statute must be resolved “in favor of the defendant.” Yet implicit in these canons is (or should be) a judicial recognition that Congress is the principal branch for making laws and deciding budget allocations. The rule of lenity includes a due process component by giving “fair warn-


ing" to citizens,\textsuperscript{5} but it also acknowledges that "legislatures and not courts should define criminal activity."\textsuperscript{6} If Congress wishes to rewrite criminal law to go beyond the boundaries set in the Court's decision, it is free to do so. As Justice Blackmun noted in a dissent in a case involving criminal law: "Now Congress must try again to fill a hole it rightly felt it had filled before."\textsuperscript{7}

The first part of this Article begins with the doctrine of stare decisis, which defers to Congress on the need to change statutory policy. Stare decisis keeps courts aware of their obligations to institutions outside the judiciary. Section II pursues the same theme by examining cases involving maritime law, attorneys' fees, and civil rights, illustrating how the Supreme Court can rule narrowly to allow Congress to revisit an area and legislate new rights. Section III, discussing repeals by implication, further develops the position that changes in the law should be made expressly by Congress, not inferred by the courts. The examples include the Snail Darter Case, the Hyde Amendment, and veterans' benefits. Section IV focuses on cases that mandate the spending of public funds and trench upon a key prerogative of Congress. The final section reviews some prominent disputes about the legitimacy of legislative history.

\section{I. STARE DECISIS}

In the interest of consistency and predictability, judges prefer to decide cases in accordance with past rulings, but stare decisis is more than simply holding fast to precedents. It is a reminder to courts to take account of the larger interests of society and legislative prerogatives. Judges should do more than write good decisions, they have a responsibility to fit their duties within the limits of the political system.

Continuity is important for statutory law because it permits citizens to arrange their affairs with greater confidence. Courts should not upset that sense of security and stability by needlessly disrupting the law. Without settled legal principles, "[I]t would be impossible for a lawyer to give any dependable advice to a client."\textsuperscript{8} "Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness."\textsuperscript{9} Without uniformity and continuity in the law, "the integrity of contracts, wills, conveyances and securities is impaired."\textsuperscript{10} When it becomes necessary to change the law, "the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of [a] court, for statutory regulations would operate only in


\textsuperscript{6} Id. at 348.

\textsuperscript{7} Ratzlaf, 510 U.S. at 162 (Blackmun, J., dissenting).


\textsuperscript{9} National Bank v. Whitney, 103 U.S. 99, 102 (1880).

\textsuperscript{10} William O. Douglas, Stare Decisis, 49 COLUM. L. REV. 735, 735-36 (1949).
Roscoe Pound explained one of the reasons why courts approach change with caution: "The courts in the past have not been ready to overturn established precepts with every swing of political and economic opinion, especially when they swing so much and so fast. These sudden changes, making new rules operating for the future are for the legislature." Judicial caution is also necessary because the introduction of new ideas in a judicial ruling rather than in a statute is likely to have unpredictable ripple effects on legal doctrines and legal reasoning. Pound pointed out that statutes make rules only for the cases within their purview. Hence when a new proposition comes in by legislation it does not disturb the general legal system, no matter how radically it departs from what went before. But when something radically new comes in by judicial decision, no one can foretell what disturbing effects may result. It does not merely decide the exact state of facts which it served to adjudicate, it is potentially a starting point for analogical reasoning for cases in widely distinct parts of the legal system. That a court has overturned rule A at once puts rules B, C, and D, rules M, and N, and rules P, and Q in question, because any rule at all analogous to A is likely to be challenged on the analogy of rule X, which has taken the place of A.

The doctrine of stare decisis carries particular force for statutory construction. The practice of the Supreme Court is "not to apply stare decisis as rigidly in constitutional as in nonconstitutional [statutory] cases." The judiciary's "reluctance to overturn precedents regarding statutory construction "derives in part from institutional concerns about the relationship of the Judiciary to Congress." If the Court errs on a statutory matter, legislatures may pass a new statute. "Congress is free to change [the] Court's interpretation of its legislation." With regard to statutory questions, Justice Brandeis said that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."

At the federal level, the primary lawmaking power resides in Congress. If the doctrine of separation of powers is to have meaning, "it means that the task of creating law falls upon the legislature, and that courts must obey and enforce the constitutionally legitimate enactments of the legislative branch." If there is doubt that statutory law or case law provides

for a legal right, the proper avenue is to leave the matter to Congress and let it be decided through the legislative process.

In a 1989 civil rights case, the Court spoke about the wisdom of letting statutory construction remain undisturbed in order to respect the law-making power of Congress: "Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."19 When courts overrule statutory precedents, "the primary reason . . . has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress."20

II. LETTING CONGRESS LEGISLATE

Federal courts frequently decline the invitation by private parties to create statutory rights left unrecognized by Congress. Should judges make new law to overcome "legislative inertia?"21 The creation of new legal rights is Congress's job, and part of a legislator's task is the decision whether to overcome legislative (and public) inertia and, perhaps, a President's veto. Those political judgments are best left to the political branches.

One could argue that the difficulty of enacting new legislation and overcoming these built-in hurdles calls for judicial initiatives, but the institutional hazards here for the courts loom large. When courts fail to resist the temptation to make new law, they may find themselves backtracking to a more secure position. Deference to the legislative branch is especially appropriate when additional funding is required. If the political branches decide that judicial rulings are too restrained to satisfy contemporary needs, they can legislate new rights.

A. MARITIME LAW

The Constitution specifically grants to the Supreme Court only one area of substantive law: "all Cases of admiralty and maritime Jurisdiction."22 For more than a century, maritime law was essentially judge-made law. Congress enacted few statutes to guide the courts.23 A series of cases from 1970 to 1990, however, illustrate how the Court went too far in discovering and announcing new legal rights in maritime law. Eventually these legislative initiatives so divided the Court that it found it necessary to pull back out of respect for the legislative powers of Congress. A federal appellate judge bemoaned this gradual loss of maritime jurisdiction:

20. Id. at 173.
The Supreme Court—whose members are admiralty judges when they hear admiralty appeals—has recently abandoned its Constitutional duty of enunciating maritime law in favor of conforming admiralty law to Congressional enactments and filling in gaps in maritime law only when authorized by Congress. Apparently admiralty judges should now assume the role of followers rather than leaders. Have admiralty judges become flotsam on the sea of maritime law?  

In 1970, the Supreme Court decided a case brought by a woman whose husband had been killed while working aboard a vessel in the waters of Florida. She sought damages for wrongful death and for the pain and suffering he experienced prior to death, claiming both negligence and the unseaworthiness of the vessel. Although “Congress had created actions for wrongful deaths of railroad employees, of merchant seamen, and of persons on the high seas,” no statute specifically permitted a cause of action for the deceased’s wife. Finding that “Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of [the] petitioner,” a unanimous Court ruled that the wife was not foreclosed from bringing the action under federal maritime law.

Relying on legislative history rather than statutory text, the Court concluded that “Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in territorial waters. . . .” Although the Court was providing a right not specifically authorized by statute, Justice Harlan’s opinion for the Court revealed a keen sensitivity to congressional prerogatives. He said it was a duty of the Court to “analyze with care the congressional enactments that have abrogated the common-law rule in the maritime field, to determine the impact of the fact that none applies in terms to the situation of this case.” The Court looked to Congress for “direction in its legislation granting remedies for wrongful deaths in portions of the maritime domain.”

To help explain its decision, the Court said it was seeking to redress three “anomalies” in maritime law. First, liability existed “if the victim is merely injured, but frequently not if he is killed.” Second, there was liability beyond the three-mile limit “but not within the territorial waters of a State whose local statute excludes unseaworthiness claims.” Third,
the "strangest" anomaly was that a seaman covered by the Jones Act was "provided no remedy for death caused by unseaworthiness within territorial waters, [whereas a longshoreman did] have such a remedy when allowed by a state statute."\textsuperscript{35}

Justice Harlan argued that it was unreasonable to presume that Congress meant to prevent the Court from resolving discrepancies in maritime law, "ceding that function exclusively to the States."\textsuperscript{36} In searching the legislative history of the Death on the High Seas Act, Harlan could find no such legislative intent.\textsuperscript{37} He was convinced that his decision was "wholly consistent with the congressional purpose."\textsuperscript{38} A law review article praised Justice Harlan for "combining[ing] high judicial craftsmanship with republican attention to the legislature's role in articulating public values."\textsuperscript{39}

The Court took a different tack four years later. A longshoreman was severely injured aboard a vessel in Louisiana waters. After recovering damages for past and future wages, pain and suffering, and medical and incidental expenses, he died and his wife brought a wrongful-death action for damages she suffered. The Court ruled that she was entitled to recover damages "for loss of support, services, and society, as well as funeral expenses."\textsuperscript{40} Writing for the Court, Justice Brennan looked not to congressional policy for guidance, but solely to state practices and academic commentators.\textsuperscript{41} He was also motivated by a desire to fulfill "the humanitarian policy of the maritime law."\textsuperscript{42} Harlan had bent over backwards to avoid friction with Congress; Brennan showed no such interest.

Justice Brennan's decision split the Court 5 to 4. The dissenting opinion, written by Justice Powell and joined by Chief Justice Burger and Justices Stewart and Rehnquist, described the majority's approach as "a nearly total nullification of the congressional enactments previously governing maritime wrongful death. . . . Several limitations built into those congressional enactments have been swept aside by the majority's decision."\textsuperscript{43} Powell compared Harlan's decision—"essentially a response to a gap in maritime remedies for deaths occurring in state territorial waters"—with the "sort of \textit{tabula rasa} restructuring of the law of admiralty" used by Brennan.\textsuperscript{44} Powell said that Brennan's opinion exhibited "little

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\textsuperscript{35.} \textit{Id.} at 395-96.
\textsuperscript{36.} \textit{Id.} at 396-97.
\textsuperscript{37.} See \textit{Moragne}, 398 U.S. at 397.
\textsuperscript{40.} Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 584 (1974).
\textsuperscript{41.} \textit{See id.} at 587, 591.
\textsuperscript{42.} \textit{Id.} at 588.
\textsuperscript{43.} \textit{Id.} at 595.
\textsuperscript{44.} \textit{Id.} at 596.
\end{flushleft}
deference . . . for enunciated congressional policy."45 "[T]he Court's holding that loss of society may be recovered is a clear example of the majority's repudiation of the congressional purposes expressed in the two federal maritime wrongful-death statutes."46

In 1978, in deciding a case involving a wrongful death on the high seas, the Court was critical of Brennan's decision.47 The question was whether one's survivors may recover damages in addition to damages authorized by Congress. The Fifth Circuit had held that survivors may recover for their "loss of society."48 The Supreme Court reversed. Writing for the majority, Justice Stevens noted that Brennan's decision in 1974 "differed from the choice made by Congress when it enacted the Death on the High Seas Act [DOHSA]."49 Acknowledging that there were valid arguments on each side of the loss-of-society issue, Stevens said "we need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us" by limiting survivors to recovery for pecuniary losses.50 He added that "Congress did not limit DOHSA beneficiaries to the recovery of pecuniary losses in order to encourage the courts to create nonpecuniary supplements."51 Stevens drew a line on judicial law-making: "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."52

Finally, in 1990, a unanimous Court decided to put a brake on its legis- lative initiatives in maritime law.53 The case involved a mother's effort to recover loss of society for the death of her son, a seaman, and compensation for his lost future income. The Court suggested that changes in the legal climate required a more restrained judiciary:

We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to over-step the well-considered boundaries imposed by federal legislation.54

45. *Gaudet*, 414 U.S. at 596.
46. Id. at 605. For a general criticism of Justice Brennan's decision in *Gaudet*, see *Gilmore & Black*, supra note 37, at 369-74.
48. *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422, 435 (5th Cir. 1977).
49. *Mobil Oil Corp.*, 436 U.S. at 622.
50. Id. at 623.
51. Id. at 625.
52. Id. Note that Brennan took no part in the consideration of this case and Marshall, joined by Blackmun, dissented. See id. at 618.
54. Id. at 27.
Because of recent congressional enactments, the Court pointed out that had the widow in *Moragne* "brought her action today, it would be foreclosed by statute."\(^{55}\) In light of the maritime policy established by Congress, the Court said it would be "inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence."\(^{56}\) It concluded that the mother could not recover loss of society for the death of her son.\(^{57}\) The Court also declined to grant her compensation for the loss of her son's future income, remarking that maritime tort law "is now dominated by federal statute . . . . Congress has placed limits on recovery in survival actions that we cannot exceed."\(^{58}\)

**B. Attorneys’ Fees**

Under the "American Rule," attorneys’ fees are ordinarily not available to the prevailing litigant in a federal lawsuit unless Congress has supplied statutory authorization.\(^{59}\) In limited instances, federal courts may assess attorneys' fees without statutory authorization,\(^{60}\) but for the most part the matter is left to congressional judgment.

In 1984, the Supreme Court decided that the Education of the Handicapped Act (EHA) did not authorize the payment of attorneys' fees to parents who brought an action against the state of Rhode Island to have their child placed in a special education program.\(^{61}\) The Court also decided that "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education."\(^{62}\) In so ruling, the Court denied that the parents were entitled to attorneys' fees under other statutes, such as the Rehabilitation Act.\(^{63}\)

A dissent by Justice Brennan, joined by Justices Marshall and Stevens, objected that the Court effectively repealed rights and expectations available in the Rehabilitation Act and the legislative history of the EHA.\(^{64}\) However, the Court had "repealed" nothing. It simply decided that the EHA was the exclusive remedy for the plaintiffs and that the EHA failed to expressly provide for attorneys’ fees. The dissenters remarked that "Congress will now have to take the time to revisit the matter."\(^{65}\) Implicit in that comment is that it would have been better for the Court to

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55. *Id.* at 28.
56. *Id.* at 32-33.
57. *See id.* at 33.
62. *Id.* at 1009.
63. *See id.* at 1021.
64. *See id.* at 1025-26.
65. *Id.* at 1031.
settle the matter and save Congress the bother. But it was appropriate for Congress to take the time to legislate because it was peculiarly the province of Congress to decide the issue and establish national policy.

During floor debate on legislation to reverse the Court's decision, Senator Paul Simon objected that the Court had "misinterpreted congressional intent." In reporting the bill, the Senate Committee on Labor and Human Resources said it was Congress's "original intent" to provide attorneys' fees to parents under the EHA. Even if there was abundant evidence that legislators in both chambers had intended attorneys' fees to be available under the EHA, the Court would have been on solid ground to say: "It might have been the intent of legislators to provide attorneys' fees here, but that right is not in the statute and we are not going to put it there. If Members of Congress believe that such a right is desirable, we invite them to legislate it." At another point in the debate, Congressman Pat Williams said that one of the objectives of the legislation to reverse the Court was "to reestablish statutory rights repealed by the U.S. Supreme Court in the decision in Smith versus Robinson." The Court could not repeal rights that were never there. In 1986, Congress amended the EHA by expressly providing for attorneys' fees. The Court did the right thing in sending the ball back to Congress.

C. CIVIL RIGHTS CASES

During the late 1980s, the Supreme Court came under heavy fire for placing too narrow a construction on statutory protections for civil rights. To critics, "these decisions signaled the most significant retreat in modern times in the judicial construction of anti-discrimination laws." But these decisions can be defended on the ground that if new legal rights are to be created, that job belongs to Congress, not the courts. As the Court noted in 1981, federal courts "will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."

A civil rights decision by the Supreme Court in 1989 shifted the burden to employees to prove that racial disparities in the work force resulted from employment practices and were not justified by business needs. This new test seemed to conflict with an earlier holding that required an employee to demonstrate only disparate results, not intent. However,

68. 131 Cong. Rec. at 31370 (1985).
the Court in 1989 expressed concern that a more expansive doctrine on disparate impact on minorities "would almost inexorably lead to the use of numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past."\(^7\)

In a dissent, Justice Stevens ripped the Court for engaging in "judicial activism."\(^7\) Authors of law review articles repeated that charge.\(^7\) But in chastising the Court for judicial activism, these critics at the same time rebuked the "conservative majority" of the Court for being "behind the times" and "as outmoded as that of the Court when it handed down its separate-but-equal decision in \textit{Plessy v. Ferguson} almost one hundred years ago."\(^7\) Actually, what had taken place is better described as judicial caution or judicial restraint. It would have been easier to charge the Court with judicial activism had it taken a broader view of employee rights. Justice Stevens correctly noted that "Congress frequently revisits this [civil rights] statutory scheme and can readily correct our mistakes if we misread its meaning."\(^7\) Two years later Congress did precisely that.

Also controversial was a 1989 decision that limited the reach of a civil rights statute (§ 1981), passed in 1866, that gave blacks the same right to "make and enforce contracts" as whites.\(^7\) Brenda Patterson, a black woman, claimed that her employer had harassed her, withheld promotion, and discharged her for reasons of race. The Court decided that Section 1981 was limited to prohibiting discriminatory actions \textit{before} someone is hired, not after, and advised Patterson that she should have brought her suit under Title VII.\(^8\) The Court said it was reluctant to read the 1866 statute "broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute" (Title VII).\(^8\) The Court also identified issues of federalism, stating that to read § 1981 expansively "would federalize all state-law claims for breach of contract where racial animus is alleged ...."\(^8\) Although the Court would be compelled to follow such a reading "when Congress plainly directs," it was "reluctant to federalize matters" traditionally covered by state common law."\(^8\)

In deciding the case, the Court had to confront an earlier decision that held that § 1981 prohibits discrimination not only by state governments, but also by private parties.\(^8\) Following the principle of stare decisis, the Court adhered to the previous interpretation but distinguished it from the

\(^{74}\) \textit{Atonio}, 490 U.S. at 653.
\(^{75}\) \textit{Id.} at 663.
\(^{77}\) Belton, \textit{supra} note 75, at 1405.
\(^{78}\) \textit{Atonio}, 490 U.S. at 672.
\(^{81}\) \textit{Id.} at 181.
\(^{82}\) \textit{Id.} at 183.
\(^{83}\) \textit{Id.} (quoting \textit{Santa Fe Indus., Inc. v. Green}, 430 U.S. 462, 479 (1977)).
\(^{84}\) See \textit{id.} at 171; see also \textit{Runyon v. McCrary}, 427 U.S. 160 (1976).
circumstances in the Brenda Patterson case. Tiptoeing through a hazardous area, the Court managed to keep faith with precedent while declining to resolve a matter that deserved congressional action. Institutionally, the Court showed good judgment in deciding these cases narrowly and tossing the ball back to Congress.

In his dissent in the Brenda Patterson case, Justice Brennan objected that the Court had given § 1981 “a needlessly cramped interpretation” and “select[ed] the most pinched reading of the phrase ‘same right to make a contract.’” Commentary in law reviews was equally biting. Had the Court looked merely vertically at its own rulings, it might have ruled in favor of Brenda Patterson. Instead, it looked horizontally, or sideways, at its circumscribed place in the political system.

D. The Political Environment

For two decades, the Court had been boxed around the ears for engaging in judicial activism and deciding what was best for the country. Recent nominees to the Court passed through the fire of Senate confirmation and were made doubly conscious of the temper of the country. Candidates for the federal courts were inclined to eschew activism in statutory as well as Constitutional interpretation.

At his confirmation hearing in 1987 to become Associate Justice of the Supreme Court, Judge Anthony M. Kennedy was asked about his Ninth Circuit decision finding that the State of Washington had not violated civil rights law by paying women substantially less than men for comparable work. He replied that Congress had enacted an equal pay act but not a statute on comparable pay, and that “if the Congress wants to enact that, I will enforce it. If the Congress has not enacted it, I cannot as a judge invent it.” Later he said that he was “quite willing to posit that the framers did not give courts authority to create a just society.” Asked who determines the attributes of a just society, he replied that “it is the prerogative and the responsibility of the political branch to take the

85. See Patterson, 491 U.S. at 171-72.
87. Patterson, 491 U.S. at 189 (Brennan, J., dissenting).
89. Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 100th Cong., 159 (1989).
90. Id. at 161.
91. Id. at 166.
leadership there."

Kennedy then elaborated on the role of courts in a democratic society:

There is the deference that the Court owes to the democratic process, the deference that the Court owes to the legislative process, the respect that must be given to the role of the legislature, which itself is an interpreter of the Constitution, and the respect that must be given to the legislature because it knows the values of the people.

Liberals criticized other decisions during this period taking an overly restrictive view of civil rights legislation. After two years of debate, Congress enacted the Civil Rights Act of 1991 to reverse or modify nine Court rulings that dealt with employment discrimination. In response to *Wards Cove Packing Co. v. Atonio*, Congress returned to the employer the burden of proving that a discriminatory practice is a business necessity. Based on the decision in the Brenda Patterson case, Congress prohibited discrimination on the job. Congress also altered other judicial decisions on civil rights. Some have seen the 1991 statute as a reproach to the Court, but it represented the proper division between the judicial and legislative branches of the roles of faithful agent and originator of new instructions. The Court's caution in extending civil rights to new areas was remedied as it should be: by congressional action.

### III. REPEALS BY IMPLICATION

A doctrine that valuably distinguishes the judicial and legislative roles is the principle that federal courts do not assume that Congress uses one statute to implicitly repeal an earlier one. Congress, as the lawmaking body, must decide for itself when to use express language to repeal a law.

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92. *Id.* at 178.
93. *Id.* at 180.
97. See id. § 101.
The doctrine disfavoring repeals by implication “applies with full vigor when . . . the subsequent legislation is an appropriations measure . . .”100 The courts take note of House and Senate rules that generally prohibit adding legislation to appropriations bills.101 Repeal in an appropriations statute in particular, is an acceptable conclusion only if Congress expressly relates the appropriations proviso to a previous law.102 The appropriations language must leave no doubt about legislative intent, like stating that no funds may be available to implement a previously authorized purpose, “notwithstanding” stated portions of the law identified in the appropriations bill.103

When statutes conflict, the courts should (and do) make an effort to protect both legislative objectives. “Where there are two acts upon the same subject, effect should be given to both if possible.”104 “The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”105 “[T]he intention of the legislature to repeal must be clear and manifest.”106 Unless the two statutes are in irreconcilable conflict, courts “must read the statutes to give effect to each if we can do so while preserving their sense and purpose.”107

A. The Snail Darter Case

In 1978, the Supreme Court rejected the argument that a congressional decision to continue appropriating funds for the Tellico Dam in Tennessee constituted an implied repeal of the Endangered Species Act of 1973, at least as the statute applied to the dam.108 Environmentalists claimed that the dam threatened the survival of a three-inch fish called the snail darter.109 Although statements from various reports by the House and Senate Appropriations Committees were offered in support of the position that the funding statutes took precedence over the authorizing legislation, the Court was “unwilling to assume that these latter Committee statements constituted advice to ignore the provisions of a duly enacted law . . . .”110 The Court stated:

102. See United States v. Dickerson, 310 U.S. 554 (1940).
103. See id. at 555.
109. See id. at 158-62.
110. Id. at 189.
The doctrine disfavoring repeals by implication . . . applies with even greater force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.111

The Court further stated that "the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."112 Recalling language from Marbury v. Madison that "[i]t is emphatically the province and duty of the judicial department to say what the law is," the Court remarked that "it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation."113

B. THE HYDE AMENDMENT

The Court's language of fidelity to separation of powers, sweeping in nature and unconditional in tone, has not prevented appellate courts from reaching uneven results in similar cases. Federal courts differed on the question whether the Hyde Amendment, by limiting federal funds for abortions by indigent women, effected a substantive change to Title XIX of the Social Security Act, which governs the Medicaid Program. In 1979, the First Circuit held that Congress utilized the device of withholding federal funds as the means of making a substantive change in the law:

[T]he record is clear that both houses of Congress were acutely conscious that they were engaging in substantive legislation. The very first event which took place in the House of Representatives was the making of two points of order, the sustaining of the same, and an amendment by sponsor Hyde simply confining his Amendment to a ban on spending federal funds for abortions, any abortions.114

Two points of order were sustained on versions of the Hyde provision as adding "legislation" to an appropriations bill. The court held that the

111. Id. at 190-91 (emphasis in original).
112. Id. at 195.
113. Id. at 194 (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).
114. Preterm, Inc. v. Dukakis, 591 F.2d 121, 129 (1st Cir. 1979).
third and successful amendment constituted substantive legislation: "[W]e are persuaded that Congress realized that it was using the unusual and frowned upon device of legislating via an appropriations measure to accomplish a substantive result."\(^{115}\)

In contrast, a federal district court interpreted the Hyde Amendment by giving greater weight to the "recognized and settled policy of Congress against legislating in the appropriations context . . . ."\(^{116}\) The court found that "the proponents of the [Hyde] amendment expressed their regret that their efforts to change substantive law on abortions languished in committee. . . ."\(^{117}\) On the basis of this reading, the court held that the Hyde Amendment merely restricted the use of federal funds for abortions and did not represent "a clear, substantive limitation on Title XIX."\(^{118}\)

In the case that eventually reached the Supreme Court, a New York district court ruled that the Hyde Amendment had changed the substantive requirements of Title XIX.\(^{119}\) To the district court, the legislative history of the Hyde Amendment demonstrated that it was intended to be "legislation" on an appropriations bill.\(^{120}\) However, the Supreme Court found it unnecessary to decide whether the Hyde Amendment changed Title XIX.\(^{121}\)

C. Veterans' Benefits

A 1988 Supreme Court decision illustrates proper judicial deference to the legislative branch. A dispute arose over a decision by the Veterans' Administration (VA) to deny two honorably discharged veterans an extension of time to use their veterans' educational benefits. Under the law enacted in 1977, veterans could obtain an extension if they had been earlier prevented from using their benefits by "a physical or mental disability which was not the result of [their] own willful misconduct."\(^{122}\) The agency had long construed the term "willful misconduct" to include primary alcoholism, and the Court assumed that Congress was aware of the VA interpretation.\(^{123}\) A Senate report on the 1977 legislation specifically referred to the VA's manual relating primary alcoholism to willful misconduct.\(^{124}\)

In 1978, Congress amended the Rehabilitation Act but did not "evince

\(^{115}\) Id. at 131.
\(^{117}\) Id.
\(^{118}\) Id.
\(^{120}\) See id. at 689.
\(^{121}\) See Harris v. McRae, 448 U.S. 297, 310 n.14 (1980).
\(^{123}\) See Traynor v. Turnage, 485 U.S. 535, 545-46 (1988) (describing primary alcoholism as "alcoholism that is not 'secondary to a manifestation of an acquired psychiatric disorder'").
\(^{124}\) See id. at 546 (citing S. Rep. No. 95-468, at 69-70 (1977)).
any intent to repeal or amend” the willful-misconduct provision. The Court refused to accept the argument that in 1978 Congress had implicitly repealed the provision of the previous year, and cited a number of cases for the principle that repeals by implication are disfavored. The Court knew that authorities were “sharply divided” over the question of whether alcoholism is a disease rather than misconduct, but for those who regarded the Court’s decision as erroneous, the Court advised that “their arguments are better presented to Congress than to the courts.” Congress enacted legislation to provide that chronic alcoholism could not be used as a basis under the willful-misconduct standard for denying veterans the right to seek education or rehabilitation. The sequence worked well here. The Court offered a narrow interpretation and invited Congress to enact new policy.

IV. ALLOCATING PUBLIC FUNDS

In Federalist No. 78, Alexander Hamilton concluded that the judiciary, of the three branches, “will always be the least dangerous to the political rights of the Constitution” because it has “no influence over either the sword or the purse.” He should be around today. To implement Constitutional rights, courts often decide cases that mandate public funding. As a means of desegregating public schools, federal judges ordered the busing of students from inner cities to outlying suburbs. Opposition to those decisions, from both white and black parents, helped convince the courts to limit busing. Continued public and congressional opposition further diminished court-ordered busing.

In 1990, the Court issued an extraordinary decision that endorsed the power of federal judges to order local governmental bodies to increase taxes to pay for a $1.8 billion court-ordered school desegregation plan. In a concurrence, Justice Kennedy objected that the decision’s “casual embrace of taxation imposed by the unelected, life-tenured Federal Judiciary disregards fundamental precepts for the democratic control of public institutions.” Five years later, after strong protests from members of Congress, the Court reversed itself, holding that a federal judge exceeded his authority by ordering pay increases for school personnel and requiring increased funding for remedial programs in inner-city public

125. Id. at 547.
126. See id.
127. Id. at 552.
129. The Federalist No. 78 at 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed. 1961).
133. Id. at 58-59.
schools. In other decisions, federal judges ordered public spending for prisons and mental institutions.

Whatever justification there might be for courts to mandate spending to enforce Constitutional rights, there is much less warrant for statutory interpretations that require additional public expenditures. The allocation of funds from one priority to another is quintessentially a legislative matter. "Prime responsibility for public finance rests with the legislature, on the side both of revenue and expenditure." Court decisions that encroach upon the "power of the purse" demonstrate a disregard for the prerogatives of Congress and invite legislative action to keep the courts within their bounds.

A. DECIDING WITNESS FEES

Some civil rights cases decided in the late 1980's concerned the payment of fees to witnesses in federal trials. In 1987, the Court held that federal courts could not require a losing party to pay the winner's expert witness fees beyond the limits specified by Congress. Without explicit statutory or contractual authorization "for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations" set forth in congressional statutes. In 1991, the Court held strictly to statutory policy on the award of fees for services rendered by experts. Congress subsequently passed the Civil Rights Act of 1991, which expanded judicial authority to award the winning party the costs of hiring experts.

In a 1991 decision that demonstrated little respect for Congress's spending prerogative, a unanimous Supreme Court interpreted a congressional statute to require payment of witness fees to a state prisoner who was summoned to appear as a witness in a federal criminal trial. A U.S. Attorney denied a prisoner's request for witness fees on the grounds that the statute did not entitle prisoners to receive witness fees. A district court and the Tenth Circuit properly agreed that the statute did not authorize such payments. The Tenth Circuit reasoned that had Congress wanted to reach that result, "it surely could have done so in more express terms." The appellate court also noted that beyond the loss of a very modest compensation that prisoners might receive from a prison

136. Hart & Sacks, supra note 2, at 698.
138. Id. at 445.
142. See id. at 186.
144. Id. at 1345.
job, they generally incur no costs while serving as witnesses. Since the payment of $30 a day for appearing as a witness was "much more" than they would make at their prison jobs, there could be temptation for prisoners to file suits and subpoena friends among inmates to appear as witnesses.

The Supreme Court seemed oblivious to these realities. Concentrating on the statutory text, the Court observed that the only specific exception was a denial of witness fees to paroled or deportable aliens. Moreover, the statute provided that a subsistence allowance would be paid to a witness other than a witness who is incarcerated. This latter provision convinced the Court that Congress thought about incarcerated individuals when drafting the statute, and that the only class specifically excluded were paroled or deportable aliens. The Court said it was unable to conclude that the payment of witness fees to prisoners was so bizarre that it could not have been the intent of Congress.

The Court relied, at least implicitly, on the doctrine expressio unius est exclusio alterius: if a statute specifies one exception to a general rule, it excludes other exceptions. That doctrine, as Judge Richard Posner has noted, assumes "legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate." It reminds one of Justice Holmes's admonition when he was sitting on the First Circuit: "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." Within a year, Congress passed legislation to reverse the Court on witness fees, stating that any incarcerated prisoner required to appear as a witness "may not receive fees or allowances." When the House Judiciary Committee reported the bill, it said that "Congress never intended that prisoners in such a situation be compensated." During floor action, Congressman Jack Brooks criticized the Court's opinion and drew attention to the realities that had impressed the Tenth Circuit:

Congress provided witness fees—now at $40 per day—to defray the costs incurred by persons when the paramount needs of the judicial system take precedence over their work and other activities. This rationale obviously has no application to prisoners, whose food, shelter, and activities are already paid for by the taxpayer. They are undeserving of any additional benefit. I am certain that most prison-

145. See id. at 1346.
146. See id.
147. See Demarest, 498 U.S. at 187.
148. See id.
149. See id. at 188.
150. See id. at 191.
153. Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).
ers find promoting justice in the courtroom preferable to another day behind bars.\(^\text{156}\)

Brooks pointed out that it was longstanding government policy to deny witness fees to incarcerated persons, and that the Court’s opinion “could result in $8.3 million of taxpayer funds being transferred to prisoners each year in the form of witness fees . . . . an outrageous misuse of public funds.”\(^\text{157}\) Before enacting this legislation to permanently reverse the Court, Congress responded to the decision by twice placing language in appropriations bills to deny witness fees to incarcerated persons. A supplemental appropriations bill provided that no funds appropriated to the Justice Department for fiscal year 1991 or any prior fiscal year “shall be obligated or expended to pay a fact witness fee to a person who is incarcerated testifying as a fact witness in a court of the United States.”\(^\text{158}\) Similar language was placed in the regular appropriations bill for the Departments of Commerce, Justice, and State.\(^\text{159}\)

The unanimity of the Court’s 1991 opinion is disappointing. Were the Justices so determined to follow the fine technicalities of canons of construction that they did not recognize the interests and rights of another branch? Was there not a single Justice sensitive to the likely encroachment on legislative prerogatives? It should not have been so difficult for Justices to write: “Nothing in this statute expressly authorizes witness fees to prisoners, and to do so would go against longstanding government policy. If prisoners are to be paid witness fees, then Congress must pass the necessary legislation. Out of respect for the legislative branch, we decline to read such intent into this statute.” If the Court wants to cultivate respect for an independent judiciary, then it must extend the same respect to the other branches.

B. The \textit{Winstar} Litigation

In 1996, the Court held that a congressional statute nullified agreements between savings and loan investors and the government, amounting to a breach of contract.\(^\text{160}\) The court largely confined the decision to technical analyses of the “unmistakability doctrine,” the elements that constitute a “public and general act,” and distinctions between the government acting as contractor and as sovereign. There seemed to be little appreciation of the relationship to its sister branch, Congress. As a result of this decision, the federal government now faces billions of dollars in claims not only from S&Ls but from utilities, nuclear plants, and other economic activities.

In response to the savings and loan crisis of the 1980’s, the Federal Home Loan Bank Board (Bank Board) encouraged healthy thrifts and


\(^{157}\) \textit{Id}. at 32503-04.


outside investors to take over ailing institutions that had liabilities far in excess of assets. As a means of helping the acquiring institutions meet capital reserve requirements imposed by federal regulations, the Bank Board permitted them to designate the excess of purchase price over the fair market value of assets as an intangible asset called "goodwill." Congress later passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) to gradually phase out the authority of thrifts to count supervisory good will in calculating core capital.

1. Lower Court Rulings

Federal regulators seized some of the acquiring institutions because, without the goodwill accounting technique, they failed to meet capital requirements. In a leading case, the Winstar Corporation, the Statesman Group, and Glendale Federal sued the United States in the Court of Federal Claims, which held that the federal government had breached the contractual obligations that permitted thrifts to count goodwill. A divided panel for the Federal Circuit reversed, holding that FIRREA fell within the sovereign acts doctrine, which absolved the government from liability, and that the acquiring institutions had assumed the risk that the law would change. The full court vacated that decision and agreed to hear the case en banc, at which point it affirmed the Court of Federal Claims. Of special interest is the en banc court's reasoning on sovereign power. The thrifts did not ask the Court of Federal Claims to provide injunctive relief to enjoin the thrift regulators from applying FIRREA requirements to the thrifts. Instead, they sought money damages for the government's breach of contract. The appellate court claimed that money damages, "in contrast to injunctive relief, presents little threat to the government's sovereign powers, other than the obvious financial incentive to honor its contracts." Thus, Congress was "always free to deem supervisory goodwill a bad idea and legislate it out of existence. Where that legislation breached the government's prior contractual obligations regarding the treatment of supervisory goodwill, however, the government remains liable in money damages for the breach." In other words, Congress may legislate as it likes, but the courts may interpret its actions to require billions of dollars in future appropriations, and such requirements are deemed consistent with sovereign power. Would that ruling be any less

161. See id. at 848-49.
164. See Winstar Corp. v. United States, 994 F.2d 797 (Fed. Cir. 1993).
166. Winstar Corp., 64 F.3d at 1547-48.
167. Id. at 1548.
invasive of sovereign power and legislative prerogatives than injunctive relief?

The Federal Circuit denied the government’s claim that FIRREA was a public and general sovereign act that excused its contractual performance. The court concluded that the relevant sections of FIRREA “are not public and general sovereign acts” and that therefore the sovereign acts doctrine does not apply.\textsuperscript{168} To support that judgment the court relied on circular reasoning: “While presumably all government action is enacted for the good of the public, government action whose principal effect is to abrogate specific contractual rights does not immunize the government from contractual liability under the doctrine.”\textsuperscript{169} To reach that judgment, the appellate court had to make the implausible conclusion that the 370-page statute, marking a comprehensive effort to deal with the entire S&L crisis, has as its “principal effect” the abrogation of contractual rights.

The Federal Circuit agreed with the claims court that in the case of FIRREA “the government acts not in its capacity as sovereign, but in its capacity as contractor.”\textsuperscript{170} According to case law, when the government enters into contracts, its rights and duties “are governed generally by the law applicable to contracts between private individuals.”\textsuperscript{171} When the government steps into the commercial marketplace, it “contracts as does a private person, under the broad dictates of the common law.”\textsuperscript{172} However, as Judge Lourie noted in a dissent, there was no reason to regard Congress’s action in FIRREA as contractual rather than sovereign: “The government was not buying goods or services when it acted . . . . [FIRREA] was broadly directed to the good of the general public, to the country's financial system, rather than to a specific contract that it disapproved.”\textsuperscript{173} In another dissent, Judge Nies noted that nothing in the contracts between the acquiring institutions and the Bank Board promised payment if Congress changed the accounting procedure for goodwill, and the contracts did not free the thrifts “from the risk of a change in regulations.”\textsuperscript{174}

The Federal Circuit dipped into legislative history to bolster its judgment that members of Congress were aware that they were repudiating the goodwill promises.\textsuperscript{175} In his dissent, Judge Lourie remarked:

That some members of Congress argued that enactment of certain provisions of FIRREA would break promises made to the thrifts does not mean that Congress’s passage of FIRREA was not a sover-

\begin{itemize}
\item \textsuperscript{168} Id. at 1548.
\item \textsuperscript{169} Id. at 1549.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Lynch v. United States, 292 U.S. 571, 579 (1934).
\item \textsuperscript{173} \textit{Winstar Corp.}, 64 F.3d at 1553.
\item \textsuperscript{174} Id. at 1551.
\item \textsuperscript{175} See id. at 1550.
\end{itemize}
eign act; . . . [n]or do such statements overcome the government's sovereign right to enact comprehensive national legislation for the common good without liability for breach of particularly affected contracts. Thus, while the thrifts certainly were victimized when they made commitments in reliance on accounting treatment agreed to by the regulatory agencies, I am unable to conclude that the government was powerless to enact appropriate legislation in order to restructure the U.S. thrift industry.176

2. The Supreme Court's Decision

Splintered in many directions, the Supreme Court affirmed the judgment of the en banc Federal Circuit ruling. Justice Souter delivered a plurality opinion joined by Justices Stevens and Breyer; Justice O'Connor joined that opinion except for two parts. Justice Breyer wrote a separate concurring opinion. Justice Scalia, joined by Justices Kennedy and Thomas, wrote another opinion, concurring in the judgment but offering different legal reasoning. Chief Justice Rehnquist dissented, joined in part by Justice Ginsburg.

Justice Souter relied on a strained reading of the "unmistakability doctrine" to reject the government’s claim of sovereign power. "[S]overeign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."177 Yet Souter was unable to identify the unmistakable terms. Instead, he merely stated that the government’s position represents "a conceptual expansion of the unmistakability doctrine beyond its historical and practical warrant" and places the doctrine "at odds with the Government's own long-run interest as a reliable contracting partner . . . ."178 One study concluded that Souter's analysis "drastically restricts the application of the unmistakability doctrine."179

Justice Souter also rejected the claim that the sovereign acts doctrine is available whenever the government performs "public and general act[s]."180 Allowing the government to avoid contractual liability "merely by passing any 'regulatory statute' would flout the general principle" that whenever the government enters into a contract its rights and duties are generally the same as when private individuals enter into contracts.181 The sovereign acts doctrine, said Souter, "was meant to serve this principle, not undermine it."182 As Rehnquist noted in his dissent,

176. Id. at 1553.
178. Id. at 883.
180. Winstar Corp., 518 U.S. at 891.
181. Id. at 895.
182. Id. For a close analysis of Justice Souter's position in narrowing the sovereign acts doctrine, including the "public and general" requirement, see Schwartz, supra note 179, at 515-33.
Souter’s analysis eliminates the traditional distinction between the government as sovereign and the government as contractor, making the government liable in the same sense as a private party.\textsuperscript{183} Another issue was whether the Bank Board and the Federal Savings and Loan Insurance Corporation (FSLIC) lacked authority “to bargain away Congress’s power to change the law in the future.”\textsuperscript{184} Souter concluded that the agencies had “ample statutory authority” to promise thrifts that they could count supervisory goodwill toward regulatory capital, and that they would be entitled to damages if that performance became impossible.\textsuperscript{185} Indeed, in 1987, Congress specifically recognized FSLIC’s authority to allow thrifts to treat goodwill in that manner.\textsuperscript{186}

Breyer, concurring in the majority opinion by Souter, concluded that the thrifts had made a convincing showing that the government specifically promised to extend to them a particular treatment for a period of years, and that the abrogation of those promises by FIRREA “rendered the Government liable for breach of contract.”\textsuperscript{187}

Scalia’s concurrence, joined by Kennedy and Thomas, agreed with the basic premise that FIRREA constituted a breach of contract, but offered different reasons for reaching that conclusion. Like the two dissenters, Scalia believed that the unmistakability doctrine applied to FIRREA, although the doctrine did not, he said, foreclose the claims by thrifts. To argue that the government promised the thrifts a favorable accounting device until the government chose to regulate in a different fashion represented “an absolutely classic description of an illusory promise.”\textsuperscript{188}

In earlier decisions, Scalia argued for a clear-statement rule before waiving sovereign power. Some of these cases concerned congressional efforts to abrogate state sovereign power. Thus, Scalia joined the majority in 1989 in holding that Congress may abrogate state immunity from federal suits “only by making its intention unmistakably clear in the language of the statute.”\textsuperscript{189} However, in 1992 he wrote for the Court in deciding that waivers of the sovereign immunity of the United States, “to be effective, must be ‘unequivocally expressed.’”\textsuperscript{190} He agreed that the consent of the federal government to be sued “must be ‘construed strictly

\textsuperscript{183} See infra notes 167-73 and accompanying text.
\textsuperscript{184} Winstar Corp., 518 U.S. at 888.
\textsuperscript{185} See id. at 890.
\textsuperscript{186} “No provision of this section shall affect the authority of [FSLIC] to authorize insured institutions to utilize subordinated debt and goodwill in meeting reserve and other regulatory requirements.” Competitive Equality Banking Act of 1987, 101 Pub. L. No. 100-86, Stat. 552, § 415(d) (1987).
\textsuperscript{187} Winstar Corp., 518 U.S. at 918.
\textsuperscript{188} Id. at 921.
in favor of the sovereign.’”¹⁹¹ One analysis charges that Scalia, in Winstar, “reinvents” the unmistakability doctrine.¹⁹² In 1999, Scalia joined a dissenting opinion written by Kennedy, who said that waivers of sovereign immunity for the federal government “must be expressed in unequivocal statutory text and cannot be implied.”¹⁹³ These rules of construction, Kennedy added, “reserve authority over the public fisc to the branch of Government with which the Constitution has placed it.”¹⁹⁴

Rehnquist’s dissent in Winstar rebuked the Court for “drastically reduc[ing] the scope of the unmistakability doctrine, shrouding the residue with clouds of uncertainty, and [limiting] the sovereign acts doctrine so that it will have virtually no future application.”¹⁹⁵ According to his reading of previous cases, a waiver of sovereign authority “will not be implied, but instead must be surrendered in unmistakable terms.”¹⁹⁶ Thus for Rehnquist, the question under the unmistakability doctrine should be: “Did the contract surrender the authority to enact or amend regulatory measures as to the contracting party? If the sovereign did surrender its power unequivocally, and the sovereign breached that agreement to surrender, then and only then would the issue of remedy for that breach arise.”¹⁹⁷

Rehnquist referred to the following language in the opinion by Souter: “[n]othing in the documentation or the circumstances of these transactions purported to bar the Government from changing the way in which it regulated the thrift industry.”¹⁹⁸ However, any such change, Rehnquist noted, would require courts to decide in subsequent proceedings whether the damages to be recovered “would be akin to a rebate of a tax, and therefore the ‘equivalent of’ an injunction.”¹⁹⁹ That type of analysis, he said, tosses to the winds any idea of the unmistakability doctrine as a canon of construction; if a canon of construction cannot come into play until the contract has first been interpreted as to liability by an appellate court, and remanded for computation of damages, it is no canon of construction at all.²⁰⁰

The dissent also criticized Souter for placing Congress in the role of contractor rather than as legislature, eliminating the sovereign rights associated with legislative action. Earlier cases emphasized both roles of government: contractor and sovereign. In 1865 the Court of Claims stated: “The United States as a contractor are not responsible for the

¹⁹². *See Schwartz*, *supra* note 179, at 538
¹⁹⁴. *Id.*
¹⁹⁶. *Id.* at 926.
¹⁹⁷. *Id.* at 929 (emphasis in original).
¹⁹⁸. *Id.* (quoting Justice Souter at 868).
¹⁹⁹. *Id.* at 930.
²⁰⁰. *Id.* at 930-31.
United States as a lawmaker." The Court of Claims added that it was a fallacy to suppose that "general enactments of Congress are to be construed as evasions of [a] particular contract. This is a grave error."

Rehnquist objected to Souter's analysis of the "public and general" nature of a public law because Souter examined the government's motive for passing the legislation. Under this test, courts would have to differentiate between regulatory legislation that is free and not free of governmental "self-interest." Courts would have to decide: "When it enacted FIRREA was the Government interested in saving its own money, or was it interested in preserving the savings of those who had money invested in the failing thrifts?" To Rehnquist, the broad scope of FIRREA entitled it to be accepted as a "public and general" act.

Toward the end of his dissent, Rehnquist focused on the budgetary impact of the Court's decision. The purpose and value of sovereign authority does not arise "from any ancient privileges of the sovereign, but from the necessity of protecting the federal fisc—and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government."

3. Computing the Cost

With the case returned to the U.S. Court of Federal Claims, the question was narrowed to the determination of damages. Chief Judge Loren A. Smith said in an interview in 1998 that it was not his job to protect the public treasury: "It's not the duty of the judiciary to guard the fisc. A judge's duty is to apply the law." In this case, however, "the law" was anything but clear. The courts were ploughing new ground.

The claims court first disposed of several procedural issues. In 1998, the Federal Circuit barred one claim on the basis of the statute of limitations. The courts were ploughing new ground.

The Federal Circuit barred one claim on the basis of the statute of limita-
and later dismissed another claim as being time-barred. Also in 1998, the claims court held that shareholders of an S&L institution were entitled to seek direct recovery of restitution damages. Decisions were handed down in other circuits.

In 1998, the Justice Department reached a settlement with four thrifts (including Winstar and Statesman Group of Iowa) for a total of $133 million. The next year the U.S. Court of Federal Claims ordered the United States to pay $908.9 million to a California thrift. The estimated cost of another 125 pending suits is about $30 billion. Other Winstar-type cases are in court, with claims against the Federal Government coming from nuclear plants, utilities, low-income housing, and contractors for commercial satellites.

C. Coal Industry Retiree Benefits

In a case that illustrates how statutory construction can shade into constitutional analysis, a plurality of the Supreme Court held that a federal statute, as applied to Eastern Enterprises, effected an unconstitutional taking. Although the fiscal implications of this decision may be far-reaching, there was little accord among the Justices. Justice O'Connor announced the judgment of the Court, joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Justice Kennedy concurred in the judgment and dissented in part. Justice Stevens filed a dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer. Breyer filed a dissenting opinion, joined by Stevens, Souter, and Ginsburg.

The statute at issue was the Coal Industry Retiree Health Benefit Act of 1992, which it established a mechanism for funding health care benefits for retirees from the coal industry and their dependents. A federal district court upheld the constitutionality of the legislation, as did the First Circuit. The appellate court said that the statute was "entitled to the most deferential level of judicial scrutiny," and that as long as legislation is supported by a legitimate legislative purpose furthered by rational

211. See Shane v. United States, 161 F.3d 723 (Fed. Cir. 1998).
213. See Sharpe v. FDIC, 126 F.3d 1147 (9th Cir. 1997); Far W. Fed. Bank v. Office of Thrift Supervision-Director, 119 F.3d 1358 (9th Cir. 1997).
217. See Grunwald, supra note 213.
means, judgments about the wisdom of legislation “remain within the exclusive province of the legislative and executive branches.” 221 Five other appellate courts also upheld the statute against constitutional challenges. 222

The Supreme Court reversed, conceding that inquiries into unconstitutional takings do not lend themselves to “any set formula” and are in fact “essentially ad hoc.” 223 In her plurality opinion, O’Connor stated that past holdings “have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties’ experience.” 224 Using that standard and three other factors, O’Connor concluded that the statute violated the Takings Clause. 225

Kennedy concurred in the judgment but regarded the plurality’s Takings Clause analysis as “incorrect” and “unnecessary for decision of the case,” preferring to rest his concurrence on due process principles. 226 He said the plurality’s decision “would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts.” 227

The dissent by Stevens, joined by Souter, Ginsburg, and Breyer, accused the plurality and Kennedy of “substitut[ing] their judgment about what is fair for the better informed judgment of the Members of the Coal Commission and Congress.” 228 Breyer’s dissent, joined by Stevens, Souter, and Ginsburg, agreed with Kennedy that the Takings Clause “does not apply.” 229 Like Kennedy, Breyer would have decided the case on the Due Process Clause. 230 Unlike Kennedy, Breyer concluded that “it is not fundamentally unfair for Congress to impose upon Eastern liability for the future health care costs of miners whom it long ago employed—rather than imposing that liability, for example, upon the present industry, coal consumers, or taxpayers.” 231

It is certainly dubious for the Court to require additional spending by Congress when the Justices can manage only a bare majority. Eyebrows rise even higher when five Justices open the door to greater federal spending but rely on different legal or constitutional principles. If the

221. Chater, 110 F.3d at 155-56.
222. See Holland v. Keenan Trucking Co., 102 F.3d 736, 739-42 (4th Cir. 1996); Lindsey Coal Mining Co. v. Chater, 90 F.3d 688, 693-95 (3d Cir. 1996); In re Blue Diamond Coal Co., 79 F.3d 516, 521-26 (6th Cir. 1996); Davon, Inc. v. Shalala, 75 F.3d 1114, 1121-30 (7th Cir. 1996); In re Chateaugay Corp., 53 F.3d 478, 486-96 (2d Cir. 1995).
223. Apfel, 118 S.Ct. at 2146.
224. Id. at 2149.
225. See id. at 2153.
226. See id. at 2154.
227. Id. at 2155.
228. Apfel, 118 S. Ct. at 2161.
229. See id.
230. See id. at 2163.
231. Id. at 2167.
Court can do nothing better than announce "We think Congress is wrong but can't agree on why," it is time to defer to the legislative judgment.

V. QUESTIONING LEGISLATIVE HISTORY

Congressional statutes and legislative history may seem tainted by contributions made by congressional staff, interest groups, and lobbyists. In a 1989 concurrence, Justice Scalia objected to reliance on a House committee report that cited several district court decisions. He said that the references to the cases were inserted at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and that the purpose of [the] references was not . . . to inform Members of Congress but rather to influence judicial construction.232

Elsewhere he noted that “[o]ne of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten ‘floor debate’—or, even better, insert into a committee report.”233

On these points Scalia is no doubt correct. Was a key amendment drafted by a law firm? Quite possibly. Did an interest group write portions of a committee report? It wouldn’t be the first time. Are those parts of the legislative history and eventual statutory text thereby rendered illegitimate and contaminated? Why? If a private lawyer drafts a bill that attracts a majority in each chamber and secures the President’s signature, it is still law. The bill’s parentage might be interesting, but that history is legally unimportant.

Speculation about who drafted committee report language raises a different issue, but there is probably no reason to give less deference to report language simply because it comes from a lawyer-lobbyist. It may seem nefarious, but suppose the committee staffer found the language perfectly accurate in communicating the intent of Congress. If we acknowledge, which we must, that interest groups not only push for legislation but help draft it, why is it impermissible for them to offer suggested report language or floor statements?

What of the other branches? Surely interest groups and lobbyists have a hand in writing departmental regulations, executive orders, and presidential proclamations. Are those products similarly discredited? Not at all. They have full legal force. As for the courts, it is not unusual to see a marked similarity between paragraphs in a judicial ruling and what appeared earlier in a brief filed by one of the interested parties. Such parallels do not invalidate the decision. Courts recall well-drafted language, agree with it, and see no need to reinvent what was said well the first time.

During his career as a professor of law, Judge Frank H. Easterbrook posed these questions for those interested in legislative history: "Who lobbied for the legislation? What deals were struck in the cloakrooms? Who demanded what and who gave up what? Knowing the contending parties conveys information."234 However, in determining what is law, those questions are irrelevant. What counts is what made it into law, not how it got there or who influenced it. One could just as easily ask about a ruling of the Supreme Court: "Which interest groups lobbied for the decision? What deals were struck in the conference room? Who demanded what and who gave up what?" Such questions do not change the holding.

The congressional process is not unique because of staff contributions or interest-group participation, which are common to all three branches. To those who question the value of congressional reports because of staff participation, Congressman Robert Kastenmeier and Michael Remington asked: "Should elected representatives give less respect to judicial opinions written in large part by law clerks?"235 Judge Patricia M. Wald made a similar point during a congressional hearing in 1990:

Just as you do not reject adherence to our opinions because they may rely on previous cases with which our law clerks are intimately familiar, but which we may not have always read in detail, we should not reject the written evidence which you leave us, even if your staff has read every word, while you are only generally familiar with its broader outlines.236

The unique quality about the congressional process is not its reliance on staff but rather its relative openness. The transparency of congressional proceedings is not matched by the executive and judicial branches. We are seldom aware of who drafts executive orders and presidential proclamations. At some point they just emerge and are accepted as legitimate documents. If it could be shown that the President never drafted a single word of an executive order and had only a vague knowledge of what was in it (not difficult to demonstrate), and that an interest group was responsible for the initial and even final draft, its authenticity and binding nature on the executive branch—and often on the private sector—would not be questioned. The legislative process is entitled to the same presumption.

Statutes and legislative history are often belittled because of vague and ambiguous provisions. Of course such criticism can be directed toward many, if not most, statutes (and many, if not most, judicial rulings). The human language is one source of this imprecision. In an essay for The

236. Statutory Interpretation and the Uses of Legislative History: Hearings before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, the House Comm. on the Judiciary, 101st Cong., 2d Sess. 7 (1990) [hereinafter Statutory Interpretation].
Federalist, James Madison stopped to pause at the inherent limitations of language. Words are used to express ideas,
but no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. . . . When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated. 237

To the shortcomings of language add the difficulty of getting legislation through two chambers, battered at every stage by interest groups, constantly reshaped by partisan calculations, and forced to accommodate White House demands because of the ever-present threat of a Presidential veto. At the end of that process, of course, one can find tortured text and inconsistent legislative history. But vagueness is not unique to large, complex legislative bodies. Multi-membered appellate courts face similar problems, even without having to contend so directly with well-financed outside parties and executive lobbying. If a majority of nine Justices cannot craft a clear opinion, why expect more from 535 Members of Congress operating in a political cauldron? Judge Abner J. Mikva advised that “[i]t is unseemly for judges, even Supreme Court Justices, to criticize Congress for not speaking with clearer tongues: ask lawyers or law students who try to parse out some of our opinions what they think about judicial clarity.” 238

There is good reason to treat cautiously the material that falls under the broad category “legislative history.” Judge James L. Buckley flagged the principal areas of concern. Having served in the U.S. Senate, he was well positioned to “have little confidence in the reliability or relevance of much of the materials that is routinely consulted by courts.” 239 Moreover, he questioned the ability of judges “to distinguish between the statutory wheat and the useless or downright misleading political chaff that is generated in the course of committee hearings and floor discussion.” 240

No matter how many Members of Congress say it is their intent to legislate a right, if the right is not in the statute there is no obligation on the part of courts to put it there. The proper procedure at that point is to return the matter to Congress for legislative (i.e., statutory) action. Buckley also expressed concern about allowing statements made during committee hearings or floor debate to determine what is lawful:

. . . this is a country that is increasingly ruled in small detail by the laws that are produced by Congress. They have to be interpreted by human beings across the country, by small town lawyers who do not have access to bound volumes of the Congressional Record, let alone of the committee hearings and so forth. They ought to be able to

240. Id.
rely on the statutory language as illuminated by carefully written committee reports to guide their clients.\textsuperscript{241}

Whatever skepticism judges may want to direct toward legislative history, federal officials will continue to take seriously what they read in committee reports, floor debates, and even correspondence they receive from committee chairmen with jurisdiction over their agency.\textsuperscript{242} Agencies understand the cost of poisoning their relations with authorization and appropriations committees. As Justice Scalia has noted, regardless of what courts do, administrative agencies "which end up having the first cut at 90 percent of federal law anyway . . . will assuredly use it [committee report]."\textsuperscript{243} Private counsel who prepare for litigation will carefully sift through legislative history for leads. Kenneth S. Geller, a former deputy solicitor general, remarked that he wasn't aware "of any brief that our firm has filed that failed to rely on legislative history. First, Justice Scalia is the minority up there, and second, it can't hurt to use legislative history if it helps your case."\textsuperscript{244}

VI. CONCLUSIONS

Professor William Eskridge suggested that when federal judges perform statutory construction they should do more than consider text and historical context, "but also their subsequent history, related legal developments, and current societal context,"\textsuperscript{245} a process he labels "dynamic" statutory interpretation.\textsuperscript{246} This method of interpretation invites judges to exercise considerable ingenuity in deciding what is best for society. Judges would play the role of "diplomats, whose ordering authority is severely limited but who must often update their orders to meet changing circumstances."\textsuperscript{247} Such an approach dispenses with what Eskridge calls a static view of statutory interpretation that regards lawmaking by judges as "beyond the authority given them in the Constitution, for it trenches upon the lawmaking power given to Congress."\textsuperscript{248}

Later, in a book-length treatment, Professor Eskridge elaborated on these points. Citing language from the author of a law review article, he urged judges to consider "not only what the statute means abstractly, or even on the basis of legislative history, but also what it ought to mean in

\textsuperscript{241} Id. at 66. On the general importance of committee report language over other parts of the legislative history, see George A. Costello, Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 Duke L.J. 39.

\textsuperscript{242} See Louis Fisher, Constitutional Conflicts Between Congress and the President 103-06 (4th ed. 1997).

\textsuperscript{243} Kastenmeier & Remington, supra note 234, at 175.


\textsuperscript{246} See id. at 1482.

\textsuperscript{247} Id.

\textsuperscript{248} Id. at 1498.
terms of the needs and goals of our present day society."\(^{249}\) Using this approach, statutory interpretation by judges results in a statute that "is not necessarily the one which the original legislature would have endorsed."\(^{250}\) To the same effect, he calls attention to Aristotle's advice that those who must interpret general statutes to apply to unanticipated cases should "correct the omission—to say what the legislator would have said had he been present, and would have put into law if he had known."\(^{251}\)

"Dynamic" interpretation can mean different things. I agree that courts should not limit their attention to statutory text, legislative context, and canons of construction. But to allow judges to say what the law "ought to mean" or what a legislator "would have said" is an exercise in judicial arrogation. It is this type of conduct that undermines judicial credibility, judicial legitimacy and, eventually, judicial independence. "We can legislate better than Congress" is not a wise strategy for the courts. A dynamic quality is needed, but it is one that would have judges look more broadly at their place in a system of separation of powers, to think institutionally as well as procedurally, and to weigh their canons of interpretation against the constitutional responsibilities of Congress. Justice Scalia has noted that it is "simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."\(^{252}\)

Judge Harold Leventhal once remarked that citing legislative history is similar to "looking over a crowd and picking out your friends."\(^{253}\) No doubt the courts have a wealth of resources when making their selections. In performing that operation, judges should not limit statutory interpretation to the available canons of construction, for too often they are imprecise, inward looking, and fail to comprehend the judiciary's place in a democratic society. Treating your friends should include being aware of Congress as a coordinate and coequal branch in many matters and the superior branch when it comes to lawmaking and the purse. Picking out Congress as a friend is a good way to avoid making Congress an enemy.


\(^{250}\) Eskridge, supra note 249, at 5.

\(^{251}\) Id. at 50 (quoting Aristotle, The Nicomachean Ethics, Bk. 5, ch. 10 (W.D. Ross trans., revised by J.O. Urmson, rev. Oxford ed. 1984)).

\(^{252}\) Scalia, supra note 233, at 22.