

Statutory Interpretation—in the Classroom and in the Courtroom

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This paper continues a discussion begun in an earlier paper in this journal.¹ That paper dealt primarily with the implications for statutory interpretation of the interest-group theory of legislation, recently revived by economists; it also dealt with constitutional interpretation. This paper focuses on two topics omitted in the earlier one: the need for better instruction in legislation in the law schools and the vacuity of the standard guideposts to reading statutes—the “canons of construction.” The topics turn out to be related. The last part of the paper contains a positive proposal on how to interpret statutes.

I. THE ACADEMIC STUDY OF LEGISLATION

It has been almost fifty years since James Landis complained that academic lawyers did not study legislation in a scientific (i.e., rigorous, systematic) spirit,² and the situation is unchanged. There are countless studies, many of high distinction, of particular statutes, but they are not guided by any overall theory of legislation, and most academic lawyers, like most judges and practicing lawyers, would consider it otiose, impractical, and pretentious to try to develop one. No one has ever done for legislation what Holmes did for the common law.³ The closest thing may be the economists' version of the interest-group theory,⁴ but the economists have limited their attention to a tiny subset of statutes, and their work has

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¹ Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

² Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 234 (R. Pound ed. 1934).

³ See O.W. HOLMES, *THE COMMON LAW* (1881).

⁴ See, e.g., Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); G. Becker, *Competition Among Pressure Groups for Political Influence* (Univ. Chicago, Center for Study of the Economy and the State, Wkg. Paper No. 023, 1982).

barely begun to penetrate the thinking of mainstream academic lawyers.⁵ Although there is a fine literature debunking the canons of construction,⁶ one has only to skim any recent volume of the *Federal Reporter* or the *United States Reports* to discover that it has had little impact on the judicial reading of statutes. The enormous political science literature on Congress and the state legislatures,⁷ which might cast light on the question whether it is realistic to ascribe to the draftsmen of legislation a knowledge of the code the courts use to interpret statutes, is unknown at the practical level of the legal profession; so is the older political science literature on the role of interest groups in legislation.⁸

While many academic lawyers are experts on particular statutes—which largely means experts on what the courts have said about the particular statutes they teach—few are experts on legislation. Few study legislation as an object of systematic inquiry comparable to the common law; few attempt even to translate the studies of economists and political scientists into language that lawyers can understand. You can pick up a clue to the situation by perusing the few published law-school textbooks devoted entirely to legislation.⁹ None recognizes the fundamental role of interest groups in procuring legislation, though the existence of such groups is acknowledged, particularly in discussions of legal regulations of lobbying;¹⁰ one text omits statutory construction as a

⁵ Posner, *supra* note 1, at 264, 271-72.

⁶ See, e.g., K. LLEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960); Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: *THE JUDGE* 30 (W. Mendelson ed. 1964), reprinted in H. FRIENDLY, *BENCHMARKS* 196 (1967); H. Friendly, *Statutorification of Federal Law* (address to the Judicial Conference of the Sixth Circuit, July 1981) (on file with *The University of Chicago Law Review*).

⁷ See, e.g., S. BAILEY, *CONGRESS MAKES A LAW* (1950); R. DAVIDSON & W. OLESZEK, *CONGRESS AND ITS MEMBERS* (1981); M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES* (3d ed. 1977); W. KEEFE & M. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* (5th ed. 1981); K. KOFMEHL, *PROFESSIONAL STAFFS OF CONGRESS* (3d ed. 1977); M. MALBIN, *UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT* (1980); W. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* (1978); N. ORNSTEIN & S. ELDER, *INTEREST GROUPS, LOBBYING AND POLICYMAKING 155-85* (1978); D. PRICE, *WHO MAKES THE LAWS?* (1972); R. RIPLEY, *CONGRESS: PROCESS AND POLICY* (2d ed. 1978).

⁸ See, e.g., A. BENTLEY, *THE PROCESS OF GOVERNMENT* 360-81 (1908); D. TRUMAN, *THE GOVERNMENTAL PROCESS* 321-94 (1951).

⁹ See O. HETZEL, *LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS* (1980); H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* (2d ed. 1981); F. NEWMAN & S. SURREY, *LEGISLATION: CASES AND MATERIALS* (1955); C. NUTTING & R. DICKERSON, *CASES AND MATERIALS ON LEGISLATION* (5th ed. 1978); H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *MATERIALS ON LEGISLATION* (4th ed. 1981).

¹⁰ See, e.g., O. HETZEL, *supra* note 9, at 693-749; H. LINDE, G. BUNN, F. PAFF & W. CHURCH, *supra* note 9, at 161-220; H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, *supra*

topic;¹¹ there is little reference to the economic or political science literature on legislation.¹² Most give disproportionate attention to such specialized topics as reapportionment and the regulation of campaign financing, presumably because these are areas where cases can be found for a casebook treatment of legislation. This shows that the editors do not really conceive of legislation as a distinct subject. A casebook on commercial law makes good sense; a casebook on legislation does not.

Nor is it an adequate reply to my Jeremiad that every good course in a statutory field such as commercial law or taxation or antitrust or copyright will impart to the students, in proper law school inductive fashion, a feel for the recurrent issues and problems involving legislation in general. Most teachers of statutory fields believe they have only enough time to introduce the students to the field—to give the students a sense of the field's scope and texture by working through the major statutory provisions and the principal cases construing them. They do not feel they have enough time to explore with the class the process by which the legislation is enacted, the political and economic forces that shaped it, or even the methods the courts use to interpret it, as distinct from the particular interpretations that the courts have made. Moreover, such issues are rarely dealt with in casebooks, and what is not in the casebook is unlikely to get into the course in any systematic fashion.

There are exceptions to these generalizations about course coverage; I am aware that seminars in legislation are offered in many law schools (the University of Chicago Law School, for example) and that courses in legal process consider legislation. But the sum of these various, rather fragmentary offerings is meager.

Twenty years after I graduated from law school, law school students, faculty, and administrators continue to complain about the malaise of the second and third years of law school. What better, if extremely limited, answer than a good course on legislation? The absence of suitable materials is only a short-term impediment.

I shall indicate briefly what I think such a course would contain, in the hope that people who have more time than I to devote

note 9, at 407-32.

¹¹ H. LINDE, G. BUNN, F. PARF & W. CHURCH, *supra* note 9.

¹² Except for scattered footnote references to miscellaneous works in *id.* at 123-41 and a brief excerpt in C. NUTTING & R. DICKERSON, *supra* note 9, at 110-13, from Arthur Bentley's classic, *The Process of Government*.

to curricular innovation will carry these ideas to fruition.¹³

1. *The Process of Legislation.* Many law students are ignorant of the process by which bills in Congress become law (more do not know even the first thing about the legislative process at the state level). Many law students do not know who writes a bill, who testifies at hearings, what a conference report is, or the difference between adding an amendment to a bill on the floor and processing a bill in the usual way through committees. It is as if in reading judicial opinions they did not know how a case got into an appellate court. Reluctant as law professors are to impart mere information in the classroom, I can see no escape from their doing so (not necessarily orally) in this instance.

2. *The Empirical Study of Legislation.* It is not enough simply to give students an outline of how the legislative process operates and a synoptic view of the scholarly controversy over the nature of what it produces. They should also be exposed to the results of empirical studies. They ought to learn what political scientists have discovered about the respective roles of Congressmen and staff¹⁴ in drafting legislation, the contribution of lobbyists and administration officials, and the time and care devoted to actual drafting, so that they can form their own judgment on whether it is realistic to suppose that statutes are drafted in the light of assumptions concerning the methods that courts will use to interpret them.¹⁵ They should also learn about the frequency and feasibility of legislative overruling of judicial decisions that interpret statutes contrary to the purpose of the legislation as conceived by either the enacting Congress or a subsequent one.¹⁶ Such data are essential to understanding and evaluating the judicial role in statutory interpretation, though I am quick to add that, to my knowledge at least, adequate data have not been compiled—further evidence of the absence of a scientific spirit from the study of legislation.

3. *Techniques for Judicial Interpretation of Statutes.* The student should be introduced to the debunking literature on the

¹³ It is probably a forlorn hope. A recent symposium on *The Law Curriculum in the 1980's*, 32 J. LEGAL EDUC. 315 (1982), does not include legislation among the topics of curricular reform.

¹⁴ On which see M. MALBIN, *supra* note 7.

¹⁵ For an informative discussion of the legislative drafting process in Congress, see K. KOFMEHL, *supra* note 7, at 117-26, 189-93; D. PRICE, *supra* note 7, and for interesting case studies, see S. BAILEY, *supra* note 7; N. ORNSTEIN & S. ELDER, *supra* note 7, at 155-85.

¹⁶ For brief forays into this surprisingly neglected subject, see M. JEWELL & S. PATTERSON, *supra* note 7, at 490-93; W. KEEFE & M. OGUL, *supra* note 7, at 428-32. The only extended study I have found is Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324 (1958).

canons of construction,¹⁷ to the positive literature that is worth reading,¹⁸ to the canons themselves,¹⁹ and to those masterpieces of statutory interpretation, such as Judge Learned Hand's opinion in the *Fishgold* case.²⁰ The student will not encounter these works in the regular curriculum because they deal with statutes, such as the veterans' reemployment provision²¹ construed in *Fishgold*, that are not the subject of any regular course.²²

4. *Researching Legislative History.* A year and a half of reading briefs in cases that often involve statutory interpretation has convinced me that many lawyers do not research legislative history as carefully as they research case law. They may not know how. It is more difficult to research legislative history than case law, yet instruction in the former is, at most law schools anyway, rudimentary. Often it is crammed into the whirlwind tour of the library that law librarians offer to beginning students who cannot comprehend the significance of what they are being told and shown. The many sources of compiled legislative histories²³ remain largely unknown to the profession. Research into U.S. government documents in general and legislative documents in particular is a formidable subspecialty of library science,²⁴ and I would guess that not one lawyer in a thousand has a real proficiency in it. He will not pick it up in his law firm and he will not learn—not well anyway—by doing. The mastery of research techniques is not so intellectually stimulating as other elements of a law school education,

¹⁷ See sources cited *supra* note 6.

¹⁸ See, e.g., L. HAND, *How Far is a Judge Free in Rendering a Decision?*, in *THE SPIRIT OF LIBERTY* 103 (I. Dilliard 3d ed. 1960); 2 H. HART & A. SACKS, *THE LEGAL PROCESS* 1410-17 (tent. ed. 1958); R. KEETON, *VENTURING TO DO JUSTICE* 78-97 (1969); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527 (1947), reprinted in F. FRANKFURTER, *OF LAW AND MEN* 44 (P. Elman ed. 1956); Friendly, *supra* note 6; H. Friendly, *supra* note 6.

¹⁹ See, e.g., K. LLEWELLYN, *supra* note 6, at 521-35.

²⁰ *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F.2d 785 (2d Cir.), *aff'd*, 328 U.S. 275 (1946).

²¹ The provisions construed in *Fishgold* were part of the Selective Training and Service Act of 1940, ch. 720, § 8(b), 54 Stat. 885, 890 (expired 1947). These provisions were replaced by the Selective Service Act of 1948, ch. 625, § 9, 62 Stat. 604, 614 (current version at 50 U.S.C. app. § 459 (1976)).

²² For another fine example of statutory interpretation not likely to find its way into a casebook on the statute, see *J.C. Penney Co. v. Commissioner*, 312 F.2d 65 (2d Cir. 1962) (Friendly, J.).

²³ Catalogued in N. JOHNSON, *SOURCES OF COMPILED LEGISLATIVE HISTORIES: A BIBLIOGRAPHY OF GOVERNMENT DOCUMENTS, PERIODICAL ARTICLES, AND BOOKS, 1ST CONGRESS - 94TH CONGRESS* (Am. Ass'n of Law Libraries, AALL Publ. Ser. No. 14, 1979 with 1981 inserts).

²⁴ For a sense of this, see J. MOREHEAD, *INTRODUCTION TO UNITED STATES PUBLIC DOCUMENTS* (2d ed. 1978).

but library science is a recognized field of learning at first-class universities, and it would not demean the law schools to offer formal instruction in a highly relevant aspect of it.

I have sketched the elements of a proposed second-year course in law school that, so far as I know, is offered nowhere today (I would be very happy to learn otherwise). Now I shall discuss some of the consequences of this gap in legal education.

II. THE CANONS OF CONSTRUCTION

A. Introduction

The canons of statutory construction—for example, one starts with the language of the statute; repeals by implication are not favored; penal statutes are to be construed narrowly and remedial statutes broadly; *expressio unius est exclusio alterius*²⁵—occupy a kind of legal *demimonde*. To exaggerate slightly, it has been many years since any legal scholar had a good word to say about any but one or two of the canons, but scholarly opinion—and I include not just the views of professors but the views expressed in nonjudicial writings of distinguished judges such as Frankfurter and Friendly—has had little impact on the writing of judicial opinions, where the canons seem to be flourishing as vigorously as ever.²⁶ This persistent gap between scholarly and practical thinking must be due, in part at least, to the lack of systematic attention that statutory interpretation receives in the law schools. The professors drum into their students' heads a distrust of legal formalism, and this has had an effect on opinions. Judicial opinions in America are less formalistic than they once were; courts are less prone to pretend that their conclusions follow by ineluctable logic from premises found in earlier cases, without any leavening of policy or common sense. But judicial opinions continue to pretend far more often than they should that the interpretation of statutes is the mechanical application of well understood interpretive princi-

²⁵ This term has been described as a "maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another Under this maxim, if [a] statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

²⁶ For an amusingly dense collocation of canons, with many citations, see *United States v. Scrimgeour*, 636 F.2d 1019, 1022-24 (5th Cir.), *cert. denied*, 454 U.S. 878 (1981). Compare *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952) ("Generalities about statutory construction help us little."), *quoted in Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) *with Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (a principle that "has been a maxim of statutory construction since" 1804 applies in this case).

ples—the canons—to legislative materials.

The usual criticism of the canons, forcefully advanced by Professor Llewellyn many years ago, is that for every canon one might bring to bear on a point there is an equal and opposite canon,²⁷ so that the outcome of the interpretive process depends on the choice between paired opposites—a choice the canons themselves do not illuminate. (You need a canon for choosing between competing canons, and there isn't any.) I think the criticism is correct, but I also think that most of the canons are just plain wrong, and it is that point that I want to develop here.

There is an initial question of what precisely it means to call a canon of statutory construction “wrong.” The answer depends on what a canon's function is. There are several possibilities. First, a canon might be part of a code that Congress uses when it writes statutes. Suppose Congress decided that if the meaning of a statute as applied to some problem is plain as a linguistic matter, the statute should be interpreted in accordance with that meaning, even though it is contrary to Congress's actual purpose in enacting the statute. So if Congress grants a tax exemption to “minister[s] of the gospel,”²⁸ rabbis should not be held eligible,²⁹ and if that makes the exemption unconstitutional under the first amendment because it discriminates against a religious faith, too bad.

I do not think that any of the canons of statutory construction can be defended on the theory that they are keys to deciphering a code. There is no evidence that members of Congress, or their assistants who do the actual drafting, know the code or that if they know, they pay attention to it. Nor, in truth, is there any evidence that they do not; it is remarkable how little research has been done on a question that one might have thought lawyers would regard as fundamental to their enterprise. Probably, though, legislators do not pay attention to it, if only because, as Llewellyn showed, the code is internally inconsistent. We should demand evidence that statutory draftsmen follow the code before we erect a method of interpreting statutes on the improbable assumption that they do.

A second line of defense of the canons is that they, or at least some of them, are common sense guides to interpretation. It is this defense that I shall be questioning at length, by denying that the canons (with two closely related exceptions) have value even as

²⁷ *E.g.*, K. LLEWELLYN, *supra* note 6, at 521-35.

²⁸ I.R.C. § 107 (1976).

²⁹ *But cf.* Salkov v. Commissioner, 46 T.C. 190, 193-99 (1966) (full time cantor is a “minister of the gospel” within the meaning of I.R.C. § 107 (1976)).

flexible guideposts—rebuttable presumptions—rather than rigid rules. A third line of defense is that even if the canons do not make very good sense, it is better that the judges should feel constrained by some interpretive rules than free to roam at large in a forest of difficult interpretive questions; but I shall argue shortly that the effect of the canons is the opposite of constraining.

There is a fourth line of defense: the canons limit the delegation of legislative power to the courts. The “plain meaning” rule³⁰ forces the legislature to draft statutes carefully; the rule that repeals by implication are not favored limits the scope of newly enacted statutes; the rule that statutes in derogation of the common law are to be construed strictly narrows the scope of all statutes applied in areas where common law principles would otherwise govern. But of course other canons look in the opposite direction, such as the important canon that remedial statutes are to be construed broadly. And, as noted earlier, two inconsistent canons can usually be found for any specific question of statutory construction. It is therefore unlikely that the canons considered as a whole stand for some general principle of limited government and separation of powers. No doubt one could, by picking and choosing, impose such a principle. But I know of no neutral, nonpolitical basis on which a judge can decide whether the legislature should be forced by some version of strict construction to legislate less or encouraged by some version of loose construction to legislate more. I shall come back to this point, however, in the last part of the paper.

B. Specific Canons

I begin my discussion of specific canons with one that has both a logical priority and an apparent reasonableness that many of the others lack. A milder version of the older, and still frequently invoked, “plain meaning” rule,³¹ it holds that in interpreting a statute you should begin, though maybe not end, with the words of the statute.³² Offered as a description of what judges do, the proposition is false. The judge rarely starts his inquiry with the words of

³⁰ A rule described as “the cardinal rule of statutory construction,” requiring that “a statute’s plain meaning should be given priority in its construction.” *Western Union Tel. Co. v. FCC*, 665 F.2d 1126, 1137 & n.21 (D.C. Cir. 1981).

³¹ *See id.*

³² *See, e.g., International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979); *Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128, 138 (1956) (Frankfurter, J., dissenting).

the statute, and often, if the truth be told, he does not look at the words at all. This is notoriously true with regard to the Constitution. More often than not, briefs and judicial opinions dealing with free speech, due process, the right to assistance of counsel, and other constitutional rights do not quote the language of the applicable provision—and not because all concerned know these provisions by heart. The constitutional provisions are in reality the foundations, or perhaps in some cases the pretexts, for the evolution of bodies of case law that are the starting point and usually the ending point of analysis for new cases.

There are many statutes of which this is also true. The one I know best is the Sherman Act.³³ Lawyers and judges do not begin their analyses of a challenged practice by comparing the practice with the language of the Act and, only if they have satisfied themselves that there is some relationship, then proceed to analyze the case law. They start with the case law and may never return to the statutory language—to “restrain trade or commerce” or to “attempt or conspire to monopolize.” Even in dealing with statutes that have not generated a huge body of case law, a judge usually begins not with the language of the statute but with some conception of its subject matter and the likely purpose—if only one derived from the name of the statute or the title of the U.S. Code in which it appears. He is right to do so, because it is impossible to make sense of statutory language without some context.

I have thus far assumed that the “start with the words” canon has reference to temporal rather than to logical priority, and that is I think how it is usually meant. But maybe this is being too literal and what really is intended is that the language of a statute be deemed the most important evidence of its meaning—which it normally is—or at least indispensable evidence—which it always is. It is ironic that a principle designed to clarify should be so ambiguous. Of course the words of a statute are always relevant, often decisive, and usually the most important evidence of what the statute was meant to accomplish. I merely object to the proposition that one must always begin with the words, and I am reasonably confident that more often than not the judge—the good judge as well as the bad judge—in fact begins somewhere else.

The “start with the words” canon, like the “plain meaning” canon itself, goes wrong by being unrealistic about how judges read statutes. Another very popular canon, “remedial statutes are to be

³³ 15 U.S.C. §§ 1-7 (1976).

construed broadly,"³⁴ goes wrong by being unrealistic about legislative objectives. The idea behind this canon is that if the legislature is trying to remedy some ill, it would want the courts to construe the legislation to make it a more rather than a less effective remedy for that ill. This would be a sound working rule if every statute—at least every statute that could fairly be characterized as "remedial" (which I suppose is every regulatory statute that does not prescribe penal sanctions and so comes under another canon, which I discuss later)—were passed because a majority of the legislators wanted to stamp out some practice they considered to be an evil; presumably they would want the courts to construe the statute to advance that objective. But if, as is often true, the statute is a compromise between one group of legislators that holds a simple remedial objective but lacks a majority and another group that has reservations about the objective, a court that construed the statute broadly would upset the compromise that the statute was intended to embody.

Another facet of the same point, which I have discussed elsewhere,³⁵ is that the absence of effective statutory remedies for violations of statutory commands should not automatically be considered an invitation to judges to create such remedies. The statute may reflect a compromise between those who wanted it to be fully effective in achieving its stated objective and those who wanted a less effective statute; if so, it should be enforced according to that compromise. Both the principle of supplementing weak statutory remedies with strong judicial remedies and the canon that remedial statutes are to be read broadly ignore the role of compromise in the legislative process and, more fundamentally, the role of interest groups, whose clashes blunt the thrust of many legislative initiatives.

The use of postenactment legislative materials to interpret a statute invites a similar objection.³⁶ Postenactment statements are likely to reflect the current preferences of legislators and of the interest groups that determine or at least influence those preferences, but the current preferences bear no necessary relationship to those of the enacting legislators, who may have been reacting to a different constellation of interest-group pressures. To give effect to the current legislators' preferences is to risk spoiling the deal

³⁴ See, e.g., *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 12 (1976).

³⁵ Posner, *supra* note 1, at 278-79.

³⁶ See *id.* at 275.

cut by the earlier legislators—to risk repealing legislation, in whole or in part, without going through the constitutionally prescribed processes for repeal. One cannot assume a continuity of view over successive Congresses.

A court should adhere to the enacting legislature's purposes (so far as those purposes can be discerned) even if it is certain that the current legislature has different purposes and will respond by amending the relevant legislation to reverse the court's interpretation. The court's adherence to the initial compromise will not be futile, for the amending legislation will probably be prospective (that is, applicable only to conduct taking place after the date of amendment), but judicial interpretations of legislation are retrospective (that is, applicable to past conduct at issue in a pending case). Thus if the court were to implement the preferences of the current legislature, it would in effect be repealing the statute earlier than the legislature itself would have repealed it.

And all this assumes that the court can predict the preferences of the current legislature, but of course it cannot. It is one thing to use a committee report to explain the meaning of a statute passed on the committee's recommendation; it is another thing to rely on a committee's report that did not result in legislation to predict how the entire legislature will act if the court does not interpret the existing statute in a particular way. Judges cannot make such predictions with any confidence.

I do not want totally to anathematize the use of postenactment materials to interpret a statute, for such materials may in some cases reflect a disinterested and informed view by a committee that is monitoring the administration of a statute; and I also want to distinguish sharply between postenactment materials and a subsequently enacted statute. Obviously a statute can change the meaning of an earlier statute even if the later statute does not expressly amend the earlier; I shall have something to say in a moment about the canon against implied repeals. But a committee report or a statement on the floor cannot amend an enacted statute, implicitly or explicitly, and rarely will it cast much light on the meaning of the statute.

Another canon that rests on an unrealistic view of the political process is the canon that the interpretation of a statute by the administrative agency that enforces it is entitled to great weight by the courts.³⁷ There is no reason to expect administrative agency

³⁷ See, e.g., *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177, 178-90 (1981).

members, appointed and confirmed long after the enactment of the legislation they are enforcing, to display a special fidelity to the original intent of the legislation rather than to the current policies of the Administration and the Congress. They may of course know more than the courts about the legislation, and to the extent they support their interpretation with reasons at least plausibly based on superior knowledge the courts should give that interpretation weight. But the mere fact that it is the current agency interpretation does not entitle it to any particular weight. If the interpretation has persisted through several changes of Administration, that may be a different matter.

Most canons of statutory construction go wrong not because they misconceive the nature of judicial interpretation or of the legislative or political process but because they impute omniscience to Congress. Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process. The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application. All this has been explained by Edward Levi in words that I cannot improve on. He points out that the ambiguity of a statute in application—the incompleteness of the statute—

is not the result of inadequate draftsmanship, as is so frequently urged. Matters are not decided until they have to be. For a legislature perhaps the pressures are such that a bill has to be passed dealing with a certain subject. But the precise effect of the bill is not something upon which the members have to reach agreement. If the legislature were a court, it would not decide the precise effect until a specific fact situation arose demanding an answer. Its first pronouncement would not be expected to fill in the gaps. But since it is not a court, this is even more true. It will not be required to make the determination in any event, but can wait for the court to do so. There is a related and an additional reason for ambiguity. As to what type of situation is the legislature to make a decision? Despite much gospel to the contrary, a legislature is not a fact-finding body. There is no mechanism, as there is with a court, to require the legislature to sift facts and to make a decision about specific situations. There need be no agreement about what the situation is. The members of the

legislative body will be talking about different things; they cannot force each other to accept even a hypothetical set of facts. The result is that even in a non-controversial atmosphere just exactly what has been decided will not be clear.³⁸

An example of a canon founded on the assumption of legislative omniscience is the canon that every word of a statute must be given significance; nothing in the statute can be treated as surplusage.³⁹ No one would suggest that judicial opinions or academic articles contain no surplusage; are these documents less carefully prepared than statutes? There is no evidence for this improbable proposition; what evidence we have, much of it from the statutes themselves, is to the contrary. True, statutory language is in an important sense more compact than the language of judicial opinions and law-review articles. Every word in a statute counts—every word is a constitutive act—whereas much in a judicial opinion will merely be explanatory of its holding, and much in an academic article merely explanatory of its thesis or findings. But it does not follow that statutes are more carefully drafted, or even that greater care assures greater economy of language; a statute that is the product of compromise may contain redundant language as a by-product of the strains of the negotiating process.

Consider now the popular canon that repeals by implication are not favored,⁴⁰ and imagine what the idea behind it might be. Maybe it is that whenever Congress enacts a new statute it combs the United States Code for possible inconsistencies with the new statute, and when it spots one, it repeals the inconsistency explicitly. But this would imply legislative omniscience in a particularly uncompromising and clearly unrealistic form, for if Congress could foresee every possible application of a new statute and make provision for it, there would be no need for judicial interpretation at all. Since total foresight is not possible, if some latent inconsistency becomes actual all a court can do is figure out as best it can whether Congress would have wanted to forbid the inconsistent application of the old statute or give less scope to the new one.

An alternative basis for this canon is the idea that if the choice is between giving less scope to the new statute and cutting

³⁸ E. LEVI, AN INTRODUCTION TO LEGAL REASONING 30-31 (1949) (footnote omitted).

³⁹ See, e.g., *Co Petro Mktg. Group, Inc. v. Commodity Futures Trading Comm'n* (*In re Co Petro Mktg. Group, Inc.*), 680 F.2d 566, 569-70 (9th Cir. 1982). This canon is also applied to the interpretation of contracts, see, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 202 comment d (1981), just as unrealistically as it is applied to statutes.

⁴⁰ See, e.g., *Kremer v. Chemical Constr. Corp.*, 102 S. Ct. 1883, 1890 (1982).

down the intended scope of the old (because both cannot be enforced fully without conflict), Congress must desire the courts to do the first. But there is no basis for this imputation of congressional purpose, and the opposite inference is if anything more plausible—that the enacting Congress cares more about its statutes than those of previous Congresses.

The canon *expressio unius est exclusio alterius*⁴¹ is also based on the assumption of legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate. It seemed dead for a while,⁴² but it was resurrected by the Supreme Court a few years ago to provide a basis for refusing to create private remedies for certain statutory violations.⁴³ Its very recent disparagement by a unanimous Court puts its future in doubt⁴⁴—or maybe just shows that judicial use of the canons of construction is hopelessly opportunistic. Whether the result in the private-action cases is right or wrong, the use of *expressio unius* is not helpful. If a statute fails to include effective remedies because the opponents were strong enough to prevent their inclusion, the courts should honor the legislative compromise. But if the omission was an oversight, or if Congress thought the courts would provide appropriate remedies for statutory violations as a matter of course, the judges should create the remedies necessary to carry out the legislature's objectives:

[t]he major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but 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.⁴⁵

My last example of a canon apparently premised on an assumption of legislative omniscience is one that even Judge Friendly, our most trenchant living critic of the canons of statutory construction, has occasionally, though cautiously, invoked: that the reenactment without change of a statute that the courts have in-

⁴¹ See *supra* note 25.

⁴² See Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 892-96 (1982).

⁴³ See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). This development is described in Note, *supra* note 42, at 895 & n.28, and deplored in H. Friendly, *supra* note 6, at 10-16.

⁴⁴ *Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 690 (1983).

⁴⁵ *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.).

terpreted in a particular way may be taken as evidence that the reenactment adopts that construction. Consider Judge Friendly's example of the domestic-relations exception to the diversity jurisdiction of the federal courts.⁴⁶ This entirely judge-made exception, although uncertain in scope, is almost as old as the federal courts themselves.⁴⁷ The grant of diversity jurisdiction to the federal courts has been reenacted several times since the exception was first recognized,⁴⁸ yet neither the text nor legislative history of the successive reenactments has ever referred to it. Can we nevertheless take these reenactments, or at least the most recent, as signifying legislative adoption of the judicially created exception? Probably not. It seems as likely that a majority of the legislators who voted on each reenactment never heard of the exception, which is in fact unknown to all but a small number of specialists in federal jurisdiction and domestic relations, or that they heard of it but had no desire to freeze the existing judicial construction into statute law, being indifferent to whether the courts continued to recognize the exception or decided to abolish it.⁴⁹

I could go on denouncing the canons of statutory construction, but I have discussed the ones that appear most frequently today in judicial decisions and I want to turn now to three canons that have some arguable merit. I have discussed the first of these canons—the canon that penal statutes should be construed narrowly⁵⁰—elsewhere.⁵¹ Here I add only that this canon is bound up with the broader issue of fair notice of potential criminal liability, so that a refusal to interpret criminal statutes narrowly could violate the familiar canon that statutes should, wherever possible, be so interpreted as to be constitutional.⁵² This canon rests on the

⁴⁶ See Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973) (Friendly, J.).

⁴⁷ It had its origin in a dictum in Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859). See Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 512-13 (2d Cir. 1973).

⁴⁸ The current version of the grant of diversity jurisdiction is found at 28 U.S.C. § 1332(a)(1)-(3) (1976). The previous reenactments of that provision are as follows: Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415, 415; Act of June 25, 1948, ch. 646, § 1332, 62 Stat. 869, 930; Act of April 20, 1940, ch. 117, 54 Stat. 143, 143; Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091; Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 433, 434-35; Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, 553; Act of Dec. 1, 1873, ch. 7, § 629, 18 Stat. 1, 110-112 (1875).

⁴⁹ A similar point is made by Judge Friendly himself in Friendly, *supra* note 6, at 66, reprinted in H. FRIENDLY, *supra* note 6, at 232-33.

⁵⁰ See, e.g., United States v. Campos-Serrano, 404 U.S. 293, 297 (1971).

⁵¹ See Posner, *supra* note 1, at 280-82.

⁵² See, e.g., Textile Workers' Union v. Lincoln Mills, 353 U.S. 448, 477 (1957) (Frank-

common-sense assumption that the legislators would rather not have the courts nullify their effort entirely unless the interpretation necessary to save it would pervert the goals of the legislature in enacting it. It is the *cy pres* doctrine applied to legislation and provides reason enough for interpreting criminal statutes narrowly if, interpreted broadly, they would violate due process.

The next canon is related. It is that statutes should be construed not only to save them from being invalidated but to avoid even raising serious constitutional questions.⁵³ Judge Friendly has criticized this canon with his customary power.⁵⁴ He asks why the legislature should care that its statute raises a constitutional question, so long as the court concludes that it is constitutional.⁵⁵ If the court is inclined to hold the statute unconstitutional, then the previous canon on construing to avoid unconstitutionality, which Judge Friendly accepts,⁵⁶ comes into play. This criticism is convincing as far as it goes but, as Judge Friendly recognizes, it is incomplete.⁵⁷ It leaves out of account the policy—derived from the structure of the Constitution—of avoiding unnecessary constitutional decisions. Applying the canon that constitutional questions are to be avoided wherever possible leaves everything pleasantly vague. Congress can amend the statute if it feels strongly and so precipitate a constitutional controversy that it may lose (not that it must lose, as would be the case if it amended a statute to nullify a construction that was necessary to make the statute constitutional), but if it does not amend the statute a collision with the courts has been averted. And even if the courts were to uphold the statute's constitutionality if forced to grasp the nettle, in the course of doing so they might say something that would cast a constitutional shadow on some other legislation. Construing legislation to avoid constitutional questions, as well as to avoid actual nullification, is thus one of those buffering devices, much discussed by the late Alexander Bickel, by which the frictions created by the institution of judicial review are minimized.⁵⁸

furter, J., dissenting).

⁵³ See, e.g., *United States v. Rumely*, 345 U.S. 41, 45 (1953) (Frankfurter, J.).

⁵⁴ See Friendly, *supra* note 6, at 44-45, reprinted in H. FRIENDLY, *supra* note 6, at 210-12; cf. *Railway Labor Executives' Ass'n v. Southeastern Pa. Transp. Auth.*, 534 F. Supp. 832, 848-49 (Regional Rail Reorg. Ct. 1982) (Friendly, J.), cert. denied, 102 S. Ct. 2271 (1982).

⁵⁵ See Friendly, *supra* note 6, at 44, reprinted in H. FRIENDLY, *supra* note 6, at 210. Friendly notes that there is usually a good chance that such questions will be resolved in favor of constitutionality. *Id.*

⁵⁶ *Id.*

⁵⁷ See *id.* at 44-45, reprinted in H. FRIENDLY, *supra* note 6, at 211-12.

⁵⁸ A. BICKEL, *THE LEAST DANGEROUS BRANCH* 181 (1962).

But this does not prove that the canon is a good one. It just shifts the plane of analysis from that of interpreting legislative intent to that of maintaining a proper separation of powers. And I think on this other plane it flops too, so that in the end I agree with Judge Friendly. The Constitution as interpreted in modern cases is extraordinarily far-reaching—a written Constitution in name only. Congress's practical ability to overrule a judicial decision misconstruing one of its statutes, given all the other matters pressing for its attention, is less today than ever before, and probably was never very great. The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution—to create a judge-made constitutional "penumbra" that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself. And we do not need that.

If I am right that the canon of narrow construction for penal statutes is really just an aspect of the canon that statutes should be construed to avoid being held unconstitutional, then I am down to just one canon; the rest, I respectfully suggest, should be discarded. But where does this leave us? Might it not be better to subject the judges to the discipline of the canons, even if the canons are in some ultimate sense wrong, than to invite them to approach the task of statutory construction without any standards at all to guide them? I take up that question next. But before doing so I want to raise the question whether the canons, far from imposing a discipline of any sort on judges, do not have the opposite effect—promoting "judicial activism," in the sense of an expansive approach to the power of courts vis-à-vis the other branches of government. Vacuous and inconsistent as they mostly are, the canons do not constrain judicial decision making but they do enable a judge to create the appearance that his decisions are constrained. A standard defense of judicial activism, in the words of a defender, is that it "is, in most instances, not activism at all. Courts do not relish making such hard decisions and certainly do not encourage litigation on social or political problems. But . . . the federal judiciary . . . has the paramount and the continuing duty to uphold the law."⁵⁹ By making statutory interpretation seem mechanical rather than creative, the canons conceal, often from the reader of the judicial opinion and sometimes from the writer, the extent to

⁵⁹ Johnson, *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 474 (1977).

which the judge is making new law in the guise of interpreting a statute or a constitutional provision. You will find more skepticism about the canons of construction in the opinions of practitioners of judicial self-restraint than in the opinions of judicial activists. The judge who recognizes the degree to which he is free rather than constrained in the interpretation of statutes, and who refuses to make a pretense of constraint by parading the canons of construction in his opinions, is less likely to act wilfully than the judge who either mistakes freedom for constraint or has no compunctions about misrepresenting his will as that of the Congress.

III. AN ALTERNATIVE TO THE CANONS

I offer not a substitute algorithm but only an attitude, or maybe a slogan, and leave it to the reader to choose between what seems to me to be the delusive rigor of the canons and the guidance offered by my suggested approach. I suggest that the task for the judge called upon to interpret a statute is best described as one of imaginative reconstruction.⁶⁰ The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.

Now it is easy to ridicule this approach by saying that judges do not have the requisite imagination and that what they will do in practice is assume that the legislators were people just like themselves, so that statutory construction will consist of the judge's voting his own preferences and ascribing them to the statute's draftsmen. But the irresponsible judge will twist any approach to yield the outcomes that he desires and the stupid judge will do the same thing unconsciously. If you assume a judge who will try with the aid of a reasonable intelligence to put himself in the place of the enacting legislators, then I believe he will do better if he follows my suggested approach than if he tries to apply the canons.

⁶⁰ I associate this view primarily with Judge Learned Hand. See *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1914) (Hand, J.); L. HAND, *supra* note 18, at 105-10; Speech by Learned Hand, Opening Session of the National Conference on the Continuing Education of the Bar (Dec. 16, 1958), reprinted in JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASSOCIATION, CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY 116, 117-19 (1959), also reprinted in R. ALDISERT, *THE JUDICIAL PROCESS: READINGS, MATERIALS AND CASES* 184, 184-85 (1976). But this view is clearly stated elsewhere, for example in J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 172-73 (2d ed. 1921), and has ancient antecedents, see, e.g., *Heydon's Case*, 76 Eng. Rep. 637, 638 (Ex. 1584); 1 W. BLACKSTONE, *COMMENTARIES* *59-61; 3 *id.* *430-31.

The judge who follows this approach will be looking at the usual things that the intelligent literature on statutory construction tells him to look at—such as the language and apparent purpose of the statute, its background and structure, its legislative history (especially the committee reports and the floor statements of the sponsors), and the bearing of related statutes. But he will also be looking at two slightly less obvious factors. One is the values and attitudes, so far as they are known today, of the period in which the legislation was enacted. It would be foolish to ascribe to legislators of the 1930's or the 1960's and early 1970's the skepticism regarding the size of government and the efficacy of regulation that is widespread today, or to impute to the Congress of the 1920's the current conception of conflicts of interest. It is not the judge's job to keep a statute up to date in the sense of making it reflect contemporary values; it is his job to imagine as best he can how the legislators who enacted the statute would have wanted it applied to situations that they did not foresee.

Second, and in some tension with the first point, the judge will be alert to any sign of legislative intent regarding the freedom with which he should exercise his interpretive function. Sometimes a statute will state whether it is to be broadly or narrowly construed;⁶¹ more often the structure and language of the statute will supply a clue. If the legislature enacts into statute law a common law concept, as Congress did when it forbade agreements in "restraint of trade" in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they would construe and apply a common law principle—in which event the values of the framers may not be controlling after all.

The opposite extreme is a statute that sets out its requirements with some specificity, especially against a background of dissatisfaction with judicial handling of the same subject under a previous statute or the common law (much federal labor and regulatory legislation is of this character). Here it is probable that the legislature does not want the courts to paint with a broad brush in adapting the legislation to the unforeseeable future. The Constitution contains several such provisions—for example, the provision that the President must be thirty-five years old. This provision does not invite construction; it does not invite a court to recast the provision so that it reads, "the President must be either thirty-five or mature." There is nothing the court could point to

⁶¹ See, e.g., Racketeer Influenced and Corrupt Organizations Act (RICO) § 904(a), printed at 18 U.S.C. § 1961 note (1976).

that would justify such an interpretation as consistent with the framers' intent. It is not that the words are plain; it is that the words, read in context as words must always be read in order to yield meaning, do not authorize any interpretation except the obvious one.

The approach I have sketched—a word used advisedly—in this part of the paper has obvious affinities with the “attribution of purpose” approach of Hart and Sacks,⁶² the antecedents of which go back almost 400 years.⁶³ But I should like to stress one difference between my approach and theirs. They say that in construing a statute a court “should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”⁶⁴ Coupled with their earlier statement that in trying to divine the legislative will the court should ignore “short-run currents of political expedience,”⁶⁵ Hart and Sacks appear to be suggesting that the judge should ignore interest groups, popular ignorance and prejudices, and other things that deflect legislators from the single-minded pursuit of the public interest as the judge would conceive it. But to ignore these things runs the risk of attributing to legislation not the purposes reasonably inferable from the legislation itself, but the judge's own conceptions of the public interest. Hart and Sacks were writing in the wake of the New Deal, when the legislative process was widely regarded as progressive and public spirited. There is less agreement today that the motives behind most legislation are benign. That should be of no significance to the judge except to make him wary about too easily assuming a congruence between his concept of the public interest and the latent purposes of the statutes he is called on to interpret. He must not automatically assume that the legislators had the same purpose that he thinks he would have had if he had been in their shoes.

A related characteristic of the passages I have quoted from Hart and Sacks is a reluctance to recognize that many statutes are the product of compromise between opposing groups and that a compromise is quite likely not to embody a single consistent purpose. Of course there are difficulties for the judge, limited as he is to the formal materials of the legislative process—the statutory text, committee reports, hearings, floor debates, earlier bills, and so

⁶² See 2 H. HART & A. SACKS, *supra* note 18, at 1413-17.

⁶³ See *Heydon's Case*, 76 Eng. Rep. 637, 638 (Ex. 1584).

⁶⁴ 2 H. HART & A. SACKS, *supra* note 18, at 1415.

⁶⁵ *Id.* at 1414.

forth—in identifying compromise. A court should not just assume that a statute's apparent purpose is not its real purpose. But where the lines of compromise are discernible, the judge's duty is to follow them,⁶⁶ to implement not the purposes of one group of legislators, but the compromise itself.⁶⁷

But what if the lines of compromise are not clear? More fundamentally, what if the judge's scrupulous search for the legislative will turns up nothing? There are of course such cases, and they have to be decided some way. It is inevitable, and therefore legitimate, for the judge in such a case to be moved by considerations that cannot be referred back to legislative purpose. These might be considerations of judicial administrability—what interpretation of the statute will provide greater predictability, require less judicial factfinding, and otherwise reduce the cost and frequency of litigation under the statute—or considerations drawn from some broadly based conception of the public interest. It is always possible, of course, to refer these considerations back to Congress—to say that Congress would have wanted the courts, in cases where they could not figure out what interpretation would advance the substantive objectives of the statute, to adopt the “better” one, or to say à la Hart and Sacks that congressmen ought to be presumed reasonable until shown otherwise. But these methods of imputing congressional intent are artificial; and as I argued earlier, it is not healthy for the judge to conceal from himself that he is being creative when he is, as sometimes he has to be even when applying statutes.

I want to end by contrasting my suggested approach with the positions in the contemporary debate over interpretation, a debate I have thus far ignored. The debate is mostly over constitutional rather than statutory interpretation, but Professor Calabresi's recent book carries it into the statutory arena.⁶⁸ He argues that courts ought to be given, and maybe ought to take without being given, the power to update statutes; he flirts with judicial “misreading” of statutes as a second-best route to this end,⁶⁹ remarks

⁶⁶ See, e.g., *NLRB v. Rockaway News Supply Co.*, 197 F.2d 111, 115-16 (2d Cir. 1952) (Clark, J., dissenting), *aff'd on other grounds*, 345 U.S. 71 (1953).

⁶⁷ Compare *United States v. Armour & Co.*, 402 U.S. 673, 681-83 (1971), where the Court interpreted the Meat Packers Consent Decree of 1920 not with reference to the intent of the parties to the decree but rather with reference to the compromise between the parties embodied in the decree.

⁶⁸ G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

⁶⁹ *Id.* at 34.

that “[t]he limits of honest interpretation are too constricting,”⁷⁰ and expresses at least qualified approval of judicial amendment of statutes where legislative amendment is blocked by interest-group pressures.⁷¹

Professor Calabresi has done us a service by bringing out into the open what are after all the secret thoughts not only of many modern legal academics but of some modern judges. Since one extreme begets another he has also helped us understand why there is today a revival of “strict constructionism,” a revival I alluded to earlier in remarking the Supreme Court’s recent disinterment of *expressio unius*.⁷² But contrary to a widespread impression, strict—that is, narrow—construction, if perhaps a useful antidote to the school of no construction, is not a formula for ensuring fidelity to legislative intent. It is almost the opposite. It is the lineal descendant of the canon that statutes in derogation of the common law are to be strictly construed and, like that canon, was used in nineteenth-century England to emasculate social welfare legislation.⁷³

To construe a statute strictly is to limit its scope and its life span—to make Congress work twice as hard to produce the same effect.⁷⁴ The letter killeth but the spirit giveth life.

There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment to the defendant.⁷⁵

⁷⁰ *Id.* at 38.

⁷¹ *Id.* at 34.

⁷² See *supra* notes 42-43 and accompanying text.

⁷³ See Jones, *Should Judges be Politicians? The English Experience*, 57 *IND. L.J.* 211, 213 (1982).

⁷⁴ See Easterbrook, *Statutes’ Domains*, 50 *U. CHI. L. REV.* 533, 548-49 (1983), where a theory of strict construction is explicitly defended as a limitation on the power of legislatures to legislate with future effect.

In speaking of the effect of strict construction on the effectiveness of the legislative process, I emphasize that I am speaking only of strict construction of statutes. If one construes the Constitution strictly, one will reduce the effectiveness of constitutional enactments; but of course one will increase the effectiveness of the legislative process by reducing the limitations that the Constitution places on that process. This is easily seen by thinking back to the discussion of the canon that statutes should be interpreted wherever possible to avoid being held unconstitutional. To construe the Constitution narrowly and statutes broadly would maximize the effectiveness of that process. But the analysis of these and other interesting permutations must await another day.

⁷⁵ Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 474-75 (1897).

It is not an accident that most "loose constructionists" are political liberals and most "strict constructionists" are political conservatives. The former think that modern legislation does not go far enough, the latter that it goes too far. Each school has developed interpretive techniques appropriate to its political ends. But as I said earlier, I know of no principled, nonpolitical basis for a court to adopt the view that Congress is legislating too much and ought therefore to be reined in by having its statutes construed strictly. I add now that such a view would be a form of judicial activism because it would cut down the power of the legislative branch; and at this moment in history, we do not need more judicial activism.