

# The Paradox of Expansionist Statutory Interpretations<sup>1</sup>

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## I. Introduction

The recent history of progressive social legislation at the national level presents a major puzzle for scholars interested in the currents of modern public policy. As is well known, the 1960's and 1970's was the heyday of progressive public policy at the federal level. In this

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relatively short period, Congress transformed the relationship of the federal government to the economy and to rights of American minorities by enacting the modern era's central pieces of social legislation, including the Civil Rights Acts (1964, 1968),<sup>4</sup> the Voting Rights Act (1965),<sup>5</sup> the Motor Vehicle Safety Act (1966),<sup>6</sup> National Environmental Policy Act (1969),<sup>7</sup> the Clean Air Acts (1970, 1977),<sup>8</sup> the Occupational Safety and Health Act (1972),<sup>9</sup> the Clean Water Act (1972),<sup>10</sup> the Consumer Product Safety Act (1972),<sup>11</sup> the Endangered Species Act (1973),<sup>12</sup> the Americans with Disabilities Education Act [1970],<sup>13</sup> the Age Discrimination in Employment Act (1970),<sup>14</sup> the Rehabilitation Act (1973),<sup>15</sup> among other watershed statutes.<sup>16</sup> However, this

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<sup>4</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); Pub. L. 90-24, 82 Stat. 73 (1968).

<sup>5</sup> 42 U.S.C. 1973 et seq.

<sup>6</sup> 15 U.S.C. 1391 et seq.

<sup>7</sup> 42 U.S.C. 4321 et seq.

<sup>8</sup> 42 U.S.C.A. 7401 et seq. (1970); 42 U.S.C. 7401 et seq. (1977).

<sup>9</sup> 29 U.S.C. 651 et seq.

<sup>10</sup> 33 U.S.C. Sec. 1251 et seq.

<sup>11</sup> P.L. 92-573; 15 U.S.C.A. 2051 et seq.

<sup>12</sup> 16 U.S.C.A. 1531 et seq.

<sup>13</sup> Pub. L. 91-230.

<sup>14</sup> 29 U.S.C. 621 et seq.

<sup>15</sup> 29 U.S.C. 701 et seq.

<sup>16</sup> This period also contains the "Great Society" and "War on Poverty" legislation, including Food Stamps (1964), Equal Opportunity Act, Medicare (1965), Medicaid (1965), the

transformation waned significantly over the next quarter century. The two-and-a-half decades since the end of the 1970's are notable for the relative absence of watershed social legislation. This episodic nature of major legislation raises a puzzle: Why the relative paucity of progressive social legislation following the orgy of statute-making in the mid-60s to late 70s period?

One explanation for this phenomenon is that Congress has become more polarized. To be sure, partisanship and polarization increased sharply over this period; and we can expect, therefore, that it would be much more difficult to reach the sort of compromise illustrative of the 89<sup>th</sup> through 92nd Congresses.<sup>17</sup> Yet, this explanation merely raises a second puzzle: What explains the troublesome and growing polarization within the contemporary Congress? To say that a polarized legislature made legislative compromise implausible begs the question of why legislators became so polarized. Moreover, the polarization explanation is hard to square with the evidence that the American public is considerably less polarized than are their elected officials.<sup>18</sup>

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Higher Education Act (1965), Head Start (1965), Model Cities, and the Urban Mass Transportation Act (1964).

<sup>17</sup>For an influential recent study of partisan polarization in the contemporary Congress, with a formulation of a model for measuring partisanship, see Sarah A. Binder, Stalemate: Causes and Consequences of Legislative Gridlock 90-105 (2003).

<sup>18</sup>See generally Morris Fiorina, Culture Wars and Related Myths about American Politics (2004).

In this paper, we suggest an explanation for the first puzzle, and, in so doing, shed new light on the second. Moreover, we draw from this explanation prescriptive lessons for scholars interested in promoting progressive social agendas through their exhortations to courts and legislators.

We begin with an observation: Many progressives both want Congress to pass more progressive legislation and for the courts to interpret existing legislation in a progressive manner, say through expanding the scope and coverage of progressive statutes. Though progressives pursue these agendas side-by-side, our analysis reveals that progressives can have only one of these two events. There is a tradeoff between these two progressive strategies; that is, the more courts pursue broad interpretations of progressive legislation, the less likely is new progressive legislation enacted by Congress. We call this insight the *paradox of judicial expansionism*: Expansionary reading of existing statutes by judges inhibits congressional passage of new progressive legislation.

The reason this logic holds concerns a key feature of legislative politics.<sup>19</sup> The standard legal approach to legislation is built on an implicit fiction, namely, that in the production of new

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<sup>19</sup> Although mostly ignored by legal scholars writing about the legislative process and statutory interpretation, this feature is described well by contemporary political scientists working within the rational choice tradition. See generally *Handbook of Political Economy* (B.

statutes, two sides or groups of legislators vie for votes of unaligned legislators. If the opponents win, the status quo is preserved; if proponents win, the new legislation passes. It follows from the logic of the standard approach that, to understand the meaning of an act, one ought to look to pronouncements of the proponents who wrote the legislation and shepherded it through the legislative process. After all, the proponents who wrote the legislation and negotiated its passage should be the most knowledgeable about the legislation's contents.

This fiction gives a false picture of the legislative process and, worse, prevents us from understanding how statutes are crafted through compromise. To pass their legislation, proponents of legislation typically must compromise with the moderates whose support is necessary to gain a majority (or, in the case of the Senate, to overcome a possible filibuster). These compromises materially transform the text of a proposal that cannot pass into one that does pass. These compromises are thus central to the production of legislation and to its meaning; and, to the extent that statutory interpretation is viewed as a search for legislative meaning, these compromises are central to an informed study of statutory meaning and legislative intent.

This perspective on coalitions and compromises implies that looking to what the proponents say about the legislation, particularly what they say *prior* to the central compromises necessary to produce the legislation, can be quite misleading about the final legislation's meaning. In many ways, bargains between proponents and moderates compromise the

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Weingast & D. Wittman eds. 2006. For a survey, see Daniel B. Rodriguez, "The Positive Political Dimensions of Regulatory Reform," 72 Wash. U. L.Q. 1, 22-26 (1994).

proponents' goals; for example, by making exceptions, by restricting the scope of the legislation's coverage, or by putting cumbersome procedures in place.<sup>20</sup> By hypothesis, proponents view these compromises as preferable to the status quo – if proponents did not, the legislation would simply fail. And, critically, these compromises are essential for the moderates to support the legislation. Therefore, to understand the contours of the ultimate legislative bargain, it is important to understand nature and scope of the compromise that enabled the bargain to pass Congress.

Enter the courts in the late 1960s and 1970s. Federal courts expanded a wide range of regulatory and other statutes.<sup>21</sup> Moreover, the means by which they did so typically involved undoing the compromises necessary to gain the moderates' support. In *Griggs v. Duke Power*,<sup>22</sup> *United Steelworkers v. Weber*,<sup>23</sup> and other key civil rights cases of the 1970's,<sup>24</sup> the Supreme

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<sup>20</sup>See text accompanying notes – infra.

<sup>21</sup>While our paper focuses on regulatory statutes, similar points could be made about the Great Society, War on Poverty, and Welfare legislation: this legislation was also confined to the same time period; and, as Shep Melnick has shown in the area of welfare policy, the federal courts also expanded the meaning of these statutes. See Shep Melnick, Between the Lines: Interpreting Welfare Rights (1994).

<sup>22</sup>401 U.S. 424 (1971).

<sup>23</sup>443 U.S. 193 (1979).

Court expanded the meaning of the 1964 Civil Rights Act beyond the compromise necessary to overcome the Senate filibuster.<sup>25</sup> In *Sierra Club*, the courts expanded the meaning of the 1970 Clean Air Act's provisions regarding so-called "pristine" areas beyond that allowed under the legislative compromise.<sup>26</sup> These judicial decisions were very much of a piece with this activist era. Judicial interpretations broadened the scope of every major regulatory initiative of this era, including voting rights, motor vehicle safety, consumer protection, and welfare benefits. To be sure, there were cases decided during this era that were non-expansionary, and even arguably contracted the scope of the statute. Yet, the more prevalent trend in federal judicial decisions, particularly in the Supreme Court and the influential D.C. Circuit, was expansionary. Courts

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<sup>24</sup>See, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). See generally Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy 1960-1972 (1990).

<sup>25</sup>See Daniel B. Rodriguez & Barry R. Weingast, "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation," 151 U. Penn. L. Rev. 1417-1542 (2003),

<sup>26</sup>See Mathew D. McCubbins, Roger Noll, and Barry R. Weingast, "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," 75 *Virginia Law Rev.* 431-82 (1989).

undid compromises in many other areas as well, implying private rights of action,<sup>27</sup> expanding the scope of reviewability of agency decisions under regulatory statutes,<sup>28</sup> and in various ways restructuring the terms of the statutory bargains.

Was this judicial expansion a good or a bad phenomenon? Ordinarily, the answer to this question depends upon one's underlying ideological position or one's view about the proper role of the courts or some combination of both factors. Participants in these debates have failed to see a critical interaction between judicial activism and legislative politics that has significant effects on the production of legislation.

In this paper, we reconfigure the inquiry from the rather unmoored question of whether statutory expansionism was good or bad to the inquiry of whether and to what extent this expansionism affected the dynamics of legislative policymaking in ways that facilitated or hindered the agendas of those who celebrated this activism in the name of progressive social values.

The modern positive political theory (PPT) of legislation and the legislative process gives us an especially helpful vantage point to assess this question. Along with other scholars in this

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<sup>27</sup>See, e.g., Cannon v. University of Chicago, 441 U.S. 677 (1979); Cort v. Ash, 422 U.S. 66 (1975); J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

<sup>28</sup>See, e.g., Daniel B. Rodriguez, "The Presumption of Reviewability: A Study in Canonical Construction and its Consequences," 45 Vand. L. Rev. 743 (1992).

PPT tradition, we emphasize the interactions among purposive institutions in the American policymaking process.<sup>29</sup> Careful attention to these interactions highlights the paradoxical quality of expansionist statutory interpretations.

The logic of our approach is this: Expansionist judicial behavior has a direct feedback effect on congressional politics. By undoing the very compromises necessary to secure an act's passage, courts effectively tell the moderates that they cannot have their compromises. When courts set aside moderate compromises, moderates come to realize that a vote today for the moderate version is likely to result later in an expanded version. Expansionist courts therefore force moderates to choose between the expanded, uncompromised version of the legislation, and the status quo. To the extent that moderates are only willing to support the legislation with the compromises intact, they will vote for the status quo and the legislative initiatives will thereby be defeated.

Our approach implies that the courts' expansionist interpretations of 60s and 70s social legislation has inhibited moderate legislators from working with other legislators to craft the sort of compromises that enabled the 1960s and 70s wave of legislation to become enacted.

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<sup>29</sup> See, e.g., Kenneth A. Shepsle & Mark S. Bonchek, Analyzing Politics: Rationality, Behavior, and Institutions (1997); Kenneth A. Shepsle & Barry R. Weingast, "Positive Theories of Congressional Institutions," 19 *Legis. Stud. Q.* 149 (1994); Terry M. Moe, "Political Institutions: The Neglected Side of the Story," 6 *J.L. Econ. & Org.* 213 (1990).

To put our thesis simply, legislators whose assent are critical in reaching statutory bargains are dissuaded from agreeing to support new legislation insofar as they believe that the courts will unravel these bargains to pursue broader agendas than the legislation allows. We suggest, therefore, a major paradox: Judicial efforts to pursue progressive aims through “dynamic” statutory interpretations<sup>30</sup> will backfire insofar as these efforts make it much less likely that the very progressive legislation that anchors such legal interpretations will see the light of day. This approach thus helps explain why the era of progressive legislation was bounded. The courts made the types of compromises necessary to produce this legislation untenable, helping to bring the era to an end.

We return to the second puzzle about the increasing polarization in Congress. As we show below, when moderate compromises are unavailable, the voting behavior of moderate members of Congress becomes less moderate. The inability to sustain moderate legislation forces moderates in Congress to take sides with more extreme measures, making their voting behavior – and hence voting scores used to measure polarization – more extreme. Expansionary judicial behavior therefore contributes to the growing polarization in Congress.

Our analysis has both positive and normative implications. Our positive political theory explains the paradox of expansionist interpretations. Further, we show how our positive model of the interaction of the legislative process and judicial practice in statutory interpretation has implications for a range of normative debates.

We develop our argument as follows: Section II lays out our theoretical approach to coalitions in Congress and intra-legislative bargaining, including the implications of this positive political theory for statutory interpretation. Section III examines what we mean by expansionist statutory interpretations. In Section IV, we describe the model of Congressional polarization and the effects of such polarization on statutory bargaining. We then expand on the paradox idea, examining in some detail one conspicuous episode of statutory expansionism, that is, the National Environmental Policy Act [NEPA] and the *Calvert Cliffs* decision,<sup>31</sup> the key case interpreting that statute. We complete our analysis of statutory expansionism and legislative behavior by considering more closely, in Section V, the normative implications of the paradox.

## **II. A Positive Political Model of Legislative Behavior and Statutory Enactment**

In earlier work, we and our PPT colleagues develop a theory of legislative bargaining and legislative rhetoric to help explain the dynamics of court/Congress relations with regard to statutory interpretation.<sup>32</sup> Understanding the role of statutory interpretation in legislative

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<sup>30</sup> See William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994).

<sup>31</sup> *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 442 F.2d 1109 (D.C. Cir. 1971). See text accompanying notes – infra.

<sup>32</sup>Rodriguez & Weingast, “New Perspectives”; McNollgast, “Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation,” *Law & Contemp. Probs.* 3 (Winter

policymaking is critical, since the courts play an active, enduring role in shaping statutes and thereby implementing public policy through their resolution of disputes over the meaning of ambiguous legislation.<sup>33</sup> Because our analysis in this paper builds directly upon this earlier work, we explain in this section the basic logic of the argument.

### A. Legislative coalitions

The traditional account of the legislative process undergirding the statutory interpretation literature implicitly assumes that statutes are the end-product of a struggle in which the bill's supporters battle with opponents and, following a process of negotiation within the coalition of supporters, legislation emerges. From the vantage point of legislative implementation, then, the spoils go to the "winners," with the proponents' views prevailing over the preferences of the opponents. So, for example, where courts avail themselves of legislative history in construing the meaning of ambiguous legislation,<sup>34</sup> the history (e.g., floor statements, committee reports)

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1994); see also McNollgast, "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," 80 *Georgetown L.J.* 705 (1992).

<sup>33</sup>See, e.g., Melnick, Between the Lines, *supra*, at 3-22.

<sup>34</sup>See, e.g., William Eskridge, Philip Frickey, & Elizabeth Garrett, Legislation: Statutes and the Creation of Public Policy (3d. ed. 2001).

crafted by the winners is typically accorded special weight;<sup>35</sup> correspondingly, self-serving statements about the meaning of the legislation by the losers – by those who unsuccessfully fought against the bill’s enactment – are given short shrift.<sup>36</sup> This view assumes that, to understand the legislation, look to the proponents who wrote the legislation; after all, they are the most knowledgeable about the legislation and hence the most authoritative as to its meaning and intentions.

Though this account accords roughly with the structure of majoritarian policymaking in Congress, it is misleading in fundamental respects. More typically, legislation is the product of a bargaining process among two or more rather different groups of legislators who comprise the

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<sup>35</sup> See, e.g., William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, Legislation and Statutory Interpretation 295-340 (2d ed. 2006).

<sup>36</sup> See, e.g., BankAmerica Corp. v. United States, 462 U.S. 122, 145 (1983) (White, J., dissenting) (“[T]he characterization of a bill by one of its opponents has never been deemed persuasive evidence of legislative intent.”); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24 (1976) (classifying remarks “made in the course of legislative debate” as “entitled ot little weight,” especially so “with regard to the statements of legislative opponents”); NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 66 (1964) (“[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.”).

coalition that supports the legislation.<sup>37</sup> One group is made up of *ardent supporters* of the legislation; these supporters can be relied upon to vote for a broad version of the proposed bill.<sup>38</sup> These supporters typically include the instigators and sponsors of the legislation, such as Senator Edmund Muskie and like-minded colleagues who played the leading roles in developing a major bill on clean air;<sup>39</sup> similarly, Senator Warren Magnuson was the ardent architect of a major initiative in consumer safety (attaching his name, in the end, to the Magnuson-Moss Warranty Act of 1975).<sup>40</sup> Without question, these ardent supporters are absolutely critical in formulating ambitious legislative proposals and in creating strategies for legislative enactment.

A second group of legislators, the *ardent opponents*, reliably oppose the legislation. These legislators seek to defeat the legislation and preserve the status quo. Their opposition is “ardent” in that there are seldom conditions that would lead them to support even a watered-

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<sup>37</sup> See McNollgast, “Legislative Intent,” *supra* n.--, at 6-25; “Positive Canons,” *supra* n.--, at 707-15.

<sup>38</sup> See Rodriguez & Weingast, New Perspectives, at 1439; McNollgast, Legislative Intent, at 19.

<sup>39</sup> See generally Shep Melnick, Regulation and the Courts: The Case of the Clean Air Act 30-35 (1983) (“From the time he sponsored the Clean Air Acts of 1965, 1967, and 1970 until he left Congress to become secretary of state, Senator Edmund S. Muskie was the political figure with the greatest influence on air pollution policy”).

<sup>40</sup> [Statutory cite] See generally David Vogel, Fluctuating Fortunes 135-36 (1989) (describing the origins and significance of the Magnuson-Moss Warranty Act).

down version of one or another legislative proposal.<sup>41</sup> The quintessential example of this coalition is the Southern Democrats and their commitment over the course of a century to defeating civil rights proposals.<sup>42</sup>

For major pieces of new legislation, seldom do either the ardent supporters or the ardent opponents comprise a majority of the legislature. Ardent supporters, for example, are typically insufficiently numerous to enact far-reaching (what we label, if inexactly, “progressive”) social legislation without the votes of a third group of legislators: the fence-sitting, *moderate* or *pivotal* legislators whose support for the legislation is more lukewarm, more conditional. This division of opinion is not because of any intrinsic characteristic of Congressional politics; rather, it is the product of historically (and durably) deep divisions among legislator preferences in the modern United States, divisions exacerbated by the anti-nationalism of the Solid South and also by the minority-protective structure of the U.S. Senate.<sup>43</sup>

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<sup>41</sup> See McNollgast, “Legislative Intent,” *supra* n.--, at 16-21; “Positive Canons,” *supra* n-, at 718-27. See also John Ferejohn & Barry R. Weingast, “Limitation of Statutes: Strategic Statutory Interpretation,” 80 *Geo. L.J.* 565, 575-76 (1992).

<sup>42</sup>See generally Taylor Branch, Pillar of Fire: America in the King Years 1963-65 (1998); Robert Mann, The Walls of Jericho: Lyndon Johnson, Hubert Humphrey, Richard Russell, and the Struggle for Civil Rights (1996).

<sup>43</sup>This phenomenon is reflected best in the filibuster and in other devices designed to make legislation difficult to enact See generally Eric Schickler, Disjointed Pluralism:

For these reasons, we focus attention on this third group.<sup>44</sup> This group is made up of legislators whose support cannot be counted upon to enact a broad version of a progressive statute; yet, at the same time, their support can be secured under certain conditions and circumstances.<sup>45</sup> The key conditions we focus on are significant changes to the proposed bill. In other words, pivotal legislators may be willing to support a more moderate version of a bill. Ardent supporters would prefer a stronger bill but, insofar as they believe that part of a loaf is better than nothing, they will compromise.

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Institutional Innovation and the Development of the U.S. Congress (2001); Keith Krehbiel, Pivotal Politics: A Theory of U.S. Lawmaking 23-24 (1998) (discussing the filibuster specifically); Barry R. Weingast & William J. Marshall, “The Industrial Organization of Congress; or, Why Legislatures, like Firms, Are Not Organized as Markets, 96 J. Pol. Econ. 132 (1988).

<sup>44</sup>See Rodriguez & Weingast, “New Perspectives,” *supra* n.-, at 1439-40; McNollgast, “Positive Canons,” *supra* n.-, at 718-27.

<sup>45</sup>We note the obvious point here that all legislators could, under certain circumstances, be categorized as pivotal, in the sense that presumably their price for support is not infinite. Even ardent opponents can be won over if the supporters are willing to pay dearly, either through a logroll or through major concessions. However, the scenarios in which ardent opponents come to support progressive social legislation are so rare (think of civil rights or environmental protection) as to without serious consequence for our model of legislative coalitions.

This description of the three key intra-congressional groups enriches the traditional account of legislation by refocusing attention from the idea that the desideratum of legislation is the “winner’s history,” to the more nuanced idea that legislation reflects bargains struck not only among the coalition of supporters but between coalitions of ardent supporters and moderates. While we do not argue that this describes *every* piece of modern social legislation, it describes most major initiatives of the era.

## B. Legislative bargaining

The bargaining process within Congress is structured by a complex set of rules, norms, procedures, and institutions. This structure does not devolve from nature,<sup>46</sup> or from the Constitution’s design,<sup>47</sup> but, rather, is the product of strategic action by purposive legislators

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<sup>46</sup>While some procedures and rules are common across legislatures, the bulk of these arrangements are particular to the legislative institution in question. For example, the fifty state legislatures in the U.S. have their unique features; moreover, the structure of decisionmaking in the House and Senate reflect considerable differences. Gary Cox provides the most generic framework for understanding the impetus for and major types of rules governing legislative activity. See Gary W. Cox, “The Organization of Democratic Legislatures,” in *Handbook of Political Economy* (Barry R. Weingast and Donald Wittman eds.2006, forthcoming).

<sup>47</sup> The U.S. Constitution is remarkably agnostic regarding the appropriate configuration of legislative structure and lawmaking design. The principal requirements of lawmaking spelled out in Article I, Section 7 are majority passage in both houses and presentment to the President

acting with variegated incentives and under the usual constraints.<sup>48</sup> While the focus in much of the recent literature on Congress has been on the ways in which these devices impede legislative policymaking by creating obstacles to passage,<sup>49</sup> we can see these devices, too, as structuring the processes of legislative bargaining. The structure of Congressional institutions both enables and

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for his consideration. The plethora of intra-Congressional institutions including, significantly, the role of committees, legislative leadership, and party activity, have developed in the shadow of the Constitution's delineation of Congressional authority; however, the attachments between this institutional architecture and Article I are rather thin.

<sup>48</sup>These "constraints" include the standard scarcity (time, information, etc.) circumstances, as well as whatever legal constraints are imposed on their activities. Recent works attempting to explain the internal structure and rules of Congress include: Cox, "Democratic Legislatures"; David Mayhew, Congress: the Electoral Connection (1974); Krehbiel, Information and Legislative Organization (1991); Gary Cox and Mathew McCubbins, Setting the Agenda: Responsible Party Government in the U.S. House of Representatives (2005); Legislative Leviathan: Party Government in the House (1993).

<sup>49</sup> See Shepsle & Weingast, "Positive Theories," supra n.--; see also Brian A. Marks, "A Model of Judicial Influence on Congressional Policymaking: *Grove City College v. Bell*," (Hoover Inst., Working Papers in Political Sci. No. P-88-7, 1988).

hobbles legislative initiatives.<sup>50</sup> The critical task of purposive legislators, then, is to negotiate legislative bargains within this complex architecture.

One basic strategy – perhaps *the* basic strategy – is compromise. Ardent supporters negotiate with moderate legislators to assure this pivotal group that their interests are taken effectively into account in constructing the statutory policy. Often this compromise entails leaving controversial provisions out; at other times, this means specifically limiting the impact of the policy in ways that appease pivotal moderates; elsewhere, legislators create complex procedures for an agency that advantage or promote the interests of some group or set of groups; and, as a final tactic, supporters may agree to provide opportunities for moderate legislators to exercise ongoing oversight (whether through “police patrols” or “fire alarms”) to assure that the statute will not move policy too far in one direction.<sup>51</sup>

As an example of the first strategy, consider the struggle over the enactment of the Consumer Product Safety Act of 1972.<sup>52</sup> As David Vogel recounts,<sup>53</sup> this Act was the product of

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<sup>50</sup> See David P. Baron & John A. Ferejohn, “Bargaining in Legislatures,” 83 *Am. Pol. Sci. Rev.* 1181 (1989).

<sup>51</sup> See Mathew D. McCubbins & Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” in Congress: Structure and Policy 426 (M. McCubbins & T. Sullivan eds. 1987).

<sup>52</sup>Pub. L. 92-573; 15 U.S.C.A. 2051 et seq.

myriad negotiations for nearly a decade, negotiations which resulted in a weaker bill, weaker in the sense that business interests were successful at curtailing federal efforts to create a truly national consumer protection law. For example, Congress declined to grant a broad private right of action to secure compliance with the Act, this notwithstanding the fact that the absence of such an enforcement device left the principal scope of decisionmaking to a complicated administrative agency process.<sup>54</sup> In the end, the CPSA was created as a sort of awkward adjunct to regulatory statutes such as the Magnuson-Moss Warranty Act (essentially an amendment to the Federal Trade Commission Act)<sup>55</sup> and the Occupational Health and Safety Act.<sup>56</sup> To prominent consumer advocates, the comparative weakness of the CPSA was the result, mainly,

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<sup>53</sup>See David Vogel, Fluctuating Fortunes: The Political Power of Business in America 59-112 (1989).

<sup>54</sup> See Vogel, *supra* n.--, at 88. See also Mark V. Nadel, Politics of Consumer Protection (1971).

<sup>55</sup>[Statutory cite.]. On the politics of the Federal Trade Commission and legislation during this era, see Randall L. Calvert, Mark J. Moran, & Barry R. Weingast, "Congressional Influence over Policy Making: The Case of the FTC," in Congress: Structure and Policy 493 (Mathew D. McCubbins & Terry Sullivan ed. 1987).

<sup>56</sup>See, e.g., Steven Kelman, "Occupational Safety and Health Administration," in The Politics of Regulation 236 (James Q. Wilson ed. 1980).

of compromises which omitted key elements of the original consumer protection proposals;<sup>57</sup> from another perspective, however, one might see these compromises as essential to enacting *any* federal legislation protecting consumers against dangerous products.

Examples of the second strategy are described in our previous analysis of the origins of the 1964 Civil Rights Act.<sup>58</sup> In the bargaining over that historic legislation, ardent supporters in the Senate, led by Hubert Humphrey and his allies, negotiated all summer long with Senator Dirksen, leader of the critical moderates whose support was necessary to break the Southern Democrats' filibuster. The compromise they struck limited in important ways the impact of the Act on Northern states;<sup>59</sup> as a consequence, the major brunt of the Act was borne by the South, and thus impacted the interests of Southern legislators who would oppose *any* version of the bill.<sup>60</sup> In a similar vein, supporters of the Clean Air Act, as Bruce Ackerman and William Hassler recount,<sup>61</sup> agreed to limit the impact of command-and-control air pollution regulations

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<sup>57</sup> See Vogel, *supra* n.--, at 87-90.

<sup>58</sup> See generally Rodriguez & Weingast, "New Perspectives," *supra* n.--, at 1452-98.

<sup>59</sup> For a description of the particular Dirksen amendments, see *id.* at 1488-90 Table 2 (entitled "Republican Changes to Blunt the Impact of the Bill on the North").

<sup>60</sup> See *id.* at 1490-94.

<sup>61</sup> See Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air (1981).

on key swing states (including, notably, West Virginia) in order to capture moderate legislators to their side.<sup>62</sup>

Mathew McCubbins, Roger Noll, and Barry Weingast provide several illustrations of the third approach.<sup>63</sup> The Consumer Product Safety Commission was encumbered with a complex offeror process by which the Commission would solicit others provide take the lead in writing regulations, thus blunting the impact of the Commission, a strategy also used by Congress to encumber toxic substances regulation.<sup>64</sup> Congress also strategically chooses assignment of the burden of proof to promote their goals.<sup>65</sup> Because the party assigned the burden of proof has the harder task, this assignment makes it less likely to prevail. Thus, the two different responsibilities of the Food and Drug Administration (FDA) have different assignments of the

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<sup>62</sup>See *id.* at 48-58.

<sup>63</sup>See Mathew McCubbins, Roger Noll, and Barry Weingast, “Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies,” 75 *Va. L. Rev.* 431 (1989).

<sup>64</sup> See Mathew D. McCubbins & Talbot Page, “The Congressional Foundations of Agency Performance,” 51 *Pub. Choice* 173, 184-86 (1986).

<sup>65</sup> See *id.* at 183. See also Mathew D. McCubbins, et al, “Administrative Procedures as Instruments of Political Control,” 3 *J.L. Econ. & Org.* 243 (1987).

burden of proof: to introduce new drugs, manufacturers must prove that the drugs are both safe and efficacious, while the FDA must prove that food manufacturers are unsafe.<sup>66</sup>

As for the fourth approach, perhaps the best example of the use of ex post oversight strategies to appease moderate legislators is the prolific use of the legislative veto device as a means by which legislators (frequently just one house of Congress) could check and balance policy by reserving the prerogative of disapproval.<sup>67</sup> This device was imperfect, of course, since it could be used only when a majority (presumably moderate legislators plus some ardent supporters) could be cobbled together to reign in rogue agencies; yet, this at least tempered the impact of an otherwise broad policy by providing a formal mechanism of Congressional review.<sup>68</sup>

Scholars assessing these episodes often reach two erroneous conclusions, one descriptive and the other normative. The erroneous descriptive conclusion is that these compromises made by ardent supporters were innocuous; that is, that moderate legislators failed to change in significant ways the architecture of the act. This conclusion is the standard wisdom with regards

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<sup>66</sup> See *id.* at 257.

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<sup>68</sup> This legislative veto strategy was impacted severely, though not irretrievably, by the Supreme Court's decision in Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

to the 1964 Civil Rights Act.<sup>69</sup> Nearly every scholar who has written about the origins of this historic statute downplays the impact of the Dirksen amendments, instead reinforcing the view propounded by Joseph Rauh, President Johnson, and Senator Humphrey, that the strong version of the bill sent over from the House and anointed by Senate liberals was passed by the Senate nearly intact.<sup>70</sup> Such a view, we have argued previously, misconceives the structure of bargaining; in particular, it devalues the pivotal role of moderate legislators whose assent is essential to reaching a bargain that can achieve majority (and, because of the filibuster, supermajority) support.<sup>71</sup>

We do not believe that the Civil Rights Act is unique in this regard. Support for the Voting Rights Act, the Clean Air Act, the National Environmental Policy Act, the Consumer

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<sup>69</sup> See Rodriguez & Weingast, “New Perspectives,” *supra* n.--, at 1456 (“The interpretation that reigns supreme in academic studies makes it appear as if civil rights legislation was all but certain by 1963”).

<sup>70</sup>See, e.g., Robert Loevy, To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964 38 (1990); Charles W. Whalen & Barbara Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act (1985); David B. Filvaroff & Raymond E. Wolfinger, “The Origin and Enactment of the Civil Rights Act of 1964,” in Legacies of the 1964 Civil Rights Act 9, 25-30.

<sup>71</sup>See Rodriguez & Weingast, “New Perspectives,” at 1476-98.

Product Safety Act, and other key pillars of the progressive social agenda of the 89<sup>th</sup>-92<sup>nd</sup> Congresses, all required critical compromises; compromises that meant that ardent supporters achieved less than they would have liked in an ideal world.

The second erroneous conclusion is prescriptive: Scholars who acknowledge that major social legislation reflected more measured compromises often despair at that fact; while celebrating the achievement, they wish Congress had enacted more far-reaching legislation. For instance, progressive scholars note that the limited scope of the original Voting Rights Act hamstrung the ability of the federal government to alter fundamentally the structure of representation throughout the United States.<sup>72</sup> Similarly, the Consumer Product Safety Act was enacted without key provisions (for instance, a private right of action) which would have enabled the federal government to bring to bear its considerable power to assure comprehensive safety for Americans by imposing major requirements on small and large manufacturers.<sup>73</sup>

The wish that Congress had enacted more far-reaching legislation often seriously underestimates the degree to which legislative compromises were necessary to enact *any* bill. After all, voting rights legislation of any serious magnitude had failed repeatedly in the years

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<sup>72</sup> See, e.g., Carol Swain, Black Faces, Black Interests: The Representation of African Americans in Congress (1993).

<sup>73</sup> See Vogel, Fortunes, supra n.--.

leaving up the 1965 Act;<sup>74</sup> the enactment of this bill required careful and cautious bargaining; indeed, when ardent supporters overshot their mark, as they did in 1966, a stronger legislative policy concerning voting crashed and burned.<sup>75</sup> Compromise, of course, is not good in and of itself. History must judge whether the adjustments necessary to secure passage were worth the price. Our principal point is that these compromises were critical to the passage of these watershed statutes.

### C. Legislative rhetoric

Where courts turn to the winners to understand the legislation, they invariably focus on the legislation's ardent supporters. Moreover, this view is reinforced in various ways by the ardent supporters themselves. The incentives to provide courts with interpretation of the legislation to reinforce ardent supporters' preferences go beyond mere credit-claiming or ego-boosting; rather, spinning legislative episodes in a way favorable to the actions and initiatives of the legislation's ardent supporters can and does impact public policy in important ways. To understand how and why this is so, we must consider the role of the courts in implementing policy through the interpretations.

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<sup>74</sup> See generally James L. Sundquist, Politics and Policy: The Eisenhower, Kennedy, and Johnson Years 259-71 (1968).

<sup>75</sup> See *id.*

Statutory interpretation represents a critical element in the process by which legislative policy takes shape.<sup>76</sup> As we discussed in the previous Section, the courts' approach to statutory interpretation is neither epiphenomenal nor automatic. Rather, everything turns on how the court approaches its interpretive responsibilities; and we can ascribe to the courts great influence over the configuration of legislative policy through its use of one or another interpretive method to resolve a dispute over the meaning of ambiguous statutory language.<sup>77</sup>

Legislators understand well this critical role of the courts and, instead of standing by idly and awaiting the decrees of the courts, they take steps to influence the process of statutory interpretation before it happens. Perhaps the most significant device by which individual legislators may exert influence is through the creation of legislative history. The positive political theory of legislation plausibly explains *why* legislators undertake efforts to make and use pre-

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<sup>76</sup>See Melnick, Between the Lines, supra n.--. See also George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy 1-41 (2003)

<sup>77</sup> See generally William N. Eskridge, Jr., "The Circumstances of Politics and the Application of Statutes," 100 Colum. L. Rev. 558 (2000); Peter Strauss, "The Courts and the Congress: Should Judges Disdain Political History?," 98 Colum. L. Rev. 242 (1998); Daniel Farber & Philip Frickey, "Legislative Intent and Public Choice," 74 Va. L. Rev. 423 (1988).

enactment and post-enactment statements to influence interpretive decisionmaking in courts.<sup>78</sup>

But *how* exactly do legislators do this?

We have explained previously how courts rely episodically on elements of proposed legislation in order to create historical support for one or another judicial interpretation. For example, in the debate over the 1964 Civil Rights Act, Senator Humphrey and his allies insisted that various amendments proposed by Minority Leader Dirksen and assented to by the liberal democrat/ardent supporters represented no serious change to the overall bill.<sup>79</sup> To be sure, moderates insisted on the contrary that these amendments *did* alter the bill significantly; yet, this dialogue illustrates the point that *all* legislators have a strategic interest in spin control, in propounding their own view about what the legislation “truly means.” We describe and analyze these efforts as part of a general *theory of legislative rhetoric*.<sup>80</sup>

We first distinguish *cheap talk*, that is, communication that is costless for the speaker to make and that is unverifiable and therefore untrustworthy. In contrast, *costly signaling* is

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<sup>78</sup>See generally Daniel B. Rodriguez, “Statutory Interpretation and Political Advantage,” 12 Int’l Rev. L. & Econ. 217 (1992).

<sup>79</sup>See generally Rodriguez & Weingast, “New Perspectives,” at 1442-48.

<sup>80</sup>See *id.* See also McNollast, “Legislative Intent,” *supra* n.--. at 3; McNollgast, “Positive Canons”, *supra* n.726-30.

communication where the speaker pays a price for inaccuracies.<sup>81</sup> The point of this distinction is that, in contrast to cheap talk, costly signals can be trusted; they therefore more accurately reflect the intent of those legislators whose support was most critical to securing assent to the final bill.<sup>82</sup> For example, speeches made at the introduction of legislation are cheap talk. This stage occurs before any of the legislative compromises necessary to pass the act and therefore cannot reflect the critical compromise provisions in the final act. Indeed, since so many more bills are introduced than are ever passed, these speeches involve fair amounts of “grandstanding” or playing to constituents about grand goals and aspirations rather than accurate portrayals of either the introduced legislative details or projections of those provisions likely to pass. Similarly, discussions after the legislation, in news conferences or memoirs are cheap talk: legislators typically do not pay a price for inaccurate assessments of the legislation in these circumstances.

In contrast, discussions on the floor of the legislative chamber that focus on the meaning of critical compromises offered in amendments are costly signals. Because they risk losing the votes of the moderates, ardent supporters pay a large price for attempts to downplay or inaccurately describe the compromise during floor debates preceding acceptance of the compromise. The same holds for committee reports. If these reports fail to describe accurately

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<sup>81</sup>On signaling generally, see, e.g., Jeffrey S. Banks, Signaling Games in Political Science 57 (1991).

<sup>82</sup>See *id.* at 1445-48. See generally Arthur Lupia & Mathew D. McCubbins, “Designing Bureaucratic Accountability,” *Law & Contemp. Probs.* 91, 94-95 (Winter/Spring 1994).

the compromises made in committee to report the legislation, members whose support was necessary to pass the bill from the committee to the floor may work against the bill's passage, thus discouraging the floor moderates from signing on to the legislation.

Another implication of this approach is that the theory of legislative rhetoric implies that the legislative record contains multiple interpretations of an act side-by-side.<sup>83</sup> Ardent supporters, on cheap talk occasions, typically propound expansionary readings of the act.<sup>84</sup> Yet moderates, emphasizing their compromises, focus on the act's limitations and compromises;<sup>85</sup> ardent supporters, on costly signal occasions after the compromises before an act's passage, will also accurately describe the act's limits.<sup>86</sup> The theory of legislative rhetoric also implies that statements by ardent supporters in costly signaling settings may well contradict their statements in cheap talk settings. These multiple and potentially contradictory statements therefore require careful attention to sort out trustworthy from untrustworthy information.

While the focus of the theory of legislative rhetoric is positive, we argue that this theory suggests a normative conclusion. In the real world, we observe that courts reinforce legislator incentives and efforts at spin control by using legislative history selectively. In particular, courts are drawn under traditional theories of interpretation toward the "winner's history;" they tend to look more closely at legislative statements of authors, sponsors, and other ardent supporters of

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<sup>83</sup>See Rodriguez & Weingast, "New Perspectives," at 1446.

<sup>84</sup>See *id.*

<sup>85</sup> See *id.*

legislation, on the not-improbable grounds that these legislators were most important to the development of the legislation.

The theory of legislative rhetoric suggests that this traditional approach is flawed because as it is based upon an erroneous depiction of the legislative process. Rather, given the structure of legislative coalitions and the strategic incentives of legislators, the proper task of courts is to sort out the various different and often contradictory statements made about the act over an often long and complicated legislative process. In the end, then, our prescription flips the typical approach to interpreting legislative history, by steering attention away from the expressed views of ardent supporters toward those of pivotal, moderate legislators and toward the ardent supporters' costly signals.<sup>87</sup>

#### D. Implications of the theory

The preceding discussion reveals three key insights about legislative behavior, insights that undergird our discussion in the next Part of judicial interpretation and activism: The first insight is that, in its processes of legislating, Congress is made up of multiple groups, including ardent supporters, ardent supporters, and pivotal, moderate legislators. Second, passage of legislation usually involves legislative bargaining among ardent supporters and moderates to assure, in the end, sufficient assent. And, third, legislators do not content themselves with

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<sup>86</sup> See *id.*

<sup>87</sup> Rodriguez & Weingast, "New Perspectives," *supra* n.--, at 1521-25; McNollgast, "Positive Canons," *supra* n.--, at 711-12.

passing the legislation but act strategically to spin the legislation, by manufacturing legislative history to suit their preferred directions.

The result of this rhetorical competition is the multiple components and contradictory legislative history upon which judicial interpretations must rely. These three mutually reinforcing conclusions frame the basic argument of this paper. Whatever the machinations of 535 federal legislators, it falls to the implementation process to determine how legislative policy will take shape.<sup>88</sup> Here, the courts' interpretive approach – and, in the end, their choice between one or another type of fidelity or, instead, a non-intentionalist form of judicial activism – profoundly impact legislative policy.<sup>89</sup> Courts that rely on the ardent supporters' cheap talk to interpret statutes are led to expansionary readings of the legislation, often undoing the compromises necessary to pass the legislation. Courts that rely on the moderates' and on the ardent supporters' costly signals will make interpretations closer to the spirit of the law as passed by Congress.

In the next three Parts, we consider how these impacts affect deleteriously the cause of progressive lawmaking. First, we use the theory in this section to define judicial expansionism. Second, we sketch out a model that explains the dynamics of judicial expansionism and

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<sup>88</sup> See generally James Q. Wilson, Bureaucracy: What Government Agencies do and Why they Do it 277-94 (1989); Eugene Bardach, The Implementation Game: What Happens After a Bill Becomes a Law (1977).

<sup>89</sup> See text accompanying notes -- supra.

Congressional polarization. And, third, we consider in depth how the courts' interpretations expand the scope of legislative bargains (focusing specifically on NEPA as an example).

### **III. What is Statutory Expansionism?**

Our claim that expansionist statutory interpretations have the paradoxical effect described in the introduction requires us, as a preliminary matter, to describe what we mean by “expansionist” interpretation. Is not one person’s expansionism another’s persuasive articulation of the meaning to be ascribed to broad purposes embedded in the statute’s text and history? While a comprehensive description of what underpins an “honest agent” theory of statutory interpretation is beyond the scope of this article, we do undertake here the task of explaining how expansionism can be separated from judicial fidelity to the revealed will of Congress.

#### **A. Modeling Statutory Expansionism**

Judges expand the statute when they interpret it to go beyond the meaning of the statute in two respects: first, when they go beyond the critical legislators’ understanding of what the statutory language he or she voted upon meant; and second, when the interpretation extends the act to cover more circumstances or require those covered by the act to do more. We view this expansion by looking at a simple spatial model of policy and judicial interpretations.

#### **Figure 1: Statutory Baseline and Judicial Deviations**

-----x-----L-----x\*-----Q-----

In this model, Q is the original status quo prior to the legislation. L is the legislation, and x and x\* are two variants of judicial changes. The degree of expansion is measured by the interval between x and L; this represents a departure from what the enacting coalition agreed upon. Interpretations pay fidelity to legislative intent when they can be said to mirror the meaning accorded to the particular statutory provision by its enactors at the time of the final compromises necessary to pass the act.

We address two additional wrinkles: First, although we do not focus squarely on this phenomenon in this article, the logic is symmetrical with regard to “contractionist” interpretations. Suppose that a court interprets a statutory provision in a way that departs from the understandings of the enacting coalition and, in doing so, narrows the scope of the statute. For example, a court might read into a statute onerous procedures for judicial redress, procedures that were not contemplated by the legislators whose support were pivotal to the act’s passage. In such a case, we see a departure from the baseline understanding. Therefore, the logic of our argument is symmetrical with respect to contractionist interpretations.

Second, we acknowledge that expansionist interpretations may be in either an ideological “leftward” or “rightward” direction. Expansionism is not, in our analysis, a synonym for liberal interpretations; nor are contractionist interpretations always conservative in orientation.

Consider a situation in which conservative Republicans gather together with moderate legislators to enact ideologically conservative legislation; here, the ardent supporters are conservatives, and the ardent opponents, liberals. Next, courts expand the meaning of the act by setting aside the compromises struck between Republican ardent supporters and moderates. These statutory constructions, which pull the statute in a more conservative direction, is expansionist in the sense we use this term. Similarly, judicial interpretations which narrow the scope of this conservative legislation are contractionist for such the same logical reasons.

The additions to the idea of expansionism are described in the next figure:

**Figure 2**

Liberal-----Q-----x\*-----L-----x-----Conservative

In this scenario, judicial interpretations may depart from the agreed upon baseline of statutory meaning in two directions.  $x^*$  represents a contractionist interpretation, that is, one that narrows the scope of the statute and thus moves policy away from L and toward Q, the status quo.  $x$  represents an expansionist interpretation, but here in a conservative direction. The degree of departure from statutory meaning is, again, measured by the interval between  $x$  and L and also by the interval between  $x^*$  and L.

Is there any good reason to focus especially on expansionist interpretations that reconfigure the statutory bargain in a liberal direction? From the logic of the argument just described, the answer is no. We are interested in expansionist interpretations not merely as in illustration of the well-trod point that courts depart from legislative will, thereby substituting their own judgment for the judgment the constitutionally authorized lawmaking branch of government but, rather, for the light it sheds on the paradox described in the introduction. The paradox is this: Advocates of progressive social legislation (ordinarily found on the left of the political spectrum) push their agendas in both Congress and the courts. Indeed, it is often the very same advocates of wide-ranging social legislation who are found, post enactment, in courts urging judges to give the statute a very progressive interpretation – an interpretation, as we show, that is beyond what Congress would have been able to enact into law if the option was presented to legislators in the initial instance. It is especially in these circumstances that the paradox arises. To be sure, where conservative activists push for wide-ranging social legislation and, further, push for interpretations that broaden its scope, the same paradox is revealed. And the logic of analysis applies in full force to these situations.

That said, we do draw examples from judicial interpretations during the 1970's especially which are relentlessly liberal.<sup>90</sup> Insofar as the focus in this and earlier work is on civil rights and environmental protection, the basic story is one of liberal judges expanding moderate legislation and thereby making it more difficult for legislation presumably favored by the very same individuals and groups who championed these expansionist decisions. The primary reason for this focus is that this era – roughly the mid-1960s through the end of the 1970's – is critical in

understanding the development of social regulation in the modern U.S. The decline of progressive lawmaking in the quarter century or so since reveals, as we suggest in this article's introduction, can be explained in part by the paradoxical expansion by courts of carefully crafted compromises. We leave to others to tell another story, perhaps one grounded in exactly the same logic we describe here, of conservative expansionist decisions in, say, the mid-1980's to the present. We do not deny that judges come to their tasks with diverse ideological bents; moreover, we do not deny that the judiciary, beginning with the election of Ronald Reagan in the early 1980's, begin to shift to the right of the ideological spectrum and thus some of this expansionism is curtailed. Yet, the story of the courts during the era which is our focus is illuminating for what it reveals about the incongruity among legislative politics, ideological-motivated strategies, and judicial approaches to the statutory interpretation. For this reason, we focus squarely, though hopefully not naively, on this era of more conspicuously liberal expansionism.

## B. Legislative Intent Revisited

Key to our analysis is the belief that courts can truly discern what the statute means by resort to the articulated views of pivotal – and typically moderate – legislators who support is necessary to pass the legislation. We have done so in previous work and we sketch out the basic logic here: To the extent that the statute's text forms the baseline of interpretation in

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<sup>90</sup>See text accompanying notes – supra.

adjudication, then the question of the courts' fidelity to the legislature is fairly straightforward.<sup>91</sup>

Despite the vigorous debate in the scholarly literature about the desirability of this "honest agent" account of statutory construction,<sup>92</sup> there is wide agreement – and uniform agreement among judges – that courts must implement the clear will of the enacting legislature to the extent that this will is manifest in the terms of the statute.<sup>93</sup>

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<sup>91</sup>To be sure, this is the basic assumption underlying so-called "textualist" theories of statutory interpretation. See, e.g., Jonathan T. Molot, "The Rise and Fall of Textualism," 106 *Colum. L. Rev.* 1 (2006); Caleb Nelson, "What is Textualism?" 91 *Va. L. Rev.* 347 (2005). However, the basic point that courts must be obedient to clear textual commands of the legislature is a generally accepted one. See Reed Dickerson, Interpretation and Application of Statutes 150-51 (1975).

<sup>92</sup> See, e.g., John F. Manning, "Constitutional Structure and Statutory Formalism," 66 *U. Chi. L. Rev.* 685 (1999); Martin H. Redish & Theodore T. Chung, "Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation," 68 *Tul. L. Rev.* 803 (1994); William N. Eskridge, Jr., "Spinning Legislative Supremacy," 78 *Geo. L.J.* 319 (1989); Frank H. Easterbrook, "The Supreme Court 1983 Term—Foreword: The Court and the Economic System," 98 *Harv. L. Rev.* 4, 60-66 (1984).

<sup>93</sup> See Eskridge, et al, Legislation, supra n. --, at --.

The traditional method by which federal courts discern the meaning of ambiguous legislation has been labeled intentionalism.<sup>94</sup> The basic premise of the intentionalist method is that the legislature's intent can be discovered by resort to legislative history and other extrinsic aids; this external evidence can illuminate the intention of legislators and, thus, the meaning of a statutory provision.<sup>95</sup> This view relies, of course, on the premise that the legislature can be properly said to have a collective intent. It relies, further, on the normative argument that the intent of the legislature is a suitable talisman for courts to use in discerning the will of the legislature. Both of these ideas have been vigorously debated in the statutory interpretation literature.<sup>96</sup>

The principal critique of the premise underlying the intentionalist enterprise is that it makes no sense to view the 535-member Congress as having a collective intent that can be

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<sup>94</sup> See the discussion in Mathew D. McCubbins & Daniel B. Rodriguez, What Statutes Mean: Positive Political Theory and the Interpretation of Federal Legislation Ch. 4 (ms. 2006).

<sup>95</sup>For an early statement of this idea, see Max Radin, "Statutory Interpretation," 43 Harv. L. Rev. 863 (1930).

<sup>96</sup>See, e.g., Eskridge, et al, Legislation, supra n.--, at 937-1039; Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 29-37 (1997); Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 S. Cal. L. Rev. 845 (1992).

recovered by the courts. Individuals, it is said, have intentions; collectivities do not.<sup>97</sup> Within the positive political theory framework, Kenneth Shepsle has immortalized the objection to notions of collective intent in his declaration that “Congress is a ‘They,’ not an ‘it.’”<sup>98</sup>

Without here canvassing the debate over collective intent, we pause to note two general rejoinders to this far-flung critique. First, with regard to the first, and rather philosophically flavored, objection, we note that the ascription of intentions to a collectivity such as a legislature is offered as a literal depiction of the mind states of this omnibus group but, following Daniel Dennett’s felicitous phrase, a “stance,”<sup>99</sup> an acknowledgment of the basic and banal point that collectivities can and do communicate to an audience and, in this communication, can assert directions that individuals follow conscientiously – indeed, the very notion of a legislature

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<sup>97</sup> Jeremy Waldron has argued against the notion of a collective legislative intent. See Jeremy Waldron, Law and Disagreement Chs. 1-2 (1999); “Legislators’ Intentions and Unintentional Legislation,” in Law and Interpretation: Essays in Legal Philosophy 329 (Andrei Marmor ed. 1995); “The Dignity of Legislation,” 54 *Md. L. Rev.* 633 (1995).

<sup>98</sup>Kenneth Shepsle, “Congress Is a ‘They,’ Not an ‘It’: Legislative Intent as Oxymoron,” 12 *Int’l Rev. L. & Econ.* 239 (1992).

<sup>99</sup>See Daniel C. Dennett, The Intentional Stance (1987). Cf. Joseph Raz, “Intention in Interpretation,” in The Autonomy of Law: Essays on Legal Positivism 249, 258-59 (Robert P. George ed. 1996).

issuing binding statutory commands presupposes at least this much.<sup>100</sup> There is, of course, much more to say about this complex debate, but the burden lies, we believe, on those who would reject legislative intent as a framework for discerning meaning to demonstrate that this concept is both incoherent and impossible to apply<sup>101</sup>.

A second rejoinder is directed specifically at Professor Shepsle's PPT-flavored objection to collective intent. Shepsle's criticism holds that a collective body cannot have a single intention, only many separate and, typically, contradictory ones. This criticism is underscored by the famous Arrow Impossibility Theorem<sup>102</sup> and the ubiquitous problem of the paradox of voting. In this view, legislative intent cannot be defined and, indeed, is an "oxymoron" in Shepsle's words. It is true, as the Arrow theorem shows, that a collective body cannot have a single, consistent will in the specific sense that it effectively has a coherent ranking of all policy alternatives. Nonetheless, we argue that the idea of legislative intent is sound and not an oxymoron.

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<sup>100</sup>See generally Cheryl Boudreau, Mathew D. McCubbins, and Daniel B. Rodriguez, "Statutory Interpretation and the Intentional(ist) Stance," 38 *Loyola L.A. L. Rev.* 2131 (2005).

<sup>101</sup>See also Arthur Lupia & Mathew McCubbins, "Lost in Translation: Social Choice Theory is Misapplied against Legislative Intent," 14 *J. Contemp. Legal Issues* 585 (2005).

<sup>102</sup>Kenneth A. Arrow, Social Choice and Individual Values (1963).

The reason is as follows. Suppose, per Shepsle,<sup>103</sup> that the legislature faces a voting paradox: A majority prefers alternative Y to X; Z to Y; but also X to Z. As Kenneth Arrow famously argued,<sup>104</sup> the cycle over these alternatives implies that the collective body has no consistent preferences over alternatives. Suppose also that the legislature first votes X against Y, winner against Z. The outcome of the first vote is Y; and the second, Z. Despite the cycle, the legislature has unambiguously settled on one of the alternatives, Z. In this framework, every legislator acknowledges that the legislature has passed alternative Z. The legislature's choice is unambiguous; although Z itself may contain ambiguities, every legislator knows that Z is not X or Y. Moreover, it matters not that other agendas (or orders in which the alternatives arise for a vote) would have yielded different final outcomes. The Constitution privileges *the* outcome passed by Congress regardless of how many alternatives were before them during the pre-enactment process.

Now let us turn to the thorny issue of "intent," a term not used thus far in the discussion. This term has two different meanings. In the first, intent is an intra-psychic term about the motives and understandings of a single individual. Some legislators may have voted for this measure because she intended that exactly this policy be implemented; another legislator may have voted for it because she thought it was good policy; and still others because it helped raise money from lobbyists. A different legislator may have voted for it because she intended that it be a stepping stone toward some other policy. And still another legislator may have voted for it because he was bribed by the leadership with a logroll-type promise to support a wholly different

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<sup>103</sup>See Shepsle, "Oxymoron," *supra* n.--, at 245-46.

piece of legislation. As this discussion suggests, the motives for legislators to vote for a measure can differ widely.

This notion of intent is so fraught with problems that it is nearly a useless concept: most legislators leave precious little evidence about this type of intent, and many legislators have strong reasons to keep their motives secret. Moreover, on complex legislation, it will be rare that a majority of legislators share a similar intent. For these and similar reasons, courts cannot discern this type of intent.

But another, simpler, notion of intent exists. Given an agenda of alternatives, X, Y or Z, did each legislator intend to vote for X over Y and Y over Z? In this sense, all informed legislators who vote for the same alternative have the same intention. When the legislature passes an alternative, a majority can have be said to have the intent to vote and pass X over Y. In particular, when amendments pass that transform the legislative text – as replacing proposal X above with proposal Y – all legislators who pay attention know that are voting X against Y.<sup>105</sup>

It is this second form that we define as *legislative intent*: the idea that a majority of legislators intends to pass the legislation as X but not as Y. This approach eschews any attempt to divine the reasons for why an individual legislature sought to support X over Y.

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<sup>104</sup>See Arrow, Social Choice, supra n.--, at --.

<sup>105</sup>See also Lupia & McCubbins, “Lost in Translation,” supra n.--.

### C. From Simple to Sophisticated Intentionalism

The principal critique of the normative premise that legislative intentions ought not to bind us is two-fold: first, critics complain that legislative intent cannot be reconstructed consistent with the Constitution and with sensible views of the respective institutional roles of Congress and the courts. This is the critique that underlies the new textualism.<sup>106</sup> Insofar as this critique rests on a complex view of the Constitution and its pertinent to theories of statutory interpretation, we bracket it and leave it until later. Second, and more to the point of our analysis here, some critics insist that the intent of Congress ought not to be relied upon because the evidence invoked by courts in support of one or another intent is famously unreliable.<sup>107</sup> This critique is encapsulated well in the famous statement attributed to the late judge Harold

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<sup>106</sup>See generally William N. Eskridge, Jr., “The New Textualism,” 37 *UCLA L. Rev.* 621 (1990). See also Antonin Scalia, “The Rule of Law as a Law of Rules,” 56 *U. Chi. L. Rev.* 1175, 1185 (1989) (“[W]hen one does not have a solid textual anchor . . . from which to derive the general rule, its pronouncement appears uncomfortably like legislation”); Frank H. Easterbrook, “Statutes’ Domains,” 50 *U. Chi. L. Rev.* 533 (1983).

<sup>107</sup> See Easterbrook, “Statutes,” *supra* n.--, at 536; John F. Manning, “Textualism as a Nondelegation Doctrine,” 97 *Colum. L. Rev.* 673 (1997); William N. Eskridge, Jr. & Philip P. Frickey, “Statutory Interpretation as Practical Reasoning,” 42 *Stan. L. Rev.* 321, 325-29 (1990).

Leventhal of the D.C. Circuit who observe that interpretation of Congress's legislative history is akin to looking over a crowded room and picking out your friends.<sup>108</sup>

In our view, both of these sets of critiques raise fundamental challenges to intentionalism as a theory of statutory interpretation. However, both are most applicable to what we call *simple* intentionalism. As we explain, *sophisticated* intentionalism weathers well these positive and normative criticisms.

The basic characteristic of simple intentionalism is that it has an unguided approach to discerning legislative intent from pieces of legislative history and various canons of statutory construction.<sup>109</sup> This view typically rests, as we have seen, on the view that the legislative battle is between two sides; to understand the legislation, look to the statements of those who wrote it. Simple intentionalism offers to courts only the injunction that they use as evidence of legislative intent sources that legislators make available for just that purpose. Moreover, no principles or guidelines are proposed for distinguishing the wheat from the chaff. This lack of guidance is particularly problematic in the case of federal legislative and legislative history for, as many

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<sup>108</sup>See Patricia M. Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term," 68 Iowa L. Rev. 195, 214 (1983) (noting Judge Leventhal's aphorism). See also Convoy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends").

<sup>109</sup>See text accompanying notes – supra.

scholars have noted, so-called historical evidence of legislator's intentions is unreliable and often contradictory.<sup>110</sup>

As an example, consider statements in the legislative record by supporters of the statute hoping to convince their colleagues to enact, and judges later to help implement, a sweepingly progressive public policy.<sup>111</sup> How do we measure whether and to what extent such statements capture well the beliefs and expectations of pivotal legislators, rather than just the hopes and dreams of one small group of legislators?<sup>112</sup> An approach to discerning legislative will that simply adopts the meaning attributed to a statute by just any statement made by a legislation's ardent supporter risks giving effect to the untrustworthy strategies of certain legislators. Moreover, statements at different times during the debate by the same ardent supporter are often contradictory – for example, when a proponent expresses the grand vision and potential of this legislation in an opening statement versus the same proponent explaining the major compromise provision on the floor prior to voting on that compromise. These contradictions seem to grant

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<sup>110</sup>See, e.g., Frank Easterbrook, “What Does Legislative History Tell Us?,” *Harv. J. L. & Pub. Policy*; Alex Kozinski, “Should Reading Legislative History be an Impeachable Offense?” *Suffolk L. Rev.*; Antonin Scalia, “The Rule of Law as a Law of Rules,” *U. Chi. L. Rev.*

<sup>111</sup> [Examples]

<sup>112</sup>On the distinction between legislator expectations and hopes, see Ronald Dworkin, “How to Read the Civil Rights Act,” in *A Matter of Principle* (1991).

judges freedom to rationalize limited or expansionary interpretations depending on which views they choose to rely.

While it is tempting to conclude from this discussion that legislative history is intrinsically unreliable, we resist that conclusion by emphasizing that there is available a more sophisticated form of intentionalism. This method endeavors to recover from the legislative record, with the use of carefully designed extrinsic aids, evidence of the legislature's real intent.<sup>113</sup> The principal insight of this sophisticated intentionalism is that the courts are guided in their efforts to discern legislative intent not particularly by extant statements of legislative intent, but, rather, by information created by legislators within the legislative process that sheds light on the bargain struck by those most critical to the negotiations over the final version. This will include, to be sure, legislators who are ardent supporters of the legislation; but, as we explain below, this will also include pivotal moderate legislators.<sup>114</sup>

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<sup>113</sup>See Rodriguez & Weingast, "New Perspectives," *supra* n.--, at 1448-51; McNollgast, "Positive Canons," *supra* n.--, at 711-18.

<sup>114</sup>While we have argued at length elsewhere for this version of intentionalism, see *id.*, we readily acknowledge that there are other sophisticated versions of intentionalism possible. Efforts to construct a template for sorting between useful and useless legislative history are in the spirit of sophisticated intentionalism; they take seriously the dynamics of the legislative process and endeavor to connect interpretive technique to the architecture of legislative policymaking. See, e.g., Eskridge & Frickey, "Practical Reasoning," *supra* n.--; Nicholas Zeppos, "Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory

The essential distinction between these two approaches, therefore, is that sophisticated intentionalism considers more systematically the structure of the legislature and its lawmaking processes as a means to steer through the seemingly contradictory statements made by different legislators. This approach grants the courts more capacity to separate real legislative intent from extraneous, often strategically constructed statements that do not accurately characterize the legislation that the legislature sought to pass. Sophisticated intentionalism is also a way to limit the discretion of judges to pick among the contradictory legislative indicia to support the interpretation they prefer.<sup>115</sup>

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Interpretation,” 76 Va. L. Rev. 1295 (1990). Similarly, theories that aim at correcting certain distortions in the legislative process are similarly valuable as refinements to the intentionalist enterprise; they take seriously the processes – good and bad – by which legislators negotiate and function. See, e.g., Eskridge, Statutory Interpretation, supra n.--, at 151-61 (evaluating the possibility that “statutory interpretation can ameliorate some dysfunctions in the political process”); Jonathan R. Macey, “Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,” 86 Colum. L. Rev. 223 (1986).

<sup>115</sup> See, e.g., Jane S. Schacter, “Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation,” 108 Harv. L. Rev. 593, 595 (1995) (“[D]emocratic legitimacy [in statutory interpretation] is measured not by the elimination of judicial discretion in statutory interpretation, but instead by the interpretive principles and default rules that shape and channel that discretion”).

This discussion can be reframed using the terms of our definition of intention and the theory of legislative rhetoric. In a typical situation, ardent supporters initially introduce a strong version of their legislation, S, which they hope to replace the status quo, Q. Ardent opponents hope to retain the status quo. As we noted, S typically will not pass, so the ardent supporters must bargain with the moderates to produce a new version of the legislation, S as amended, or A, that will pass. When this compromise succeeds, all members of the coalition – ardent supporters and moderates alike – intend to pass A over Q, not S over Q.

Now consider the theory of legislative rhetoric, which shows that the legislative record is likely to contain multiple and contradictory views about interpretation.<sup>116</sup> The statements of ardent supporters upon introducing S are likely to characterize S. They do not characterize A; indeed, these legislators may well not yet know the nature of the compromises necessary to pass a version of their legislation. Further, even once the compromise is produced, ardent supporters have strong incentives to convince the court that what they well know to be A is really S. In their cheap-talk settings, they are likely to explain how A is not much of a compromise from S;<sup>117</sup> the amendments transforming S into A were relatively minor;<sup>118</sup> or they may simply state that A accomplishes what S would accomplish.<sup>119</sup> But in their costly signaling capacity, ardent supporters are likely to characterize the differences between A and S accurately. Similarly, moderates once on board to support the legislation, will accurately characterize the legislation in

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<sup>116</sup> See text accompanying notes – *supra*, and sources cited therein.

<sup>117</sup> See Rodriguez & Weingast, “New Perspectives,” *supra* n.--.

<sup>118</sup> See *id.*

their costly signaling capacity (they may have incentives in cheap talk settings to over-emphasize the nature of their compromises).

Moreover, the theory of legislative rhetoric explains why judges have a choice in their statutory interpretation cases. Judges seeking to expand the meaning of the act will emphasize the ardent supporters' aspirational statements at the time of the bill's introduction and their cheap talk statements; whereas ones seeking to maintain the legislation will emphasize the ardent supporters' costly signals and the statements of the moderates.

The view of sophisticated intentionalism is to discern A, in particular, to discern the ways in which A differ from S. Doing so requires relying on the ardent supporters' and moderates costly signals.

Our view differs from textualists.<sup>120</sup> As with the latter, we agree that legislation contains contradictory statements and that the legislative record – if used haphazardly or with an idea of sustaining a particular interpretation – allows judges sufficient evidence to have the freedom to choose fidelity to the statute or to expand the statute. But unlike textualists, our approach does not eschew intentionalism or legislative indicia. Rather, sophisticated intentionalism and the theory of legislative rhetoric show how to steer through the contradictory statements in a way that helps create fidelity to the original legislative intent, namely, that members of the majority

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<sup>119</sup> See *id.*

<sup>120</sup> See text accompanying notes – *supra*.

coalition – ardent supporters and moderates alike – knew they had made a compromise A from the original proposal S and sought to pass A to replace Q.

Sophisticated intentionalism is well suited to the uncovering of the legislature’s pertinent intent for three reasons: First, judges can use this method and the available sources of evidence of meaning to examine carefully and critically the legislative process; this hard look draws a tighter connection between the law-interpreting enterprise and the law-enacting enterprise. Second, sophisticated intentionalism provides templates to help choose among the contradictory sources of legislative history. Though this distinction must be mapped out with care, this template provides a more nuanced basis for ascribing an intent to the large, strategically sensitive, group of legislators making up Congress as an institution. Third, and finally, sophisticated intentionalism limits discretion of judges and therefore limits the risks revealed by unmoored excavations into legislative history, risks captured felicitously by Judge Leventhal in his description of legislative history as random and malleable.

From one perspective, the approach to capturing legislative intent sketched above can be defended as a superior method of uncovering legislative meaning; in an earlier article, we have undertaken just such a defense.<sup>121</sup> Our purpose in describing sophisticated intentionalism in this paper, however, is more modest. We aim only to establish a plausible descriptive baseline of what is the interpretation that is consistent with the legislature’s revealed intent. From this baseline, we can ascribe the label “expansionist” to interpretations that depart from this will in

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<sup>121</sup>See Rodriguez & Weingast, “New Perspectives,” supra.

the direction of L in Figure 1 above. To sum up: *Where the court reads the statute to mean something beyond what its words and illuminating context provides, the court is expanding the meaning of the statute.*<sup>122</sup>

#### **IV. The Paradox of Statutory Expansionism**

It is a commonplace to note that members of Congress became substantially more polarized beginning in the late 1970's. "Although no one doubts the reality or historical importance of this development," political scientist Gary Jacobson writes, "consensus on its

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<sup>122</sup>This framework, we emphasize, refers only to the interpretation given to the statute by a court. We do not mean to confuse the issue of statutory expansionism with statutes created by Congress that expand the scope of, say, individual rights or administrative power. Certainly, much of modern social legislation is expansive, in that sense that it enhances the rights and regulatory expectations of individuals within the statute's scope; moreover, Congress frequently expands protections previously established via legislation, as where it amends legislation to broaden the statute's scope. So, for example, Congress has occasionally expanded the scope of voting rights protections by amending its lodgestar 1965 Act. These statutory expansions must be distinguished from certain court decisions which arguably have expanded the scope of the statute beyond the meaning assented to by members of the key coalitions in Congress when the law was passed. In our view, statutory expansions implemented by Congress are entirely proper; expansions carried out through interpretations are considerably more controversial. And it is these latter expansions that occupy our attention here.

etiology has proven elusive.”<sup>123</sup> Many scholars point to various endogenous factors, including changes in legislative rules and other intra-legislative changes.<sup>124</sup> Others insist that this polarization is the product of electoral change, including changes in the electoral base caused by redistricting, the Voting Rights Act, and other factors.<sup>125</sup> Although “[t]hese explanations are not necessarily mutually exclusive,”<sup>126</sup> a key dividing line between these various explanations of polarization involves the empirical question whether polarization happens mainly through the phenomenon of replacement of more moderate, with more extreme, legislators, or whether legislators “convert” or “adapt” over time in a way that polarizes Congress as a whole. While

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<sup>123</sup>Gary Jacobson, “Explaining the Ideological Polarization of the Congressional Parties since the 1970’s” at 2 (ms. on file, 2003).

<sup>124</sup>Sean Theriault summarizes this view: “First, the House rules have become so restrictive that it is difficult for moderates to demonstrate their moderate ideologies . . . Second, the political issues debated by Congress today are much more ideological. Third, the party leaderships of both Democrats and Republicans in both chambers have become more explicitly ideological.” Sean Theriault, “The Case of the Vanishing Moderates: Party Polarization in the Modern Congress” at 3 (ms. on file, 2004).

<sup>125</sup>See, e.g., Jeffrey Stonecash, et al, Diverging Parties: Social Change, Realignment, and Party Polarization (2003); Carson, Crespín, Finnocchiaro, & Rhode, “Linking Congressional Districts Across Time: Redistricting and Party Polarization in Congress” (ms. on file, 2003).

<sup>126</sup>Theriault, *supra* n.--, at 3.

debate rages over this question,<sup>127</sup> there is strong evidence that at least a substantial portion of the polarization in Congress can be attributed to shifts in the behavior of incumbent legislators. The basic problem is that moderate legislators, face reduced incentives to behave moderately, are moving away from the middle and toward the extremes. Compromise which requires negotiation at the ideological middle, therefore, is proving to be increasingly difficult to achieve. And to the extent that moderate/ardent supporter agreements are critical to get progressive legislation passed, these movements redound particularly to the detriment of the left side of the political spectrum. Of course, a full-blown analysis of the causes of legislative polarization lies beyond the scope of this paper. However, our focus on some plausible causes of this polarization and also on the effects of this polarization for progressive state-making helps illuminate this vexing subject.

In the next section, we develop a simple spatial model that demonstrates a causal relationship between judicial activism and congressional polarization. Although we do not claim that judicial activism is the sole explanation for polarization, it is a heretofore unnoticed causal factor contributing to the growing polarization over the last three decades of the twentieth century.

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<sup>127</sup>Compare Keith Poole, “Changing Minds? Not in Congress!” (ms. on file, 2003) (legislator views are stable across their career) with Jacobson, *supra* at 20 (“members do change ideological location over time”) and Jeffrey Roberts & Steven Smith, “Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971-2000,” 47 *Amer. J. Pol. Sci.* 305 (2003).

### A. A Model of Judicial Expansionism and Congressional Polarization

To understand the effects of an activist court on congressional voting and legislation, we provide a simple voting and agenda model of Congress. What follows is an extended example, but we believe that it illustrates a general point.

James Snyder's pioneering argument about "artificial extremism" was the first to observe systematic problems in voting scores of this sort.<sup>128</sup> Using a simple model, Snyder showed that voting scores did not accurately reflect differences in legislator preferences. This is in part because the legislative agenda process restricts what members vote on, so that there is a bias in scores.

Our analysis builds on Snyder's work and takes place in two stages. We first model the Congress prior to the appearance of an activist judiciary. This reveals both the range of bills that are passed and how members of Congress will vote. We then study the effects of an activist judiciary by performing a comparative statics analysis of the previous model; this shows how an activist judiciary alters bill passage and congressional voting. An important result is that the

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<sup>128</sup>James M. Snyder, "Artificial Extremism in Interest Group Ratings," *Legislative Studies Quarterly*, August (1992).

model shows how voting scores can differ dramatically from preferences; this result will prove central to our interpretation of the effect of an activist judiciary on the legislature.

For the purposes of our analysis, we assume, first, that the majority party in Congress control the agenda or those issues that come up for a vote. As Gary Cox and Mat McCubbins explain, this implies that potential legislation that would command a majority but would make most of the majority party worse off are kept off the agenda and never arise for a vote.<sup>129</sup> Second, to become law, all legislation requires that a majority of legislators vote in favor of the legislation. Third, the legislature is subject to a filibuster by any subset of members. Before any proposed legislation subject to a filibuster can be brought up for a vote before the legislature, the legislature must first vote cloture, which requires that a supra-majority of the legislators vote for cloture.<sup>130</sup>

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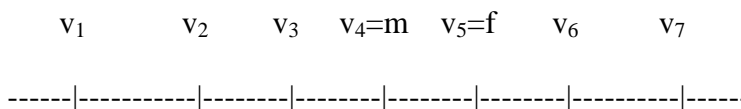
<sup>129</sup>See Cox & McCubbins, Setting the Agenda, supra n.--, at 37-49. Alternative assumptions about agenda power could be employed, see, e.g., John H. Aldrich, Why Parties? The Origin and Transformation of Party Politics in America (1995); Kenneth A. Shepsle, "The Changing Textbook Congress," in Can the Government Govern? (John Chubb & Paul Peterson eds. 1989), so that the results that follow do not depend on the party agenda control model.

<sup>130</sup>This approach builds on the pivotal politics models of and Keith Krehbiel, Pivotal Politics: A Theory of U.S. Lawmaking (1998) and David W. Brady & Craig Volden, Revolving Gridlock (1997).

To make the model simple, we study a seven-person legislature. We assume a single issue over which the legislature will vote, perhaps reflecting a standard left-right political continuum (see figure 1). Legislators are assumed to have preferences over policies;<sup>131</sup> each has an ideal policy she prefers to all others; and, further, each legislator prefers policies closer to her ideal policy to those further away. We label the legislators or voters  $v_1$  through  $v_7$ , with the labels appearing above the continuum.

This structure implies that, when faced between a proposed policy alternative and the status quo, each legislator votes for the one closest to her ideal policy. Notice from the figure that the distribution of preferences is centrist in the sense that most of the legislators have ideal policies located in the center of the political spectrum. For simplicity, we assume that the legislators  $v_1 - v_4$  are members of the majority party while legislators  $v_5 - v_7$  are members of the minority.

**Figure 3: Distribution of Preferences in the Legislature**



We next consider a series of votes under the assumption that, in its statutory interpretation decisions, the judiciary faithfully attempts to implement the policy chosen by the

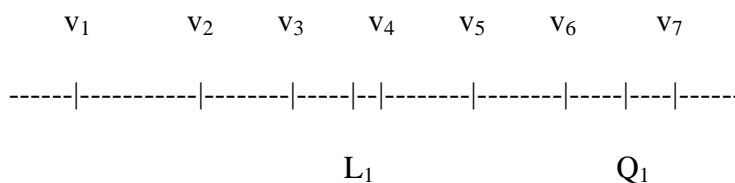
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<sup>131</sup>See id.

legislature. We consider three different votes, each with a status quo,  $Q$ , and a proposed piece of legislation,  $L$ . The subscripts on  $Q$  and  $L$  represent the vote number, 1-3.

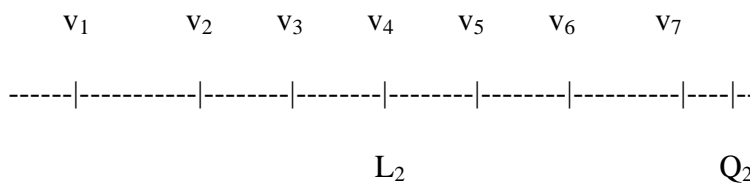
Figure 3 presents the first vote, between legislative proposal  $L_1$  and status quo,  $Q_1$ . Labels for the policy alternatives appear below the line. Five of the seven legislators favor the legislation ( $v_1 - v_5$ ), so not only does  $L_1$  command a majority, but it will not be subject to a successful filibuster. Legislators six and seven oppose the legislation.

**Figure 4: First Legislative Proposal,  $L_1$ , and Status quo,  $Q_1$**



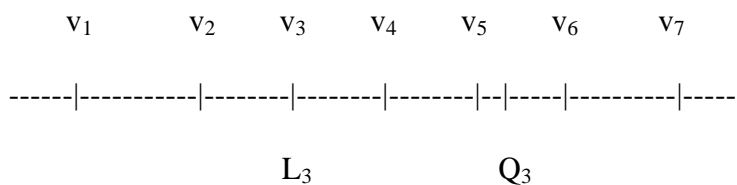
The second vote considers a status quo at  $Q_2$  and a legislative proposal at  $L_2$ . Although the alternatives are in somewhat different positions, the same coalitions form to support and oppose the legislation.

**Figure 5: Second Legislative Proposal,  $L_2$ , and Status quo,  $Q_2$**



Finally, consider the third vote. In this case, the status quo,  $Q_3$ , is less extreme than on previous votes. The proposed legislation,  $L_3$ , commands a majority of votes, with voters 1 through 4 in favor. Yet voter 5, the filibuster pivot, prefers the status quo, so the bill will be subject to a filibuster and the vote on will cloture fail 4-3, with voters 5 through 7 voting against.

**Figure 6: Third Legislative Proposal,  $L_3$ , and Status quo,  $Q_3$**



Next, we compute voting scores for these legislators. Voting scores are summary statistics that, in this case, reflect the percentage of times a legislator votes in favor of legislation that moves policy in a particular direction (e.g., to the left).

Table 1 provides the voting records for all seven legislators and computes their voting scores. The first two columns report the number of yes and no votes, respectively; the final column reports the voting score, the proportion of times that a voter votes in favor of left-moving legislation.

All members of the majority party have the same voting record (they all vote in favor of all legislation); they therefore have the same voting score, 100. Members of the minority, however, have a variety of scores. Voters 5 and 6 are moderates and vote moderately. Each votes sometimes with her party, sometimes with the majority, giving them voting scores of 67 and 33, respectively. Minority voter 7 votes against every bill proposed by the majority party, thus a voting score of 0.

**Table 1: Voting Scores for the Legislature  
(No Active Judiciary).**

Legislator	Vote		Voting Score
	Yes	No	
v <sub>1</sub>	3	0	100
v <sub>2</sub>	3	0	100
v <sub>3</sub>	3	0	100
v <sub>4</sub>	3	0	100
v <sub>5</sub>	2	1	67
v <sub>6</sub>	1	2	33
v <sub>7</sub>	0	3	0

Therefore, voting scores do not accurately characterize legislator preferences. Even though the members of the majority party have significantly different preferences, they all have the same, extreme voting score: they all support the left-moving measures 100 percent of the time. Indeed, the voting scores induce an “artificial extremism” in the sense that they make the legislature appear more polarized than it actually is.<sup>132</sup> Although member preferences were constructed to be centrist – most have preferences in the middle of the policy space – the voting

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<sup>132</sup>See Snyder, “Extremism,” supra n.--.

scores of five members are at the extremes even though the ideal policies of two voters are extreme.

The analysis thus far assumed that legislators believed that the courts faithfully attempt to implement the policy chosen by the legislature. Suppose instead that the legislature faces an activist judiciary, one that seeks to expand the interpretation of the legislation. To operationalize this assumption, we assume that when faced with statutory interpretation decision about the meaning of a particular law, the courts move policy to the left. To make the calculations simple, suppose that all laws are moved to voter 3's ideal policy.

If legislators ignored the activist judiciary, then their voting records would remain the same as that calculated above. If, however, legislators understand that the judiciary will move policy to the left, then they know a vote for the proposal being considered by the legislature is not a vote for that policy, but a vote for the policy in place *after* the judiciary expands the meaning of the act.

An anticipated activist judiciary changes the meaning of the law passed by the legislature. The vote on the first legislative proposal,  $L_1$ , still commands a majority, but now cannot achieve cloture. This legislation therefore fails, with every minority voting against. The second proposal,  $L_2$ , will pass as before: although the expansionary reading of this act is further to the left, the filibuster pivot,  $v_5$ , still prefers the legislation to the status quo, so cloture can be achieved and the legislation passed. As before, the third legislative proposal fails.

We report the voting records and associated voting scores for the legislature in the presence of an activist judiciary in table 2. The differences between the two settings are dramatic. Nothing about the legislature has changed. The distribution of preferences remains identical, as does the content of the bills and the status quos against which they are pitched. All that has changed is the assumption about how the judiciary treats legislation.

**Table 2: Voting Scores for the Legislature  
(An Active Judiciary).**

Legislator	Vote		Voting Score
	Yes	No	
v <sub>1</sub>	3	0	100
v <sub>2</sub>	3	0	100
v <sub>3</sub>	3	0	100
v <sub>4</sub>	3	0	100
v <sub>5</sub>	1	2	33
v <sub>6</sub>	0	3	0
v <sub>7</sub>	0	3	0

An expansionist judiciary has several effects on legislation. First, consistent with our argument in this article, fewer proposals pass the legislature. Because the judiciary alters the meaning of an act – that is, it moves the act’s position in the policy space – legislators vote on the legislation based on how it will be interpreted, not on the legislative text as negotiated in the legislature. Fewer bills will therefore pass.

Second, the legislature appears to become more polarized. Using voting scores to assess legislators, the moderates appear to have disappeared from the legislature. When courts do not accept moderate bills but instead expand the meaning of the legislation, they force moderates to choose between more extreme legislation and the status quo. Being moderates, they prefer moderate policies over the extremes. But an activist judiciary transforms moderate policies into more extreme ones. Per the simple model above, many moderates react to an activist judiciary by simply voting no – they prefer the legislation as written, but not the legislation as expanded by the judiciary. Voter 6 now votes exactly as her extreme partisan colleague, voter 7; and voter 5 has moved away from siding more frequently with the opposite party to siding two-thirds of the time with her party. These legislators, moderate in their preferences, give the appearance through voting of being more extreme than they are, as do the moderates in the majority party. This extremism is, recalling Snyder’s description, “artificial” in that the voters would under other circumstances behave more moderately and thus more consistent with their middle-of-the-road preferences;<sup>133</sup> however, the result for the legislative bargaining process is the same as it would be if there were simply no moderate legislators. Of course, in a seven person example, the behavioral change appears small, affecting only two of the seven voters, or twenty-eight percent. But if we increased the number of legislators to 100, still retaining the uniform distribution, then the behavior change would affect on the order of twenty-eight legislators, a sizeable portion of the legislature. Moreover, 100 legislators would allow the majority party to contain legislators to the right of the median, and these legislators would have moderate scores under the assumption of courts as faithful agents.

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<sup>133</sup>See Snyder, “Extremism,” supra n.--.

Third, the approach yields another implication not shown above. The above model ignored where the legislative proposals came from. Reflecting the power of the filibuster pivot to prevent legislation, modern pivotal politics models of legislative bargaining argue that the majority's proposals must take into account the minority's preferences in order to gain support for cloture.<sup>134</sup> Often, this entails direct bargaining between the proponents of the legislation with those among the minority whose support is needed to vote for cloture. The above model shows that this will typically be the moderate minority members.

If moderate minority members believe, however, that the deals they negotiate in order to support cloture will be undone through expansionary readings by the courts, then they are not likely to bother negotiating these deals in the first place. Hence, the legislature will negotiate fewer moderate proposals and thus make fewer proposals. An activist judiciary makes negotiating legislation harder.

We bring the model back to the article's main point: All major legislation addressing fundamental problems must overcome a filibuster; to be meaningful, this legislation must represent a major change in the status quo. The last conclusion above yields the *paradox of an expansionist judiciary*: Judges are activist when they seek to promote more progressive legislation by expanding the scope of legislation beyond the agreed upon statutory terms and understandings. In spatial terms, they are expansionist when they move the legislation away from

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<sup>134</sup>See Krehbiel, Pivotal Politics, supra n.--, at 93-117 (describing "filibuster pivots").

the moderate compromise and the original status quo. Yet, judicial activism of this sort has just the opposite effect on the legislature. By preventing moderates from making deals that will gain their support for major legislation, judicial expansionism implies that the legislature negotiates and passes fewer major laws. Paradoxically, an activist judiciary may reinterpret existing legislation more progressively, but it makes new progressive legislation less likely.

As noted in the previous Part,<sup>135</sup> this logic applies to contractionist interpretations as well. Where courts, through their interpretations, move the statute away from the understandings of the enacting coalition in a narrowing direction, this, too, makes it more difficult for moderate legislators to reach agreements with ardent supporters. Legislators, then, are pushed to artificial extremes for the same essential reasons.

## B. Illustrations of the General Thesis

“Smoking gun” evidence of our thesis is difficult to assemble. Seldom do legislators make the effort to explain that, but for the risk of statutory expansionism, they would have voted for a particular piece of legislation. And, like the dog that did not bark in the Sherlock Holmes story, it is notoriously difficult to identify a precise cause for why Congress failed to enact one or another progressive statute.

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<sup>135</sup>See text accompanying notes at – supra.

That said, we believe that the preceding model of Congressional polarization and its impact on legislative bargaining can be supported by evidence of judicial behavior and legislative consequences during the critical era of the 1960's through 80's. Looking at the landscape from a bird's eye view, we see courts during this era expanding significantly the scope of moderate statutory bargains; thereafter, Congress proves incapable or unwilling either to overturn these expansionary decisions (a not surprising result, for reasons we have described previously) or to augment progressive protections in these key policy areas by enacting new statutes. To be sure, this statutory expansionism abates in the mid-1980's and beyond, as more "conservative" courts construe civil rights and other progressive statutes more narrowly than before.<sup>136</sup> Yet, a careful look at this pre-retrenchment era is significant in that it gives us a new perspective on the hoary debate between liberals and conservative activists about what sort of judicial approach and attitude regarding the interpretation of progressive statutes makes the most sense.

As a way into the general theory, we examine in some detail the court of appeal's decision in a watershed environmental law case of the early 1970's, Calvert Cliffs' Coordinating Comm. V. U.S. Atomic Energy Comm'n.<sup>137</sup> In that case, the D.C. Circuit interpreted – and, we argue, *expanded* – the scope of the National Environmental Policy Act of 1969. The dynamics of this enactment/expansion episode helps illustrate the paradox we describe. Moreover, we

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<sup>137</sup>449 F.2d 1109 (D.C. Cir. 1971).

argue that this episode is not unique; we observe similar dynamics with regard to key progressive statutes of the period.<sup>138</sup>

### 1. NEPA and Calvert Cliffs

In 1969, following spirited debate and years of negotiation, Congress enacted the National Environmental Policy Act [NEPA].<sup>139</sup> This act established a series of regulatory responsibilities, imposing duties on federal agencies to ensure that their actions took appropriate account of environmental effects. Though the requirement of “environmental impact reports” is the best known element of NEPA, equally significant as a matter of procedural consequence is the requirement that agencies give great attention to environmental considerations in the performance of their tasks. As expressed by the principal supporters (by any measure, *ardent* supporters) of the Act, Senators Edmund Muskie of Maine and Henry “Scoop” Jackson of Washington, these requirements are “action-forcing” and will ensure that “[n]o agency will be able to maintain that it has no mandate or no requirement to consider the environmental consequences of its actions.”<sup>140</sup>

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<sup>138</sup>See Rodriguez & Weingast, “New Perspectives,” *supra*.

<sup>139</sup>42 U.S.C.A. Section 4321 *et seq.*

<sup>140</sup>Hearings on S. 1075, S. 237, and S. 1752 Before Senate Committee on Interior and Insular Affairs, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess. 116, 206 (1969).

By any measure, NEPA is an historic, far-reaching piece of environmental legislation. In relatively few words, NEPA encapsulates the value and imperative of maintaining an active eye on public and private activities to ensure that environmental values are considered before decisions are made.<sup>141</sup> The injunction expressed in Title I, labeled the “Declaration of National Environmental Policy,” is “to use all practicable means and measures . . . to create the maintain the conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.”<sup>142</sup> The remainder of the Act provides various procedural requirements for agencies to follow in implementing its environmental responsibilities under the statute.

From the beginning, environmental interest groups urged on federal agencies and the courts an interpretation of NEPA that would have required substantive responsibilities.<sup>143</sup> Reading NEPA this way would obligate agencies to give effect to environmental concerns and considerations; and, critically, these obligations *would flow directly from the terms of this Act*, and not from other environmental statutes such as the Clean Air and Water Acts. This rendering

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<sup>141</sup> For a considerably more skeptical account of NEPA and its potential by a leading environmental law scholar, see Joseph Sax, “The (Unhappy) Truth About NEPA,” 26 Okla. L. Rev. 239 (1973).

<sup>142</sup> NEPA, Section 101(a).

<sup>143</sup> See the discussion of in *Stryker’s Bay* litigation at text accompanying notes – infra.

of NEPA as a font of substantive obligations was rejected repeatedly by relevant federal agencies, the lower federal courts, and, eventually by the United States Supreme Court.<sup>144</sup>

In addition to these efforts to move the statute from a procedurally focused, to a substantively focused, one, advocates also pushed hard for an interpretation that would require agencies to replace their existing environment-pertinent procedures with new procedures mandated by NEPA. If this interpretation were accepted, the change would be a significant one. Many federal agencies had already addressed the problem of how to deal with environmental issues, and some had adopted procedures for doing so.

For example, under this interpretation, the Atomic Energy Commission [hereinafter “the Commission”] would have to scrap a comprehensive set of regulations in return for a new series of procedural guidelines designed to ensure greater attention to the environment than either the agency or Congress at the time it enacted the agency’s organic statute decreed.

The controversy over this matter reached the influential D.C. Circuit Court of Appeals in 1971 in *Calvert Cliffs*. This case raised two issues, a technical one and a broader one. The technical issue concerned whether the Commission’s existing rules precluding consideration of

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<sup>144</sup>See, e.g, Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989); Strycker’s Bay Neighborhood Council, Inc., v. Karlen, 444 U.S. 223 (1980). See also Daniel Mandelker, “NEPA Alive and Well: The Supreme Court Takes Two,” 19 *Envtl. L. Rep.* 10385 (Sept. 1989).

nonradiological environmental issues unless specifically raised in a proceeding would hold, thus allowing some, but not all environmental issues to be raised before the Commission. The larger issue, as noted by Judge Skelley Wright for the court, was whether the Commission's extant procedures, formed in part under existing environmental laws, must give way to new procedural requirements originating in NEPA.

The D.C. Circuit held in favor of the environmental group bringing the action – the Calvert Cliffs' Coordinating Committee. For reasons we explain below, this interpretation of the young NEPA expanded the scope of the Act beyond what the enacting coalition of legislators intended and expected; and this and other similar expansions contributed to the polarization in Congress with regard to environmental policy in the subsequent decades.<sup>145</sup>

“Our duty,” announces Judge Wright at the beginning of his opinion, “is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”<sup>146</sup> From this grand encomium to the large

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<sup>145</sup> Other expansionist decisions decided during this era include Public Serv. Co. of New Hampshire v. United States Nuclear Regulatory Commn., 582 F.2d 77 (1<sup>st</sup> Cir.), cert denied, 439 U.S. 1046 (1978); City of Rochester v. United States Postal Service, 541 F.2d 967 (2d Cir. 1976); Environmental Defense Fund v. Mathews, 410 F. Supp. 336 (D.D.C. 1976); McDowell v. Schlesinger, 404 F. Supp. 221 (W.D. Mo. 1975); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Or. 1971).

<sup>146</sup>449 F.2d at 111.

purposes of NEPA, Judge Wright indicates that the intent and purpose of the statute was to impose substantial – and substantially new – obligations on federal agencies to ensure that the environment will be taken adequately into account in regulatory decisionmaking processes.

The language of the statute indicates that environmental protection is a goal to be balanced by agencies against other interests. So, the statute requires that agencies “identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations.”<sup>147</sup> The ambiguous term in this injunction is “appropriate.” In *Calvert Cliffs*, Judge Wright declares that “[t]he word ‘appropriate’ . . . cannot be interpreted to blunt the thrust of the whole Act or to give agencies broad discretion to downplay environmental factors in their decisionmaking processes.”<sup>148</sup> The linchpin of the dispute is over whether “appropriate” tempers federal agencies’ responsibility to protect the environment to the best of their ability or whether, as the D.C. Circuit concludes in the end, it provides a rather thin caveat in the pursuit of unqualified environmental protection.

The specific legal question is this: In what way may agencies rely on existing procedures addressing environmental issues rather than on new ones mandated by NEPA? The conclusion of the court in *Calvert Cliffs* is a powerful one: Existing agency procedures must give way to new

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<sup>147</sup>Section 102(2) (B).

<sup>148</sup>449 F.2d at 1113, n.8.

ones implementing the mandate under NEPA. Since this case, NEPA has been broadly read to require virtually all federal agencies to pursue aggressively environmental protection whatever reasons might exist for temperance or moderation.

Even more significant as a matter of statutory interpretation is the dispute over the meaning of Section 104 of the Act. This section provides that “[n]othing in [NEPA] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality . . . .”<sup>149</sup> The Commission here had insisted that its standards were in accord with NEPA and with other environmental statutes, including, especially, the Clean Water Act. The issue was whether NEPA sought to ensure more extensive procedural requirements by displacing both the carefully drafted regulations in the existing environmental acts and the procedures adopted by the Commission under these acts. In the absence of clear statutory language, the resolution of this dispute turned on the question of what significance to accord to ameliorative statements in the legislative history, statements that suggested that NEPA ought not to be read as a “framework” statute.<sup>150</sup> The D.C. Circuit declared that NEPA required precisely this replacement. The court declared that the Commission’s regulations therefore fell short of what NEPA required.

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<sup>149</sup>NEPA, Section 104 et. seq.

<sup>150</sup>For a comprehensive analysis of so-called “framework” statutes, see Elizabeth Garrett, “The Purposes of Framework Legislation,” 14 J. Contemp. Legal Issues 717 (2005).

To understand why *Calvert Cliffs* was an expansionist decision, it is important to understand the Congressional compromise that underlay NEPA. In securing support from moderate legislators, the coalition of ardent supporters insisted that NEPA did not require consideration of environmental interests notwithstanding economic costs; nor did it require agencies such as the AEC to scrap utterly its procedural regulations where those regulations were designated to implement the Water Quality Improvement Act [WQIA] and other relevant environmental statutes. With regard to the latter question, co-sponsor Senator Jackson insisted that “[t]he compromise worked out between the bills provides that the licensing agency will not have to make a detailed statement on water quality if the State or other appropriate agency has made a certification pursuant to [WQIA].”<sup>151</sup> Moreover, the Senate committee report, a costly signal and clearly the best piece of evidence of what the committee compromise revealed about the relationship between NEPA and extant regulatory standards, declared that “[i]t is the intention that where there is no more effective procedure already established, the procedure of this act will be followed.”<sup>152</sup> The implication is that, at a minimum, NEPA was designed to provide environmental attention where none existed. A stronger interpretation also consistent with this language is that NEPA would allow existing procedures to stand to the extent that they effectively served the purposes of other environmental legislation. Both these interpretations differ from that of the court.

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<sup>151</sup>115 Cong. Rec. (Part 21) at 29053.

<sup>152</sup>115 Cong. Rec. (Part 30) at 40927-28.

That NEPA reflected a compromise between ardent environmental interests and more moderate legislators makes sense in the context of the times. During the 90<sup>th</sup> and 91<sup>st</sup> Congresses, legislators struggled mightily over the scope of a range of environmental initiatives. Predictably, interest groups mobilized on all sides of these battles. Final versions of legislation represented compromises among diverse groups of legislators. Ardent supporters such as Edmund Muskie celebrated, appropriately enough, these historic victories;<sup>153</sup> the 1960s and 1970s were, indeed, a watershed period for environmental protection.<sup>154</sup> However, legislators who took a more moderate position with regard to environmental protection could also credibly claim that their interests were taken properly into account in the design of the regulatory programs. Environmental statutes of this era reflected carefully tailored compromises;<sup>155</sup> NEPA was no exception.

Notwithstanding the strong evidence of the compromise in the final version of NEPA, Judge Wright relied significantly upon statements of ardent supporters. In what could be best be

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<sup>153</sup>See the discussion in R. Shep Melnick, Regulation and the Courts: The Case of the Clean Air Act 24-52 (1983).

<sup>154</sup>See, e.g., Charles O. Jones, Clean Air: The Policies and Politics of Pollution Control (1975); Alfred Marcus, "Environmental Protection Agency," in The Politics of Regulation 267 (James Q. Wilson ed. 1980).

<sup>155</sup>See Melnick, The Clean Air Act, supra n.--, at 49-52; Marcus, "EPA," supra n.--, at 269-74.

regarded as cheap talk,<sup>156</sup> supporters insisted that the compromise did not cabin the scope of NEPA to ensure environmental protection at all costs. Judge Wright concludes, implausibly, that “Senator Jackson appears not to have ascribed major importance to the compromise.”<sup>157</sup> And, responding to statements that confirmed this compromise, including statements by environmentalist icon, Edmund Muskie, Judge Wright announces that “[t]his rather meager legislative history . . . cannot radically transform the purport of the plain words of Section 104.”<sup>158</sup>

Whether relying on the so-called “plain words” of the statute, the selective legislative history, or general purposive methods, the D.C. Circuit decision in *Calvert Cliffs* cannot be read as anything other than an expansionist interpretation of NEPA. As we have seen, the meaning of the so-called plain meaning of the text hinges on the word “appropriate,” hardly plain in and of itself. Moreover, environmental activists of this era have embraced this decision on precisely these grounds. As with other expansionist decisions of this era,<sup>159</sup> *Calvert Cliffs* is noted for its broad declaration that environmental protection is an unqualified responsibility of the federal government, a responsibility that ought not and cannot be balanced against other interests, whether economic or political. For its supporters and critics, *Calvert Cliffs* is best understood as

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<sup>156</sup> On cheap talk, see text accompanying notes – supra and sources cited therein.

<sup>157</sup> 449 F.2d 1126 n.37.

<sup>158</sup> Id. at 1126.

<sup>159</sup> See sources cited in n.-- supra.

a judicial declaration of environmental idealism, and, moreover, as an apt example of what Martin Shapiro has called “political jurisprudence.”<sup>160</sup>

Of course, *Calvert Cliffs* was not the end of the story. The federal courts interpreted NEPA in other key decisions.<sup>161</sup> In its 1989 decision in Robertson v. Methow Valley Citizens Council,<sup>162</sup> the Supreme Court reiterated the point made in different ways in the legislative history that NEPA propounded only procedural, and not substantive, safeguards. While this construction was and is criticized for supposedly narrowing the scope of the Act,<sup>163</sup> there is precious little evidence in the legislative record that even ardent supporters of the bill supposed that they were enacting into law a new body of substantive environmental regulations.

Environmental legislation in the period following *Calvert Cliffs* and other expansionist cases has been rather rare. Controversy raged during the 1980's over legislative efforts to amend clean air legislation in a pro-environmental direction.<sup>164</sup> Moderates in particular were dubious

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<sup>160</sup>See Martin Shapiro, “Judicial Activism,” in The Third Century: America as a Post-Industrial Society (Seymour Martin Lipset ed. 1979).

<sup>161</sup>See sources cited in n.—supra.

<sup>162</sup>490 U.S. 332 (1989).

<sup>163</sup>See, e.g., Antonio Rossman, “NEPA: Not So Well At Twenty,” 20 *Envtl. L. Rep.* 10174 (May 1990).

<sup>164</sup>

about agreeing to support environmental initiatives in the clean air contexts;<sup>165</sup> moreover, efforts to tackle such emerging environmental issues as global warming and new forms of biological degradations – to say nothing of efforts at promoting “environmental justice” – have mostly been stillborn. While the explanations from the declining federal role in environmental protection are complicated, we note that the statutory expansionism reflected in *Calvert Cliffs* and cousin cases have pushed moderates away from the negotiating table; they have raised the costs to pivotal moderates contemplating compromise.

## 2. Statutory expansions and modern civil rights legislation

In our earlier article, we explained in detail how a number of lodestar civil rights decisions from the 1970s and 80s reflected the federal courts’ expansions of the bargains struck by ardent supporters and moderate legislators.<sup>166</sup> As with NEPA and *Calvert Cliffs*, the courts latched onto statements of ardent supporters – statements that are best viewed as cheap talk – in order to broaden the scope of the statute beyond the reach intended by the legislators critical to the final compromise. The tone of the courts’ opinions are similar to what we observe in *Calvert*

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<sup>166</sup>Rodriguez & Weingast, “New Perspectives,” supra n.

*Cliffs*; that is, the judges embrace an ideology of strong civil rights protection and implement this ideology without sufficient regard to the central compromises of the enacting legislature.<sup>167</sup>

In many ways, the lodestar case is *United Steelworkers v. Weber*.<sup>168</sup> Not coincidentally, this case is a central testing case for various modern theories of statutory interpretation. Ronald Dworkin and William Eskridge, Jr.,<sup>169</sup> among others,<sup>170</sup> examine *Weber* in close detail in order to ground their complex, and ultimately “dynamic,” theories of legal interpretation.<sup>171</sup>

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<sup>167</sup>McCubbins, Noll, and Weingast come to a similar conclusion about the Sierra Club decision expanding the meaning of the 1970 Clean Air Act. See McNollgast, “Structure and Process,” *supra* n.--, at 440-44.

<sup>168</sup>443 U.S. 193 (1979).

<sup>169</sup>See Dworkin, Principle, *supra* n.--, at 318-335; Eskridge, Statutory Interpretation, *supra* n., at 156-78.

<sup>170</sup>See, e.g., Philip P. Frickey, “Wisdom on Weber,” 74 Tul. L. Rev. 1169 (2000); George Schatzki, “United Steelworkers of America v. Weber: An Exercise in Understandable Indecision,” 56 Wash. L. Rev. 51 (1980).

<sup>171</sup>See generally Ronald Dworkin, Law’s Empire (1986); Eskridge, Statutory Interpretation, *supra* n.--.

So what does *Weber* tell us about the interpretation debate? In that case, the Supreme Court considered competing sources of legislative history in order to understand the meaning of the vexing term “discrimination.”<sup>172</sup> In his opinion for the Court, Justice Brennan put the emphasis on statements of ardent supporters, thereby recreating the structure of the statutory agreement.<sup>173</sup> There is little reason to believe that Senator Dirksen and his colleagues in the Senate would have endorsed the reading ascribed to Title VII by Justice Brennan and the *Weber* majority; and, as a matter of interpretive technique, there was no palpable interest on the part of the Court in the expectations and understandings of pivotal moderate legislators. In the end, the legislative history invoked by the *Weber* Court was avowedly the “winner’s” history, that is, the strategic statements of ardent supporters of the Act – supporters who would never have enacted the Civil Rights Act of 1964 into law without the assent of skeptical moderate legislators, particularly Republican senators.<sup>174</sup>

Perhaps we can only speculate about the impact of these expansionist civil rights decisions upon the course of civil rights legislation in the 1970s, 80s, and 90s.<sup>175</sup> However, with the benefit of four decades of civil rights history, some tentative conclusions can be reached. Most fundamentally, we observe that civil rights expansionism contributed to the enduring

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<sup>172</sup>Weber, 443 U.S. at 197.

<sup>173</sup>*Id.* at 205-08. See generally Rodriguez & Weingast, “New Perspectives,” *supra* n.-, at 1519-20.

battles over civil rights legislation in the years following the passage of the 1964 Act. As we know from the leading histories of the period, the struggle over civil rights legislation continued into the 70s and 80s, this notwithstanding the fact that the configuration of legislative politics had shifted significantly during this same period.<sup>176</sup>

To be sure, the enactment of the Voting Rights Act of 1965 helped reshape the Solid South and, with it, reshaped political interests in the direction of civil rights legislation.<sup>177</sup> However, this reconfiguration was incomplete. The omnipresent threat of the filibuster and, moreover, the replacement of intransigent Southern Democrats with reasonably conservative Southern Republicans, meant that the battle for civil rights protection would (and did) remain difficult.<sup>178</sup> In the midst of this battle, the impact of the courts' liberal/expansionist decisions

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<sup>175</sup>See *id.* at 1517-21.

<sup>176</sup>Hugh Davis Graham, Civil Rights Era, *supra* n.--; Philip A Klinkner and Rogers M. Smith, The Unsteady March: The Rise and Decline of Racial Equality in America (1999); Nina M. Moore, Governing Race: Policy, Process, and the Politics of Race (2000).

<sup>177</sup>See text accompanying notes -- *supra*.

<sup>178</sup>See generally Earl Black & Merle Black, The Rise of Southern Republicans 65-80 (2002); Harvard Sitkoff, The Struggle for Black Equality: 1954-1992, at 32-33 (rev. ed. 1993); James L. Sundquist, Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States (1973).

increased the costs to the moderate legislators to support civil rights initiatives.<sup>179</sup> And seldom did these moderates support initiatives to expand the scope of civil rights protections.

Paradoxically, then, the mechanism for the broadening of civil rights interests – namely, expansionist statutory interpretations – helped to undermine the necessary foundations for the progressive civil rights revolution.<sup>180</sup>

## V. Implications

In describing the effects of expansionist interpretations, we have been presupposing that progressives are motivated by an interest in promoting social legislation and, moreover, in promoting a broad construction of this policy. To be sure, conservatives skeptical about expansive federal policies may well be heartened by an approach to interpreting regulatory statutes that undermines legislative agreement. This paper is not the place to engage squarely the debate over the wisdom and efficacy of federal interventions in modern society. Rather, we offer a dire warning about judicial activism grounded in the *realpolitik* of Congressional

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<sup>179</sup>See Rodriguez & Weingast, “New Perspectives,” *supra* n.--.

<sup>180</sup>Some of this argument is implicit in the logic of William Eskridge’s argument in “Reneging on History? Playing the Court/Congress/President Civil Rights Game,” 79 Cal. L. Rev. 613 (1991).

policymaking. In this final Section, we expand on this warning by examining more closely some of the effects of judicial expansionism.

#### A. Policy tradeoffs implied by judicial expansionism

The standard critiques of judicial activism focuses on the extent to which such strategies undermine the rule of law. In the main, this is an internalist critique; that is, it focuses on the judiciary, referencing the ostensible responsibilities of judges in interpreting legislative will and using the baseline of intentionalism to criticize judicial departures.<sup>181</sup> Often, this internalist critique is bridged with larger analyses of the consequences of the courts' activism. Some scholars observe, for example, that judicial activism undermines public faith in the objectivity of judging; or, relatedly, judicial activism encourages inefficient litigation and saps the energies of public institutions and degrades the economy.<sup>182</sup>

While we have sympathy with these critiques, these critiques are not the focus of our analysis. Rather, we argue that a key consequence of judicial expansionism in statutory

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<sup>181</sup>See, e.g., John Manning, "Textualism and Legislative Intent," 91 Va. L. Rev. 419 (2005); Jonathan T. Molot, "The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role," 53 Stan. L. Rev. 1 (2000).

<sup>182</sup>Walter Olson, *Litigation Explosion*; Peter Huber; Jeremy Rabkin.

interpretation is that, paradoxically, it undermines the very values that undergird its logic.

Advocates of judicial activism must confront an essential trade-off: Either they can embrace the essential coalitional compromises that enable progressive social legislation to see the light of day or they can celebrate judicial activism; but, insofar as judicial expansionism is defended as a means of multiplying the value of progressive social policy by taking the statute to a “new level” of progressivism, this strategy will backfire. Liberal advocates may resolve this tradeoff in one way or another; our objective is merely to illuminate the tradeoff, to highlight the paradox in order to raise doubts about the logic of the expansionist strategies characteristic of the 1970s.

While our argument of the effects on congressional bargaining of judicial expansion is primarily a positive one, we raise here the normative question whether these expansionist interpretations are worth the price. We believe that such normative analysis requires consideration of the *effects* of interpretive approaches upon the lawmaking process. And it is for the purpose of considering these effects that our analysis of the paradox of expansionist interpretations yields the most normative insight.

First, consider the views of interest groups. The question is whether expansionist interpretations are of greater benefit to the interest groups who promote these laws (and who prefer broader to narrow legislation) than strictly intentionalist interpretations given the consequences of less future legislation. To consider this scenario, let us return to our two policy examples above, environmental protection and civil rights. Congress enacted the main cornerstones of environmental protection during the 1960's and 70's. That period brought clean

air and water legislation, NEPA, the Endangered Species Act, and other key environmental laws.<sup>183</sup> Insofar as this view holds, the encouragement on the part of environmental interest groups to federal courts in the post-enactment years to expand the scope of these statutes in the 1970s may have then been a rational strategy; indeed, ardent supporters in Congress at that time may have preferred, from where they sat in the post-enactment period, that courts “update” statutes to take into account the preferences of the current, rather than the enacting, legislature.<sup>184</sup> Similarly, civil rights interest groups may have been motivated in their efforts to get courts to expand the scope of key legislation by their belief that Congress would be unlikely to enact major new civil rights initiatives.<sup>185</sup>

Three alternative hypotheses are possible, however. First, interest groups and members of Congress at the time may have faced a prisoners’ dilemma: each wanted an expanded interpretation in their own area, but not systematic judicial expansion that harmed congressional bargaining. Second, interest groups and members of Congress may have simply been ignorant of the effect or not looking so many years down the road. Third, interest groups and congressional majorities understood the tradeoff and thought it worth the price, even know that this action

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<sup>183</sup>See text accompanying notes – *supra*.

<sup>184</sup>See, e.g., Einer Elhauge, “Preference-Estimating Statutory Default Rules,” *Colum. L. Rev.* (2003); Alex Aleinikoff, “Updating Statutory Interpretation,” 97 *Mich. L. Rev.* 20 (1988).

<sup>185</sup>See, e.g., Eskridge, “Civil Rights Game,” *supra* n.--.

would harm the interests of future generations by exchanging policy benefits today for greater difficulties in passing legislation down the road.

Second, regardless of whether interest groups and members of Congress at the time preferred expansionary readings given the consequences, our perspective reveals another effect: expansionism made it more difficult for future constituencies and Congresses to pass new legislation addressing new problems or to adapt existing legislative solutions to changing circumstances of the next generation and beyond. Therefore, expansionism has limited the democratic process's ability to adapt to new circumstances.

Consider, again, environmental protection and civil rights. In both areas, interest groups pushed hard, albeit with mixed success, for new progressive social legislation; indeed, they continue to press hard for new laws. In the area of civil rights, the battle looms over the renewal of the Voting Rights Act, a renewal that must take place, if at all, by 2007. The civil rights community can be expected to engage vigorously in this legislative struggle. Only the most ardent ideologues and optimists believe that every civil rights initiative worth fighting for has already been enacted into federal law; likewise, few in the environmental community believe that every legislative agenda of modern environmentalism has been passed by Congress during the past half century. Therefore, the stakes for progressives *if we are right about the paradox of expansionist statutory interpretations* remain high.

The moral of the story, then, is that the call for judicial activism must be assessed in light of the consequences of this activism for the federal lawmaking process. There are tradeoffs at issue when pursuing strategies of statutory expansionism. And these tradeoffs must be considered carefully in reaching normative conclusions about a particular approach to interpreting social legislation in the modern era.

## B. Reinforcing polarization

A key lesson of the positive political theory of legislative decisionmaking is that congressional institutions are structured to make legislative change difficult.<sup>186</sup> In that vein, PPT scholars have employed the various “veto gates,” structure-induced equilibria, and “pivotal politics,” a series of related approaches that explain how congressional institutions make legislation difficult despite shifting legislative preferences.<sup>187</sup>

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<sup>186</sup>See text accompanying notes – supra.

<sup>187</sup>See, e.g., Arthur Denzau and Robert Mackay. “Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior.” 27 *American Journal of Political Science* (1983) 740-761; Kenneth A. Shepsle and Barry R. Weingast, “Structure-Induced Equilibrium and Legislative Choice,” 37 *Pub. Choice* 509 (1981) (discussing committees as veto gates); Kenneth A. Shepsle, “Institutional Arrangements and Equilibrium in Multidimensional Voting Models,” 23 *Am. J. Pol. Sci.* 27 (1979) (same); Cox and McCubbins,

The increased congressional polarization, exacerbated by expansionist interpretations, creates greater opportunities on the part of extremist opponents to capitalize on the antimajoritarian structures and rules of Congress to block legislation that would otherwise be in the interest of legislative majorities. Put differently, potential moderate legislators will be pushed toward the camp of ardent opponents insofar as their ability to pursue “acceptable” legislative compromises decline.

This increased polarization is most likely an unintended consequence of the courts’ activism. Courts may be agnostic on the question whether and to what extent antimajoritarian lockups are desirable or pernicious; they may view themselves as pursuing expansionist strategies for particular ideological reasons; or they may believe that they are merely following the best evidence of the will of the legislators who most matter. In any case, judges may be blissfully unaware of the impact of their interpretive approach upon the democratic structure of Congress.

There is a different way to view this situation, however. Courts may be engaging in expansionist interpretation as one element in a larger objective of improving the political process. Indeed, a large prescriptive legal literature suggests that this is a proper and desirable

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Setting the Agenda , supra n. – (discussing party veto gates); Krehbiel, Pivotal Politics, supra n.-- , (describing model of congressional gridlock).

judicial strategy.<sup>188</sup> With regard to statutory interpretation in particular, diverse scholars including Cass Sunstein,<sup>189</sup> William Eskridge,<sup>190</sup> and Jonathan Macey,<sup>191</sup> have urged that courts deploy interpretive approaches in order to improve lawmaking processes. Professor Cass Sunstein's exhortations are particularly revealing; in a series of articles and in a book, he spells out a large number of interpretive canons designed to correct imperfections in the political process.<sup>192</sup> These works illustrate the deeply normative underpinnings of expansionist interpretation; they also demonstrate the subtle and sophisticated arguments made by legal

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<sup>188</sup>Cf. John Hart Ely, Democracy and Distrust (1980) (articulating a process-perfecting view of constitutional adjudication); William H. Riker & Barry R. Weingast, "Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures," 74 Va. L. Rev. 373 (1988).

<sup>189</sup>See, e.g., Cass Sunstein, "Interpreting Statutes in the Regulatory State," 103 Harv. L. Rev. 1989 (1990); see also Cass Sunstein & Adrian Vermeule, "Institutions and Interpretation," Mich L Rev.

<sup>190</sup>See Eskridge, Statutory Interpretation, supra n.--, at 88-92.

<sup>191</sup>See Jonathan Macey, "Public-Regarding Legislation," supra n.--, at 237-46; "Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory," 74 Va. L. Rev. 471 (1988).

<sup>192</sup>See Cass Sunstein, After the Rights Revolution (1991); "Antidelegation Canons," U. Chi. L. Rev. --; "Interpreting Statutes," supra n.--

scholars determined to articulate and defend an activist, “process-perfecting” approach to interpreting statutes in the modern administrative state.

Our analysis in the preceding parts of this paper reveals that these efforts at “improving” the political process may have the reverse effect of facilitating polarization. These views therefore reinforce extremism within the contemporary Congress and, therefore, may have the opposite effect from those that were intended. At the very least, our approach demonstrates that judicial practice in statutory interpretation directly affects the legislative process in non-obvious ways. This implies that the normative attractiveness of various process perfecting judicial rules must be judged not only by their intended and direct effects, but also on their equally important but indirect effects on how they affect the legislative process. The appealing conception of Congress as a fundamentally democratic institution designed to represent the interests of the public is difficult to align with the reality of the modern Congress as polarized and, therefore, riven with partisan struggles and intransigence. Without exaggerating the courts’ contribution to this doleful situation, we underscore our main point that the courts’ rearrangement of the key elements of legislative bargains through expansionist interpretations can harm our system of representative democracy by reinforcing polarizing tendencies within Congress.

## **VI. Conclusion**

In this article, we explain and analyze the paradox of an expansionary judiciary. We show that a judiciary that systematically expands the meaning of congressional statutes has a range of

seemingly unintended effects. The most direct effect is that this expansionism inhibits legislative production of new statutes. Because the legislative process is one of negotiation and compromise, major statutes require careful crafting of a majority coalition. In general this implies that the original proposal of the ardent supporters has little chance of passing. Legislative compromise systematically transforms this initial legislative vehicle into new legislation. Because these compromises materially alter the proposal from one that will not pass to one that does, they are central to the legislation's meaning and the intentions of the bill's crafters.

Expansionist courts of the 1970s and early 1980s frequently set aside the finely crafted legislative compromises in favor of expansionary readings that relied on the ardent supporters' descriptions of their initial proposal and of their cheap talk descriptions of the compromise. Doing so, however, has a feedback effect on the legislature by making new legislation less likely. Whether intended or not, expansionism of this type means that the moderates cannot have their compromises. Because of this effect, moderates are less likely to support legislation since they must choose between a more extreme version and the status quo. This is the paradox of judicial expansionism: it creates more progressive interpretations of existing legislation at the expense of fewer new pieces of progressive legislation.

We have also argued that the paradox has a number of wider implications, both positive and normative. For the positive implications: First, we argued that the paradox helps explain why the era of progressive legislation in the second half of the twentieth century is confined to a relatively short period, 1964 through the mid or late 1970s. As judges began to expand the meaning of these statutes in their statutory interpretation decisions, moderates became less likely

to compromise and produce new statutes. Put simply, the paradox implies that judicial expansion contributed to the demise of new progressive legislation.

Second, the paradox helped foster the growing polarization within Congress of the last three to four decades. Using a simple voting model, we showed how judicial expansionism altered congressional voting patterns, making members of Congress appear more extreme. The reason is that moderates who believe they cannot craft moderate compromises that will sustain court challenges face only extreme measures. Moderate Democrats therefore end up voting with more extreme Democrats; while moderate Republicans vote with their more extreme partisans. The main consequence is that it appears the moderates have disappeared from Congress. Yet in reality we cannot tell if the moderates have disappeared. As the simple voting model demonstrated, the absence of moderate compromises implies an absence of opportunities for moderates to express their moderation. Progressive public policy is poorer as a result.