

THE PARADOX OF EXPANSIONIST STATUTORY INTERPRETATIONS[†]

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INTRODUCTION

For scholars interested in the currents of modern public policy, the recent history of progressive social legislation at the national level provides a workable paradigm. The 1960s and 1970s were the well-advertised heyday of progressive public policy at the federal level. In this relatively short pe-

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riod, Congress transformed the relationship between the federal government and both the economy and the rights of American minorities by enacting the modern era's central pieces of social legislation, including¹ the Civil Rights Act,² the Voting Rights Act,³ the Clean Air Act, and other watershed statutes.⁴ This transformation has waned significantly, however, over the next quarter century. The twenty-five years since the end of the 1970s are notable for the absence of watershed social legislation, which raises a puzzling question: Why the relative paucity of progressive social legislation following the orgy of statutory enactments in the mid-1960s to late-1970s 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 89th through 92nd Congresses.⁵ Yet, this explanation merely raises a second question: What explains this growing divide within the contemporary Congress? To say that a polarized legislature made legislative compromise implausible begs the question of why legislators first became so polarized. Moreover,

¹ This period also contains the "Great Society" and "War on Poverty" legislation, including the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964), Medicare and Medicaid, Pub. L. No. 89-97, 79 Stat. 286 (1965), the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965), Head Start, Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964), Model Cities, Demonstration Cities and Metropolitan Development Act of 1966, Pub. L. No. 89-754, 80 Stat. 1255 (1966), and the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (1964).

² Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 42 U.S.C.); Pub. L. No. 90-284, 82 Stat. 73 (1968). *See generally* THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION (Robert D. Loevy ed., 1997); ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990); CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

³ Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000). *See generally* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999); QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994); ABIGAIL THERNSTROM, WHOSE VOTES COUNT? (1987).

⁴ National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (1966); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970); Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 121 (1970); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 576 (1970); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972); Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

⁵ 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) (measuring the frequency of Congressional deadlock and discussing Congress's ability and means for reaching compromise in relation to issues of national significance).

the polarization explanation is hard to square with the evidence that the American public is considerably less polarized than are their elected officials.⁶

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

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

This logic follows from a key feature of legislative politics.⁷ The standard legal approach to legislation is built on an implicit fiction, namely, that in the production of new 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. This standard approach illustrates 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, precludes us from understanding how statutes are crafted through compromise. Rather than simply winning moderate legislators to their side, proponents of legislation typically must compromise with the moderates whose support is necessary to create a majority coalition. These compromises materially transform the text of a proposal that will not pass into one that does. 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.

⁶ See generally MORRIS FIORINA, *CULTURE WARS AND RELATED MYTHS ABOUT AMERICAN POLITICS* (2004).

⁷ 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. For a survey, see Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 22–26 (1994).

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 proponents' goals, for example, by making exceptions, by restricting the scope of the legislation's coverage, or by creating cumbersome procedures.⁸ 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 the 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.⁹ Moreover, the means by which they did so typically involved undoing the compromises necessary to gain the moderates' support. In *Griggs v. Duke Power*,¹⁰ *United Steelworkers v. Weber*,¹¹ and other key civil rights cases of the 1970s,¹² the Supreme Court expanded the meaning of the 1964 Civil Rights Act beyond the compromise necessary to overcome the Senate filibuster.¹³ In *Ruckelshaus v. Sierra Club*,¹⁴ 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.¹⁵ These judicial decisions were manifestations of this activist era. Was this judicial expansion good or bad? 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

⁸ See text accompanying *infra* notes 38–51.

⁹ 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).

¹⁰ 401 U.S. 424 (1971).

¹¹ 443 U.S. 193 (1979).

¹² See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). See generally THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION: CASES AND MATERIALS* 909–1122 (1981) (detailing key civil rights cases of this era).

¹³ 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. PA. L. REV. 1417 (2003) [hereinafter *New Perspectives*] (describing expansive interpretations of the Civil Rights Act).

¹⁴ 463 U.S. 680 (1983).

¹⁵ 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 VA. L. REV. 431, 450–51 (1989) (arguing that courts' decisions to expand the provisions to promulgate rules to prevent deterioration contradicted the legislative history of the act which revealed Congress only intended to require polluters to use the "best available control technology").

factors. In this paper, we eschew inquiry into whether statutory expansionism was good or bad, instead focusing deliberately on whether and to what extent this expansionism affects 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 PPT tradition, we emphasize the interactions among purposive institutions in the American policymaking process.¹⁶ 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 compromises necessary to secure an act's passage, courts effectively tell the moderates that they cannot have their compromises. When courts regularly 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 the social legislation of the 1960s and 1970s has inhibited moderate legislators from working with other legislators to craft similar compromises. To put our thesis simply, legislators whose assent is 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 interpretations¹⁷ 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.

This analysis also helps explain why the modern Congress is increasingly polarized. As we show below, when moderate compromises are unavailable, the voting behavior of these centrist members of Congress becomes less moderate. The inability to sustain moderate legislation forces

¹⁶ See, e.g., KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 299–456 (1997); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990); Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEGIS. STUD. Q. 149 (1994).

¹⁷ See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

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 Congressional polarization.

Though this Article provides a missing descriptive theory concerning the barriers to expansive social legislation, it has both positive and normative implications. The positive political theory explains the paradox of expansionist interpretations. Further, this Article shows that the 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: Part I lays out our theoretical approach to coalitions in Congress and intra-legislative bargaining, including the implications of this positive political theory for statutory interpretation. Part II examines what we mean by expansionist statutory interpretations. Part III describes the model of Congressional polarization and the effects of such polarization on statutory bargaining. We expand on the paradox idea, examining in some detail one conspicuous episode of statutory expansionism, that is, the National Environmental Policy Act (“NEPA”)¹⁸ and the *Calvert Cliffs* decision,¹⁹ the key case interpreting that statute. The empirical analysis provides an interpretation of judicial expansionism rather than a definite empirical test. The Article concludes in Part IV by analyzing the normative implications of the paradox of statutory expansionism and legislative behavior.

I. A POSITIVE POLITICAL MODEL OF LEGISLATIVE BEHAVIOR AND STATUTORY ENACTMENT

Earlier works in this field developed a theory of legislative bargaining and legislative rhetoric that help explain the dynamics of court-Congress relations with regard to statutory interpretation.²⁰ Understanding the role of statutory interpretation in legislative policymaking is critical, since the courts play an active, enduring role in shaping statutes and thereby implementing public policy through the resolution of disputes over the meaning of ambiguous statutory language.²¹ Because the analysis in this Article builds directly upon this earlier work, it is necessary to establish the basic logical foundations of the argument.

¹⁸ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

¹⁹ *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971). See text accompanying *infra* notes 143–71.

²⁰ See, e.g., McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994) [hereinafter *Legislative Intent*]; *New Perspectives*, *supra* note 13, 1431–51; see also McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992) [hereinafter *Positive Canons*]. McNollgast is a pseudonym used by Professors Matthew D. McCubbins, Roger Noll, and Barry Weingast.

²¹ See, e.g., MELNICK, *supra* note 9, at 3–22.

A. Legislative Coalitions

The traditional account of the legislative process 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' preferences prevailing over their opponents'. So, for example, where courts avail themselves of legislative history in construing the meaning of ambiguous legislation, the history (e.g., floor statements, committee reports) crafted by the winners is typically accorded special weight;²² correspondingly, self-serving statements about the meaning of the legislation by the losers—those who unsuccessfully fought against the bill's enactment—are given short shrift.²³ This view of legislative implementation assumes that to understand legislation, one should look to its proponents, who are presumably the most knowledgeable about its substance 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 different groups of legislators who comprise the legislation's supporting coalition.²⁴ 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.²⁵ 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 the Clean Air Act.²⁶ Similarly, Senator Warren Magnuson was the ardent architect of a major initiative in consumer safety (attaching his name, in the end, to the

²² See, e.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, AND ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 295–340 (2d ed. 2006).

²³ 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, 204 n.24 (1976) (classifying remarks “made in the course of legislative debate” as “entitled to 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.”).

²⁴ See *Legislative Intent*, *supra* note 20, at 6–25; *Positive Canons*, *supra* note 20, at 707–15. For further discussion of the ardent supporter–ardent opponent dichotomy, see *Positive Cannon*, *supra* note 20, at 711.

²⁵ See *New Perspectives*, *supra* note 13, at 1439; *Positive Canons*, *supra* note 20, at 711.

²⁶ See R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 31 (1994) (“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.”).

Magnuson-Moss Warranty Act of 1975).²⁷ 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 and seek to defeat the legislation and preserve the status quo. Their opposition is “ardent” in that there are but few situations in which they would support even a watered-down version of one or another legislative proposal.²⁸ The quintessential example of this coalition is the Southern Democrats and their commitment over the course of a century to defeating civil rights proposals.²⁹

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 South³⁰ and also by the minority-protective structure of the U.S. Senate.³¹

For these reasons, this Article focuses attention on this third group. This group consists 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.³² We

²⁷ 15 U.S.C. §§ 2301–2312 (2000). See generally DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 135–36 (1989) (describing the origins and significance of the Magnuson-Moss Warranty Act).

²⁸ See *Legislative Intent*, supra note 20, at 16–21 (describing coalitions and theory of legislative decisionmaking); *Positive Canons*, supra note 20, at 718–27 (describing how a legislator’s valuation of a policy choice decreases as the distance between that legislator’s preferred policy and the policy choice increases); see also John Ferejohn & Barry R. Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 575–76 (1992).

²⁹ See generally TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65 (1998); ROBERT MANN, THE WALLS OF JERICO: LYNDON JOHNSON, HUBERT HUMPHREY, RICHARD RUSSELL, AND THE STRUGGLE FOR CIVIL RIGHTS (1996).

³⁰ See *id.* and sources cited therein. On the Solid South, see, for example, Philip E. Converse, *A Major Political Realignment in the South?*, in CHANGE IN THE CONTEMPORARY SOUTH 195 (Allan P. Sindler ed., 1963).

³¹ This phenomenon is reflected best in the filibuster and in other devices designed to make legislation difficult to enact. See, e.g., KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 23–24 (1998) (discussing the filibuster specifically); ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS (2001); 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).

³² 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 oppo-

focus on those circumstances where the pivotal legislators' support hinges on the scope or impact of the legislation. 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.

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 this argument cannot describe *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,³³ or from the Constitution's design,³⁴ but, rather, is the product of strategic action by purposive legislators acting with variegated incentives and under the usual constraints.³⁵ While the focus in much of the

nents 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 carry no serious consequence for our model of legislative coalitions.

³³ 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 United States 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 *THE OXFORD HANDBOOK OF POLITICAL ECONOMY* (Barry R. Weingast & Donald Wittman eds., 2006).

³⁴ 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 for his consideration. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (declaring bicameralism and presentment to be constitutional minimums to acts of legislation). 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. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993) (declaring Senate's use of committee for impeachment a nonjusticiable political question).

³⁵ These "constraints" include the standard scarcity of resources (time, information, etc.), as well as whatever legal constraints are imposed on their activities. Recent works attempting to explain the internal structure and rules of Congress include: GARY COX & MATHEW MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005) [hereinafter COX & MCCUBBINS, *SETTING THE AGENDA*]; GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* (1993); KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1991); DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 2004); Cox, *supra* note 33.

recent literature on Congress has been on the ways in which these devices impede legislative policymaking by creating obstacles to passage,³⁶ we can see these devices, too, as structuring the processes of legislative bargaining. The structure of congressional institutions both enables and hobbles legislative initiatives.³⁷ 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 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 to assure that the statute will not move policy too far in one direction.³⁸

A second mechanism of compromise is the restriction of the scope of the statute, thus blunting its impact on certain individuals and groups. Examples of the second strategy are described in our previous analysis of the origins of the 1964 Civil Rights Act.³⁹ In the bargaining over that historic legislation, ardent supporters in the Senate, led by Hubert Humphrey and his allies, negotiated all summer 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 statute on Northern states;⁴⁰ 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.⁴¹ In a similar vein, supporters of the Clean Air Act, as Bruce Ackerman and William Hassler recount,⁴² agreed to limit the impact of command-and-control air pollution

³⁶ See 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) (modeling legislative process and describing various institutionally embedded obstacles to enactment of statutes).

³⁷ See, e.g., David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 AM. POL. SCI. REV. 1181 (1989) (arguing that legislators take into account the formal rules and structure of the legislature when they act non-cooperatively in order to serve their own constituents).

³⁸ 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).

³⁹ See *New Perspectives*, *supra* note 13, at 1452–98.

⁴⁰ For a description of the particular Dirksen amendments, see *id.* at 1488–90 tbl. 2 (entitled “Republican Changes to Blunt the Impact of the Bill on the North”).

⁴¹ See *Senate Defeats Filibuster, Passes Civil Rights Act, 73–27*, in CONG. QUARTERLY ALMANAC: 88TH CONGRESS, SECOND SESSION 354, 361 (1964) (quoting Senator Richard Russell as saying that the bill “has been stripped of any pretense and stands as purely a sectional bill”).

⁴² See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981).

regulations on key swing states (including, notably, West Virginia) in order to pull moderate legislators to their side.⁴³

A third approach is the development of administrative procedures for the purpose of reining in regulatory institutions. In this respect, Congress cabins the impact of its statute on regulated interests. Mathew McCubbins, Roger Noll, and Barry Weingast provide several illustrations of this approach.⁴⁴ For example, the Consumer Product Safety Commission was encumbered with a complex offeror process by which the Commission would solicit non-governmental officials to take the lead in writing regulations, thus blunting the impact of the Commission.⁴⁵ Congress also used this strategy to encumber toxic substances regulation.⁴⁶ Moreover, Congress can strategically assign the burden of proof in legislation to increase control over administrative agencies.⁴⁷ The difficulty of satisfying the burden of proof means that parties so burdened are less likely to prevail. Thus, drug manufacturers bear the burden of proving to the FDA that new drugs are both safe and efficacious, while the FDA bears the burden of proving that food manufacturers are operating in an unsafe manner.⁴⁸ As a result of this structural arrangement, the administrative discretion of regulatory agencies to whom power to regulate had been delegated explicitly by Congress was restricted.

The fourth approach, the prolific use of the legislative veto,⁴⁹ was perhaps the best example of an ex post oversight strategy to appease moderate legislators. The legislative veto device was used as a means by which legislators (frequently just one house of Congress) could check and balance policy by reserving the prerogative of disapproval.⁵⁰ 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 rein in rogue agencies; yet, this at least tempered the impact of an otherwise broad policy by providing a formal mechanism of Congressional review.⁵¹

⁴³ See *id.* at 50.

⁴⁴ 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).

⁴⁵ See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 267-68 (1987).

⁴⁶ See Mathew D. McCubbins & Talbot Page, *The Congressional Foundations of Agency Performance*, 51 PUB. CHOICE 173, 184-86 (1986).

⁴⁷ See *id.* at 183; see McCubbins et al., *supra* note 45, at 262.

⁴⁸ See McCubbins et al., *supra* note 45, at 268-69.

⁴⁹ See Joseph Cooper, *The Legislative Veto in the 1980s*, in CONGRESS RECONSIDERED 364, 367 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985).

⁵⁰ One example of Congress' inclusion of the legislative veto can be found in the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1976), where Congress retained the power to withdraw troops.

⁵¹ This legislative veto strategy was impacted severely, though not irretrievably, by the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983).

Scholars assessing these four approaches 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 regard to the 1964 Civil Rights Act.⁵² 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.⁵³ Such a view, as 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.⁵⁴ The Civil Rights Act is not unique in this regard. Support for the Voting Rights Act, the Clean Air Act, the National Environmental Policy Act, the Consumer Product Safety Act, and other key pillars of the progressive social agenda of the 89th–92nd 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.⁵⁵ Similarly, the Consumer Product Safety Act was enacted without a guarantee of a private right of action. Such a provision, parallel to like provisions in key environmental statutes of this era,⁵⁶ would have enabled the federal

⁵² See *New Perspectives*, *supra* note 13, at 1456 (“The interpretation that reigns supreme in academic studies makes it appear as if civil rights legislation was all but certain by 1963.”).

⁵³ See, e.g., LOEVY, *supra* note 2, at 319 (describing Dirksen’s role as innocuous); 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 (Bernard Grofman ed., 2000).

⁵⁴ See *New Perspectives*, *supra* note 13, at 1476–98 (arguing that as a moderate bargaining with ardent supporters, “although Dirksen’s amendments neither emasculated the bill nor changed its basic framework, his changes added up to more than mere technical and clarifying alterations. Taken as a whole, these amendments were designed to blunt the impact of the bill on the North”).

⁵⁵ See, e.g., NINA MOORE, GOVERNING RACE: POLICY, PROCESS, AND THE POLITICS OF RACE 79 (2000) (“[S]ixties civil rights legislative proposals were, in effect, stripped of their most critical enforcement provisions.”).

⁵⁶ See, e.g., 42 U.S.C. §§ 9604, 9607 (setting forth cause of action under the Comprehensive Environmental Response, Compensation and Liability Act); *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994) (characterizing CERCLA as a “comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites”); see

government to bring to bear its considerable power to assure comprehensive safety for Americans by imposing major requirements on small and large manufacturers.

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 leading up to the 1965 Act.⁵⁷ Indeed, when ardent supporters overshot their mark, as they did in 1966, a stronger legislative policy concerning voting crashed and burned.⁵⁸ 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, however, 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. This view, moreover, 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 their interpretations.

Statutory interpretation represents a critical element in the process by which legislative policy takes shape.⁵⁹ As 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.

Legislators understand well this critical role of the courts and, instead of standing idly by and awaiting the courts' decisions, they take steps to influence the process of statutory interpretation in advance. Perhaps the most significant device by which individual legislators may exert influence is

also 33 U.S.C. § 1319(b) (authorizing the EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order" under the Clean Water Act).

⁵⁷ See generally JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS 275–86* (1968).

⁵⁸ See *id.*

⁵⁹ See MELNICK, *supra* note 9.

through the creation of legislative history. The positive political theory of legislation plausibly explains *why* legislators undertake efforts to make and use pre-enactment and post-enactment statements to influence interpretive decisionmaking in courts.⁶⁰ 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 both the liberal Democrats and ardent supporters—represented no serious change to the overall bill.⁶¹ To be sure, moderates insisted, to 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.” These efforts are described and analyzed as part of a general *theory of legislative rhetoric*.⁶²

It is first necessary to distinguish between *cheap talk*—that is, communication that is costless for the speaker to make and that is unverifiable and therefore untrustworthy—and *costly signaling*—communication where the speaker pays a price for inaccuracies.⁶³ 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.⁶⁴ For example, speeches made at the introduction of legislation are ordinarily 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 hyperbole about grand goals and aspirations rather than accurate portrayals of either the introduced legislative details or projections of those provisions likely to pass.⁶⁵ Similarly,

⁶⁰ See generally Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217 (1992) (discussing Congressional control over agencies through control and influence over statutory interpretation).

⁶¹ See text accompanying *supra* note 53.

⁶² See *New Perspectives*, *supra* note 13, at 1445–48.

⁶³ On signaling generally, see, for example, Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, 57 LAW & CONTEMP. PROBS. 91, 94–95 (1994).

⁶⁴ See *New Perspectives*, *supra* note 13 at 1445–48. This is a perspective originally proposed in *Legislative Intent*, *supra* note 20.

⁶⁵ To provide some perspective, it is estimated that over 10,000 bills are introduced in each Congress. WILLIAM ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION* 26 (3d ed. 2001). In comparison, over the last twenty years, Congress has passed only a few hundred measures—ranging from a high of 814 in 1988 to a dismal 346 in 1995 during the Republican Congress's Contract with America. Senate Daily Digest-Office of the Secretary, 20-Year Comparison of Senate Legislative Activity, <http://www.senate.gov/reference/resources/pdf/yearlycomparison.pdf> (last visited September 2, 2006).

discussions in news conferences or memoirs after the legislation's creation 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.⁶⁶ The same holds for committee reports.⁶⁷ If these reports fail to describe accurately the compromises made in committee, members whose support was necessary to pass the bill from the committee to the floor may work against the bill's passage, thus discouraging moderates from signing on to the legislation.⁶⁸

Another implication of the theory of legislative rhetoric is that the legislative record contains multiple, side-by-side interpretations of an act.⁶⁹ Ardent supporters, on cheap talk occasions, typically propound expansionary readings of the act. Yet moderates, emphasizing their compromises, focus on the act's limitations; ardent supporters, on costly signal occasions after the compromises but before an act's passage, will also accurately describe the act's limits. 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, there is a normative conclusion. In the real world, courts reinforce legislator incen-

⁶⁶ See, e.g., *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979) (Rehnquist J., dissenting). Then-Justice Rehnquist described how the statements of Representative Celler, the Chairman of the House Judiciary Committee and a sponsor of Title VII, helped to secure passage of the Civil Rights Act. Chairman Celler assured the House that “[t]he Bill would do no more than prevent . . . employers from discriminating against *or in favor of* workers because of their race, religion, or national origin.” *Id.* at 233 (emphasis in original). In the upper house, Senator Humphrey similarly stated that “there is nothing in [Title VII] that will give any power to the [EEOC] or to any court to require hiring, firing, or promotion of employees in order to meet a racial ‘quota’ or to achieve a certain racial balance.” *Id.* at 238. This exchange was necessary to sway moderates from the belief that Title VII would permit or require affirmative action. *ESKRIDGE ET AL.*, *supra* note 65, at 100. In fact, they may be credible solely because as a “repeat player who wanted to establish a reputation for truthfulness” true statements regarding an important compromise underpinning the legislation would ensure that Senator Humphrey “could make credible deals in future negotiations.” *Id.*

⁶⁷ See generally George A. Costello, *Average Voting Members and Other “Benign Fictions”*: *The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 43–47.

⁶⁸ For more on the centrality of the committee system in securing the legislative bargain that is ultimately contained in the legislation, see Weingast & Marshall, *supra* note 31, at 144–48 (1988).

⁶⁹ See *New Perspectives*, *supra* note 13 at 1446 (“Our theory of legislative rhetoric implies that multiple interpretations of an act exist simultaneously in the legislative record.”).

tives and efforts at spin control by using legislative history selectively.⁷⁰ In particular, courts are drawn under traditional theories of interpretation toward the “winner’s history”; that is, they tend to look more closely at legislative statements of authors, sponsors, and other ardent supporters of legislation, on the not-implausible grounds that these legislators were most important to the development of the legislation.⁷¹

The theory of legislative rhetoric suggests that this traditional approach is flawed because 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, 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 the ardent supporters’ costly signals.⁷²

D. Implications of the Theory

The preceding discussion reveals three key insights about legislative behavior, insights that undergird our discussion in the next Section on judicial interpretation and activism. First, in its process of legislating, Congress consists of multiple groups, including ardent supporters, ardent opponents, 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 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.

⁷⁰ For an interesting example of the incentives bolstered by the selective use of legislative history in action, compare Brief for Senators Graham and Kyl, as Amicus Curiae Supporting Respondents at 16, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), available at <http://www.hamdanrumsfeld.com/GrahamBrief.pdf> (citing “legislative history” involving colloquy between Senators Graham and Kyl—“two of the primary sponsors of the amendment” at issue—as support for immediate effect of legislation) with *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006) (affording weight to Senator Levin’s statement regarding statutory meaning, “as one of the sponsors of the final bill,” but downplaying remarks from Senators Kyl and Graham because they were “inserted into the Congressional record after the Senate debate) (emphasis in original). For an overview of the Senators’ efforts, and the Court’s response, see Emily Bazelon, *Invisible Men*, SLATE, Mar. 27, 2006, <http://www.slate.com/id/2138750/>.

⁷¹ See, e.g., *BankAmerica Corp. v. United States*, 462 U.S. 122, 139 (1983) (commenting that “greater weight . . . concerning the proper interpretation of the original bill” should be afforded to two supporters of the Clayton Act as opposed to an opponent of the legislation); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) (“Although the statements of one legislator made during debate may not be controlling . . . Senator Bayh’s remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute’s construction.”).

⁷² *Positive Canons*, *supra* note 20, at 711–12.

These three mutually reinforcing conclusions frame the basic argument of this Article. Whatever the machinations of 535 federal legislators, it frequently falls ultimately to judicial implementation to determine how legislative policy will take shape. Here, the courts' interpretive approach profoundly impacts legislative policy. 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 the ardent supporters' costly signals will make interpretations closer to the spirit of the law as passed by Congress.

In the next three Parts, the Article explains how these impacts deleteriously affect the cause of progressive lawmaking. First, the theory discussed in this section helps to define judicial expansionism. Second, this Article presents a model that explains the dynamics of judicial expansionism and congressional polarization. And, third, this Article provides an in-depth explanation as to how the courts' interpretations expand the scope of legislative bargains (focusing specifically on NEPA as an example).

II. WHAT IS STATUTORY EXPANSIONISM?

The claim that expansionist statutory interpretations have the paradoxical effect described in the introduction requires, as a preliminary matter, a description of what constitutes "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 the task of explaining how expansionism can be separated from judicial fidelity to the revealed will of Congress.

A. Modeling Statutory Expansionism

Judges expand a statute when they extend the statute beyond the critical legislators' understanding of what the statutory language he or she voted upon meant; in particular, when the interpretation requires those covered by the act to do more or removes limits or qualifications contained in the act. This expansion can be seen 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. Interpretations are expansionist when they move the meaning of the act from L further from Q toward x or even beyond x. For example, suppose that the line represents the degree of environmental protection, with none on the right (the more conservative, anti-regulatory position) and very high levels on the left (the liberal, pro-environmental position). The status quo, Q, represents the environmental outcome in the absence of environmental laws; and L is an environmental protection law that represents an increase in environmental protection over Q. In this setting, x is a judicial interpretation that expands the degree of environmental protection beyond L, that is, that creates a higher level of environmental protection than the original legislation, L. When an interpretation mirrors the meaning accorded to the particular statutory provision by its enactors at the time of the final compromises necessary to pass the act, we can say that this interpretation comports with legislative intent—that is, when $x=L$. Interpretations are consonant with legislative intent—that is, $x=L$ —when they can be said to mirror the meaning accorded to the particular statutory provision by its enactors.

There are, however, two additional wrinkles: First, although not the focus of 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 onerous procedures into a statute for judicial redress, procedures that were not contemplated by the legislators whose support was pivotal to the act’s passage. In such a case, there is a departure from the baseline understanding, albeit in the opposite direction. To continue the environmental example, a contractionist court would alter the degree of environmental protection from L back toward Q, such as x*. The logic of our argument, therefore, is symmetrical with respect to contractionist interpretations.

The second wrinkle is 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, are expansionist in the sense we use this term. Similarly, judicial interpretations that narrow the scope of this conservative legislation are contractionist for much the same logical reasons.

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

Figure 2.



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 original status quo. Interpretation 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 L and x 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. Expansionist interpretations are not merely illustrations of the well-trod point that courts depart from legislative will, thereby substituting their own judgment for that of Congress. Rather, they shed considerable light on the paradox described in the introduction. Between the early 1960s and the 1990s, advocates of progressive social legislation (typically found on the left of the political spectrum during this period) pushed their agendas in both Congress and the courts.⁷³ Indeed, often the very same advocates of wide-ranging social legislation are found, post enactment, in courts urging judges to give the statute a very progressive interpretation—an interpretation, as shown, that is beyond what Congress could have enacted if the option was presented to legislators in the initial instance. It is especially in these circumstances that the paradox arises.

To be sure, in the 21st century, conservative activists push for wide-ranging social legislation and, further, push for interpretations that broaden its scope, revealing the same paradox.⁷⁴ And the logic of our analysis applies in full force to these situations. An activist, conservative Congress, passing a conservative social agenda combined with a conservative court expanding the meaning of these acts will be subject to the same paradox.

That said, this Article draws examples from judicial interpretations during the 1970s that are relentlessly liberal.⁷⁵ Insofar as the focus in this and earlier work is on civil rights and environmental protection, the basic

⁷³ See *New Perspectives*, *supra* note 13, at 1529–30.

⁷⁴ See *id.* at 1530.

⁷⁵ See text accompanying *infra* notes 127–86.

story is one of liberal judges expanding moderate legislation and thereby making more difficult the passage of other 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 1970s—is critical in understanding the development of regulation in the modern United States. The decline of progressive lawmaking in the quarter century or so since, as suggested in the introduction, can be explained in part by the paradoxical expansion by courts of carefully crafted compromises.

B. *Legislative Intent Revisited*

Key to this 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 whose support is necessary to pass the legislation.⁷⁶ To the extent that the statute’s text forms the baseline of interpretation in adjudication, then the question of the courts’ fidelity to the legislature is fairly straightforward.⁷⁷ Despite the vigorous debate in the scholarly literature about the desirability of this “honest agent” account of statutory construction,⁷⁸ 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.⁷⁹

The traditional method by which federal courts discern the meaning of ambiguous legislation has been labeled intentionalism.⁸⁰ 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 evi-

⁷⁶ See *New Perspectives*, *supra* note 13, at 1448–51.

⁷⁷ 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) (arguing that textualists should give way to the post-textualist era); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 353–54 (2005) (describing the concept of “objectified intent”).

⁷⁸ See, e.g., Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984) (arguing that judges facilitate legislation if they are honest agents of the political branches); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 320 (1989) (contesting the honest agent theory); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 694 (1999) (describing the “widely shared premise that judges must act as ‘faithful agents’ of the legislature”).

⁷⁹ See 2A NORMAN J. SINGER, SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45:06 (6th ed. 2000) [hereinafter SUTHERLAND’S] (“In a case where a court is faced with a novel question, it must seek to ascertain and give effect to the intention of the legislature as it is expressed in the statute itself.”).

⁸⁰ ESKRIDGE, *supra* note 17, at 684–89 (discussing “intentionalism”); see also SUTHERLAND’S, *supra* note 79, at § 45:05 (6th ed. 2005) (discussing prevalence of and standards for interpreting statutes in light of legislative “intent”); *Day v. North Am. Rayon Corp.*, 140 F. Supp. 490, 493 (D.C. Tenn. 1943) (discussing “intent” as not being “what may have been in the mind of the person who wrote the statute” but, instead, a result of “legislative history and conditions which may have comprised a background for legislative action” and “the language of the statute itself”).

dence can illuminate the intention of legislators and, thus, the meaning of a statutory provision.⁸¹ This view relies, of course, on the premise that the legislature can be properly said to have a collective intent.⁸² 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.⁸³ 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 recovered by the courts. Individuals, it is said, have intentions; collectivities do not.⁸⁴ 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.’”⁸⁵

Without here canvassing the debate over collective intent, we note that there are two general rejoinders to this far-flung critique. With respect to the ascription of intention to a collectivity such as a legislature, this ascription is not offered as a literal depiction of the mind-states of this omnibus group but rather, following Daniel Dennett’s felicitous phrase, as a “stance,”⁸⁶ that is, an acknowledgment that collectivities can and do communicate to an audience. Moreover, collectivities can assert directions that individuals follow conscientiously—indeed, the very notion of a legislature issuing binding statutory commands presupposes as much.⁸⁷ This Article,

⁸¹ For an early statement of this idea, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). See also SUTHERLAND’S, *supra* note 79, § 45:06 (discussing concept of “intent”).

⁸² For arguments that this premise is ridiculous, see Radin, *supra* note 81, at 870 (“That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.”). For the argument that the concept of intent is at least as coherent as the legal fiction of tort law’s “reasonable man,” see SUTHERLAND’S, *supra* note 79, at § 45:06 (“Just as nobody has ever seen the reasonably prudent man who is used as a standard of judgment in tort law, the extent to which an abstract, nonsubjective, conception of legislative intent is utilized confirms its usefulness as a standard of judgment in statutory construction.”).

⁸³ See, e.g., ESKRIDGE, *supra* note 17, at 937–1039. Compare ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (1997) (opposing the use of legislative history) with Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (supporting the use of legislative history).

⁸⁴ Jeremy Waldron has argued against the notion of a collective legislative intent. See JEREMY WALDRON, LAW AND DISAGREEMENT 1–48 (1999); Jeremy Waldron, *Legislators’ Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 329–56 (Andrei Marmor ed., 1995).

⁸⁵ Kenneth Shepsle, *Congress Is a ‘They,’ Not an ‘It’: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

⁸⁶ See DANIEL C. DENNETT, THE INTENTIONAL STANCE 15 (1987); cf. Joseph Raz, *Intention in Interpretation*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 258–59 (Robert P. George ed., 1996).

⁸⁷ See Cheryl Boudreau, Mathew D. McCubbins, and Daniel B. Rodriguez, *Statutory Interpretation and the Intentional(ist) Stance*, 38 LOYOLA L.A. L. REV. 2131, 2143–44 (2005) (explaining why structure of lawmaking assumes that Congress can issue binding commands to implementation institutions).

of course, cannot address all sides of this complex debate, but the burden lies 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.⁸⁸

A second rejoinder is directed specifically at Professor Shepsle's positive political theory criticism that a collective body cannot have a single intention, only many separate and, typically, contradictory ones.⁸⁹ This criticism is underscored by the famous Arrow Impossibility Theorem⁹⁰ 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. The reason is as follows. Suppose, as predicted by Shepsle,⁹¹ 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,⁹² 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 *one* outcome passed by Congress regardless of whether some other alternatives could defeat the proposal passed by Congress.

Now let us turn to the thorny issue of intent, a term we have not yet introduced. This term has two different meanings. In the first, intent is an intra-psychic term about the motives and understandings of a single individual.⁹³ A legislator 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

⁸⁸ See also Arthur Lupia & Mathew McCubbins, *Lost in Translation: Social Choice Theory Is Misapplied Against Legislative Intent*, 14 J. CONTEMP. LEGAL ISSUES 585, 611 (2005).

⁸⁹ See Shepsle, *supra* note 85, at 239.

⁹⁰ KENNETH A. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d. ed. 1963).

⁹¹ See Shepsle, *supra* note 85, at 241–44.

⁹² See ARROW, *supra* note 90, at 3.

⁹³ See ESKRIDGE ET AL., *supra* note 22 at 224 (2000) (“[I]ntentionalism’s professed goal . . . is to implement the *actual* intent of the enacting Congress.”).

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 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, for 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 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 they are voting X against Y.

It is this second form of intent that we term *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. As we show in the following, this approach is not a sleight of hand. In what follows, we provide a new method for understanding this form of legislative intent.

C. *From Simple to Sophisticated Intentionalism*

The principal critique of the normative premise that legislative intentions ought not to bind the courts 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.⁹⁴ Insofar as this critique rests on a complex view of the Constitution and is pertinent to theories of statutory interpretation, it is bracketed and left until later. Second, and more to the point of this analysis, 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.⁹⁵ This

⁹⁴ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 646–50 (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”).

⁹⁵ See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–29 (1990); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 689 (1997).

critique is encapsulated well in the statement attributed to the late Judge Harold Leventhal of the D.C. Circuit who observed that interpretation of Congress's legislative history is akin to looking over a crowded room and picking out your friends.⁹⁶

This Article focuses on both critiques in that they raise fundamental challenges to intentionalism as a theory of statutory interpretation. Both are most applicable, however, to what is referred to as *simple* intentionalism. But as explained, *sophisticated* intentionalism weathers well against these positive and normative criticisms.

The basic characteristic of simple intentionalism is its unguided approach to discerning legislative intent from pieces of legislative history and various canons of statutory construction.⁹⁷ This characterization 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 evidence of legislative intent that legislators make available for just that purpose. 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 history for, as many scholars have noted, so-called historical evidence of legislators' intentions is unreliable and often contradictory.⁹⁸ Indeed, our theory of legislative rhetoric demonstrates that multiple and contradictory views exist side-by-side in the legislative record.⁹⁹

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. 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 the ardent supporters?¹⁰⁰ Discerning legislative will from only the meaning attributed to a statute by the legislation's ardent supporters risks giving effect to certain of these legislators' untrustworthy strategies. Moreover, according to our theory of legislative rhetoric, statements at different times during the debate by the same ardent supporters are often contradictory—for example, when a proponent expresses the grand

⁹⁶ 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.").

⁹⁷ See text accompanying *supra* notes 80–82.

⁹⁸ See, e.g., Frank Easterbrook, *What Does Legislative History Tell Us?*, 66 HARV. J.L. & PUB. POL'Y 441, 442–44 (1990); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 21 SUFFOLK L. REV. 807, 813 (1998).

⁹⁹ See text accompanying *supra* notes 59–71.

¹⁰⁰ On the distinction between legislator expectations and hopes, see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 323 (1991).

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

While it is tempting to conclude from this discussion that legislative history is intrinsically unreliable, we resist this conclusion by emphasizing that a more sophisticated form of intentionalism is available. This method endeavors to recover from the legislative record, with the use of carefully designed extrinsic aids, evidence of the legislature's real intent.¹⁰¹ 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.¹⁰²

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 greater 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.¹⁰³

¹⁰¹ See *New Perspectives*, *supra* note 13, at 1448–51; *Positive Canons*, *supra* note 20, at 711–18.

¹⁰² While we have argued at length elsewhere for this version of intentionalism, see *New Perspectives*, *supra* note 13, at 1448–51, 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, *supra* note 95, at 324–32, 345–62 (explaining and defending practical reasoning model, a model which contains a proposed hierarchy of sources for use in interpreting statutes). 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, *supra* note 17, 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, 233–40 (1986) (explaining judiciary’s role as “enforcer of legislative deals”).

¹⁰³ 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 the refined definition of intention and the theory of legislative rhetoric offered above. In a typical situation, ardent supporters initially introduce a strong version of their legislation, S, with which they hope to replace the status quo, Q. Ardent opponents hope to retain the status quo. As 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.¹⁰⁴ 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 is A is really S. In their cheap-talk settings, they are likely to explain how A is not much of a compromise from S,¹⁰⁵ the amendments transforming S into A were relatively minor; or they may simply state that A accomplishes what S would accomplish. 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 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,¹⁰⁶ whereas ones seeking to maintain the legislation will emphasize the ardent supporters' costly signals and the statements of the moderates.¹⁰⁷

The view of sophisticated intentionalism is to discern A and, in particular, to discern the differences between A and S. Doing so requires reliance on the ardent supporters' and moderates' costly signals. This view differs from a textualist approach.¹⁰⁸ We agree with textualists 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

¹⁰⁴ See *supra* notes 59–71 and accompanying text.

¹⁰⁵ See *New Perspectives*, *supra* note 13, at 1445–46.

¹⁰⁶ See *id.* at 1498–1521.

¹⁰⁷ See *id.*

¹⁰⁸ See text accompanying *supra* notes 94–95.

the statute or to expand the statute.¹⁰⁹ But, unlike textualists, our approach does not eschew intentionalism or legislative indicia. Rather, sophisticated intentionalism and the theory of legislative rhetoric demonstrate how courts can steer through contradictory statements in a way that helps create fidelity to the original legislative intent, namely, that members of the majority 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 uncover the legislature's 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. By linking the interpretation of a statute to the circumstances surrounding its enactment, sophisticated intentionalism 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 intent to the large, strategically sensitive, group of legislators making up Congress as an institution. Third, and finally, sophisticated intentionalism limits judicial discretion and, therefore, limits the risks created by untethered explorations into legislative history, risks captured felicitously by Judge Leventhal in his description of legislative history as random and malleable.¹¹⁰

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.¹¹¹ The purpose in describing sophisticated intentionalism in this Article, however, is more modest. Our aim is only to establish a plausible descriptive baseline of what is the consistent interpretation with the legislature's revealed intent. From this baseline, one may ascribe the label "expansionist" to interpretations that depart from this will in the direction of x from 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.*¹¹²

¹⁰⁹ See, e.g., William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2065–70 (2006) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006)); John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 440–42 (2005).

¹¹⁰ See *supra* note 94.

¹¹¹ See *New Perspectives*, *supra* note 13.

¹¹² 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 the 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

III. THE PARADOX OF STATUTORY EXPANSIONISM

It is a commonplace to note that members of Congress became substantially more polarized beginning in the late 1970s. Many scholars point to various endogenous factors, including changes in legislative rules and other intra-legislative changes.¹¹³ 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.¹¹⁴ Although “[t]hese explanations are not necessarily mutually exclusive,”¹¹⁵ a key dividing line between these various explanations of polarization involves the empirical question of 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 debate rages over this question,¹¹⁶ there is strong evidence that at least a substantial portion of the polarization in Congress is attributable to shifts in the behavior of incumbent legislators. The basic problem is that moderate legislators, facing reduced incentives to behave moderately, are moving away from the middle and toward the extremes. Compromise that requires negotiation at the ideological middle, therefore, is proving to be increasingly difficult to achieve. And to the extent that agreements between moderates and ardent supporters 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, focusing on some plausible causes of this polarization—and also on

has occasionally expanded the scope of voting rights protections by amending its lodestar 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.

¹¹³ 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 much more explicitly ideological

Sean Theriault, *The Case of the Vanishing Moderates: Party Polarization in the Modern Congress*, at 3–4 (September 23, 2003) (unpublished manuscript, on file with authors) (citation omitted).

¹¹⁴ See, e.g., JEFFREY STONECASH ET AL., *DIVERGING PARTIES: SOCIAL CHANGE, REALIGNMENT, AND PARTY POLARIZATION* (2003).

¹¹⁵ Theriault, *supra* note 113, at 4.

¹¹⁶ Compare Keith T. Poole, *Changing Minds? Not in Congress!*, at 3 (January 13, 2003) (unpublished manuscript, on file with authors) (legislator views are stable across their career) with 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) (increasing polarization at least partially result of changing party strategies and changing party leadership rather than changing membership).

the effects of this polarization for progressive state making—helps illuminate this vexing subject.

The following section develops a simple spatial model that demonstrates a causal relationship between judicial activism and congressional polarization. Although judicial activism is not 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.

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.¹¹⁷ Using a simple model, Snyder showed that voting scores did not accurately reflect differences in legislator preferences.¹¹⁸ This is in part because the legislative agenda process restricts what members vote on, so that there is a bias in scores.

This Article's 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 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 this analysis, it is assumed, first, that the majority party in Congress controls the agenda or those issues that come up for a vote. As Gary Cox and Mathew 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 surface for a vote.¹¹⁹ Second, to become law, all legislation requires that a majority of legislators vote in favor of the legislation. Third, the legislature is subject

¹¹⁷ James M. Snyder, Jr., *Artificial Extremism in Interest Group Ratings*, 17 LEGIS. STUD. Q. 319 (1992).

¹¹⁸ *Id.* at 320.

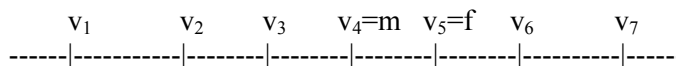
¹¹⁹ See COX & MCCUBBINS, SETTING THE AGENDA, *supra* note 35, at 37–49. Alternative assumptions about agenda power could be employed, *see, e.g.*, JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA 221–26 (1995), so that the results that follow do not depend on the party agenda control model.

to a filibuster by any subset of members.¹²⁰ 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 super-majority of the legislators vote for cloture.¹²¹

To simplify the model, 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 2). Legislators are assumed to have preferences over policies;¹²² 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. The model labels the legislators, or voters, v_1 through v_7 , with the labels appearing above the continuum.

This structure implies that, when deciding between a proposed policy alternative and the status quo, each legislator votes for the option 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, the model assumes that 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 legislature. Three different votes are considered, 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.

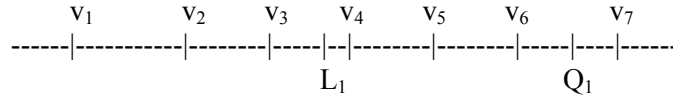
Figure 3 presents the first vote, between legislative proposal L_1 and status quo, Q_1 . Labels for the policy alternatives appear below the line. Five of the seven legislators favor the legislation (v_1 – v_5). Thus, not only does L_1 command a majority, but, because it commands the support of a supermajority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

¹²⁰ Similar examples to what follows can be constructed without the cloture assumption; therefore, the results that follow apply to the House in addition to the Senate.

¹²¹ This approach builds on the pivotal politics models of KEITH KREHBIEL, *supra* note 31, and DAVID W. BRADY & CRAIG VOLDEN, *REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON* (1998).

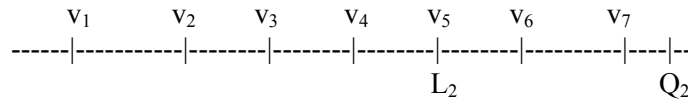
¹²² See KREHBIEL, *supra* note 31, at 22.

Figure 4: First Legislative Proposal, L_1 , and Status Quo, Q_1 .



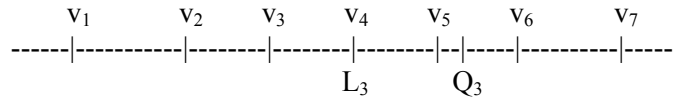
The second vote considers a status quo at Q_2 and a legislative proposal at L_2 . Although the alternatives are in somewhat different positions, the same coalitions form to support and oppose the legislation.

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 cloture will 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.

Voting scores, therefore, 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% 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.¹²³ Although member preferences are by construction centrist—most have preferences in the middle of the policy space—the voting scores of five members are at the extremes even though the ideal policies of two voters are extreme.

*Table 1: Voting Scores for the Legislation
(No Activist Judiciary).*

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

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 required to interpret a particular statute, the courts move policy to the left.

¹²³ See Snyder, *supra* note 117, at 338 (“The basic problem is that one cannot necessarily infer a change in legislators’ preferences from a change in their roll-call behavior, except in certain cases.”).

To make the calculations simple, suppose that the courts in their interpretations move all laws 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 laws 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.

The voting records and associated voting scores for the legislature are reported in the presence of an expansionist 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 Legislation
(An Activist Judiciary).*

<i>Legislator</i>	<i>Vote</i>		<i>Voting Score</i>
	<i>Yes</i>	<i>No</i>	
V_1	3	0	100
V_2	3	0	100
V_3	3	0	100
V_4	3	0	100
V_5	1	2	33
V_6	0	3	0
V_7	0	3	0

An expansionist judiciary has several effects on legislation. First, consistent with this Article's argument, 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.

Second, the legislature appears to become more polarized. The voting scores seem to indicate that the moderates 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 to extreme policies. But an activist judiciary transforms moderate policies into more extreme ones. According to 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.¹²⁴ 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 the number of legislators is increased to one hundred, still retaining the uniform distribution, then the behavior change would affect twenty-eight legislators, a sizeable portion of the legislature. Moreover, one-hundred 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.

Third, the approach yields another implication not shown above. The model above ignored the origin of legislative proposals. Reflecting the power of the moderates to prevent legislation, modern pivotal politics models argue that the majority's proposals must take into account the minority's preferences in order to gain support for cloture.¹²⁵ 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 the coalition crucial to the final bargain typically will 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

¹²⁴ See *id.* at 336.

¹²⁵ See KREHBIEL, *supra* note 31, at 93–117 (describing "filibuster pivots").

proposals and thus make fewer proposals altogether. An activist judiciary makes negotiating legislation more difficult, and thus less likely.

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 the moderate compromise and the original status quo. Yet, judicial activism of this sort has just the opposite effect on the legislature. By discouraging moderates from making deals that will gain their support for major legislation, judicial expansionism dictates that the legislature negotiate and pass fewer major laws. Paradoxically, an activist judiciary may interpret existing legislation more progressively, but it makes new progressive legislation less likely.¹²⁶

B. Illustrations of the General Thesis

"Smoking gun" evidence of this 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,¹²⁷ it is notoriously difficult to identify a precise cause for why Congress failed to enact one or another progressive statute.

That said, 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 1960s through 1980s. 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 proved either incapable or unwilling to overturn these expansionary decisions; nor did it augment progressive protections in these key policy areas by enacting new statutes. To be sure, this statutory expansionism abates in the mid-1980s and beyond, as more "conservative" courts construe civil rights and other progressive statutes more

¹²⁶ As noted in the previous Part, *see* text accompanying *supra* notes 117–26, 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.

¹²⁷ ARTHUR CONAN DOYLE, *THE ADVENTURE OF SILVER BLAZE* (1892) (involving a crime solved, in part, based on a non-barking dog). The logic of this rule was nicely set forth by Justice Brennan, with a little help from another jurist: "When a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'" *Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987) (quoting GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–32 (1982)).

narrowly than before.¹²⁸ Yet, a careful look at this pre-retrenchment era is important because 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 detail a watershed environmental law case of the early 1970s, *Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission*.¹²⁹ In that case, the D.C. Circuit interpreted—and expanded—the scope of the National Environmental Policy Act of 1969. The dynamics of this enactment and expansion episode help illustrate the paradox.

I. NEPA and Calvert Cliffs.—In 1969, following spirited debate and years of negotiation, Congress enacted the National Environmental Policy Act [NEPA].¹³⁰ This act established a series of regulatory responsibilities and imposed duties on federal agencies to ensure that their actions took appropriate account of environmental effects.¹³¹ 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.¹³² 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”¹³³ and will ensure that “[n]o agency will then be able to

¹²⁸ See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 60–65 (1980) (interpreting § 2 of the Voting Rights Act of 1965 to be applicable only to jurisdictions that acted purposefully and discriminatorily to deny or abridge the freedom to vote on account of race); *Grove City Coll. v. Bell*, 465 U.S. 555, 570–74 (1984) (interpreting Title IX of the Education Amendments of 1972 to be applicable only to financial aid departments and not to other departments); *U.S. Dep’t of Transp. v. Paralyzed Vets. of Am.*, 477 U.S. 597, 608–610 (1986) (interpreting section 504 of the Rehabilitation Act of 1973 to be inapplicable to air carriers); *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 165–69 (1989) (interpreting the Age Discrimination in Employment Act of 1967 to permit an age-based discrimination employee benefit plan adopted prior to enactment of the Act).

¹²⁹ 449 F.2d 1109 (D.C. Cir. 1971). The case has been described as “the most oft-cited opinion in environmental law,” Oliver A. Houck, *Is that All? A Review of The National Environmental Policy Act: An Agenda for the Future*, by Lynton Keith Caldwell, 11 DUKE ENVTL. L. & POL’Y F. 173, 183 n.41 (2000), and as the opinion which “transformed NEPA into “the Magna Carta of modern environmental law.” Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 209 (2004).

¹³⁰ 42 U.S.C. §§ 4321–4347 (2000).

¹³¹ 42 U.S.C. § 4332(A), (B).

¹³² See National Environmental Policy Act of 1969, 42 U.S.C. § 4332(B) (2000) (requiring agencies to ensure that “environmental amenities and values [are] given appropriate consideration in decision-making”).

¹³³ *Calvert Cliffs*, 449 F.2d at 1113 n.7 (citing S. REP. NO. 91-296, at 19 (1969)).

maintain that it has no mandate or no requirement to consider the environmental consequences of its actions.¹³⁴

By any measure, NEPA is a historic, far-reaching piece of environmental legislation.¹³⁵ In relatively few words, NEPA encapsulates the value and imperative of maintaining a close watch on public and private activities to ensure that environmental values are considered before decisions are made.¹³⁶ The mandate in Title I, labeled the “Congressional Declaration of National Environmental Policy,” is “to use all practicable means and measures . . . to create and 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.”¹³⁷ The remainder of the Act provides various procedural requirements for agencies to follow in implementing its environmental responsibilities under the statute.¹³⁸

From the beginning, environmental interest groups urged an interpretation of NEPA on federal agencies and the courts that would have required substantive, and not merely procedural, responsibilities.¹³⁹ These substantive responsibilities would entail disapproving activities that would result in environmental damage. Critically, these obligations would flow directly from the terms of the Act, that is, from interpretations of the Act that gave it a substantive import, and not from other environmental statutes such as the Clean Air and Water Acts. The relevant federal agencies, the lower federal courts, and, eventually, the Supreme Court, all rejected this rendering of NEPA as a font of substantive obligations.¹⁴⁰

In addition to these efforts to move the statute from a procedural to a substantive focus, advocates also pushed hard for an interpretation that would require agencies to replace their existing procedures with new procedures mandated by NEPA. Such an interpretation would have occasioned significant change; many federal agencies had already addressed the prob-

¹³⁴ *Hearings on S. 1075, S. 237, and S. 1752 Before Senate Committee on Interior and Insular Affairs*, 91st Cong., 116, 206 (1969).

¹³⁵ See sources cited in *supra* note 129.

¹³⁶ 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).

¹³⁷ 42 U.S.C. § 4331(a) (2003).

¹³⁸ See, e.g., 42 U.S.C. § 4332(2)(C)(i) (2000) (requiring “all agencies of the Federal Government [to] . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action”); *Calvert Cliffs*, 449 F.2d at 1112–14 (summarizing NEPA’s procedural requirements).

¹³⁹ See, e.g., Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 207–09 (1998) (“Viewed broadly with regard to the intentions of its sponsors, the full potential of NEPA has not yet been realized.”).

¹⁴⁰ See, e.g., *Strycker’s Bay Neighborhood Council, Inc., v. Karlen*, 444 U.S. 223, 228 (1980); see also Daniel Mandelker, *NEPA Alive and Well: The Supreme Court Takes Two*, 19 ENVTL. L. REP. 10385 (1989).

lem of how to deal with environmental issues, and some had adopted procedures for doing so.¹⁴¹ For example, under this interpretation, the Atomic Energy Commission (“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 required by either the agency or Congress at the time.¹⁴²

The controversy over this matter reached the influential D.C. Circuit Court of Appeals in 1971 in *Calvert Cliffs*. The first issue raised in the case was a technical one; it concerned whether the Commission’s rule against raising nonradiological issues outside of a formal proceeding were permissible under NEPA.¹⁴³ The rule had the effect of permitting affected parties to raise some, but not all, environmental issues before the Commission outside of a formal proceeding.¹⁴⁴ The second, and larger issue, was whether the Commission’s extant procedures, formed in part under existing environmental laws, must give way to new procedural requirements originating in NEPA.¹⁴⁵ In other words, did Congress in enacting NEPA require 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? The resolution of the legal dispute in *Calvert Cliffs* turned on 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”¹⁴⁶ The Commission here had insisted that its standards were in accord with NEPA and with other environmental statutes, including, especially, the Clean Water Act.¹⁴⁷

The D.C. Circuit held in favor of the environmental group bringing the action—the Calvert Cliffs’ Coordinating Committee. “Our duty,” announced 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.”¹⁴⁸ After providing this grand encomium to NEPA’s ambitious purposes, Judge Wright indicated that the intent and purpose of the statute was to impose substan-

¹⁴¹ See *Calvert Cliffs*, 449 F.2d at 1120-24.

¹⁴² *Id.* at 1123-24. “This is exactly what the Supreme Court held—requiring the Commission to promulgate new regulations that would not be in ‘fundamental conflict with the basic purpose of [NEPA].’” *Id.* at 1123.

¹⁴³ *Id.* at 1122.

¹⁴⁴ *Id.* at 1123-24.

¹⁴⁵ *Id.* at 1122. The Atomic Energy Commission argued that “proof that the applicant is equipped to observe and agrees to observe such standards and requirements” as are required under other state and federal environmental laws constituted “a satisfactory showing that there will not be a significant, adverse effect on the environment.” *Id.*

¹⁴⁶ 42 U.S.C. § 4334 (2000); see also *Calvert Cliffs*, 449 F.2d at 1124.

¹⁴⁷ *Calvert Cliffs*, 449 F.2d at 1124-26.

¹⁴⁸ *Id.* at 1111.

tial—and substantially new—obligations on federal agencies to ensure that the environment will be taken adequately into account in regulatory decisionmaking processes.¹⁴⁹

Judge Wright rested his analysis on the language and purpose of the statute. The key provision stated 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.”¹⁵⁰ The linchpin of the dispute was whether “appropriate” tempers federal agencies’ responsibility to protect the environment to the best of their ability or whether, as the D.C. Circuit concluded in the end, it provided a rather thin caveat in the pursuit of unqualified environmental protection.¹⁵¹

The court’s conclusion in *Calvert Cliffs* was powerful: Existing agency procedures must give way to new ones implementing NEPA’s broad mandate. 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 polarization in Congress with regard to environmental policy in the subsequent decades.¹⁵²

To understand why *Calvert Cliffs* is 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

¹⁴⁹ See, e.g., *id.* at 1115 (“But if the decision was reached procedurally without individualized consideration and balancing of environmental factors [as required by NEPA] . . . it is the responsibility of the courts to reverse.”).

¹⁵⁰ *Id.* at 1113 (quoting 42 U.S.C. § 4332(2)(B) (2000)).

¹⁵¹ *Id.* at 1113 n.8. In blunt terms, Judge Wright went on to say that “[t]he Act requires consideration ‘appropriate’ to the problem of protecting our threatened environment, not consideration ‘appropriate’ to the whims, habits or other particular concerns of federal agencies.” *Id.*

¹⁵² Other expansionist decisions from this era include *Pub. Serv. Co. of N.H. v. U.S. Nuclear Regulatory Comm’n*, 582 F.2d 77 (1st Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978) (holding that licensing by Federal Regulatory Comm’n is “major federal action” for purposes of NEPA); *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967 (2d Cir. 1976) (holding that construction of a postal facility is “major federal action” under NEPA); *Env’tl. Def. Fund v. Mathews*, 410 F. Supp. 336 (D.D.C. 1976) (holding that NEPA constructively “amends the Federal Food, Drug, and Cosmetic Act to the extent that it requires the FDA to give full consideration without restrictions of time to all environmental issues related to FDA approval”); *McDowell v. Schlesinger*, 404 F. Supp. 221 (W.D. Mo. 1975) (holding that transfer of civilian air force employees from one base to another was “major federal action” under NEPA); *Goose Hollow Foothills League v. Romney*, 334 F. Supp. 877 (D. Or. 1971) (holding that federal agency acted “arbitrarily” in determining that construction of high rise building would not have “significant effect” on quality of human environment under NEPA standards).

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].¹⁵³ 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.”¹⁵⁴ 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.

That NEPA reflected a compromise between ardent environmental interests and more moderate legislators makes sense in the context of the times. During the 90th and 91st Congresses, legislators struggled mightily over the scope of a range of environmental initiatives.¹⁵⁵ Predictably, interest groups mobilized on all sides of these battles.¹⁵⁶ Final versions of legislation represented compromises among diverse groups of legislators.¹⁵⁷ Ardent supporters such as Edmund Muskie celebrated, appropriately enough, these historic victories,¹⁵⁸ the 1960s and 1970s were, indeed, a wa-

¹⁵³ 115 CONG. REC. 29,053 (1969).

¹⁵⁴ 115 CONG. REC. 40,420 (1969).

¹⁵⁵ See, e.g., Henry N. Jackson, *Environmental Policy and the Congress*, 11 NAT'L RES. J. 403, 406–07 (1971) [hereinafter *Environmental Policy*] (“In the 1960’s, there were sporadic, uncoordinated efforts to deal with various aspects of the ‘environmental problem.’ Most of these efforts, however, were responses to specific problems and did not attempt, let alone achieve, a coherent statement of policy or public philosophy”); see also SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, S. REP. NO. 91-296 (1969); Henry M. Jackson, *Foreword: Environmental Quality, the Courts and the Congress*, 68 MICH. L. REV. 1073, 1076–77 nn.13–19 (1970) (collecting legislative environmental efforts throughout the 1960s). There was a flurry of legislative efforts to create environmental legislation during the 90th and 91st Congresses. In the 90th Congress, over 100 bills related to various aspects of environmental protection were introduced. S. REP. NO. 91-296, at 12 n.7. By mid-July of 1969, the 91st Congress had proposed over 40 bills “concern[ing] either . . . a national policy for the environment or the establishment of machinery to study the overall problems of the human environment.” *Id.* Though there was extensive activity in the 90th and 91st Congress, NEPA’s roots extended back almost a decade. Much of NEPA was drawn from prior legislation that Senators had presented but that had never garnered the requisite number of votes to pass. One of the most influential of these “ambitious measures” was the Resources and Conservation Act, S. 2549, 86th Cong. (1959), which Senator James Murray had introduced a decade earlier.

¹⁵⁶ Cf. *Environmental Policy*, *supra* note 155, at 408 (“Passage and implementation of the National Environmental Policy Act was begun in an atmosphere of public attention—almost a competition for primacy in advocating environmental causes.”).

¹⁵⁷ *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1124–26 (D.C. Cir. 1971) (describing evidence of compromise between provisions of NEPA and the Water Quality Improvement Act of 1970).

¹⁵⁸ See MELNICK, *supra* note 26, at 31–35.

tershed period for environmental protection.¹⁵⁹ However, legislators who took a more moderate position with regard to environmental protection could also credibly claim that their interests were properly taken into account in the design of the regulatory programs. Environmental statutes of this era reflected carefully tailored compromises; NEPA was no exception.

Notwithstanding the strong evidence of compromise in the final version of NEPA, Judge Wright insisted that the compromise did not cabin the scope of NEPA to ensure environmental protection at all costs. Judge Wright concluded, implausibly, that “Senator Jackson appears not to have ascribed major importance to the compromise.”¹⁶⁰ And, responding to statements that confirmed this compromise, Judge Wright announced that “[t]his rather meager legislative history . . . cannot radically transform the purport of the plain words of Section 104.”¹⁶¹

The D.C. Circuit decision in *Calvert Cliffs* cannot be read as anything other than an expansionist interpretation of NEPA.¹⁶² As shown, the so-called plain meaning of NEPA’s 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.¹⁶³ As with other expansionist decisions of this era,¹⁶⁴ *Calvert Cliffs* is noted for its broad dec-

¹⁵⁹ See, e.g., CHARLES O. JONES, *CLEAN AIR: THE POLICIES AND POLITICS OF POLLUTION CONTROL* (1975); MELNICK, *supra* note 26, at 28.

¹⁶⁰ *Calvert Cliffs*, 449 F.2d at 1125 n.37.

¹⁶¹ *Id.* at 1126.

¹⁶² Houck, *supra* note 129, at 183 (“[Judge Wright] did not change the statute. He simply rewrote it with as much law to apply as he could find.”).

¹⁶³ See *id.* at 183–84. Professor Houck captures this sentiment well:

[G]iven the generality of its language and *the compromises made in its enactment*, NEPA is extremely lucky to have had any impact on federal decision-making at all. At another time, and almost certainly today, this statute would have been delivered stillborn. It was brought to life by two great coincidences in the law.

The first was *Calvert Cliffs* . . . Dr. Caldwell, Senator Jackson, and the entire Senate Committee would have been hard pressed to write a stronger, more explicit statement. *Indeed, had they done so, it is quite possible that NEPA would never have been enacted.* . . .

For these reasons, it is either a little disingenuous or a little naïve for [a prominent environmental lawyer] to complain of NEPA’s reduction-to-its-minima at the hands of environmental lawyers. As any first-time reader of this statute can attest, it is anything but self-evident. The drafters of NEPA were fortunate that their statute went anywhere at all, much less that it has gone so far. NEPA was saved from anonymity and an early death by an extraordinary opinion by the District of Columbia Circuit, followed by other far-sighted opinions, followed by a remarkably strong set of regulations, that, collectively, *did what Congress could not or would not do*.

Id. at 181, 183–85 (emphasis added); see also Lazarus, *supra* note 129, at 207–08 (explaining that expansionist interpretations of environmental statutes are necessary to overcome inherent limitations of American legislative law).

¹⁶⁴ See *Greene County Planning Bd. v. Fed. Power Comm’n*, 455 F.2d 412, 420 (2d Cir. 1972) (stating that NEPA “is a mandate to consider environmental values at every distinctive and comprehensive stage of the . . . process”); *Env’tl. Def. Fund v. Tennessee*, 468 F.2d 1164, 1174–77 (6th Cir. 1972) (charging federal officials with continuously appraising and reevaluating projects for broad environmental concerns); *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972) (holding that the “environmental considerations” referred to in NEPA extend beyond sewage, garbage, and water and air pollution to in-

laration 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.¹⁶⁵ For its supporters and critics, *Calvert Cliffs* is best understood as a judicial declaration of environmental idealism, and, moreover, as an apt example of what Martin Shapiro has called “political jurisprudence.”¹⁶⁶

Of course, *Calvert Cliffs* was not the end of the story. The federal courts interpreted NEPA in other key decisions.¹⁶⁷ In its 1989 decision in *Robertson v. Methow Valley Citizens Council*,¹⁶⁸ the Supreme Court reiterated the point made in different ways in its 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,¹⁶⁹ 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 1980s over legislative efforts to amend clean air legislation in a pro-environmental direction.¹⁷⁰ Moderates in particular were dubious about agreeing to support environmental initiatives in the clean air contexts.¹⁷¹ While the explanations for the declining federal role in environmental protection are complicated,¹⁷² we note that the statutory expansionism reflected in *Calvert Cliffs* and related 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 an earlier article, we explained in detail how a number of lodestar civil rights decisions from the 1970s and 1980s reflected the federal courts’ expansions

clude “noise, traffic, overburdened mass transportation systems, crime, congestion and even the availability of drugs . . .”).

¹⁶⁵ As Professor Lazarus notes, this expansionist decision was merely the first in a wave of similarly expansionist decisions: “In short, Congress placed the ambitious environmental statutes on the books in the 1970s, but it was the judiciary, led by judges like Judge Skelly Wright, who made it actually happen. . . . The judiciary accomplished a revolutionary change in the nation’s laws.” Lazarus, *supra* note 129, at 211.

¹⁶⁶ See Martin Shapiro, *Judicial Activism, in THE THIRD CENTURY: AMERICA AS A POST-INDUSTRIAL SOCIETY* 109 (Seymour Martin Lipset ed., 1979).

¹⁶⁷ See sources cited in *supra* note 164.

¹⁶⁸ 490 U.S. 332, 350–51 (1989).

¹⁶⁹ See, e.g., Antonio Rossman, *NEPA: Not So Well at Twenty*, 20 ENVTL. L. REP. 10174 (1990).

¹⁷⁰ MELNICK, *supra* note 26, at 145-51.

¹⁷¹ See *id.*

¹⁷² See generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004) (describing the connections between declining federal role in environmental protection and larger trends in American law and politics).

of the bargains struck by ardent supporters and moderate legislators.¹⁷³ 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 is similar to what we observe in *Calvert 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.¹⁷⁴

In many ways, the lodestar case is *United Steelworkers of America v. Weber*.¹⁷⁵ Not coincidentally, this case is a central testing case for various modern theories of statutory interpretation. Ronald Dworkin and William Eskridge, Jr.,¹⁷⁶ among others,¹⁷⁷ examine *Weber* in close detail in order to ground their complex, and ultimately “dynamic,” theories of legal interpretation.¹⁷⁸

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.”¹⁷⁹ In his opinion for the Court, Justice Brennan put the emphasis on statements of ardent supporters, thereby recreating the structure of the statutory agreement.¹⁸⁰ 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.

Perhaps one may only speculate about the impact of these expansionist civil rights decisions upon the course of civil rights legislation in the 1970s, 1980s, and 1990s.¹⁸¹ With the benefit of four decades of civil rights history, however, some tentative conclusions can be reached. Most fundamentally,

¹⁷³ *New Perspectives*, *supra* note 13, at 1501–21.

¹⁷⁴ McCubbins, Noll, and Weingast come to a similar conclusion about the Sierra Club decision expanding the meaning of the 1970 Clean Air Act. See McCubbins, Noll, & Weingast, *supra* note 15, at 450–54.

¹⁷⁵ 443 U.S. 193 (1979).

¹⁷⁶ See DWORKIN, *supra* note 100, at 318–331; ESKRIDGE, *supra* note 17, at 156–78.

¹⁷⁷ See, e.g., Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169 (2000).

¹⁷⁸ See, e.g., ESKRIDGE, *supra* note 17.

¹⁷⁹ *Weber*, 443 U.S. at 201–02.

¹⁸⁰ *Id.* at 204–08; see also *New Perspectives*, *supra* note 13, at 1519–20 (describing Justice Brennan’s reliance on statements by ardent supporters of broad civil rights agenda).

¹⁸¹ See *id.* at 1527–30.

we observe that civil rights expansionism contributed to the enduring battles over civil rights legislation in the years following the passage of the 1964 Act. As the leading histories of the period recount, the struggle over civil rights legislation continued into the 1970s and 1980s, notwithstanding the fact that the configuration of legislative politics had shifted significantly during this same period.¹⁸²

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.¹⁸³ This reconfiguration was incomplete, however. 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.¹⁸⁴ In the midst of this battle, the impact of the courts' liberal and expansionist decisions increased the costs to the moderate legislators to support civil rights initiatives.¹⁸⁵ 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.¹⁸⁶

IV. IMPLICATIONS

In describing the effects of expansionist interpretations, there is a presupposition 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 Article is not the place to engage in the debate over the wisdom and efficacy of federal interventions in modern society. Rather, it offers a dire warning about judicial activism grounded in the *realpolitik* of Congressional policymaking. This final section expands on this warning by examining more closely some of the effects of judicial expansionism.

¹⁸² HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972*, at 301–449 (1990); PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (1999).

¹⁸³ See text accompanying *supra* notes 29–30.

¹⁸⁴ See EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 65–80 (2002).

¹⁸⁵ See *New Perspectives*, *supra* note 13, at 1527–30.

¹⁸⁶ Some of this argument is implicit in William Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 672–84 (1991) (explaining why “the Supreme Court is no longer the most appropriate mechanism for advancing progressive civil rights policies through statutory interpretation” and noting that “[the] challenge for Congress and civil rights groups . . . is to develop alternative approaches for implementation that do not depend upon the Court’s cooperation”).

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.¹⁸⁷ 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.¹⁸⁸

These critiques are not the focus of this Article. Rather, we argue that a key consequence of judicial expansionism in statutory 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; the objective of this Article is merely to illuminate the tradeoff—highlighting the paradox in order to raise doubts about the logic of the expansionist strategies characteristic of the 1970s.

While the argument of judicial expansion's effects on congressional bargaining is primarily a positive one, there lurks the normative question whether these expansionist interpretations are worth their price. Any 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—given the diminished prospects of future legislation—expansionist interpretations are of greater benefit to the interest groups who promote these laws (and who prefer broader to narrower legislation) than strictly intentionalist interpretations. Considering this scenario requires a return to the two policy examples above: environmental protection and civil rights. Congress enacted the main cornerstones of environmental protection during the 1960s and 1970s. That period brought clean air and water legislation, NEPA, the Endangered Species Act, and other key environmental laws.¹⁸⁹ Insofar as

¹⁸⁷ See, e.g., Manning, *supra* note 109, at 430–39.

¹⁸⁸ WALTER OLSON, *LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1988).

¹⁸⁹ See text accompanying *supra* note 4.

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.¹⁹⁰ Similarly, civil rights interest groups may have been motivated in their efforts to encourage courts to expand the scope of key legislation by their belief that Congress would be unlikely to enact major new civil rights initiatives.¹⁹¹

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 of not looking so many years down the road. Third, interest groups and congressional majorities may have understood the trade-off and thought it worth the price, even knowing that this action would harm the interests of future generations by exchanging policy benefits today for greater difficulties in passing legislation down the road.

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.¹⁹²

Consider, again, environmental protection and civil rights. In both areas, interest groups aggressively pushed, albeit with mixed success, for new progressive social legislation; indeed, they continue to press hard for new laws. Therefore, the stakes for progressives—if *we are right about the paradox of expansionist statutory interpretations*—remain high.

¹⁹⁰ See, e.g., Alex Aleinikoff, *Updating Statutory Interpretation*, 97 MICH. L. REV. 20 (1988).

¹⁹¹ See, e.g., Eskridge, *supra* note 186, at 618–23 (explaining the dynamics of Court–Congress interactions during the 1962–72 period).

¹⁹² See, e.g., Kimberly M. Large, *The Mischaracterization of Justice Scalia as Environmental Foe: What Harm to Standing Following the Court’s Stance in Laidlaw Environmental v. Friends of the Earth?*, 10 WIDENER L. REV. 561, 580–81 (2004) (arguing that expansion of standing in the realm of environmental litigation unduly limits democratic governance and displaces the executive branch’s traditional enforcement function); see also Barbara Spillman Schweiger, *The Path of E-Law: Liberty, Property, and Democracy from the Colonies to the Republic of Cyberia*, 24 RUTGERS COMPUTER & TECH. L.J. 223, 236 (1998) (arguing that judicial review and expansiveness have, over time, removed some areas of law (e.g., rules of property, the structure of government and basic rights) from the democratic process).

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.¹⁹³ 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.¹⁹⁴

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 legislative majorities’ interest. 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 of 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 agenda of improving the political process. Indeed, a large prescriptive legal literature suggests that this is a proper and desirable judicial strategy.¹⁹⁵ With re-

¹⁹³ See Rodriguez, *supra* note 7, at 64–73 (describing obstacles to legislative enactment and connecting obstacles to positive political theory of the legislative process).

¹⁹⁴ See, e.g., COX & MCCUBBINS, *SETTING THE AGENDA*, *supra* note 35 (discussing party veto gates); KREHBIEL, *supra* note 31 (describing model of congressional gridlock); Arthur Denzau & Robert Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. J. POL. SCI. 740 (1983); Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 509 (1981) (discussing committees as veto gates).

¹⁹⁵ 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*

gard to statutory interpretation in particular, diverse scholars including Cass Sunstein,¹⁹⁶ William Eskridge,¹⁹⁷ and Jonathan Macey,¹⁹⁸ have urged that courts deploy interpretive approaches in order to improve lawmaking processes. Professor Cass Sunstein's exhortations are particularly revealing; he spells out a large number of interpretive canons designed to correct imperfections in the political process.¹⁹⁹ These works illustrate the deeply normative underpinnings of expansionist interpretation; they also demonstrate the subtle and sophisticated arguments made by legal scholars determined to articulate and defend an activist, "process-perfecting" approach to interpreting statutes in the modern administrative state.

The analysis in the preceding Parts reveals that these efforts at "improving" the political process may have the reverse effect of facilitating polarization. These views 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.

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 support-

Legislative Choice: The Political Consequences of Judicial Deference to Legislatures, 74 VA. L. REV. 373 (1988) (defending aggressive judicial review in order to overcome obstacles in legislative process).

¹⁹⁶ See, e.g., Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 1989 (1990).

¹⁹⁷ See ESKRIDGE, *supra* note 17, at 88–92.

¹⁹⁸ See Jonathan Macey, *supra* note 102, at 261–66.

¹⁹⁹ See Sunstein, *supra* note 196.

ers 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, 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 alters 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 more extreme Republicans. The main consequence of this polarization is the apparent disappearance of moderates from Congress. Yet, in reality, we cannot tell if the moderates have disappeared, because as the simple voting model demonstrated, the absence of moderate compromises implies an absence of opportunities for moderates to express their moderation.

What are the consequences for public policy? We lose out on the ability of our elected representatives to gather together as a diverse collection of individuals to work through coalitions and toward compromise. Fewer progressive statutes are passed; and, sadly, our legislature reinforces the polarization that impedes our social progress.

