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Legislation in Legal Imagination: Introductory Exercises

PATRICK O. GUDRIDGE*

A sense of disappointment is evident in much recent writing about statutory construction. The jurisprudence of statutes, the theory of how the products of legislative processes figure in legal analysis, remains only peripheral. It asserts no claim to the central place in our thinking that we would have been prepared to grant it.¹ But in the face of this failure, what conclusion should we draw?

If theories of statutory interpretation have not succeeded, perhaps the explanation lies less in some in-built "unanalyzability" in statutes, and more in the images that predispose our theorizing, the expectations we hold concerning the appearance a successful theory should present.² We tend to assume that, if statutes are to

* Professor, University of Miami School of Law; I am grateful to Ken Casebeer, Paul Dean, John Gaubatz, Michael Graham, Dennis Lynch, Jim Mofsky, and Mark Tushnet for their representations, suggestions, and criticisms. The approach and conclusions of this essay, however, are peculiarly my own.

1. The failure of statutory interpretation to emerge as a primary topic of legal thought was an implicit subject of the important 1950 Vanderbilt symposium. *A Symposium on Statutory Construction*, 3 VAND. L. REV. 365 (1950). The cheerfulness of Justice Frankfurter's *Foreword* does not entirely obscure the underlying stoicism of his argument. See Frankfurter, *Foreword*, *id.* at 365-67. Many of the essays published in the symposium were more obvious in acknowledging the surprisingly primitive state of the art in statutory jurisprudence, e.g., MacDonald, *The Position of Statutory Construction in Present Day Law Practice*, *id.* at 369 ("The growing volume and complexity of legislation have increased the responsibility of the practitioner year by year, but adequate and organized aids for the discovery and construction of that legislation have not been provided"); the merely conventional role of traditional rules of construction, e.g., Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, *id.* at 401-06; and a general sense of dissatisfaction, e.g., Horack, *Cooperative Action for Improved Statutory Interpretation*, *id.* at 382 ("Judges, practicing attorneys and law professors all have echoed basic dissatisfaction with the operation and application of the rules of statutory interpretation").

For recent accounts of the decline of statutory interpretation, incorporating post-1950 developments, see Weisburg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213-16 (1983); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 892-98 (1982).

2. The sense that efforts at statutory interpretation are often artifacts—expressions of theoretical predispositions more than reactions to statutes themselves—is commonplace in recent critical writing. See, e.g., Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983) ("too often the meaning of a statute is smuggled into the rules that determine when, and why, to cut off debate"); Abraham, *Statutory Interpretation and Literary Theory*:

be interesting subjects of analysis, any theory identifying their relevant features should reveal those features as susceptible of a sufficiently detailed description to be jurisprudentially useful. However innocuous this prerequisite might be in isolation, we frequently complicate the task of satisfying it by setting up two additional demands. Attempts to characterize (to describe the proper form for) statutory analysis often appear to suppose that an appropriate characterization must be unifying. It must identify a common element cutting across the full (or at least a large) range of statutes. Such attempts often also seem to postulate that a successful characterization would identify a feature of statutes that is not only "detailed" and "common" but also "objective"—in the sense of being obviously of pre-interpretive origin, truly a part of a statute "itself."³

Some Common Concerns of an Unlikely Pair, 32 RUTGERS L. REV. 676, 680-88 (1979).

3. A substantial body of recent writing indirectly confirms my characterization of the attributes we commonly expect theories of statutory interpretation to display. This work has in common a distinctive "negative" structure. It treats statutes or traditional modes of interpretation as "lacking" desired qualities and looks to some other set of legal materials to fill the absence. The virtues that the writers find in the "other" regime, of course, are also a measure of the (disappointed) expectations they hold concerning statutes.

Not all of this work rejects traditional statutory analysis entirely—at least not at first glance. Thus, Professor Calabresi addresses the apparently narrow problem of "obsolete" statutes and argues that courts, in the face of such out-of-date legislation, should refer to common law values instead. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). Professor Tribe discusses only statutory "silences"; constitutional law, he believes, is a more appropriate source of responses to legislative failures to act than any statutory analysis *per se*. Tribe, *Toward A Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982). And Professor Easterbrook's subject is the limits on the reach of particular statutes. Easterbrook, *supra* note 2, at 533. He argues that references to statutory language or legislative intent are less satisfactory means of identifying those limits than an independent "metatheory" of statutory application. Easterbrook's own meta-attempt emphasizes, *inter alia*, an analogy linking legislatures and parties to contracts; an analogy that leads Easterbrook to frame an *ex ante* inquiry into the costs and benefits of various rules of construction governing statutory limits. *See id.* at 540-51.

It is not difficult to see that Calabresi, Tribe, and Easterbrook regard the relevance of their alternative references as more or less independent of particular statutory contexts—as *applied* in particular situations but not wholly *determined* by those situations. Easterbrook is explicit on this point. *See id.* at 535 ("a general rule of construing statutes to find their boundaries"). The work of all three, again rather obviously, proceeds on the assumption that the pertinent "other" regimes are capable of supplying appropriately detailed analytics. *See, e.g.,* Tribe, *supra*, at 524-28. And however careful these writers are in avoiding any naive assertions of the absolute "groundedness" of their alternative references, *compare id.* at 532-35 (emphasizing incompleteness and indeterminacy of rules for construing Constitution) with G. CALABRESI, *supra* at 96-101 (discussing reality of common law "legal fabric"), they appear to be sure that one virtue of such references is their appearance of being *relatively* more grounded than statutory analysis—at least in connection with questions of obsolescence, gaps, and boundaries.

In fact, although Calabresi, Tribe, and Easterbrook purport to acknowledge a place for

Neither of these latter assumptions, at least, is genuinely necessary. In place of the bias in favor of unifying accounts, for example, we might substitute a predisposition to see difference—ask of a theory of statutory interpretation that it acknowledge that modes of interpretation vary in fundamental ways from statute to statute, or even from interpreter to interpreter. Similarly, we might set aside the notion that a theory acquires persuasive force insofar as the features of a statute to which it refers are “really present.” We may be willing to tolerate an inability to determine whether statutory features are simply creatures of a theory if we can view the theory as itself possessing a measure of “objectivity.” From this perspective, we would judge the theory as a “prac-

traditional statutory analysis, each is dubious of the power of such analysis in any event. See, e.g., *id.* at 42-43, 214-16 n.30, 217 n.39; Tribe, *supra*, at 517. Easterbrook is again the most explicit, arguing that one benefit of his metatheoretical approach to boundaries is the limitation it sets on uses of traditional statutory analysis. See Easterbrook, *supra* note 2, at 550-51. Interestingly, the negative structure organizing the arguments of these writers also frames the discussion of several other prominent critics who have assessed statutory analysis *per se*. And again, susceptibility to detailed description, general relevance, and well-groundedness figure as at least potential virtues of the alternative regime. This mode of organization is visible, for example, in Judge Posner's recent attempt to sketch an economics-based approach to statutory analysis. E.g., Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983). Perhaps more surprisingly, a similar organizing insight shapes the work of Professors Hart and Sacks, who sought to reorient statutory analysis by holding statutory language and legislative history hostage to ordinary linguistic usages and the legal community's prior expectations about the law's content. See H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1218-26, 1410-17 (1958) (unpublished manuscript); see also *infra* note 66. This approach, which makes study of the readers of statutes at least as important as study of either the writers or the statutes themselves, receives elaborate treatment in Professor Dickerson's attempt to restate the standard vocabulary of statutory analysis in the terms of a theory of communication giving priority to context and reader orientation. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* (1975). The reader's perspective dominates both sides of Dickerson's distinction between cognition and creation of statutory meaning. Compare *id.* at 223 (“the meaning of a statute to the hypothetical typical member of the legislative audience to whom it is addressed closely approximates, and thus expresses, the subjective intent of the authors”) with *id.* at 247 (creative judge “owes fidelity to the coherence of the legal order”). And somewhat surprisingly, a family resemblance to the Hart and Sacks approach may also be glimpsed in Professor Abraham's provocative juxtaposition of statutory analysis and literary theory. Abraham, *supra* note 2, at 676. Abraham sees statutory content as importantly conventional, as a product of the interpreter's organizing perspective. “[T]hose who suggest that a text is an object entirely independent of its readers are ignoring the sense in which the bedrock beliefs of its readers actually constitute the text.” *Id.* at 686. But he also points to the existence of the interpretative community as a potential source of stability—as a regulator of convention. See *id.* To the extent that interpreters agree on the relevant conventions, Abraham conceives of a kind of ersatz objectivity. “[F]acts are not immutable, as the objectivist would have it, nor individual or arbitrary They do provide objectivity, however, within a community of interpretation where they need not be questioned.” *Id.* at 688. See generally Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

tice"—of interest insofar as we can describe it as in use, or insofar as we assert it in order to put it to use. Features of a statute thus would become "real" because a theory in practice treated them as such.

Of course, in the light of these revised assumptions, the normative relevance of a theory of statutory interpretation would be less obvious. Generality and extrinsic reference, we may think, are features of a theory that come quite close to being self-evidently desirable. The conclusions suggested by a statutory theory possessing these features thus acquire additional credibility. By contrast, neither acknowledgments of diversity nor depictions of an only "practiced" objectivity trigger any similar approval reflex. An approach to statutes incorporating these elements may be conceivable. But it is not easy, at least at first glance, to see why such an approach (or its suggested conclusions) would be desirable.

In this essay, however, I attempt to make a case for one version of such a statutory jurisprudence. I begin with the traditional question facing the theory of statutory interpretation. Is the interpreter of a statute *active*, imposing a set of values in order to give form to fundamentally malleable legislative materials, or *passive*, merely providing the voice for conclusions a statute itself somehow dictates? Either alternative, I think, is rather obviously unsatisfactory. Do interpreters really hold their values and views already fully-formed, even before they confront statutes? Do statutes contain within themselves the results of their own application, in advance (somehow) of the process of interpretation? We might expect, rather, to see a kind of *contest* between interpreter and statute, in which either or both may, by the close of analysis, go through a process of change (respectively, of mind or of apparent form). A statute may be what its reader makes of it, in the sense that the reading resolves its form. And this reading may indeed depend upon what the interpreter chooses to impute. But the reading may also reveal (more complexly) the ways in which the possibilities a statute presents influence the resolution the interpreter chooses. For the interpreter, statutory analysis can operate as a process of both recognition and expression. The form we attribute to the statute serves as a means by which we represent (in order to identify as well as to communicate) the values we hold.

Statutory analysis, therefore, may be both descriptive and precipitative of that which it describes. It is one way (among several) that legal inquiry brings into focus and thus brings to bear the enveloping normative field. It is at the same time one way (among

several) that legal inquiry reciprocally influences the organization and content of this normative field. This double feature of statutory analysis, as I have reformulated it, is crucial. It suggests a function for efforts to characterize statutes that permits such efforts to retain value (perhaps gain value) in the face not only of normative consensus, but also transition, fundamental conflict, or radical flux. Herein, I think, lies the justification for relaxing our commitments to unity and objectivity.

* * * *

These propositions are the underlying subject of this essay. Nonetheless, they are not so much discussed directly as rediscovered, in the course of a series of investigations of particular statutory analyses. Initially, I reread the Radin/Landis exchange⁴—the scene for an early appearance of much modern statutory theory. Despite their differences, Radin and Landis both notably deemphasized statutes as such in their accounts of statutory jurisprudence. Their assumption that statutes per se provide only the backdrop for inquiry is interesting, I think, for two reasons. It is a source of difficulty in the arguments of both Radin and Landis. And it fixes a point of departure. What would we have to believe in order to reject Radin and Landis, in order to recognize an important place for statutes themselves? I briefly describe the features one such alternative theory of statutory interpretation might possess.⁵ (At this point the ideas I have sketched in this introduction return momentarily to the surface.) This rather abstract summary, however, is itself only a preliminary account. It serves as a preparation for the largest part of the essay, an examination of three Supreme Court decisions, dating from 1982:⁶ each the product of a unanimous Court, but each, in differing ways, and in different substantive contexts,⁷ illustrative of the use of statutory analysis to

4. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); see *infra* text accompanying notes 1-65.

5. See *infra* text accompanying notes 67-69.

6. *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577 (1982); *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982); *Marine Bank v. Weaver*, 455 U.S. 551 (1982).

7. The cases address a question of litigative standing under federal campaign finance law, see *infra* text accompanying notes 73-133; the capacity of a collective bargaining agreement to alter pension arrangements, see *infra* text accompanying notes 134-98; and the definition of a "security" for purposes of antifraud litigation enforcing rule 10b-5, see *infra* text accompanying notes 199-278.

I should emphasize at the outset that I do not write about these cases from the perspective, for example, of labor law or securities law insofar as such a perspective might provide

encode controversy—to become both an expression and a means of conflict. Finally, it will become clear that this essay is in its entirety introductory, a trial run in advance of a more ambitious project. In concluding, I describe parts of that project.

I.

Max Radin's article *Statutory Interpretation* begins:

Anglo-American law is in a fair way of becoming statutory, not by a great act of summation like the *Bürgerliches Gesetzbuch* or the Swiss Code, but piecemeal by the relentless annual or biennial grinding of more than fifty legislative machines. At any rate, in a constantly increasing number of litigated cases, the point of departure is as likely as not to be a statute, the effect of which is to be estimated, the meaning discovered, and the applicability affirmed or rejected.⁸

These two sentences point in different directions. "Anglo-American law is in a fair way of becoming statutory . . ." Legal study, we might suppose, is a kind of metaphysics; recognizing, relating (here counting) fundamental entities (here statutes). But the emphasis immediately shifts. "[T]he point of departure is as likely as not to be a statute, the effect of which is to be estimated, the meaning discovered, and the applicability affirmed or rejected." The passive voice indicates consciousness: that of the estimator, the discoverer, the applier. Statutes are subjects of consciousness, and as such are only "points of departure." The focus is consciousness itself as it is revealed in processes of comprehension or understanding.

Of what relevance are *statutes* in the process of statutory interpretation? This is not really Radin's question.⁹ He is interested primarily in the role of *interpretation*, in the part played in law-making by judicial consciousness. Radin emphasizes "judicial epistemology."¹⁰ And yet (in whatever fashion) it is to statutes that judges react. In describing judicial consciousness, Radin cannot

an independent basis for evaluating these cases. I do reconstruct elementary themes of labor law or securities law, for example. But because I take the three Supreme Court opinions as starting points, and because I first explore formal aspects of their treatment of statutory interpretation, the versions of substantive law that I project may differ in various ways from the pictures that practitioners in the given fields frequently invoke.

8. Radin, *supra* note 4, at 863.

9. In a subsequent article, Radin discussed more explicitly the subject of statutes as such. Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388 (1942); see *infra* note 50.

10. Radin, *supra* note 4, at 865.

help but refer, if only casually, to statutes themselves. Implicit in these references lies some sort of characterization, a legislative metaphysics. In any event, I propose to take seriously Radin's off-hand images and allusions, to recover and re-present as a systematic scheme his attributions. I will, therefore, "misread" *Statutory Interpretation*: describe it in a fashion that gives priority to what was for Radin merely background (the statutory references) and subordinates (treats mostly as context) his main point—the "real" importance of judicial sensibility. But the distortion, I think, is only superficial. Once we become aware of Radin's way with statutes, we can see that in an important sense his particular picture of judicial consciousness is in fact "really" an artifact, dependent importantly upon his background constructions. Moreover, we can also see that Radin's attributions, while constitutive for *his* larger analysis, are, once they become prominent, obviously deceptive: they obscure rather than clarify *our* sense of statutes as such.

A.

Statutory Interpretation, as I read it, is first of all an analysis of the usual doctrines that courts invoke in construing statutes. Legislative intent provides the unifying principle for the traditional system. The plain meaning rule, maxims of construction, references to legislative history, all such forms of analysis find their justification as means of divining legislative intent. But legislative intent, Radin argues, is a "monster."¹¹ "A legislature certainly has no intention whatever in connection with words which two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs."¹² Legislatures simply "[utter] the words of a statute";¹³ they "make statements in general terms of undesirable and desirable situations"¹⁴ Statutes are "words." Doctrines of statutory construction must be judged as means of finding the meaning of words. As indicators of meaning, Radin argues, traditional approaches are hopelessly defective. Prospective, general statutes are almost inevitably indeterminate; plain meanings are thus rare.¹⁵ Maxims of construction are either vacuous or contrary to ordinary

11. *Id.* at 872; see *id.* at 869-72.

12. *Id.* at 870.

13. *Id.* at 871.

14. *Id.*

15. See *id.* at 867-69.

usage.¹⁶ Legislative history, in the strict sense, is usually ambiguous.¹⁷

Radin's replacement of legislative intent with the idea of statutes as words is also central to the positive argument of *Statutory Interpretation*. Traditional doctrines, Radin concludes, are "card-board structures";¹⁸ their role in legal analysis is little more than that of *post hoc* rationalization.¹⁹ The consequences of alternative decisions, and the values attached to the various contingencies, are in fact the chief considerations relevant in matters of statutory interpretation. Radin defends at length the "competent calculus of probable consequences"²⁰ that takes place behind the "smoke screen."²¹ But as he acknowledges, the jurisprudence of results is at best an incomplete theory of statutory interpretation. It assigns no role whatsoever to statutes themselves: "[C]ourts act in the case of statutes as they act when no statute is in question."²² To correct this deficiency, Radin returns to the idea of statutes as words. "Words are certainly not crystals, as Mr. Justice Holmes has wisely and properly warned us, but they are after all not portmanteaus. We can not quite put anything we like into them."²³

In the end, however, Radin reaches much the same conclusion about straightforward inquiries into the meaning of words as he had earlier reached concerning the more rococo techniques of traditional statutory interpretation. There is, of course, the purpose of a statute, "evident in the character of the thing itself," independent of any fictional legislative intent.²⁴ "[I]t is rare indeed that we can not say positively what any particular statute is for, by reading it."²⁵ Even without regard to purpose, the meaning of the words of a statute will fix "a maximum and a minimum of extension. . . . apparent to any intelligent person reading the statute

16. *See id.* at 873-75, 880.

17. *See id.* at 873. Although Radin briefly mentions "debates in the legislature," his discussion of legislative history emphasizes efforts to draw conclusions from the content of the "[s]uccessive drafts of a statute." *Id.* Presumably, Radin's critique of the idea of legislative intent disposes of references to legislative debates. *See id.* at 869-72.

18. *Id.* at 885.

19. *Id.* at 880.

20. *Id.* at 885.

21. *Id.* at 882.

22. *Id.* at 878.

23. *Id.* at 866; *see id.* at 878-79.

24. *Id.* at 875. "So, a razor is something to shave with, and we should know this without the least speculation as to the ideas which were in the manufacturer's mind when the razor was made." *Id.* at 875-76.

25. *Id.* at 876.

...²⁶ Nevertheless, statutory purposes are not likely to be unique. "[N]early every end is a means to another end."²⁷ Similarly, statutory language will often leave "a large choice between a maximum and a minimum of extension."²⁸ Radin is left with the jurisprudence of results at the center of his theory of statutory interpretation. "The statute—the *lex lata*—creates limits on both sides of strictness and liberality,"²⁹ but the limits are so broad that ordinarily it will be the choice, and not the limits, that matters.

B.

What does it mean to say that statutes are "words"? Radin's usage varies. He frequently refers to "statutes" and "words" interchangeably.³⁰ Occasionally, he characterizes statutes as particular forms of words: statements,³¹ descriptions,³² or commands.³³ Indeed, at one point, Radin distinguishes between statutes as descriptions and statutes as commands.³⁴ But where he means to be precise, Radin employs a distinction between "determinable" and "determinate," treating statutes as "determinables":

The situation described in a statute is generally a determinable; that is to say, it is a statement which involves a number of possible events or individualizations, any one of which would be correctly described by that determinable. A determinable of this sort can be made more nearly determinate by reducing the number of possible individualizations, and it becomes quite determinate when it is so expressed that there is only one.³⁵

This distinction formally summarizes Radin's dichotomy of general descriptions and unique events, which underlies his central argument about statutory ambiguity:

26. *Id.* at 879.

27. *Id.* at 876.

28. *Id.* at 881.

29. *Id.* at 882.

30. *See, e.g., id.* at 863 ("the wording of enactments"). "[W]e may not disregard [words] in statutes. The real question in statutory interpretation is just what we shall do with them." *Id.* at 866.

31. *See, e.g., id.* at 871 (legislators "make statements in general terms of undesirable and desirable situations").

32. *See, e.g., id.* at 868 ("a group of events is described in a statute").

33. *See, e.g., id.* at 876 (a statute "asserts that something is to be done").

34. *See id.* ("whatever uncertainty . . . may exist as to the conditions under which it should be done, as a rule there is none as to the situation which the conditions are to give rise to").

35. *Id.* at 868.

[A statute] . . . is a statement of a situation, or rather of a group of possible events within a situation, and as such is essentially ambiguous If . . . a group of events is described in a statute, there must be at least two which will fit that description, and since events are unique, any description of a group is almost by definition ambiguous.³⁶

This distinction also explains Radin's ordinary treatment of statutes and words as interchangeable. "Determinate" not only assigns to the statute generality and thus ambiguity; it also conflates such terms as statement, description, or command, redefining statutes at the level of category or variable. General, ambiguous, categorical—Radin also associates these features with words, at least as a matter of tendency:

If there is a glaring contradiction between what the judge thinks desirable and what the great majority of the community so considers, the community must, in its legislative function, limit as carefully as it can by more easily determinable categories the range within which the judge shall select his desirables. But the legislature can not both have its cake and eat it. It can not indulge itself in using large, round, sonorous words and then complain that courts do not treat them as precise, definite, and unreverberant.³⁷

The whole possesses no features (or at least no relevant feature) not possessed by its parts: statutes are words. Metaphysically, the equation is appealing. After all, statutes really are just words. But words are not just things. Words have a meaning, function as signs, refer to other things. The fact that words have meaning is Radin's starting point, both in criticizing traditional doctrine as an inadequate key to meaning, and in arguing that statutes, inherently ambiguous in meaning, must inevitably play only a limiting role in statutory interpretation.³⁸ Radin's argument thus requires him to treat as metaphysical, as fundamental characteristics of the object itself, certain features of words as signs, notably their character as categories and thus their tendency to generality and ambiguity. But the features of words as signs that play a part in Radin's argument are not inevitably fundamental. They are merely artifacts of one way of using words, by-products of a particular theory of expression and comprehension. Radin's metaphysic is not

36. *Id.*

37. *Id.* at 884.

38. See, e.g., *id.* at 876-79, 880-82.

as "realistic" as it first seems. An epistemological shift—a change in our view of how words work—may precipitate a metaphysical revolution.

In fact, it cannot be that statutes are just words, because words, as we encounter them, are not just words, an aggregate or jumble. The idea of words as such is an abstraction. Nor do we encounter words as language. "Language" refers to our theory of the most general logic underlying the use of words, to our description of the full set of combinational possibilities, and not to a theory of the *use* of words as such.³⁹ A theory of this latter sort might invoke ideas of style or dominant combinations.⁴⁰ But first of all, such a theory would recognize that the use of words presupposes that there are indeed means for putting words to use.⁴¹ For example, we might, with Derrida, take seriously the differences between uses of words in speech and writing.⁴² This seemingly elementary distinction may be especially interesting for present purposes: Radin, it turns out, clearly ignores it. He treats statutes or the process

39. See, e.g., F. DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 9-15 (trans. ed. 1959).

40. I have discussed this possibility elsewhere. See Gudridge, *The Persistence of Classical Style*, 131 U. PA. L. REV. 663 (1983).

41. It is important to distinguish between two ways we refer to uses of words. Sometimes we treat usage as a source of meaning; we assume that there are settled ways of inferring from context the specific meaning of an otherwise ambiguous word. For example, in his essay reexamining the Radin/Landis debate, Gerald MacCallum developed an elaborate contextual analysis, suggesting that the existence of various conventions of legislative and judicial procedure, if known and followed by both legislators and judges, might make both the idea of legislative intent more plausible and the substance of such intent more identifiable than Radin had assumed. Courts could thus usefully resort to legislative intent in order to give statutes content. See MacCallum, *Legislative Intent*, 75 YALE L.J. 754 (1966). Yet, as Professor MacCallum acknowledged, the stability and particularity of the conventions or "context" that his analysis supposed could not be taken for granted. See *id.* at 785, 786-87. In general, theories of meaning that refer to context may be notable (and vulnerable) because of the degree to which they must make assumptions about the stability of social environments. See, e.g., S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 96-98 (1982).

We also refer to "uses" of words in a way that implicates but does not purport to resolve questions of meaning. The emphasis here is on "forms of use"—devices for organizing uses of words. Such devices may define part of the context from which the meaning of words becomes apparent, and thus can hardly be considered truly neutral instruments of communication. But forms of use, we tend to think, are relatively open to choice and adjustment: perhaps establish a moving context, rather than the fixed context that direct "meaning as use" theories tend to suppose. An emphasis on forms of use may suggest that the meaning of statutory words is something that is caught up in a process or dynamic, always *more or less* established, and that disagreement about the meaning of such words is something describable in terms more revealing than essentially binary references to the "success" or "failure" of efforts at categorization. Or so I assume: much of this essay is an attempt to put to work the ideas of "forms of use" and "moving context."

42. See, e.g., J. DERRIDA, *OF GRAMMATOLOGY* (trans. ed. 1976).

of legislating as a form of speech: "When the legislature has uttered the words of a statute . . .";⁴³ "The fondness of the draftsman for a special locution . . .";⁴⁴ "large, round, sonorous words";⁴⁵ etc. The analytical forms that Radin attributes to statutes—statement, description, command—are all typically forms of sentences that we ordinarily associate more with speaking than writing. In addition, the statutes to which Radin refers for illustration, if not matters of common legal knowledge, like the Statute of Frauds,⁴⁶ are all capable of one sentence summary: "A statute which declares gambling contracts to be void . . .";⁴⁷ "a statute making murder capital . . .";⁴⁸ "the many statutes in Western states granting a bounty for coyote scalps."⁴⁹ Is there a connection here, a link between the tendency to see statutes as speech and to see statutes as simple? In any event, it is a fact that statutes are not literally speech. Legislatures, whatever else they are, are not choirs. Statutes are a form of writing.

Is this the idea that we should take literally, subjecting statutes to the modes of analysis that we reserve for other writings *qua* writings? The statute would itself become the relevant object, a text, and the characteristics of the statute as a literary form would become the relevant metaphysical attributes. Epistemology would become hermeneutics, a theory of the relationship of text and meaning. We are left, then, to redefine statutory form, and thereby to make sense of perhaps the only plausible metaphysical statement: statutes are statutes.⁵⁰

43. Radin, *supra* note 4, at 871.

44. *Id.* at 873.

45. *Id.* at 884.

46. *See id.* at 877, 879.

47. *Id.* at 876.

48. *Id.*

49. *Id.* at 879 n.31.

50. In his later essay, Radin saw statutes as essentially reducing to two components. *See* Radin, *supra* note 9, at 394-408. The first was the statute's purpose: "the specific result that can reasonably be taken to be what the statute is striving to attain." *Id.* at 408. The second was an "instrumental or implemental part." *Id.* at 399. These "means which the statute indicates for achieving its purpose . . . usually constitute the major portion of the statute." *Id.* Such statutory mechanics may either expedite "the activity of courts and officials by making it clear when and how they must act," or reveal that the statutory "goal is to be achieved, but not in any and every fashion and at the sacrifice of other values worth protection." *Id.* Statutory interpretation became for Radin a process of judicial or administrative identification of statutory purpose, evaluation of the purpose's merit, and judgment about the limits of statutory mechanics, properly acknowledging both a legislature's own expressed hesitancy in pursuing its aim and any doubt the interpreter might feel as well. *See id.* at 422.

Radin's approach in this second essay is vulnerable to several criticisms. It assumes that

II.

This conclusion, however, is premature. The features of statutory words that Radin emphasizes have to do with the function (for Radin, usually failure) of words as classifiers, as categories—as rules. But if he treats rule application as the model for the process by which a statute (if only sometimes) itself resolves questions of meaning, it is because Radin has first of all separated statutory words from any systematic relationship with the idea (a metaphysical “monster”) of legislative intent. James Landis, in his critique of Radin,⁵¹ purported to rehabilitate the idea of legislative intent, in a way that not only restored that idea’s plausibility, but also removed any need to see the process of statutory interpretation as involving exercises (whether successful or unsuccessful) in rule application per se:

The so-called rules of interpretation are not rules that automatically reach results but ways of attuning the mind to a vision comparable to that possessed by the legislature. The vision of itself rarely actually grasps the particular determinate, but the eye once aligned in the same direction will more probably place a particular determinate in its appropriate spot.⁵²

Landis is obviously making an important argument.⁵³ If his ap-

some single statutory purpose is usually apparent. “Generally it is unmistakable.” *Id.* at 398. In his earlier essay, however, Radin had demonstrated the elasticity of the “purpose” notion. See Radin, *supra* note 4, at 875-79. In *A Short Way with Statutes*, Radin also requires judicial or administrative interpreters to accept the legislative choice of purpose. “The legislature that put the statute on the books had the constitutional right and power to set this purpose as a desirable one for the community, and the court or administrator has the undoubted duty to obey it.” Radin, *supra* note 9, at 398. But he permits the interpreters to take into account their own attitudes about the legislative purpose in dealing with questions of statutory mechanics. Radin seems to believe that this indirect subversion can have only a limited effect. It will figure only in a decision about whether to look beyond a statute’s own enforcement mechanisms in order to pursue the statute’s purpose. See *id.* at 422. But this view apparently presumes that statutory mechanics, like purposes, are clear. If not (and Radin remains skeptical of the definitional effectiveness of statutory language, see, e.g., *id.* at 406), the dissenting interpreter can easily purport to accept a statute’s purpose while in fact working to frustrate it.

51. Landis, *supra* note 4, at 886.

52. *Id.* at 892.

53. Traces of Landis’s approach reappear in more recent writing about statutory interpretation. For example, the Hart and Sacks *Legal Process* materials parallel Radin’s later essay in emphasizing statutory purpose, compare H. Hart & A. Sacks, *supra* note 3, at 1411, 1413-17, with Radin, *supra* note 9, at 407-10, but discuss statutory purpose within a theoretical framework that first establishes point of view—Landis’s sense of “mind” and “vision,” see Landis, *supra* note 4, at 892—as primary, see, e.g., H. Hart & A. Sacks, *supra*, at 1410 (outline heading: “*The Mood in Which the Task Should Be Done*”) (emphasis in original). Unlike Radin, Hart and Sacks are thus able to refer to a statutory purpose without needing

proach works, we need not concern ourselves with the deficiencies in Radin's account of statutes as words. The statute itself within the Landis scheme is always secondary: at most evidence of legislative intent; otherwise mere surface, below or behind which the real analysis takes place. We will see, however, that if we look closely at the Landis approach, its efforts to create an alternative to Radin end up as unsatisfactory. Indeed, the Landis analysis ultimately resembles the Radin approach. Both simplify statutory form, in the course of arguments that remind us that such simplification is troubling.

A.

Landis would rehabilitate the idea of legislative intent by first distinguishing between judges as individuals and the judicial role. Drawing on the constitutional principle of separation of powers, Landis states the rule of construction that courts should carry out legislative intent as the definition of the judicial office in statutory construction cases:

The Anglo-American scheme of government conceives of lawgivers apart from and at times paramount over courts. Such a function, commonly vested in a legislature, presupposes an intelligible method of making known to the organs of administration, courts or otherwise, its desires and hopes. That method centuries ago crystallized into the formalism of passing statutes. It is from such a conception that one derives the rule of statutory interpretation emphasizing the intent of the passer of statutes.⁵⁴

For individual judges, therefore, the intent rule acquires an ethical cast: judges as individuals, as part of their responsibility to be true to their role, assume an obligation to construe statutes so as to give effect to legislative intent. "When the intent or meaning of the legislature is discoverable, statutory interpretation posits no serious problem except the political one of insistence upon judicial humility."⁵⁵ By stating the intent rule in ethical form, Landis is able to acknowledge the ambiguity of traditional techniques of

to treat such a purpose as always (or almost always) self-evident. See, e.g., *id.* at 1413-17.

Some of Landis's arguments have so far acquired the status of "common property" that they are used even by authors who do not regard point of view as crucial. Compare Landis, *supra* note 4, at 888-90, with J.W. HURST, *DEALING WITH STATUTES* 37 (1982) (attention to legislative procedures as solution to problem of legislative intent). Concerning Hurst's divergence from Landis, see *infra* note 65.

54. Landis, *supra* note 4, at 886.

55. *Id.* at 891.

statutory construction as means of gauging legislative intent without diminishing the force of his argument.⁵⁶ The separation of powers requires of judges fidelity to legislative intent as "an attitude of mind."⁵⁷ Even if techniques of construction sometimes fail to reveal legislative intent per se, judges who resort to such techniques do not act outside their office so long as they act in the proper spirit. Indeed, techniques of construction, even if faulty, may be of value to judges precisely because their use helps to create the proper orientation:

The despised rules of *expressio unius exclusio alterius*, presumptions of strict and liberal interpretation, are of this character. They predicate attitudes of mind more likely to recreate the atmosphere surrounding the statute in its passage and thus more likely to give effect accurately to the real legislative purpose.⁵⁸

Landis repeatedly acknowledges that rules of construction and methods of identifying legislative intent "solve only the obvious case," and otherwise merely "give a direction for profitable thinking."⁵⁹ "Of course, guessing will not thereby be eliminated; but what science, natural or otherwise, has eliminated the necessity of guesswork?"⁶⁰ Judges committed to the idea of respect for legislative intent are free to treat resort to any particular technique of construction as a matter of craft, to assess the usefulness of such techniques factually in particular cases, and even to innovate in developing new techniques. The "attitude of mind" is the key. "[T]here is a world of difference between an attitude of mind that honestly seeks to grasp these [indicia of legislative intent] . . . and give them effect, and one that cavalierly throws them overboard and leaves us at the mercy of the judge's 'day before yesterday.'"⁶¹ Judges who accept fidelity to legislative intent as a cast of mind are free to treat the question of the substance of legislative intent as a question of fact, and to act with the freedom that factual in-

56. In discussing Landis's treatment of legislative intent, I do not mean to suggest that he ignores statutory language. Because Landis equates "intent" and "meaning," see *id.* at 888, discovery of legislative intent resolves questions of statutory language. Interestingly, in contrast with Radin (especially Radin in his second essay), Landis finds little use for the idea of purpose—for Landis, purpose is a placeholder for "spurious interpretation," *id.*, for the discretionary choices of "[s]trong judges," *id.* at 891.

57. *Id.* at 892; see *id.* at 893 ("honest effort of courts").

58. *Id.* at 892.

59. *Id.* at 892, 892-93.

60. *Id.* at 893.

61. *Id.* at 892.

quiry presupposes.

B.

But is legislative intent really a fact? Radin, after all, dismisses it as fictional: as impossible. Landis can concede that legislative intent may not be precisely discoverable in any particular case. His constitutional theory of the separation of powers, and his ethical argument for judicial self-limitation, however, both assume that legislative intent exists, even if it is not always apparent. But what does it mean to say that legislative intent exists or does not exist? Radin's claim is that the legislature as such is an entity incapable of intent because it is a collection or aggregate of individuals. Only individuals individually are capable of intent. Landis appears to agree.⁶² He argues, however, that legislatures are neither entities as such nor simply aggregates of individuals. It is this fact that gives rise to the possibility of "legislative intent":

The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence. To insist that each individual legislator besides his aye vote must also have expressed the meaning he attaches to the bill as a condition precedent to predicated an intent on the part of the legislature is to disregard the realities of legislative procedure. Through the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent becomes in reality a concurrence in the expressed views of another. A particular determinate thus becomes the common possession of the majority of the legislature, and as such a real discoverable intent.⁶³

Landis defends the idea of legislative intent by analyzing legislatures in much the same way that he analyzes courts. His first step is to distinguish the individual actors, the legislators and judges, from their roles. Next, he gives content to the roles. Landis addresses judges directly, and thus he describes the judge's role as judges would experience it, as an attitude of mind. Landis, however, does not address legislators, but rather describes the legislative role to judges. His description is thus again framed in terms of the judge's perception, this time of the visible manifestations of legislative procedure.⁶⁴ Finally, in both instances, Landis holds the

62. *Id.* at 891-93.

63. *Id.* at 888-89.

64. This complex sense of perspective distinguishes Landis from Hurst. Landis treats

actors to their roles. Because he argues directly to judges, Landis portrays judicial conformity to role as a matter of ethics. Because he describes the legislative role to judges, Landis treats legislative conformity as an epistemological opportunity. To the extent that judges treat legislators as acting within their role, judges can acquire knowledge of legislative intent.

The metaphysical assumption that underlies Landis's argument is this: judges are people, legislators are people. It is from this premise that Landis derives his treatment of judicial role as a form of consciousness, his rehabilitation of legislative intent, and his emphasis on legislative procedure as a source of information as to intent. Landis's governing assumption reveals the important difference, in emphasis if not necessarily in conclusion, between his argument and that of Radin. Radin treats statutes as the initial and fundamental subject of analysis, using as his organizing premise the proposition that statutes are words. His conclusions (implicit in his premise) are largely negative concerning the value of statutory analysis per se. But it is these conclusions that constitute the main burden of Radin's argument. He would not deny (how could he?) that judges are people. Indeed, this second assumption is central to his depiction of the jurisprudence of results. Personalizing, however, is for Radin the stopping point: what we are left with, given the only limiting function of statutes as words. Landis begins where Radin leaves off. For Landis, personalizing is a way of describing legal institutions that opens up the possibility of the positive jurisprudence that Radin could not derive from the idea of statutes as words. In this jurisprudence, the characteristics of statutes as words, and indeed the characteristics of any of the modes of evidence of legislative intent with which the judge's analysis concerns itself, are largely irrelevant, a matter of detail. The judicial consciousness, the attitude of mind of fidelity to legislative intent, does not depend for its existence upon the character and

courts and legislatures as different kinds of institutions—even though he urges courts to attempt “to recreate the atmosphere surrounding the statute in its passage and thus more likely . . . give effect accurately to the real legislative purpose.” *Id.* at 892. Thus, there is always in Landis a sense of falling short, of the inevitably *approximate* quality of judicial attempts at empathy. “[T]he emphasis must lie upon the honest effort of courts to give effect to the legislature’s aims, even though their perception be perforce through a glass darkly.” *Id.* at 893. Hurst, however, begins by describing legislatures as they would appear to an observer free from the constraints of judicial process; an observer able to appreciate fully the institutional capacities, limits, and agenda of legislators. J.W. Hurst, *supra* note 53, at 1-29. Thereafter, in exploring the “judicial” subjects of statutory interpretation and constitutional limits, Hurst brings to bear his model of legislative capacity; the peculiarities of judicial vision are not a primary concern. See, e.g., *id.* at 52-53, 78-81.

identity of the particular means through which judges simultaneously seek to learn and learn to seek legislative intent. So too with the fact that individual legislators must organize their activities, precisely because they are individuals, in ways that treat the views of particular legislators as authoritative. The existence of legislative procedure, and not the precise identity of the particular kinds of procedures in use, is the key.

C.

Landis differentiates individual officeholders from courts and legislatures as institutions, and treats the individuals as primary for purposes of analysis, in order to draw a distinction between judges and the judicial role and to develop a conception of legislative intent that can give content to the judicial role. This connection between legislative intent and judicial role is vital. It is not enough that legislative intent exists. Landis must show that in the sense in which legislative intent exists, it is open at least in theory to the view of individual judges, and thus would appear to the judges to be a plausible organizing principle for a description of the judicial role. To establish the visible existence of legislative intent, Landis relies upon a theory of legislative procedure. Individual legislators, in order to organize their activities, delegate responsibility for particular pieces of legislation to particular legislators; these delegates explain and justify legislation to the other legislators; legislators treat these explanations and justifications as definitive for purposes of final deliberation. So long as legislative procedure generally takes this form, and so long as legislative procedures are visible to judges, legislative intent, in Landis's system, is in principle accessible to judges.

A number of assumptions obviously underlie this elaborated version of Landis's argument. Initially, Landis must assume either that legislators explain and justify all features of legislation or that the features of legislation that legislators do explain and justify are those features that judges will find salient in applying statutes. Moreover, Landis must also assume that the judicially visible explanations and justifications proffered by legislators are not, with respect to the critical questions at least, self-conscious or strategic: statements that in the interest of legislative compromise or some other purpose are made principally for the benefit of watching judges; statements that either preempt or disguise "true" explanations and justifications.

Landis would argue that the assumption underlying the theory

of legislative procedure do not have to be always correct. Legislative intent does not need to be entirely visible to judges. So long as judges ordinarily have something with which to work, so long as there is some evidence of legislative intent that is salient and not plainly a legislative fabrication, the attitude of mind of fidelity to legislative intent will provide a plausible organizing principle for judicial inquiry. There is a point, though, at which this argument, even as it salvages Landis's theory of legislative intent, reduces his larger theory of statutory interpretation to irrelevance. As evidence of legislative intent becomes more fragmentary and less reliable, the question of what judges do with that evidence, what inferences they draw, how they organize their analysis, becomes more central, and the fact that judges are committed to fidelity of legislative intent becomes more peripheral, both for judges themselves in the process of judging, and for outside observers seeking to influence or provide an account of the process of statutory interpretation.

Landis has no theory of what to do with evidence of legislative intent.⁶⁵ He would treat the question as a matter of detail in order to keep his theory consistent with the reality of an autonomous judicial craft and to avoid the need either to acknowledge or reject Radin's demonstration of the manipulability of the traditional techniques of this craft. As fidelity to intent becomes more tentative, however, Landis ceases to be able to defend his claim to be above the battle. He must throw in with Radin, and describe evidence of legislative intent, at the level of craft, as a constraint on the jurisprudence of results similar in function to statutory words. Or alternatively he must acknowledge the need for a theory that would define the relationship among techniques of statutory interpretation, that would organize resort to all forms of evidence of intent. This latter approach would be only conventionally a theory of legislative intent. In substance it could not avoid becoming a theory of the relationship of legislative process and statutory language. Statutory language would operate as both point of departure (how did it come to be?) and final arbiter (is this really a plausible explanation?). But this dynamic plainly presupposes that

65. For Landis, the question is empirical. Legislative procedure is either revealing or it is not. Landis is confident that attention to legislative proceedings will usually prove helpful for the judge. "Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning." Landis, *supra* note 4, at 889. If, however, judges can find nothing "accurate and compelling," Landis is prepared to concede Radin's point. "[H]ere society and the legislature both entrust themselves to the law-making powers of courts." *Id.* at 893. His empiricism, however, returns: this "group of cases" is "smaller than is generally supposed." *Id.*

statutory language, of itself, is somehow provocative. Thus, if the Landis argument is not to lead us straight back to Radin, it leaves us with (is simply another preparation for) the task of working out a theory of statutory form.

III.

At important points in Radin's analysis, we repeatedly encounter images of substitution. For example, Radin represents statutory words as frequently possessing only ritual significance. Courts purport to interpret statutory language, but in doing so they actually express conclusions reached on other grounds—the jurisprudence of results. Radin regards words as nonetheless sometimes genuinely decisive. He imagines a limit to ambiguity, a threshold beyond which (suddenly) words cannot take on the meaning that the jurisprudence of results demands. For Radin, interpretation and statutory language are disjoint; each phenomenon becomes relevant as a replacement for the other. In this sense, interpretation and statutory language are substitutes. Again: words work only as limits because Radin conceives of words as functioning as categories and because he considers the process of categorization as imprecise. The working picture is once more one of substitution: the substitution of word X for phenomenon Y. And the conclusion that Radin reaches is simply a conclusion about the success or failure of substitution. Words are ambiguous up to a point because substitution is incomplete.

Statutes in Radin's system present themselves as merely aggregates of words because substitution, as an analytic form, suggests that the appropriate response to ambiguity is the drawing of distinctions, the further refinement and multiplication of categories, a repeated narrowing and replacement of focus. Within Radin's perspective, we work with particular statutory words rather than a statute as a whole. If we were to treat statutes rather than statutory words as relevant, we would be attempting to develop a sense of pattern rather than aggregation. A sense of pattern, however, is difficult to accommodate within a logic of substitution. Patterning presupposes several ideas considered simultaneously; categorization presupposes ideas considered separately or in sequence.

It seems at first that Landis breaks free of the logic of substitution. He emphasizes relationships: between courts and legislatures, of judges to their office, among legislators. In each instance, however, while initially describing a duality, Landis ultimately resolves the duality for purposes of analysis. Constitutional princi-

ples require courts to prefer legislative judgments to their own. Professional ethics requires judges to subordinate their own personalities to the requirements of role, and to fabricate legislative judgments (if all else fails) as replacements for their own views. Considerations of craft (effective fabrication) dictate that legislative procedure and not legislators becomes the subject of judicial study. The inner logic is once more one of substitution. If we are unpersuaded, it is for familiar reasons: the substitutions cannot be complete, in much the same way that Radin's statutory words fail to classify fully.

A true alternative to Radin must free itself further of the logic of substitution. The notion of statutes as such, we might think, should possess a particular informing significance: organize (allow us to see) a relationship of text and meaning in which statute and interpretation interrelate rather than substitute.⁶⁶ Within this perspective, we would see the structure of the statutory text as itself subject for (or to) the play of interpretation. The relevant consequences for the interpreter would be consequences for statutory structure; the relevant values would be values concerning statutory structure. This proposition, however, is not enough. It seems to suggest nothing more than a formalism as empty as it is open. We must also accept, therefore, a second idea. A truly substantive jurisprudence of results begins and ends with the interpretation of statutory structure: orients itself initially and expresses itself ultimately through the process of coming to conclusion about what exactly the organization of a statute is.

Giving content to this last assertion requires a series of related descriptive and normative commitments. *Descriptive*: we must be able to specify how statutory structure can reveal or express matters of pertinence for a substantive jurisprudence of results. *Normative*: we must also be able to explain why, even if statutory structure is thus relevant, a substantive jurisprudence could not

66. There is, of course, another alternative to the Radin (and thus the Landis) approach. This is the view of Professors Hart and Sacks, see H. Hart and A. Sacks, *supra* note 3, within which statutes react against, or are interpreted in the light of, a surrounding legal universe—prototypically, the common law. I do not discuss the Hart and Sacks perspective here (although I will in subsequent work) in part because, as adjusted by Professor Calabresi, see G. CALABRESI, *supra* note 3, it has become the recent subject of cogent analysis by other writers. See, e.g., Weisburg, *supra* note 1. Moreover, in my own view, the underlying notion of an enveloping legal environment—a dictionary-like background source of meanings—does not fit very well within the contemporary legal scene, notwithstanding its potential usefulness and the special care and sophistication with which Professors Hart and Sacks, in particular, brought to bear in developing the idea. See Gudridge, *supra* note 40 at 686-98.

properly proceed independently in any event. This latter question is the easier to discuss first.

The obligation is in one sense constitutional. Statutes, in whatever way that they turn out to be relevant, preempt (because of their constitutional status) sources of law or forms of expressing law that courts would otherwise treat as similarly relevant.⁶⁷ There

67. The relative priority of statutes vis-à-vis common law or administrative regulations is less certain than it first appears to be. In earlier periods in Anglo-American legal history, the idea of statutory priority may not have been well-established. For example, medieval English judicial treatment of statutes suggests to many historians that the relatively few statutes of the period were seen as analogous to judgments in particular cases, and therefore susceptible of rather casual handling by judges. See, e.g., S. THORNE, *Introduction, A DISCOURSE UPON THE EXPOSITION AND UNDERSTANDING OF STATUTES* 5, 9 (S. Thorne ed. 1942). But cf. Arnold, *Statutes as Judgments: The Natural Law Theory of Parliamentary Activity in Medieval England*, 126 U. PA. L. REV. 329 (1977) (at least some medieval statutes were less declaratory of general principles, and more transforming of such principles, and thus were seen at the time as distinct from judgments as such). In a more recent past, critics of late nineteenth and early twentieth century American judges sometimes charged that courts of this period so enthusiastically deployed maxims calling for narrow construction of statutes in derogation of the common law that the supposed priority of statutes over common law became more a matter of form than substance. See, e.g., Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908) (noting an emerging contrary trend).

At present, the assumption of statutory supremacy runs up against at least three different sorts of contrary practice. Statutes striking courts as inconsistent with modern common law have been artfully displaced through various means. See, e.g., *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 (1975). Professor Calabresi has not only called attention to this phenomenon, but has defended at length an explicit, common law based "second look" review of apparently obsolescent statutes. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). In addition, courts, especially the Supreme Court, have arguably attributed greater or lesser rigor to constitutional provisions on the basis of an implicit assessment of either legislative capacity as such or judicial competence relative to legislative competence. Even if this is not the program to which courts in fact subscribe, leading theorists contend that it should be. See J. ELY, *DEMOCRACY AND DISTRUST* (1980) (representational model of legislative process and its limits); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) (greater emphasis on limits of relative judicial competence). Constitutional law thus becomes a second legal regime regularly calling into question, or marking as problematic, the priority of legislation. Interestingly, in those instances in which constitutional law actively develops, and largely preempts all but derivative legislation, but see *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the formative process may more closely resemble common law accumulation than traditional models of statutory elaboration. Compare Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 230-36 (1968) (common law element in constitutional adjudication) with Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 522-23 (1948) (adherence to initial interpretation of statute distinguishes statutory interpretation from common law approach). Finally, assertions of the priority of legislation must also confront the willingness of courts to defer to administrative interpretations of statutes, a deference especially notable in some (but by no means all) recent Supreme Court decisions. Compare *Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3227, 3241-43, 3254 (1983) (giving weight to administrative construction), and *Bob Jones Univ. v. United States*, 103 S. Ct. 2017 (1983) (same) with *Bureau of Alcohol, Tobacco, & Firearms v. Federal Lab. Rel. Auth.*, 104 S. Ct. 439 (1983) (rejecting agency inter-

is also another way of perceiving the obligation. For a court, statutes are first of all significant insofar as litigants explain their presence and defend their claims by insisting that statutory language authoritatively describes their situations: somehow summarizes not merely their predicaments, but also the pertinent implications—what is to be done. A court may occasionally decide that statutes are in fact beside the point. But unless the court is confident of this conclusion at the outset (the litigants must therefore be deeply confused), the court confronts what it is likely to perceive as (what we might uncontroversially argue indeed is) an obligation, tracing from a responsibility to act in good faith that the court owes to the litigants, to take proffered statutes seriously. A court is obligated to work with statutes, in other words, in order to discover what it is that the litigants think that a case involves, or to express to the litigants what the court in the end thinks the case concerns.⁶⁸

pretation). There is also the more general phenomenon of legislative delegations of authority to administrative agencies—delegations often so broad that statutory provisions themselves arguably end up far in the background for purposes of administrative decisionmaking. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676-77, 1694-98, 1711-12 (1975). It is not difficult to argue that the various regulations and decisions of administrators, like common law adjudication and the active elements in constitutional law, importantly circumscribe the range in which legislation as such truly governs. References to legislative priority thus acquire something of a fictional cast.

All of these assertions are contestable. It certainly seems, however, that much at the level of practice supports the argument that Radin, in his second essay, offered at the level of political theory. Relative to other legal institutions, legislatures can make no special claim to priority. See Radin, *A Short Way With Statutes*, *supra* note 9, at 405-06. Radin ultimately equivocated. "[W]ithin its constitutional powers, the legislature does in fact issue directives to the court and . . . a court that refused to accept them would be openly violating its duties." *Id.* at 396. But it is possible to be more assertive. To assume a principle of "institutional settlement," see H. Hart & A. Sacks, *supra* note 3, at 4-6, 1225, an allocation to the legislature of the role of "chief policy-determining agency of the society," *id.* at 1140, begs the essential question. As a matter of constitutional practice, "policy" is a product of competition. At different times, and with respect to different matters, different lawmaking institutions will take the lead. Questions of "institutional settlement" are chronically open, and are as much subject to varying resolution as ostensibly distinct matters of substance. If the traditional idea of statutory priority is to retain any content at all, it must be recast to refer to the superior capacity of statutes (relative to common law, constitutional, or administrative materials) to capture the legal imagination. Statutes, we must believe, achieve pre-eminence only if they reveal something other legal materials cannot (or at least in the particular instance do not); something, once seen, which takes precedence, becomes the subject for which other materials serve as simply commentary. The possibility of a legislative priority based on the power of statutory descriptions is implicitly one subject of much of the rest of this essay. For the moment, it suffices to note that this reformulated view collapses the distinction tentatively drawn in the text. The normative priority of statutes becomes a function of their descriptive capacity.

68. Should courts take statutes seriously because litigants do so if litigants invoke stat-

Either version of the obligation to take statutes seriously is open-ended. If there is little that a court can discern from statutory structure, "similarly relevant" is a weak constitutional duty: preempts only minimally. And if statutes reveal or express little, any obligation of the courts to adjudicate responsibly will include only a limited duty to work with the statutes themselves. The normative relevance of statutes thus depends upon their descriptive capacity. How much a court should work with statutes is a function of how much the court could work.

To what must we commit ourselves if we wish to see statutory structure as substantively important? We might start with the proposition that a statute records the politics of its own enactment. It is tempting to describe a statute as an encoded utopia, a particular vision of the world as it should be. And yet a statute is frequently as much or more a register of resistance to that vision as well. Utopia and counter-utopia may co-exist. Insofar as a statute addresses questions of enforcement, a statute reveals the fact of opposition within the world in which the statute describes itself as applying. More generally, statutory ambiguities, qualifications, and gaps are often evidence of hesitation or unresolved dispute within the world of the statute's adoption. A statute—its structure—is a model of conflict.⁶⁹

utes only because *they* think that *courts* take statutes seriously? Perhaps, from the perspective of courts, it makes sense to reduce the range of vision, to ignore the reasons why litigants invoke statutes. Litigants may refer to statutes for a variety of reasons—not just because they believe that courts have *already* displayed a preference for statutes, but in order to try to persuade courts to develop such a preference, or (regardless of what litigants think of judicial reactions) because statutes, in particular cases, are (it turns out) the only legal materials that seem to express the litigants' point of view. In the latter two instances, of course, the behavior of the litigants is plausible only if we are sure that statutes possess content. If statutes are simply empty forms for expressing otherwise-reached judicial conclusions, the circularity of the judge's good faith obligation is indeed obvious. Litigants must, in this instance, be referring to statutes only because (for some reason) judges prefer reference to the statutory form. The good faith argument, like the constitutional argument, *see supra* note 67, thus links its normative claim with an assumption about descriptive capacity.

69. Writers addressing the subject of statutory interpretation frequently observe that the process of enacting legislation leaves its mark on the final product:

Adjustments, bargains, compromises made in hammering out the final product will likely have explicit or implicit reflections in the different elements built into the statute. We should not romanticize the process of obtaining legislation; it is usually a somewhat rough-and-tumble business, and what emerges is unlikely to be a finely joined piece of cabinet work.

J.W. HURST, *supra* note 53, at 59-60; *see, e.g.*, LEVI, *supra* note 67, at 521-22; RADIN, *A Short Way With Statutes*, *supra* note 9, at 399. Hurst's carpentry metaphor nicely captures the usual view: the politics of enactment leaves legislation flawed—ambiguous, subject to exception, incomplete in the realization of its purpose; as though it departed from some ideal. The proposition that a statute is a model of conflict is in part a variation on this theme. I

In coming to a conclusion about structure, the interpreter attaches a specific meaning to ambiguous statutory language, attributes or denies emphasis to particular parts of a statute, proceeds on the basis of some idea of statutory priorities: in short, brings the statute into focus. If statutory structure is a model of conflict, we should not be surprised to discover that such focusing is in fact the work of the interpreter. But we can also see that, even if we regard the interpreter rather than the statute as decisive, we need not therefore treat interpretation and statutory structure as independent. The interpreter working with the statute encounters a set of cues that identify the relevant substantive prejudices to bring to bear. Indeed, we can imagine a more positive role for statutory structure, without repudiating our initial image of interpretation as resolution. The interpreter may discover that statutory form is not entirely plastic; that substantive conflict is not expressed only in the form of thoroughgoing structural ambivalence; that indeed structure, if only rarely truly settling, may nonetheless build into the statute a kind of political momentum. Often, to be sure, a bill

also mean, however, to rework substantially the standard assumption. Instead of viewing the political process as in some way "marring" legislation—depriving it of its ideal form—I will treat what might appear to be "defacing" as precisely the point of legislation. Conflict does not blunt legislative expression; rather, it is precisely what legislation is supposed to express.

For this approach to move beyond the stage of slogan, it must suggest a view of both the substance of politics—for example, as to whether important questions are in principle susceptible of resolution—and the relationships among the institutions of politics—for example, as to whether we can identify any one institution as more responsible than others for political choices. Traditional views of statutes assume that substantive questions of politics are resolvable in principle (and are frequently resolved in practice) and that the institution with chief responsibility for resolution is the legislature. (This is, of course, a caricature of the efforts of thoughtful writers on the theory of statutory interpretation; but it at least describes a usual point of departure or reflex attitude.) The idea of a statute as a model of conflict, I think, carries with it a different (although hardly unfamiliar) picture. Substantive questions of politics often involve hard choices implicating fundamental conflicts susceptible in principle of no settled resolution. The various institutions of politics, informal as well as formal, set up a progression (always itself subject to challenge, variation, and rearrangement), at each stage of which the fundamental conflicts reappear, to be acted upon, but never (or hardly ever) finally. Each institution, however, defines the terms in which the next faces the issue, in this way perhaps screening out "false conflicts," but also thereby imparting a bias, which may be more or less convincing, to the manner in which the question will next be faced. Cf. Dworkin, *Law as Interpretation*, in *THE POLITICS OF INTERPRETATION* 249, 262-66 (W.J.T. Mitchell ed. 1983) (similar but more deterministic analogy of legal reasoning to the process of writing a chain novel). Legislatures often figure rather early in the process; administrators and courts frequently enter later; none can claim a privileged status. This is also, obviously, a caricature. For the present I do not mean to defend or elaborate the picture directly. Instead, I intend only to test the plausibility of its formal corollary—that if we regard statutes as models of conflict, we can begin to understand how statutes in particular cases figure more than ostensibly in the thinking of result-oriented judges.

is defeated even as it is enacted: qualifications overwhelm—or at least nothing stands in the way of the interpreter who, in attaching priorities in reading a statute, would emphasize the qualifications. But sometimes the utopian element survives. A particular substantive vision that an interpreter cannot easily reject—that if rejected re-presents itself as a series of seemingly technical problems: the legislative struggle that a statute embodies may not merely reintroduce itself—simultaneously substantively and structurally—as the subject of interpretation, but give direction to interpretation as well. It is this possibility that a substantive approach to statutory structure would ultimately emphasize.

IV.

The United States Supreme Court announced its decision in three cases on March 8, 1982: *Bread Political Action Committee (PAC) v. Federal Election Commission (FEC)*;⁷⁰ *United Mine Workers of America Health & Retirement Funds v. Robinson*;⁷¹ and *Marine Bank v. Weaver*.⁷² The issue in each case was one of statutory construction. In all three cases the Court was unanimous in both its decision and opinion. We would not regard the result in any of these cases as surprising.

Nonetheless, we can see in each of these “safe” opinions a significant fragility or contingency in its approach to statutory construction. The artifice is too obvious; we are too much aware of effort. The manifestations of effort, the signs that what is constructed is after all delicate work, show up when we read the opinions as confrontations with problems of statutory structure. At the same time, the structural problems turn out to be expressions of central substantive controversies: politics encoded. This is, of course, what the preceding abstract discussion prepared us to see. But these cases are not simply “illustrations.” Much of what is interesting in the idea of statutory structure is left unexpressed at the general level, but becomes plainly apparent once we begin to try to recover the context of a particular case. The relation of abstract to particular (here anyway) is not one of rule and application—simply that of start and finish.

70. 455 U.S. 577 (1982).

71. 455 U.S. 562 (1982).

72. 455 U.S. 551 (1982).

A.

In *Bread Political Action Committee v. FEC*,⁷³ the question at issue was whether section 437h(a) of the Federal Election Campaign Act (Campaign Act)⁷⁴ authorized political action committees to take advantage of certain expedited procedures in challenging the constitutionality of money raising limitations that the Act imposed.⁷⁵ By its terms, section 437h(a) recognized the Federal Election Commission, "the national committee of any political party, or any individual eligible to vote in any election for the office of President" as entitled to institute actions subject to accelerated disposition.⁷⁶ A political action committee as such obviously cannot fit itself within the statutory list. Justice O'Connor, writing for the unanimous Supreme Court, understood this fact to be both beginning and end of the matter.

Our analysis of this issue of statutory construction "must begin with the language of the statute itself"⁷⁷

. . . .
 . . . § 437h(a) affords its unique system of expedited review to three carefully chosen classes of persons⁷⁸

. . . .
 . . . [O]nly parties meeting the express requirements of § 437h(a) may invoke its procedures. Because the appellants do not meet these requirements, they may not invoke the expedited procedures of § 437h(a).⁷⁹

Political action committees could raise their constitutional grievances only through ordinary channels.

Justice O'Connor represented plaintiffs as struggling against

73. 455 U.S. 577 (1982).

74. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 315, 88 Stat. 1263, 1285 (codified as amended at 2 U.S.C. § 437h(a) (1982)).

75. See 2 U.S.C. § 441(b)(4)(D) (1982).

76. The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States Court of Appeals, for the circuit involved, which shall hear the matter sitting en banc.

2 U.S.C. § 437h(a) (1982).

77. 455 U.S. at 580 (quoting *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980)).

78. *Id.* at 581.

79. *Id.* at 584.

"the obvious meaning of the language of § 437h(a),"⁸⁰ and as unable, in the face of "the plain language of § 437h(a),"⁸¹ to provide "clear evidence" of a "clearly expressed legislative intention" that the unique expedited procedures of § 437h be afforded to parties other than those belonging to the three listed categories."⁸² The case, as she portrays it, is an easy one. And yet, despite its straightforward air, Justice O'Connor's analysis includes several steps that, once we recognize them, are by no means self-evident. The statute is not as decisive as it first seems.

For Justice O'Connor, it apparently goes without saying that political action committees are themselves the relevant unit: distinct entities, and as such legally opaque rather than merely transparent aggregates of individuals who might very well (as individuals) satisfy the requirements of section 437h(a). An assumption of this sort is a surprising one to make automatically. The question of whether to ascribe entity status to particular associations has often proven difficult.⁸³ No obvious short-cuts are apparent in the facts in *Bread PAC*. There is no indication, for example, that the trade associations that organized the political action committees incorporated the groups. Indeed, the committees were merely "separate segregated funds."⁸⁴ The Court of Appeals regarded them as "simply political arms of the parent organizations."⁸⁵ The trade associations themselves, of course, were free to incorporate.⁸⁶ The corpo-

80. *Id.* at 581.

81. *Id.*

82. *Id.*

83. The "reality" of organizations—whether they or their members individually are the legally relevant actors—has often seemed to courts to be not only an open question, but one susceptible of different answers at different stages in a legal proceeding. Thus, in the famous case of *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), the Supreme Court held that a labor union's national organization, although unincorporated, was capable of being sued as a distinct entity, contrary common law notwithstanding. *Id.* at 383-92. Capacity, however, was not the equivalent of liability; the entity question reappeared once the Court reached the merits. Chief Justice Taft held that plaintiffs did not identify actions of the national organization's officers as clearly enough "official" in character to implicate the organization under agency principles in a strike called by some of its members; for purposes of liability, therefore, the national union ceased to be the relevant actor. *Id.* at 393-96. For a contemporary discussion of the relationship of *Coronado Coal's* initial capacity holding and then-existing case law, see Sturges, *Unincorporated Associations as Parties to Actions*, 33 *YALE L.J.* 383 (1924). See generally, *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 *HARV. L. REV.* 983, 1080-87 (1963) (summarizing course of capacity law after *Coronado Coal*).

84. See 2 U.S.C. §§ 441(b)(2)(C), (b)(4) (1982).

85. *Bread Political Action Comm. v. Federal Election Comm'n*, 635 F.2d 621, 624 n.3 (7th Cir. 1980), *rev'd*, 455 U.S. 577 (1982).

86. Arguably, the Federal Election Campaign Act (Campaign Act) encourages incorpo-

rate status of a trade association, however, should not transmit itself to a group it sets up, any more than a corporation alters the status of a partnership by participating in its formation.⁸⁷ In any event, even if we regard the political action committee as so plainly *not* a separate entity as to merge its identity with the organizing parent, it is by no means clear that the "derivative" corporate status of political action committees (or indeed the corporate status of the trade associations themselves) under state law should be conclusive of their characterization under federal law as well. Although federal "veil piercing" law is less than clear, the tendency seems to be to adhere to state characterizations only if consistent with the substantive policies of the federal statutes at issue.⁸⁸ The question of entity status, we might think, is properly open in advance of statutory analysis rather than, as the Supreme Court treated it, already resolved at the outset.

In its starting assumption, moreover, the *Bread PAC* opinion departs from the agnostic approach the Supreme Court has often adopted in dealing with questions of standing and entity status. If an association, regarded as an entity, cannot assert an appropriate interest, the Court usually considers whether the nature of the litigation will permit the group to be treated as an aggregate, in order to make possible analysis of the interests of individual members as well.⁸⁹ At first glance, the political action committees seem to gain

ration of trade associations. As the court of appeals noted in *Bread PAC*, 635 F.2d at 627, incorporated trade associations may claim certain, albeit limited, solicitation rights other than those permitted by section 441b(b)(4)(D), the substantive provision at issue in *Bread PAC*. See 2 U.S.C. §§ 441b(b)(4)(A)(i), (b)(4)(B) (1982).

87. The Uniform Partnership Act is explicit in permitting corporations to enter into partnerships. See UNIF. PARTNERSHIP ACT §§ 2, 6 (1983). Any questions (now long since put to rest) about this form of corporate activity arose as matters of corporate rather than partnership law. See W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 42, 43 (5th ed. 1980) (whether participation in a partnership was *ultra vires*).

88. See Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

89. See, e.g., *Harris v. McRae*, 448 U.S. 297, 320-21, *reh'g denied*, 448 U.S. 917 (1980) (religious beliefs of members too personal and varied to permit assertion by association); *Warth v. Seldin*, 422 U.S. 490, 511, 512-14 (1975) (association permitted to assert interests of members but member interests found to be inappropriate for standing purposes); *id.* at 514-17 (damage claims of members cannot be asserted by association; injunctive claims proper but individual interests too conjectural to confer standing). The occasional willingness of the Supreme Court to disregard the formally separate status of an entity and its "members" is best illustrated by *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), in which the Court held that a state agency organized to encourage the national marketing of locally-grown apples was equivalent to a trade association of apple growers, and might therefore assert the interests of those growers as a basis for litigative standing. *Id.* at 341-45. *But see id.* at 345 (agency also possesses interest of its own). These

little from aggregate treatment. Section 441b(b)(4)(D) of the Campaign Act does not distinguish between a trade association and its political action committee, and identifies the "members" of the trade association as corporations.⁹⁰ Since corporations cannot vote in presidential elections, focusing attention on these "members" would not confer standing. The statute's usage, however, is not clearly exclusive. There may be "members" of a political action committee other than corporations who can indeed satisfy section 437h(a)—for example, a committee's actual operating personnel. Notably, the Campaign Act specifically requires designation of a treasurer.⁹¹ Furthermore, section 441b(b)(4)(D) identifies corporations as "members" but it also treats the corporations themselves in a "veil piercing" fashion. It limits political action committee fundraising to shareholders, officers, executive personnel, and their families:⁹² statutory precedent, perhaps, for treating corporations as aggregates for standing purposes under section 437h(a) and for regarding political action committee personnel as also relevant to standing analysis.⁹³

Justice O'Connor did not necessarily err in attributing entity status to political action committees under the Federal Election Campaign Act. We might in the end conclude that her characterization is appropriate. In treating the issue as resolved from the start, though, Justice O'Connor makes a structural as well as a

cases suggest that the Supreme Court views the question of the separateness of an association and its members as presumptively beside the point: as relevant only if considerations of proper litigative procedure so suggest in a particular case. Insofar as it is concerned chiefly with whether the interests of individuals are appropriate for "representation" by an association, the Court seems to regard associations as simply another form of litigative class. *Cf. Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1504-16 (1976) (use of predominance requirement for class certification as means of identifying interests appropriate or inappropriate for class representation).

90. Section 441b(b)(4)(D) states:

This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation . . . has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

2 U.S.C. § 441b(b)(4)(D) (1982).

91. *Id.* § 433(b)(4) (1982).

92. *Id.* § 441b(b)(4)(D) (1982).

93. *Cf. Federal Election Comm'n v. National Right to Work Comm.*, 103 S. Ct. 552, 557 (1982) ("some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under § 441b(b)(4)(C)").

substantive commitment. She asserts that statutory language is clear in its implications: on its face a definitive resolution. It is this attribution of clarity that we can see is open to question.

The idea of statutory clarity is indeed a recurring theme in the *Bread PAC* opinion. Justice O'Connor repeatedly refers to section 437h(a) as creating "three specifically enumerated classes,"⁹⁴ and as therefore the product of sensitive drafting: "three carefully chosen classes."⁹⁵ "Congress . . . went to the trouble of specifying that only two precisely defined types of artificial entity and one class of natural persons could bring these actions."⁹⁶ The Court's opinion, however, also reveals evidence that description of section 437h(a) in these terms is notably artificial. Nothing in the record of congressional deliberations suggests close congressional attention to wording. "In fact, the section's legislative history is too brief and ambiguous to provide much solace to either side of the present controversy."⁹⁷ The language of section 437h(a), for that matter, is not even original.

The grant of standing to the three listed categories of plaintiffs is similar to the grant Congress had adopted earlier in 26 U.S.C. § 9011(b) authorizing the "Commission, the natural committee of any political party, and individuals eligible to vote for President" to bring suits to implement or construe the Presidential Election Campaign Fund Act⁹⁸

The fact of borrowing seemingly subverts the image of careful drafting. It also shifts the focus of inquiry from section 437h(a) to its parent, section 9011(b). Section 9011(b) apparently attempts to facilitate quick resolution of questions of interpretation in order not to bog down the electoral process. This objective explains the provision's affirmative thrust—its waiver of usual exhaustion rules, its use of three-judge district courts, and its requirement that a case "be in every way expedited."⁹⁹ But this purpose also may suggest that the provision's "limitation" is a kind of optical illusion; an accident of language,¹⁰⁰ difficult to see as contributing to the

94. 455 U.S. at 580.

95. *Id.* at 581.

96. *Id.* at 583.

97. *Id.* at 581.

98. *Id.* at 579 n.2 (quoting 26 U.S.C. § 9011(b)(1) (1976)).

99. *See* 26 U.S.C. § 9011(b)(2) (1976).

100. On this view, the reference in section 9011(b)(1) to "[t]he Commission, the national committee of any political party, and individuals eligible to vote for President" becomes an expansive reference similar to the immediately preceding administrative review section, 26 U.S.C. § 9011(a) (1976). That section confers standing on "any interested per-

provision's aim.¹⁰¹ The statutory emphasis falls more on the nature of the question than on the precise identity of the parties. We become aware, once again, of the "imposed" nature of the rigor Justice O'Connor discovers in the analogous standing provision of section 437h(a).¹⁰²

The *Bread PAC* opinion does not so much respond to the form of section 437h(a) as supply that form in the first place. An alternative reading was possible. If we emphasize the casualness of the statutory language, "individual eligible to vote" might plausibly refer to persons participating in the operation of political action committees: for example, treasurers. To note this second approach to section 437h(a), however, is not necessarily to criticize the Supreme Court for imposing the form that it chose. Neither statutory form—rigor or relaxation—can claim an a priori superiority. Whether Justice O'Connor's opinion is persuasive or not depends upon our sense of the implications of her choice of form. Initially, the question is one concerning the terms of the particular statute at issue: What drops out of or enters the analysis because of Justice O'Connor's choice? We may also face a question pertaining to a larger jurisprudence: What concerns might prompt Justice O'Connor to sacrifice an equally appropriate approach to the statute in question?

It is easy to see that Justice O'Connor's representation of section 437h(a) as "clear" blocks (in her discussion) a ready recognition of the provision's significance within the Campaign Act as a whole. Because she regards the statutory provision as straightforward, Justice O'Connor approaches its legislative history warily. If the deliberative record is to be relevant, it must reveal a congressional intention precisely and plainly different from what Justice

son." *Id.* Of course, the language in the two sections is different. But a priori, it is by no means clear which provision is more restricted. Section 9011(b)(1) has its specific categories—Justice O'Connor's point. Nonetheless the provision seems to prejudge, through these categories, the question of "interest." *But cf.* *Athens Lumber Co. v. Federal Election Comm'n*, 689 F.2d 1006, 1011 (1982), *petition for reh'g en banc granted*, 689 F.2d 1016 (11th Cir. 1983) (section 437h(a) categories do not eliminate additional judicial standing inquiry), discussed *infra* note 131. Depending on the content of judge-made standing law (seemingly acknowledged rather than replaced by section 9011(a)), "any interested person" under section 9011(a) might, in particular cases, fail to encompass the full range of section 9011(b)(1) litigants. Instead of treating either provision's language as precise, it may be more plausible to give first emphasis to the legislative commitment to haste that is evident in both provisions.

101. *But see infra* text accompanying note 110.

102. Appellants in *Bread PAC* argued along these lines. 455 U.S. at 583.

O'Connor reads in the statutory language.¹⁰³ Not surprisingly, Justice O'Connor fails to find the requisite clear statement and she thus dismisses the legislative debate.¹⁰⁴ This approach to the analysis of legislative history is in two ways distracting. It makes a demand that is unlikely to be met. Congressional debate rarely expresses itself in the precise language for which Justice O'Connor searches. But more importantly, Justice O'Connor's emphasis on what is absent also leads her to overlook what is in fact there.

The legislative history reported in *Bread PAC*, although limited, reveals that section 437h(a) was chiefly the work of Senator Buckley,¹⁰⁵ who we know was a leading opponent of the Campaign Act.¹⁰⁶ The history that the Court recites also suggests that both proponents and opponents of the legislation were doubtful of the Campaign Act's constitutionality in all respects.¹⁰⁷ Even if we think that neither side in fact cared about the first amendment, legislative history suggests at least that some proponents of the legislation believed that, unless constitutional doubts were accommodated within the statutory structure, the opportunity for legal argument (on this view a kind of filibuster) would confuse the legislative process. Section 437h(a) is thus precisely a structural embodiment within the Campaign Act of legislative conflict.¹⁰⁸ As such, and because of its particular content, section 437h(a) has important implications as an indicator of the way that the statute "expects" to be read.

Section 437h(a) incorporates within the Campaign Act an apparent congressional acknowledgment that, notwithstanding their seeming definitiveness, the substantive provisions of the Act are more truly tentative. The exact reach of the Act depends not so much on the terms of the statute itself as on the content of an extrinsic constitutional law. Legislative acquiescence in this way in the final role of constitutional law (and thus the role of the courts) in statutory drafting is noteworthy not simply because it represents a retreat from the usual idea of assertive or definitive legislation. It also permits a court that is engaged in constitutional review—the process of final legislative specification—to ignore underlying questions about the primacy of judicial formulations:

103. *Id.* at 581.

104. *Id.* at 584.

105. *Id.* at 581-82, 582 n.3 (quoting 120 CONG. REC. 10,562 (1974)).

106. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).

107. *See* 455 U.S. at 582 (quoting 120 CONG. REC. 10,562 (1974); *id.* at 35,140).

108. 120 CONG. REC. 10,562 (1974).

questions, that is, about the definitiveness of constitutional law itself. The Campaign Act raises no *Katzenbach v. Morgan*¹⁰⁹ problems. Here, at least, self-confident judicial analysis of constitutional values, whether in the process of review as such, or as part of an ostensible exercise in statutory construction, is peculiarly appropriate. The statute itself sanctions such activism.

Against the background of section 437h(a)'s larger significance, it is surely ironic that Justice O'Connor treats this particular statutory provision as on its own terms so self-contained. Given the overall significance of constitutional adjudication within the statutory scheme, and the corollary retreat from statutory claims to finality, the appropriate approach in interpreting the standing requirements of section 437h(a) would seem to be one that encouraged such constitutional litigation and (if necessary) expressed little hesitancy in treating the relevant statutory language as casual rather than precise.

And yet this same background may also justify Justice O'Connor's more constricting approach. The Campaign Act, after all, did become law. The opponents of the bill failed within the legislative process. Even if proponents were prepared to recognize the tentativeness of statutory provisions in the face of the Constitution, they did not therefore mean for the statute to be utterly nugatory. Constitutional adjudication would complete the task of legislation rather than nullify it. To this end, section 437h(a) in its

109. 384 U.S. 641 (1966). The Supreme Court has indicated, although not without ambiguity or dissent, that congressional interpretations of the thirteenth and fourteenth amendments may command judicial deference, at least if the congressional readings extend constitutional protection of individual rights beyond the limits courts would otherwise fix. See generally Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 MINN. L. REV. 299 (1982) (summarizing developments after *Katzenbach*). Presumably, this judicial deference, whatever its precise form, would also cover congressional interpretations of the Bill of Rights, in their literal capacity as limits on the federal government. See, e.g., *Welsh v. United States*, 398 U.S. 333, 371-72 (1970) (White, J., dissenting).

In the context of federal campaign finance legislation, the question of judicial deference to congressional constitutional interpretation might arise in connection with construction of provisions regulating campaign contributors. A narrow reading could further a supposed legislative respect for first amendment rights of contributors greater than the Supreme Court would itself extend, see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 24-30 (1976) (per curiam). A broader view of the provisions would fit a possible congressional concern for the indirect censoring effects of private financing, a concern the Supreme Court has found difficult to link with the first amendment. See *id.* at 48-49; Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 631-42 (1982). The question would become: which of these deviant constitutional theories (if either) had Congress espoused? Cf. *Pennhurst State School v. Halderman*, 451 U.S. 1, 15-17 (1981) (requiring explicit congressional adoption of fourteenth amendment theory).

entirety serves to expedite litigation (to bring the process of legislation to a close).¹¹⁰ Constitutional adjudication takes time; section 437h(a) operates to reduce that time to a minimum. But delay is a function not only of the length of particular suits but of the total number of suits. To permit political action committees— organizations under the Act of precisely the kinds of people who would have an interest in routinely opposing the Act's implementation—to take advantage of section 437h(a) would be to invite a flood of section 437h(a) suits, if only for the purpose of delay, and perhaps without regard for the constitutional merits of the claims. It might be better, therefore, to restrict suit under section 437h(a) to groups that have a more disinterested (or at least more complex) perspective and thus are less likely to raise constitutional claims unless constitutional concerns are truly salient: thus the statutory limits on standing.

There is, however, a fundamental difficulty for this way of rationalizing Justice O'Connor's opinion. It would appear that the only obstacle that *Bread PAC* creates for political action committees in seeking access to section 437h(a) is one of pleading. In the future, committee suits must be brought in the name of individual members or functionaries who are eligible voters—a committee treasurer or other officer.¹¹¹ This is hardly a serious impediment and therefore it would seem that section 437h(a) cannot accomplish the limitation of constitutional litigation that we have hypothesized as a possible defense for Justice O'Connor's restrictive reading of the standing language. Indeed, if political action committees can so easily outmaneuver *Bread PAC*, it is hard to come up with *any* explanation for the decision that attributes a particular purpose to the standing limits as such. Justice O'Connor at one point invokes a clear statement requirement limiting judicial leeway in construing statutes that alter ordinary jurisdictional arrangements.¹¹² But even if concern for which cases come first is

110. Section 437h(a) permits litigants to skip usual proceedings at the district court level and move immediately to the court of appeals. See *supra* note 76. The policy of expedition is also apparent in the remaining subsections of section 437h, which limit the time for an appeal to the Supreme Court to twenty days, see 2 U.S.C. § 437h(b) (1982), and require both the court of appeals and the Supreme Court to accelerate their usual procedures. See *id.* § 437h(c).

111. Cf. *Athens Lumber Co. v. Federal Election Comm'n*, 689 F.2d 1006, 1009, 1011 (1982), *petition for reh'g en banc granted*, 689 F.2d 1016 (11th Cir. 1983) (plaintiff corporate president has standing under section 437h(a) in challenge to Campaign Act restriction on corporate political contributions).

112. 455 U.S. at 580-81.

proper,¹¹³ *Bread PAC's* approach to section 437h(a) does absolutely nothing to restore the old order if all that it requires is a change in nominal parties. Nor can we assume that the Supreme Court obtained anything but a meaninglessly brief reprieve from the substantive constitutional issues that the *Bread PAC* litigation raised—assuming both that it is appropriate for the Court to seek to avoid such questions¹¹⁴ and that the particular issues here were ones that the Court indeed preferred not to face.¹¹⁵

We are perhaps left with a purely expressive account. *Bread PAC* is simply one more illustration of the Supreme Court's recent (albeit fluctuating) commitment to the idea that allegations of standing should be precisely put.¹¹⁶ The Court does not treat the language of section 437h(a) as clearly defined—as the beginning and end of statutory analysis—because of some theory of the statute and its interpretation. Instead, the Court is predisposed to treat standing requirements in general as clear in order to justify its policy of penalizing ambiguous (or wrong) allegations. Any de-

113. *But cf. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263-64 (1975) ("But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former").

114. Compare Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (exploring circumstances in which avoidance is proper), with Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (emphasizing limits on use of avoidance techniques).

115. The Supreme Court decided cases raising first amendment challenges to the Campaign Act prior to *Bread PAC*. See, e.g., *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182 (1981); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). And it has also decided such cases since *Bread PAC*. See *Federal Election Comm'n v. National Right to Work Comm.*, 103 S. Ct. 552 (1982).

116. In a series of important cases, the Supreme Court has insisted that judicial acknowledgment of plaintiff's standing, or of a claim's justiciability more generally, requires allegations in a complaint clearly spelling out the relationship between challenged acts of defendant and injury to plaintiff's interests. This specification, the Court has sometimes suggested, must be precise enough to reveal how the remedy a plaintiff requests will indeed cure the alleged injury. See, e.g., *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1667 (1983); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-44 (1976); *Warth v. Seldin*, 422 U.S. 490, 503-04, 508, 516-17 (1975). A second line of the Court's decisions, however, reveals a greater willingness to draw inferences from limited pleadings, either leaving specific questions of causal relationships for trial, see, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 366, 376-78 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109-15 (1979), or treating the causal relationship as sufficiently self-evident to require no further investigation, see, e.g., *Larson v. Valente*, 456 U.S. 228, 242-43 (1982); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 161-62 (1981). In still other cases, plaintiffs supplemented allegations in complaints with sufficient evidence adduced in discovery and accepted in trial court findings to establish the requisite relationships. See, e.g., *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 74-77 (1978).

fense of this approach, we can see, would shift the frame of reference dramatically. The Campaign Act itself would not be relevant; instead, we would find ourselves discussing whatever controversies underlie theories of pleading.

This is indeed a radical reading of the *Bread PAC* opinion. It suggests that the explicit subject of Justice O'Connor's analysis—section 437h(a) and its construction—is not in fact the true subject but simply the context or medium within which other independent concerns express their presence. It also emphasizes, in identifying the relevant autonomous policies, a theme in recent Supreme Court adjudication that so far has become only barely expressed and, to the extent that the Court is actually committed to the idea of strict pleading, brings the Supreme Court into conflict with prevailing theories of pleading and procedure.¹¹⁷ Before we accept this picture of extreme statutory passivity, therefore, we might reconsider the assumption that brought us to this point: the idea that a political action committee can easily reacquire standing by bringing suit in the name of a voter member.

At least at first glance, it looks like the matter is straightforwardly resolved in *California Medical Association v. Federal Election Commission (FEC)*,¹¹⁸ a Supreme Court decision of a year earlier. There, the Court avoided the question of PAC standing under section 437h(a) by emphasizing the individual plaintiffs in the case. "The individual appellants . . . fall within this last [section 437h(a)] category [voters], and, as members and officers of CMA and CALPAC, have a sufficiently concrete stake in this controversy to establish standing to raise the constitutional claims at issue here."¹¹⁹ But why does the Court find it necessary to make *two* points? It is not enough that individual plaintiffs are voters who fall immediately into a section 437h(a) category. They are also members and officers of the PAC and its parent association, and this fact, apparently, is equally important for the Supreme Court

117. See Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 398 (1980). Opinion-writing Justices frequently call attention to the relationship between their approaches to standing and background theories of pleading. Compare *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1675 (1983) (Marshall, J., dissenting) ("I am aware of no case decided since the abolition of the old common law forms of action . . . that in any way supports this crabbed construction of the complaint"), and *Warth v. Seldin*, 422 U.S. 490, 528 (1975) (Brennan, J., dissenting) ("reverting to the form of fact pleading long abjured in the federal courts"), with *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 384 (1982) (Powell, J., concurring) ("Liberal pleading rules have both their merit and their price").

118. 453 U.S. 182 (1981).

119. *Id.* at 187 n.6.

in explaining its finding of standing.

This redundancy has its origins in *Buckley v. Valeo*.¹²⁰ *Buckley* did not involve a suit brought by either a PAC or its members, but rather an initial challenge to the constitutionality of the Campaign Act prosecuted by Senator Buckley, other members of Congress, various candidates, political parties and public interest groups. In passing on a challenge to the standing of these various litigants, the Supreme Court began by observing that, although "Congress, in enacting [section 437h(a)] . . . , intended to provide judicial review to the extent permitted by Art. III,"¹²¹ Congress "may not, of course, require this Court to render opinions in matters which are not 'cases or controversies.'"¹²² After raising the possibility of constitutional restraints on the reach of section 437h(a), however, the *Buckley* Court did not proceed to assess the standing of any particular plaintiffs. "In our view, the complaint in this case demonstrates that at least some of the appellants have a sufficient 'personal stake'. . . ."¹²³

California Medical Association, we can now see, was a case in which the Supreme Court carried out the approach that *Buckley* set forth (even if it did not fully follow). The majority in *California Medical Association* refers to the PAC membership of individual voters to confirm that Congress has not exceeded "the constraints of art. III of the Constitution"¹²⁴ This conclusion, however, creates two problems. First, it at least seems that *California Medical Association* and *Bread PAC* are inconsistent. In the earlier case, for apparently constitutional reasons, the Supreme Court emphasized the organizational membership of voters in order to justify their standing. But in the second decision, as a matter of statutory analysis under section 437h(a), the Court holds that the organizational matrix is beside the point. After *Bread PAC*, presumably, it would be improper, if we take the statute seriously, to place much emphasis on PAC membership as such. This conclusion is especially persuasive if we explain the limitation in the language of section 437h(a) by reference to a congressional concern that PACs not use section 437h(a) to delay implementation of the statute.¹²⁵ But given *California Medical Association*, absent

120. 424 U.S. 1 (1976) (per curiam).

121. *Id.* at 11-12.

122. *Id.* at 11.

123. *Id.* at 12.

124. 453 U.S. at 187 n.6.

125. See *supra* text following note 109.

emphasis on PAC membership, voter standing—that which section 437h(a) explicitly authorizes—is apparently constitutionally suspect. Do *Bread PAC* and *California Medical Association*, if we read them together, suggest that, given the language of section 437h(a), voters cannot now refer to PAC membership, and therefore, notwithstanding the language of section 437h(a), they *lack* standing to sue for constitutional reasons?

Perhaps we should look more closely at the ostensibly constitutional requirement that *California Medical Association* is enforcing. Herein lies the second problem. *California Medical Association* is either assuming that voters have at stake only interests that are too general to provide a basis for standing,¹²⁶ or that the first amendment rights that the voters are claiming do not operate to protect voters *qua* voters and therefore voter interests, even if real, are beside the point—irrelevant in light of the substance of the litigation.¹²⁷ Neither formulation, however, describes a standing rule that in cases other than *California Medical Association* the Supreme Court has been prepared to label as unequivocally constitutional in origin. Bars against assertions of generalized injury or against invocations of purposively irrelevant constitutional provisions are supposedly “prudential”—open to Congress to set aside.¹²⁸ If, as the Court tells us, “[t]he grant of standing under §

126. Cf. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-27 (1974) (interest as citizen too “generalized”).

127. Cf. *H.L. v. Matheson*, 450 U.S. 398, 405-07 (1981) (plaintiff who does not claim to be a “mature minor” cannot assert abortion statute infringes constitutional rights of members of this class); *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970) (the question is “whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question”). The inquiry into the salience of a given interest is often personalized—restated as an investigation of whether a litigant is invoking a “third party’s” rights. See *United States v. Raines*, 362 U.S. 17, 21 (1960) (ordinarily “one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that . . . it might also be taken as applying to other persons or in other situations in which its application might be unconstitutional”). For a discussion of the relationship of “zone of interests” analysis and notions of “third-party” rights, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 3-22, 3-23, 3-28 (1978).

128. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975); Garvey, *A Litigation Primer for Standing Dismissals*, 55 N.Y.U. L. REV. 545, 562-63 (1980). Like Congress, federal courts may also recognize exceptions to “prudential” standing rules. The Supreme Court has done so at least once in the case of the ban on assertions of generalized interests. See *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayer standing to assert rights under the first amendment Establishment Clause). The Court has frequently waived the rule against asserting third-party rights. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 113-16 (1976) (plurality opinion); *United States v. Raines*, 362 U.S. 17, 22-23 (1960); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

437h" is "limited only by the constraints of Art. III,"¹²⁹ why is there any problem in *California Medical Association*? Congress has simply brushed aside some judge-made rules.

But then again, the distinction between "constitutional" and "prudential" standing rules is not an easy one.¹³⁰ The Supreme Court has not committed itself unhesitatingly to a precise demarcation.¹³¹ Perhaps as a result, the Court has been at times uncomfortable in acknowledging a power on the part of Congress to take over standing questions for itself.¹³² Arguably, the Supreme Court may yet concede that practically any congressional judgment about relevant injuries is likely to withstand the Court's scrutiny.¹³³ It is

129. 453 U.S. at 187 n.6.

130. See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1644-47 (10th ed. 1980).

131. Confusion is especially apparent with regard to the prohibition against assertions of generalized interests. Justice Powell, writing for a majority of the Supreme Court, declared that the generalized-interest ban was "essentially" a matter of "judicial self-governance." *Warth v. Seldin*, 422 U.S. 490, 500. But Chief Justice Burger's majority opinion in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), appears to treat the ban as immediately deriving from a constitutional requirement of "injury in fact." *Id.* at 218-19. More recently, Justice Rehnquist, writing for the majority in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), initially conceded that the distinction between constitutionally-required and prudential standing rules "has not always been clear." *Id.* at 471. As if to illustrate the point, Justice Rehnquist, after assigning concern about generalized interests to the "set of prudential principles," *id.* at 474; see *id.* at 475, rejected the argument of plaintiffs that the first amendment establishment clause itself legitimated their interest by grouping the interest of plaintiffs with those judged in cases like *Schlesinger* and concluding, "That is not an injury sufficient to confer standing under Art. III" *Id.* at 485.

One recent court of appeals decision construing section 437h(a) reflects the Supreme Court's classificatory difficulties. In *Athens Lumber Co. v. Federal Election Comm'n*, 689 F.2d 1006 (1982), *petition for reh'g en banc granted*, 689 F.2d 1016 (11th Cir. 1983), the court concluded that plaintiffs suing as voters under section 437h(a) must meet the "minimum requirements" of article III. *Id.* at 1011; see *id.* at 1010-11 n.4. Although voting capacity satisfied the statute, it was otherwise an "untenable" basis for standing. *Id.* at 1013. Only the voter's additional status as president of a company threatened with a Campaign Act prosecution justified a finding of standing. *Id.* at 1013-14. The court concluded by permitting the company president to assert the rights of the company: "the general disfavor of *jus tertii* claims is a prudential limitation" *Id.* at 1014.

132. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487-88 n.24 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

133. The question whether article III limits congressional definitions of relevant interests for standing purposes sets in motion several lines of thinking in Supreme Court opinions.

On one view, standing requirements are understood to be distinguishable from justiciability rules *per se*. Other justiciability rules measure the authenticity of a dispute,—originating in what is taken to be a primal constitutional command to avoid advisory opinions. Standing requirements address other concerns. From this perspective, so long as litigation involves appropriately authentic disputes, congressional redefinitions of relevant

possible, though, that rather than make this concession, the Court

interests are nonproblematic. Justice Stewart's majority opinion in *Sierra Club v. Morton*, 405 U.S. 727 (1972), illustrates this view:

Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, . . . or to entertain "friendly" suits, . . . or to resolve "political questions," . . . because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue," . . . is one within the power of Congress to determine.

Id. at 732 n.3 (citations omitted).

The effort to separate standing rules from other justiciability doctrines coexists readily with a line of cases, emerging early but continuing into the present, which treats congressional recognition of "new" interests as presenting little problem in the context of legislation either establishing the protection of such interests as part of the agenda of an existing regulatory regime, *see, e.g.*, *The Chicago Junction Case*, 264 U.S. 258, 266-67 (1924), or setting up some new regulatory scheme in which the private actions that the scheme authorizes are manifestly important to furthering the legislative purpose, *see, e.g.*, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972). These cases represent the question of the legitimacy of plaintiffs' interests as in a way already resolved by the remedial framework Congress establishes in order to give these interests protection. "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). The congressionally-defined cause of action supplies a "legal" context in the same way common law causes of action supply a similar context for more traditional interests. *See, e.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152-53 (1951) (Frankfurter, J., concurring).

The "cause of action" cases, however, become more difficult if inquiries into standing are seen as interconnected with other aspects of justiciability doctrine—as part of the process of determining the "authenticity" of litigation. This interconnection is a characteristic theme in many recent opinions: standing analysis becomes simply another variation on a common concern. *See, e.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472-74 (1982); *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974). It may appear, given this interdependence, that relaxation of standing rules could be appropriately balanced through use of other justiciability measures. *See Flast v. Cohen*, 392 U.S. 83, 94-100 (1968). But changes in standing rules might also transform the entire scheme, in ways inconsistent with constitutional objectives. *See United States v. Richardson*, 418 U.S. 166, 188-97 (1974) (Powell, J., concurring). In any event, this sense of interconnection suggests that congressional additions to the list of appropriate interests should not be viewed with merely a blank tolerance. The stability of the system requires that such additions be tested in light of basic article III policies. *See, e.g.*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

Recent decisions of the Supreme Court reveal efforts to embrace aspects of each of these lines of thought. The conflict among the approaches thus becomes all the more apparent. For example, an awareness that recognition of relevant interests is the end-product of a process of assessing the difficulties and uses of the causes of action that protection of such interests would require carries over from judicial encounters with congressional interventions to the Supreme Court's characterizations of its own prudential rules. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975). The same cause of action analysis, however, could in principle encompass the "core" constitutional rules as well, *see Garvey, A Litigation Primer for Standing Dismissals, supra* note 129, at 558, and thus might ultimately subvert the constitutional "core"/prudential "periphery" model itself. *See generally* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425 (1974). Or occasionally the Court's opinions relax recently-imposed strict pleading

will continue to judge congressional standing grants—at least when it can nonetheless uphold the grants—in light of traditional standing rules, without regard to the precise status of the usual rules, if only as a means of encouraging congressional caution and avoiding an ultimate constitutional question. In this light, *Bread PAC* and *California Medical Association* together establish no doctrinal proposition. Because the Supreme Court regarded section 437h(a) as restricting standing in *Bread PAC*, no constitutional rituals were necessary. And if the constitutional inquiry in *California Medical Association* was thus little more than ritual, there is no reason to suppose that in the next case after *Bread PAC*, when a PAC member or functionary sues as a voter, *Bread PAC* will strike the Supreme Court as reopening the *California Medical Association* issues. This means, of course, that our earlier suspicion was correct. *Bread PAC* is indeed only ceremonial: simply a bow to proper pleading.

What, finally, does all of this suggest? We can see, I think, the virtue of simplicity. Once we question whether section 437h(a) is as straightforward as Justice O'Connor insists that it is, we move into a realm of argument in which our sense of the statute as decisive is subject to repeated assault. The initial inquiry into whether statutory language is more sensibly treated as casual or precise becomes an investigation of whether, and on what terms, legislative conflict resulted in a committed or equivocal statute. This question turns into an analysis of whether *Bread PAC* accomplished anything at all at the statutory level or whether instead statutory construction simply had the result of imposing certain pleading rules. And this question itself expands, to become as well an investigation of whether the Supreme Court's method of construction is also part of a constitutional politics of bluff, involving the Court and Congress. In the end, we find ourselves sure of very little. Only this:

requirements, *see supra* note 116, in order (apparently) to portray congressional rights of action as ultimately (if indirectly) protecting interests of more or less traditional form, rather than as full-fledged departures from usual norms of "injury in fact." Compare *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374-75 (1982) (absence of misrepresentation means no injury to white housing discrimination tester) with *id.* at 375-78 (permitting tester to sue on basis of unelaborated allegation of infringement of interest in living in racially integrated area). *See also* *Gladstone, Realtor v. Village of Bellwood*, 441 U.S. at 115 (finding implicit economic interest in claim of injury to interest in living in integrated area). Such compromises, of course, do little more than preserve the basic tensions. The pressure may be intensifying. Several lower courts have either openly recognized "radical" congressional standing grants, *see, e.g., Rite v. Costle*, 650 F.2d 1312, 1319-22 (5th Cir. 1981), or laid groundwork for doing so, *see, e.g., National Treasury Employees' Union v. Campbell*, 654 F.2d 784, 788-89 (D.C. Cir. 1981).

statutory clarity and decisiveness in *Bread PAC* is largely artificial. The statute itself asserts little; the Supreme Court's decision to treat the statute as prominent pushes it forward only (or mainly) as a front.

B.

In other cases, of course, statutory language and policy may in fact be the inspiration and subject of judicial reasoning— identifying and expressing the values that judges regard as relevant. And yet, however simple the opinions in these cases appear to be, the underlying dynamic of commitment and hesitation may be as intricate as that in *Bread PAC*. Important statutes are (or become) ambivalent. They codify conflict rather than political consensus.

In *United Mine Workers of America Health & Retirement Funds v. Robinson*,¹³⁴ the question was whether section 302(c)(5) of the Labor Management Relations Act of 1947¹³⁵ (the Taft-Hartley Act) prohibited a collective bargaining provision that distinguished, seemingly arbitrarily, between two classes of widows of coal miners. Under the terms of the agreement, widows of miners who had died prior to December 6, 1974, received increased health benefits if their husbands, as of the time of death, were not only eligible for retirement benefits, but had actually retired.¹³⁶ Widows received no additional health benefits if their husbands, though eligible for retirement, had remained employed.¹³⁷ A divided panel of the United States Court of Appeals for the District of Columbia Circuit concluded that discrimination in these terms, however useful as a bargaining compromise, bore no relationship to the objectives of the pension fund.¹³⁸ The bargained provision therefore violated section 302(c)(5), which requires that pension funds operate "for the sole and exclusive benefit of the employees"¹³⁹

134. 455 U.S. 562 (1982).

135. Labor Management Relations Act, 1947, § 302(c)(5), ch. 120, 61 Stat. 157 (1947) (codified as amended at 29 U.S.C. § 186(c)(5) (1976 & Supp. V 1981)).

136. 455 U.S. at 567.

137. *Id.*

138. *Robinson v. UMWA Health and Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981), *rev'd*, 455 U.S. 562 (1982). Judge Robinson wrote for the court, *id.* at 417-24, Judge Davis concurred, *id.* at 424-25, and Judge Robb dissented, *id.* at 425-26.

139. Section 302(c)(5) states in pertinent part:

The provisions of this section shall not be applicable . . . (5) with respect to money or other things of value paid to a trust fund established by such [collective-bargaining] representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . : *Provided*, That (A) such payments are held in trust for the purpose of paying, either from prin-

The Supreme Court reversed the judgment of the court of appeals. Writing for the unanimous Court, Justice Stevens held that section 302(c)(5) did not impose a reasonableness requirement restricting the range of classifications a collective bargaining agreement might employ in distributing pension benefits. "Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others."¹⁴⁰ Legislative history and surrounding statutory language suggested that section 302(c)(5) had only a narrow purpose. "The section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders."¹⁴¹ This "anti-siphoning" concern provided no basis for a "restriction on the allocation of the funds among the persons protected by § 302(c)(5)."¹⁴²

The error of the court of appeals, Justice Stevens thought, lay in its assimilation of *Robinson* to cases "in which trustees of employee benefit trust funds, not the collective-bargaining agreement, fixed the eligibility rules and benefit levels."¹⁴³ Perhaps trustees, in the exercise of a delegated discretion, acted unlawfully if they drew arbitrary distinctions among beneficiaries. In this case, though,

[t]he . . . trustees were not given "full authority" to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective-bargaining agreement. By the terms of the trust created by that agreement, the trustees are obligated to

cipal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, . . . and [such agreement] shall also contain provisions for an annual audit of the trust fund . . . ; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust

140. 455 U.S. at 570.

141. *Id.* at 571-72.

142. *Id.* at 572 (emphasis added).

143. *Id.* at 573. The cases the court of appeals most often cited fit Justice Stevens's characterization. See, e.g., *Norton v. I.A.M. Nat'l Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977); *Pete v. UMWA Welfare & Retirement Fund*, 517 F.2d 1274 (D.C. Cir. 1975) (en banc); *Roark v. Boyle*, 439 F.2d 497 (D.C. Cir. 1970); *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968). But see *infra* note 152.

enforce these determinations unless modification is required to comply with applicable federal law. The common law of trusts does not alter this obligation.¹⁴⁴

Section 302(c)(5) itself was not such "applicable federal law."¹⁴⁵ No other statute imposed a pertinent restriction.¹⁴⁶ Thus, the Supreme Court concluded that the trustees in *Robinson* acted properly in complying with the collective bargaining agreement.

Was *Robinson* really so easy a case? In interpreting section 302(c)(5), Justice Stevens attributed a notably modest purpose to the statutory provision. He viewed section 302(c)(5) as no more than a response to the specific problem to which members of Congress had referred in justifying the provision. We might with equal plausibility, however, regard the immediate provocation of the statute as instead illustrative of the general *type* of abusive practice that the legislation proscribed. Characterization thus becomes a matter for choice. On one view, section 302(c)(5) addresses only pension-fund looting—whether by unions (the immediate congressional concern) or perhaps by management as well.¹⁴⁷ Or alternatively, section 302(c)(5) addresses a larger category of pension-fund misuse—any practice that works to the disadvantage of fund beneficiaries and that is not defensible in terms of fund objectives.¹⁴⁸ Looting obviously falls within this alternative category; but so does a collective bargaining agreement that arbitrarily distinguishes between seemingly similar groups of beneficiaries. This more ambitious reading is entirely consistent with the language of section 302(c)(5). The statute does not refer narrowly to particular abuses, but emphasizes instead "the sole and exclusive *benefit* of the employees"¹⁴⁹ Justice Stevens might underscore the phrase "sole and exclusive" as the statutory language carrying the purposive burden, and thus defend the narrower theory of the legislative

144. 455 U.S. at 573-74.

145. *Id.* at 574.

146. *Id.*

147. Cf. Note, *The Duties of Employee Benefit Plan Trustees under ERISA in Hostile Tender Offers*, 82 COLUM. L. REV. 1715-19 (1982) (discussing the applicability of ERISA "sole and exclusive benefit" language—derived from section 302(c)(5)—as a constraint on role of pension funds in takeover contests).

148. Prior to *Robinson*, courts of appeals, dealing with trustee exercises of discretion, did not simply rely on trusts principles in invalidating, for example, arbitrary eligibility requirements. Instead, these courts treated section 302(c)(5) as itself providing at least part of the basis for their decisions. See, e.g., *Lee v. Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1971); *Roark v. Lewis*, 401 F.2d 425, 428 (D.C. Cir. 1968). These cases, of course, do not fit easily within an anti-looting model of section 302(c)(5).

149. Labor Management Relations Act, 1947, § 302(c)(5) (emphasis added).

objective. It is clear, though, that section 302(c)(5) is open to interpretation. Neither "plain meaning" nor the statute's agenda of concern dictates the *Robinson* gloss.

The *Robinson* critique of the analysis of the court of appeals is similarly debatable. Justice Stevens assumes that the collective bargaining agreement in *Robinson* functions as a trust instrument. As such, the agreement is the first source of the obligations of the trustees; general conceptions of fiduciary responsibility are relevant only insofar as the bargaining agreement is incomplete in its instructions or otherwise grants discretion to the trustees. Provisions in the actual bargaining agreement in *Robinson*, however, appear to assume that a more complex, less peremptory dynamic describes the relationship of the agreement and trustee discretion.¹⁵⁰ More fundamentally, *Robinson* raises questions because, for Justice Stevens, the agreement effectively supplants not only usual principles of fiduciary administration, but also section 302(c)(5) itself. Strictly speaking, of course, the agreement does not prevail if it is plainly in conflict with the statute. But Stevens treats the statute as relevant only if there is indeed such a conflict. And he attributes so little content to section 302(c)(5) that it is hard to see

150. Article XX § (h)(5) of the National Bituminous Coal Wage Agreement of 1974, states:

The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

(a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder; . . .

(d) to comply with all applicable court or government decisions or rulings.

455 U.S. at 574 n.13. The first sentence of the provision appears to recognize a rather active role for the trustees, one in which the trustees may initiate the process of modification, and not simply react to the demands of the employers and the union. Given the more open-ended process the Wage Agreement thus apparently envisions, to hold (at minimum) that the trustees were under a duty to *propose* redefining the beneficiary class in *Robinson* would hardly contravene the Agreement; indeed, the Wage Agreement supplies a procedure for accommodating the actual conclusion of the court of appeals that the trustees should have refused to implement the bargaining agreement—a procedure available even if the later quoted passages only refer (as Justice Stevens seems to hold that they do) to changes dictated by applicable statutes and regulations on their face.

Other bargaining agreements, in addressing pension questions, are even more deferential in their respect for trustee discretion. See, e.g., *Toensing v. Brown*, 374 F. Supp. 191, 199 (N.D. Cal. 1974), *aff'd*, 528 F.2d 71 (9th Cir. 1975) ("recommendation of the Collective Bargaining Parties").

(absent straightforward looting) how such a conflict would arise.¹⁵¹

On an alternative reading, section 302(c)(5) might figure more prominently. The trust instrument would now be an amalgam. Section 302(c)(5) becomes the primary document, establishing basic principles; collective bargaining agreements serve a secondary purpose, as specifications or explanations of these principles. The fiduciary obligations of the trustees, on this view, are initially creations of statute. A role for the trustees in monitoring the consistency of bargaining agreements, among each other and more importantly vis-à-vis statutory principles, becomes easy to see.¹⁵² The

151. See *infra* text accompanying note 170.

152. This approach would draw support from *Toensing v. Brown*, 528 F.2d 69 (9th Cir. 1975), and the cases that treat *Toensing* as persuasive. In *Toensing*, the court of appeals upheld a vote of pension fund trustees to comply with the results of collective bargaining in allocating pension benefits. The court, however, repeatedly noted the status of the collective bargaining conclusions as merely "recommended increases." *Id.* at 72; see *supra* note 150. The court also declared:

We wish to emphasize, however, that trustees have a duty to exercise their independent judgment in administering trust funds established under § 302 Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory.

528 F.2d at 72. Subsequent courts have cited *Toensing* as support for the proposition that pension fund administration is a process ordinarily distinct from collective bargaining. See, e.g., *Griffith Co. v. NLRB*, 660 F.2d 406, 410-11 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982); *Talarico v. United Furniture Workers Pension Fund A*, 479 F. Supp. 1072, 1079-80 (D. Neb. 1979); see also *Hawkins v. Bennett*, 704 F.2d 1157, 1159 (9th Cir. 1983) (The trust fund is independent of the collective bargaining agreement). The court of appeals in *Robinson* relied on *Toensing* in arguing that the trustees could reject the bargaining agreement allocation. *Robinson v. UMW Health & Retirement Funds*, 640 F.2d 416, 423 n.51 (D.C. Cir. 1981), *rev'd*, 455 U.S. 562 (1982).

Perhaps more significantly, the view of pension trusts as more creatures of statute than of bargaining agreements is consistent with the characterizations of courts that have recently confronted the difficult problems involved in reconciling traditional rules and practices of collective bargaining with the obligations of congressional pension legislation. See Employee Retirement Income Security Act of 1974 (ERISA) Pub. L. No. 93-406, 94 Stat. 1208 (codified as amended in various sections of titles 5, 18, 26, 29, 31, & 42 U.S.C., but the sections under consideration in this article are located at 29 U.S.C. §§ 1001-1381 (1976 & Supp. V 1981)) Multiemployer Pension Plan Amendments Acts of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208 (codified in scattered sections of titles 5, 26 & 29 U.S.C. (1976 & Supp. V 1981)); *Robbins v. Prosser's Moving & Storage Co.*, 700 F.2d 433 (8th Cir. 1983) (*en banc*); *T.I.M.E.-D.C., Inc. v. Trucking Employees*, 560 F. Supp. 294 (E.D.N.Y. 1983). In these cases, the manifest role of statutory regulation in fixing the factors that pension fund trustees must take into account has prompted courts to treat as given the separateness of pension fund and collective bargaining processes. These courts both acknowledge and insist upon the exercise of discretion by trustees in determining their responses to collective bargaining politics. See *Robbins*, 700 F.2d at 433 (trustees need not exhaust bargaining agreement arbitration procedures); *T.I.M.E.-D.C.*, 560 F. Supp. at 294 (trustees must make independent determination under MPPAA in deciding whether employer has shut down a plant permanently—thus triggering pension fund withdrawal liability—or has simply closed the

language of section 302(c)(5) itself supports this reading of the statute as constitutive of the trust relationship rather than merely regulatory. Section 302(c)(5) includes far more than the "sole and exclusive benefit" rule. It identifies beneficiaries,¹⁵³ lists events triggering payments and the generic forms benefits may take,¹⁵⁴ assigns to a "written agreement" (obviously secondary) the task of specifying "the detailed basis on which such payments are to be made,"¹⁵⁵ describes the procedures for administration of the fund,¹⁵⁶ and requires that payments to pension or annuity funds be made to "a separate trust."¹⁵⁷ The statutory provision, we can see, performs many of the functions of a trust instrument.¹⁵⁸

This subordination of the role of the bargaining agreement, and reemphasis of both the statute and trust principles, also acquires support from the Supreme Court's decision in 1981 in *NLRB v. Amax Coal Co.*¹⁵⁹ In *Amax*, the Court held that a union did not commit an unfair labor practice by engaging in a strike in furtherance of a demand that an employer refrain from insisting on separate representation in the administration of a multiemployer pension fund. Operation of the fund was a process distinct from the process of collective bargaining per se; the union therefore did not interfere with the employer's right to choose its own bargaining representative.¹⁶⁰ Justice Stewart's majority opinion re-

plant for the duration of labor dispute).

153. "[S]uch payments are [to be] held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents" LRMA § 302(c)(5)(A).

154. Under section 302(c)(5)(A), benefits may be paid: "for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illnesses resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance" *Id.*

155. LRMA 302(c)(5)(B).

156. Section 302(c)(5)(B) requires that (1) employees and employers be "equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . ."; (2) a described arbitration procedure be followed "in the event that the employer and employee groups deadlock on the administration of such fund"; and (3) there be "an annual audit of the trust fund" and "a statement of the results . . . available for inspection by interested persons"

157. LRMA § 302(c)(5)(C).

158. See generally 1 A. SCOTT, *THE LAW OF TRUSTS* § 46 (3d ed. 1967) (required contents of trust memorandum).

159. 453 U.S. 322 (1981).

160. "Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances." . . . The duties

ferred specifically to section 302(c)(5) in order to establish its distinction between fund administration and collective bargaining and emphasized that the statute established principles of trust law, and not bargaining, as the ultimate regulator of the administrative process.¹⁶¹

Interestingly, Justice Stevens was the sole dissenter in *Amax*. He observed that, under section 302(c)(5)(B), the administrators of benefit funds are identified as "representatives of the employers" or "representatives of employees"—and not as trustees.¹⁶² He also described several questions of pension fund administration upon which employer and employee representatives might differ, along lines plainly paralleling usual divisions in collective bargaining.¹⁶³ Stevens concluded that pension fund administration was often simply another instance of collective bargaining, and employer representation rights were therefore relevant.¹⁶⁴

There are, of course, ways of harmonizing *Amax* and *Robinson*.¹⁶⁵ It should be clear, however, that Justices Stewart and

of an employer-appointed trustee of an employee benefit trust fund . . . are totally alien to both of these activities.

Id. at 338 (citation omitted).

161. *See id.* at 329-32. Justice Stewart also interpreted the Employee Retirement Income Security Act, *see supra* note 153, as having "essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." 453 U.S. at 332; *see id.* at 332-34. He further noted that the Multiemployer Pension Plan Amendments Act, *see supra* note 152, "amended ERISA to impose new responsibilities upon the trustees of multiemployer trust funds . . ." 453 U.S. at 334 n.17.

162. 453 U.S. at 343 (Stevens, J., dissenting).

163. *See id.* at 344-47 (Stevens, J., dissenting).

164. *See id.* at 351-53 (Stevens, J., dissenting). Justice Stevens, however, did not dispute that "representatives" engaged in pension fund administration assume "fiduciary responsibilities." *Id.* at 343. But he seemed to assume that fiduciary obligations acquired content chiefly in the context of the execution of duties specifically mandated by the "written trust instrument." *Id.* at 346. "[D]iscretionary decisions" were as much or more matters of bargaining. *Id.*

165. Arguably, *Robinson* complements *Amax* precisely. *Amax* sets up pension administration as a sphere distinct from the ordinary politics of collective bargaining. But administration, we may think, is a task very different from that of defining benefit levels in general. *Robinson* gives institutional content to this distinction (1) by recognizing the authority of collective bargaining with respect to pension benefit levels, at least insofar as bargaining expresses itself through the bargaining agreement, and (2) by limiting the authority of pension administrators insofar as they purport to reject or modify the agreement. However elegant this formulation is, we might note that its distinction between bargaining and administration is not drawn so clearly in other areas of labor law, *see, e.g.*, cases cited *infra* note 197 (varying approaches to duty of fair representation in grievance handling), and that the emphasis on restricting the bargaining process to negotiation of the agreement is reminiscent of an analogy of bargaining agreements and contracts much in controversy, *see, e.g.*, Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973). The relevant point for purposes of this essay, however, is that, as the opinions of Justices Stewart

Stevens, in writing for the Supreme Court in the two cases, took very different approaches. In *Robinson*, Justice Stevens incorporated elements of the *Amax* analysis. He acknowledged the relevance of the law of trusts. But it became relevant (and here Stevens reads *Amax* narrowly, as no more than a rejection of his own dissenting argument in that case) only if the bargaining agreement first of all granted trustees discretion; a discretion fiduciary principles would then inform.¹⁶⁶ Justice Stevens would not acknowledge that the law of trusts was in effect part of the statutory scheme. Indeed, he pointedly left open the question whether fiduciary obligations as such provided a basis for federal causes of action.¹⁶⁷ Presumably, the law of trusts was pertinent in cases like *Robinson* only as a matter of state law, applying in the *absence* of pertinent federal standards.¹⁶⁸

art and Stevens permit us to see, the view of *Amax* and *Robinson* as clearly dividing spheres of responsibility is not one that is *necessary* given statutory language. Moreover, as we shall see, this reading, as other possible readings, implicates complex related questions of formal interpretation and the underlying substantive politics of the statutory provision.

166. Compare *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573 n.12 (1982) with *id.* at 573-74; see also *supra* note 164 (discussing Justice Stevens's dissent in *Amax*).

167. 455 U.S. at 573 n.12.

168. *Id.* at 574; see, e.g., *Ader v. Hughes*, 570 F.2d 303, 306 (10th Cir. 1978); *Associated Contractors v. Laborers Int'l*, 559 F.2d 222, 226 (3d Cir. 1977). Federal courts acquire jurisdiction "to restrain violations" of section 302(c)(5) under section 302(e), ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. § 186(e) (1976 & Supp. V 1981)). There is a long standing controversy among the lower federal courts about the limits of section 302(e) jurisdiction. See generally Gostz, *Developing Federal Labor Law of Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 925-31 (1970) (the extent of federal court jurisdiction over trust administration under § 302(e)). In *Copra v. Suro*, 236 F.2d 107 (1st Cir. 1956), Chief Judge Magruder raised the possibility that section 302(e) has the effect of "making the federal district court into something like a chancery court for the enforcement of trust agreements and the advice of welfare fund trustees." *Id.* at 114. He suggested that notions of "a 'protective jurisdiction' . . . or the creation of a body of federal common law of welfare trusts (springing from the terms of § 302(c)(5)) could tie this jurisdiction to § 302 and thus legitimate it under Art. III." *Id.* at 114-15. Judge Magruder avoided resolving the matter by adopting a pendent jurisdiction approach. *Id.* at 115-16. Subsequent cases reveal no agreement among federal judges concerning the *Copra* suggestions. See *Associated Contractors*, 559 F.2d at 226 & nn.7 & 8. Frequently, courts seeking to limit section 302(e) jurisdiction restrict its reach to "challenges to the structural validity of a trust fund." *Sheet Metal Indus. Trust Fund v. Commercial Roofing & Sheet Metal*, 665 F.2d 1218, 1224 (D.C. Cir. 1981). "Structural" challenges, on a restrictive reading, would extend only to matters concerning the trust fund's compliance with statutory standards. *Associated Contractors*, 559 F.2d at 225; see, e.g., *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 424 (1st Cir. 1968); *Collins v. Trustees of Local 478 Trucking Pension Fund*, 487 F. Supp. 520, 524 (D.N.J. 1980) (decision of trustees to increase benefits of some pensioners but not others is not a "structural violation"). Courts adhering to this "structural" test, however, often interpret it "liberally." See *Sheet Metal Indus. Trust Fund*, 655 F.2d at 1224 n.9. For example, one court has said that "an eligibility requirement that arbitrarily excludes employees from benefits does not

In *Robinson*, thus, the picture of a statute as a distinctive legal entity plays a crucial, if background, role. Justice Stevens restricts the relevance of fiduciary principles by subordinating these principles to the specific terms of a collective bargaining agreement. But this subordination is hardly "natural." Both the overall organization of section 302(c)(5) and the specific statutory language under scrutiny in *Robinson* provide support for a reversed orientation in which fiduciary concerns constrain bargaining agreements.¹⁶⁹ Justice Stevens, however, encourages us to view fiduciary principles as "alien"—as not themselves statutory in origin, as creatures of a fully separate jurisprudence. The subordinate status of fiduciary concerns thus becomes less surprising. The law of trusts, because it is not part of the statute, can be relevant only insofar as it is made so by the collective bargaining agreement. The law of trusts becomes an interpretive regime, working out the implications of the arrangements the bargaining agreement sets up. Indeed, this separation of the statute and the law of trusts also adds to the plausibility of Justice Stevens's initial narrow reading of the language and purpose of section 302(c)(5).¹⁷⁰ If trust concerns are statutorily beside the point, the limited "antisiphoning" perspective that is clearly present in the legislative history faces an only hypothetical competitor.

This sense of statutory distinctiveness is not simply a rhetorical accident. To be sure, near the end of his *Robinson* opinion, Justice Stevens makes an argument that he obviously means to be more pragmatic than formal. Arbitrariness, he claims, is perhaps inherent in the benefit-setting process. "[B]ecause finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits."¹⁷¹ The collective bargaining process, therefore, may be better equipped to

operate for the sole and exclusive benefit of the employees and therefore constitutes a 'structural defect' under § 302." *Adams v. New Jersey Brewery Employees' Pension Trust Fund*, 670 F.2d 387, 397 (3d Cir. 1982) (citation omitted). Such broad readings of section 302(c)(5) in order to establish a statutory predicate for section 302(e) jurisdiction are in substance equivalent to an acknowledgement of the *Copra* "common law" jurisdiction.

It appears that the *Robinson* opinion has only narrowly limited federal courts in their references to a broad "structural" jurisdiction. See, e.g., *Dudo v. Schaffer*, 551 F. Supp. 1330, 1337-38 (E.D. Pa. 1982) (*Robinson* limits scrutiny if eligibility requirements fixed by collective bargaining agreement).

169. See *supra* text accompanying notes 151-58.

170. See *supra* text accompanying notes 140 & 147-48.

171. *Robinson*, 455 U.S. at 575.

deal with distributive questions than rule-oriented judges. This functional defense of the *Robinson* result, however, cannot be left unqualified, as Justice Stevens himself acknowledged. Statutory limits on the substance of collective bargaining agreements are commonplace.¹⁷² Legal regulation of line drawing is manifestly possible. In fact, in precisely the pensions context, "[t]he substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive standards of . . . ERISA."¹⁷³ Judges are not always at a disadvantage vis-à-vis collective bargaining. Functional considerations become pertinent only in cases like *Robinson*, in which no statute provides directly relevant "detailed and comprehensive standards." The practical argument in *Robinson* thus incorporates the assumption of statutory distinctiveness. Because the statute in isolation provides no working material, "judicial review" is left with only "an undefined standard."¹⁷⁴

In light of *Amax*, however, it is precisely this representation of statutory language as freestanding or autonomous that undermines the *Robinson* opinion. Justice Stewart's majority opinion in *Amax* notes the repeated use of the language of trusts law throughout section 302(c)(5), and concludes that "Congress intended to impose on trustees traditional fiduciary duties"¹⁷⁵ "[T]he future operations of all such funds would be subject to supervision by a court of chancery."¹⁷⁶ In other words, the statute itself makes the law of trusts relevant—as a set of interpretive principles, not simply of use in giving content to pension provisions in bargaining agreements, but pertinent as well in implementing the statutory program. After reading Justice Stewart's opinion in *Amax*, we may conclude that the doubt Justice Stevens expresses in *Robinson* about the "federal law" status of trust principles is idiosyncratic.¹⁷⁷ *Amax* plainly treats the law of trusts in the labor pension context as "federal common law"—its federal enforcement authorized (or rather assumed) by the statute. The law of trusts and statutory language, we may think, are not so separate as Justice Stevens depicts them. Each in differing ways supposes the other.

172. *See id.*

173. *Id.* For discussion of the significance of ERISA (and the MPPAA) in the interpretation of section 302(c)(5), see *supra* note 152.

174. 455 U.S. at 574.

175. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981); see *id.* at 328-32.

176. *Id.* at 331.

177. *But see supra* note 168.

If we take *Amax* seriously, Justice Stevens's opinion in *Robinson* seems to err in its underlying formal assumption. Section 302(c)(5) and the fiduciary principles of the law of trusts are not wholly distinct, each to be analyzed or used in isolation. Section 302(c)(5) thus bears a greater resemblance to the substantive provisions of statutes like ERISA, which Justice Stevens acknowledged to be proper and manageable constraints on collective bargaining. Indeed, Justice Stewart in *Amax* describes section 302(c)(5) as a source of basic ERISA precepts.¹⁷⁸ Courts may draw not only on the terse language of the statutory provision, but also on the presumably rich accumulation of fiduciary precedent in trusts law generally. Perhaps Justice Stevens is skeptical about the actual usefulness of this trusts jurisprudence. But his skepticism, if we believe *Amax*, places *Robinson* in conflict with the thrust of section 302(c)(5) itself.

The conflict, however, may not be unique to *Amax* and *Robinson*. In *Amax*, Justice Stewart's references to statutory common law and to statutory incorporation of traditional legal formulations are familiar labor law devices.¹⁷⁹ But these devices are ones that we particularly associate with the Labor Management Relations Act of 1947.¹⁸⁰ This statute, politically famous as the Taft-Hartley Act, amended the original National Labor Relations Act of 1935,¹⁸¹ and in the process introduced into the 1935 Act elements in conflict with the original provisions; elements that incorporate within the National Labor Relations Act an acknowledgment of the opposition the original provision had stimulated.¹⁸² In a variety of ways the Taft-Hartley Act added to the National Labor Relations Act mechanisms that complicate and constrain the original statutory

178. "ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." 453 U.S. at 332; see Note, *supra* note 147, at 1715-19 (describing duty of ERISA trustees to act "solely in the interests of the participants" as expressing "the core purpose of the statutory scheme" and interpreting ERISA standard in light of its origins in section 302(c)(5)).

179. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1958) ("general agency principles" apply "in distinguishing between employees and independent contractors" under amended National Labor Relations Act); *infra* note 185.

180. Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.).

181. National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981)).

182. See Cox, *Some Aspects of the Labor Management Relations Act, 1947* (I), 61 HARV. L. REV. 1, 4 (1947).

program of recognizing and encouraging collective bargaining.¹⁸³ Familiar examples include the statutory recognition of union unfair labor practices,¹⁸⁴ the substitution of traditional legal terminology for definitions that courts had previously interpreted to emphasize statutory purposes,¹⁸⁵ authorization of judicial enforcement of collective bargaining agreements against both management and labor,¹⁸⁶ as well as the famous restrictions on strikes¹⁸⁷ and "closed shops."¹⁸⁸ An always opening question, a never closed controversy, thus becomes part of labor law, simultaneously form and sub-

183. This was, emphatically, the conclusion of Professor Cox, writing shortly after enactment of the LMRA. See Cox, *supra* note 182, at 44-49; Cox, *Some Aspects of the Labor Management Relations Act, 1947* (II), 61 HARV. L. REV. 274, 313-14 (1948). But see *infra* note 189.

184. The National Labor Relations Act of 1935, in its first form, had listed in section 8 a series of unfair labor practices by employers. 49 Stat. 452 (1935). The Labor Management Relations Act added a parallel subsection (b) to section 8, describing unfair labor practices by labor organizations or their agents. See 61 Stat. 141-42 (1947). For the codification of both provisions, see 29 U.S.C. § 158 (1976) (as amended).

185. For example, the LMRA amended the original definition of "employee" in section 2 (3) of the NLRA, 49 Stat. 450 (1935), to add, *inter alia*, language excluding from the definition "any individual having the status of an independent contractor," see 61 Stat. 138 (1947) (codified as amended at 29 U.S.C. § 152(3) (1976 & Supp. V 1981)). This amendment overruled legislatively a series of court decisions, epitomized by *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), in which the distinction between "employees" and "independent contractors" was tested less through traditional common law definition and more through reference to underlying statutory policies. See *Allied Chemical Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). If the *Hearst* approach survives at all, it is only in cases in which common law rules are themselves ambiguous. See *id.*

I do not mean to overstate the significance of this shift. Common law rules as sometimes formulated identify as relevant many of the factors courts following *Hearst* had also treated as pertinent. Compare Cox, *supra* note 182, at 7 (*Hearst* courts looked to various considerations pertaining to "economic function" in addition to question of "control"—the common law test) with RESTATEMENT (SECOND) OF AGENCY § 220 (2)(a)-(j) (1958) (similarly describing aspects of economic environment in addition to control). It is not clear, however, whether federal courts, at least in recent decisions, look beyond the questions of control in its several aspects. See, e.g., *NLRB v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 919-20 (11th Cir. 1983). Independent contractor cases have sometimes generated remarkable patterns of indecision. See, e.g., *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 869 (D.C. Cir. 1978) ("the NLRB [has] repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations"). Such waffling is perhaps evidence that the statutory embrace of common law principles has denied courts and the NLRB a guiding sense of programmatic bias.

186. LMRA §§ 301(a)-(b), ch. 120, 61 Stat. 136, 156-57 (1947) (codified as amended at 29 U.S.C. §§ 185(a)-(b) (1976 & Supp. V 1981)).

187. *Id.* §§ 206-10, ch. 120, 61 Stat. 136, 155-56 (1947) (codified as amended at 29 U.S.C. §§ 176-80 (1976 & Supp. V 1981)).

188. The LMRA amended section 8(a)(3) of the NLRA to change the proviso permitting "closed shop" agreements, see 49 Stat. 449, 452 (1935), to one authorizing "union ship" (after-acquired membership) arrangements, 61 Stat. 136, 140-41 (1947) (codified as amended at 29 U.S.C. § 158(a)(3) (1976 & Supp. V 1981)).

stance. To what extent should the amendments of the original statutes be read modestly, in deference to the original scheme, or rather strongly, as limits on that scheme? To what extent, in other words, should we promote collective bargaining or, instead, regulate it.¹⁸⁹

Given the antagonism built into the amended National Labor

189. Perhaps these are the wrong questions. Ms. Stone has suggested that, even as Professor Cox was skeptically cataloging the changes the LMRA had worked in labor law, he was also sketching the outlines of a theory of "industrial pluralism," Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511, 1514 (1981), emphasizing a view of unions as no more than an institutional embodiment of employees, see Cox, *supra* note 182, at 46 ("there is still more truth in the philosophy which asserts that the union and the employees are one than there is in the opposing view"), and an image of collective bargaining as a process informed at its best by a "voluntary acceptance of mutual responsibilities," Cox, *supra* note 183, at 313, with "roots in the ideals of self-rule and government according to law," Cox, *supra* note 182, at 1. Notions similar to these, elaborated in a complex case law and a rich theoretical literature, would supply the basis for a labor law jurisprudence in which processes of ordering rather than the substance of conflict were (or are) the point of departure—for critique and defense. See Stone, *supra*. If we accept this thesis, which gives prominence both to developments in the years after the passage of the LMRA, and to anticipations in the earlier period, see *id.* at 1521-23, the conflict between the LMRA and the original NLRA would appear to become less central. This conclusion acquires additional force if we take account of the work of Professor Klare, who has described in some detail the ways in which courts initially interpreting the NLRA blurred the implications of that statute by reading it through the lenses of their usual legal theory. See Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978). The opposition of the NLRA and the LMRA again loses a distinctive importance; from the outset, it may seem, the NLRA was caught up in a process of reaction.

It remains the case, I think, that this sort of extrapolation from the work of Stone and Klare is crucially incomplete. There is in Cox's commentary on the LMRA, for example, not only the beginnings of a picture of "industrial pluralism," but also, rather strongly, a sense of a social and a legal transformation abruptly (and unnecessarily) cut short. See Cox, *supra* note 182, at 46-47 (depicting changes in work environment "[w]hen the union comes"). The Cox essays not only communicate a vision of an eventual labor law based on consensus, pluralist accommodation, and legality; they also describe a scenario of then-present conflict, in which "[t]he transition to a system of collective bargaining revolutionizes plant relationships, and therefore itself creates a period of unrest," *id.* at 49. A parallel counter-revolution also emerges: "too many employers hope to preserve or return to the old regime." *Id.* at 2. Cox himself sometimes sought to identify "a middle course," *id.* at 48, and criticized the LMRA because of its "psychology of conflict," Cox, *supra* note 183, at 314. "Anything which intensifies the conflict will increase the bitterness and resulting disturbances, and, in consequence, will prolong the period required to achieve harmonious relationships once recognition is gained," Cox, *supra* note 182, at 48. Nonetheless, the fact of conflict from which Cox started, that he saw the LMRA as summarizing, and that my analysis has formally restated in terms of the relationship of the NLRA and LMRA, remains worth noting. It is perhaps one reason (among others) for the emergence of the industrial pluralism idea, but cf. Stone, *supra*, at 1524 (emphasizing threat to collective bargaining posed by movement towards compulsory arbitration); more importantly, it may serve as a reference point for approaches to labor law that would treat conflict as less resolvable, and collective bargaining as a less neutral institution.

Relations Act, judicial decisions interpreting the Act often differ in their emphases. The tension in the relationship of *Amax* and *Robinson* reappears in other cases as well.¹⁹⁰ Still, *Amax* and *Robinson* are notable illustrations of this dissonant jurisprudence. Seven Justices of the Supreme Court are able to agree with *both* the use of trust principles by Justice Stewart to limit the sphere of collective bargaining *and* the refusal by Justice Stevens to take such principles seriously in order to enhance the role of bargaining.¹⁹¹ The equanimity of the concurring Justices may become more comprehensible, however, if we note that, at least at the level of results, neither case represents an unequivocal triumph for a single point of view. Separately as well as jointly, *Amax* and *Robinson* illustrate the opposing themes that organize the amended National Labor Relations Act.

In *Amax*, Justice Stewart emphasized trusts principles in order to defend a union against an unfair labor practice charge arising out of a union effort to expand the agenda of collective bargaining. If we consider why the employer wanted separate representation in pension administration, and take into account the fact that the employer was a western mine operator,¹⁹² we may wonder whether, even if one employer motive was the subversion of multiemployer pension funds, another was perhaps the longer-term goal of reducing the significance of multiemployer collective bargaining as such within the coal industry, and thus bargaining per se, at least in the newly developing western mines. If so, we may conclude that *Amax* invokes trusts limitations on collective bargaining but in the end also defends collective bargaining.

Robinson is similarly complex in its effect. Justice Stevens

190. One line of cases appropriate for this analysis might be the group of decisions dealing with employer remedies in the event of wrongful strikes, whether in breach of collective bargaining agreements or otherwise. See, e.g., *Complete Auto Transit, Inc. v. Reis*, 415 U.S. 401 (1981); *Carbon Fuel Co. v. UMW*, 444 U.S. 212 (1979); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976); *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970). The first two cases deal with "wildcat" strikes and damages liability. The latter two address union-directed strikes and injunctive remedies. Notwithstanding their differentiating features, the cases confront the common question of the status of unions, relative to both collective bargaining agreements and union members. The ambiguities and hesitations revealed in and among the Supreme Court's various opinions, we might think, reflect (at least in part) a conflict revealed as well in the differing perspectives from which the NLRA and the LMRA proceed.

A similar conflict is evident in the opinions of the Court in last Term's fair representation damages case, *Bowen v. United States Postal Serv.*, 103 S. Ct. 588 (1983).

191. Justice O'Connor was not a member of the Court at the time of *Amax*; Justice Stewart was no longer a member as of *Robinson*.

192. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 325-26 (1981).

shields collective bargaining from trustee or judicial review in a situation in which any tendency towards arbitrariness that such bargaining possesses is most likely to be present. As Justice Stevens notes, it is not just that benefit classifications are frequently artificial; the beneficiaries are not even represented in the bargaining process. In *Allied Chemical Workers Local No. 1 v. Pittsburgh Plate Glass Co.*,¹⁹³ the Supreme Court held that retirees and their families were not among the statutorily defined members of collective bargaining units.¹⁹⁴ Justice Stevens refers to *Pittsburgh Plate Glass* as though it explains rather than undermines the fairness of the *Robinson* result:

There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when the potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective-bargaining agreements because the union need not "affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent."¹⁹⁵

Obviously, Justice Stevens is not arguing that *Pittsburgh Plate Glass* establishes retirees as a class of outlaws or pariahs. Rather, his underlying argument may be that, if *Pittsburgh Plate Glass* is to retain significance, its exclusion of retirees cannot be offset by recognition of a fiduciary duty that would indirectly supply retirees with the same benefits as membership status. Or perhaps *greater* benefits: in the duty of fair representation cases, the Supreme Court, again subordinating trust principles,¹⁹⁶ has in impor-

193. 404 U.S. 157 (1971).

194. *Id.* at 165-71. The Supreme Court ruled on the question for the purpose of determining whether an employer was under a "mandatory" duty to bargain with respect to questions of changes in the pension benefits payable to already retired employees. Its ultimate holding that an employer is free, at least with respect to NLRB unfair labor practice jurisdiction, to adopt unilaterally, during the term of a collective bargaining agreement, a modification in its pension policy with respect to retired employees, *see id.* at 188, does not mean that an employer cannot elect to negotiate such changes; nor does it mean that, if unions choose to represent the interests of retirees in such "permissive" bargaining, the unions are free of all forms of duty of fair representation, *id.* at 181 n.20.

195. *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 574-75 (1982) (quoting *Allied Chem. Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 (1971)).

196. Concerning the similarity of the duty of fair representation and the duties of trustees, *see Bowen v. United States Postal Serv.*, 103 S. Ct. 588, 606 (1983) (White, J., dissent-

tant cases seemed to define in rather weak terms the usual duty that bargaining representatives owe to members of bargaining units.¹⁹⁷

But if *Robinson* is the child of *Pittsburgh Plate Glass*, we end up with a reversed form of the *Amax* irony. *Pittsburgh Plate Glass* is the quintessential Taft-Hartley case. Justice Brennan's majority opinion portrayed the narrow definition of unit membership as the work of the Labor Management Relations Act, a product of the congressional effort to restore traditional legal definitions to labor law and to limit the jurisdiction of collective bargaining.¹⁹⁸ In *Robinson*, thus, Justice Stevens celebrates collective bargaining, but in ultimate service of the policy of restricting such bargaining. In *Robinson* as well as in *Amax*, we can see, the statutory conflict is implicit in judicial reasoning as well.

C.

Answers to the question of a statute's limits—whether the statute indeed summarizes the appropriate criteria or concerns for addressing a given problem—may vary, as in *Robinson*, depending upon assumptions about whether the statute incorporates by reference some "other" legal regime. Judgments about statutory reach, however, are also sometimes frameable in terms more or less "internal" to the statute. This latter mode of proceeding is equally capable of exposing underlying conflicts or uncertainties in a statute's substantive program. In the process, it may supply these conflicts or uncertainties with a distinctive form—a regular place in the statute's jurisprudence.

ing in part).

197. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) ("A breach of the statutory duty of fair representation occurs only when a union's unit is arbitrary, discriminatory, or in bad faith"). As the history of the *Robinson* case illustrates, an "arbitrariness" standard is not inevitably weak. The standard may acquire an important procedural dimension, especially in cases involving union processing of individual employee grievances. See, e.g., *Vaca*, 386 U.S. at 193; see also *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 557-58, 571 (1976) (duty of fair representation action possible, given allegations union failed to discover exonerating evidence for use in arbitration, if failure amounts to bad faith). Lower courts have interpreted the *Vaca* standard, at least in grievance processing cases, with varying degrees of rigor. Compare *Superczynski v. P.T.O. Serv., Inc.*, 706 F.2d 200, 202-03 (7th Cir. 1983) with *Poole v. Budd Co.*, 706 F.2d 181, 183 (6th Cir. 1983). In cases involving challenges to the substantive terms of bargaining agreements, however, the force of the arbitrariness standard would seem to diminish significantly, in view of judicial acknowledgment of the obligation of "the union . . . to balance the interests of all its constituents . . ." *Allied Chem. Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 173 n.12 (1971).

198. *Allied Chem. Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-68 (1971).

Marine Bank v. Weaver,¹⁹⁹ the case that provokes these comments,²⁰⁰ arose as a result of efforts by Marine Bank officials to minimize risks to which the bank was exposed because of the financial difficulties of one of its debtors. Bank officials apparently assisted the debtor, already in default on its obligations to the bank, to obtain guarantors for a new loan from the bank.²⁰¹ The guarantors purchased a \$50,000 certificate of deposit from the bank and pledged the certificate as collateral securing the guarantee.²⁰² The debtor promised the guarantors one half of its net profits, as well as \$100 per month, for the duration of the guarantee; the debtor also agreed to allow the guarantors to use (at the debtor's discretion) a barn and pastureland owned by the debtor.²⁰³ The guarantors obtained the right to veto future borrowing by the debtor.²⁰⁴

Allegedly, bank officials told the guarantors that the proceeds from the new loan would serve as working capital for the debtor.²⁰⁵ In fact, however, the bank required the debtor to use almost all of the proceeds to cover prior bank loans.²⁰⁶ The debtor subsequently initiated bankruptcy proceedings.²⁰⁷ The guarantors sued Marine Bank,²⁰⁸ invoking rule 10b-5,²⁰⁹ an antifraud prohibition promul-

199. 455 U.S. 551 (1982).

200. The statutory conflict in the background of *Marine Bank* is not entirely "internal." Competing theories at times incorporate references to an "outside" legal regime—for example, the common law of fraud. These references, though, define only some of the several elements of the competition. See *infra* text accompanying notes 249-78.

201. 455 U.S. at 553-54. The debtor was an unincorporated meat packing company. Marine Bank was apparently not receiving regular payments on \$33,000 in outstanding loans. Moreover, the debtor had substantially overdrawn its checking account. Marine Bank, as creditor, had perfected the usual array of security interests. *Weaver v. Marine Bank*, 637 F.2d 157, 159 (3d Cir. 1981), *rev'd*, 455 U.S. 551 (1982). The question of the extent to which Marine Bank had dealt with the guarantors was contested by the bank, 637 F.2d at 159-60, but because the case arose on appeal from an order granting summary judgment in favor of Marine Bank, the reviewing courts based their analyses on the allegations of the plaintiff guarantors.

202. 455 U.S. at 552-53.

203. *Id.* at 553. The guarantors, as described by the court of appeals, "were farmers engaged in auctioning livestock"; "[a]ged 79 and 71 respectively, they had no formal education beyond the eighth grade, and had spent their lives as cattle farmers." 637 F.2d at 159.

204. 455 U.S. at 553.

205. *Id.*

206. "The proceeds of the \$65,000 loan were forthwith disbursed to repay loans and overdraft obligations to the Bank approximating \$42,800, to pay past due federal taxes, and to pay past due obligations to trade creditors. That left approximately \$3,800 for working capital." 637 F.2d at 159.

207. The debtor filed its bankruptcy petition four months after receiving the loan. *Id.* at 159.

208. "Although the bank had not yet resorted to the Weavers' certificate of deposit at

gated by the Securities and Exchange Commission pursuant to section 10(b) of the Securities Exchange Act of 1934.²¹⁰ In federal district court, however, Marine Bank succeeded in its motion for summary judgment.²¹¹ The district court ruled that, even if the bank acted fraudulently, it did not do so "in connection with a purchase or sale of a security," thus rendering the Exchange Act (and rule 10b-5) inapplicable.²¹²

Reversing a divided panel of the Third Circuit of the United States Court of Appeals,²¹³ a unanimous Supreme Court agreed with the district court. The certificate of deposit that the guarantors obtained and then pledged was not itself a "security" within the sense of section 3(a)(10) of the Exchange Act.²¹⁴ "[T]he purchaser of a certificate of deposit is virtually guaranteed payment in full, whereas the holder of an ordinary long term debt obligation assumes the risk of the borrower's insolvency."²¹⁵ Nor was the agreement between the guarantors and the debtor an "investment contract" or some other form of security. "The unusual instruments found to constitute securities in prior cases involved offers

the time this litigation commenced, it acknowledged that its other security was inadequate and that it intended to claim the pledged certificate of deposit." 455 U.S. at 553-54.

209. 17 C.F.R. § 240.10b-5 (1983). Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

210. 48 Stat. 891 (1934) (codified as amended at 15 U.S.C. Section 78j(b) (1976)). Section 10(b) provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

211. 455 U.S. at 554.

212. *Id.*

213. *Weaver v. Marine Bank*, 637 F.2d 157, 158-65 (3d Cir. 1981); *id.* at 165-70 (Weis, J., dissenting).

214. 15 U.S.C. § 78c(10) (1976 & Supp. V 1981); *see infra* note 220.

215. 455 U.S. at 558.

to a number of potential investors, not a private transaction as in this case."²¹⁶

I would guess that the casual reader of the opinions in *Bread PAC* and *Robinson* is persuaded. Justices O'Connor and Stevens make the cases look like easy matters of statutory application. Difficulties become apparent only upon close examination. *Marine Bank*, however, is notably unpersuasive on its face. The propriety of the way in which the bank engineered the transaction is obviously the crucial question in the case. We might expect that even a threshold inquiry into statutory applicability would attach at least some significance (one way or another) to the bank's maneuvers. Within the Supreme Court's approach, however, the bank's conduct never becomes pertinent. Writing for the Court, Chief Justice Burger analyzes the status of the certificate of deposit by characterizing the certificate generically. He refuses to consider the use to which the certificate is put in the particular case²¹⁷ and emphasizes instead the risk-free dimension it possesses in the abstract. Similarly, Chief Justice Burger isolates the agreement between the guarantors and the debtor. Highlighting its peculiarities, he assimilates the agreement to an ordinary personal contract, bearing little resemblance to standard images of financing transactions.²¹⁸ The bank's crucial role as intermediary fails to appear in either part of Chief Justice Burger's discussion.

The Supreme Court's statutory analysis as such underscores the apparent sidestep. Unlike the *Bread PAC* and *Robinson* opinions, *Marine Bank* does not purport to treat statutory language as decisive on its face; section 3(a)(10) itself figures in the Court's discussion only occasionally.²¹⁹ Indeed, Chief Justice Burger notes that the section 3(a)(10) list of types of securities is both "quite broad"²²⁰ and open to adjustment if "the context otherwise re-

216. *Id.* at 559.

217. *Id.* at 559 n.9; see *infra* note 233 and accompanying text.

218. *Id.* at 560.

219. *Id.* at 555 & n.3, 556-57, 558-59, 559 (all are brief references only).

220. *Id.* at 555. Section 3(a)(10) states:

When used in this chapter, unless the context otherwise requires . . .

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include

quires."²²¹ He also recognizes that the statutory term "investment contract" is a placeholder for a functional or contextual assessment of "unusual instruments."²²² Statutory language, it appears, in no way "compelled" the Court to ignore the specifics of the case.

Is *Marine Bank* simply an incompetent piece of work, one that (remarkably) all nine Justices were willing to tolerate? It is, I think, a more interesting case than this conclusion would suggest. The Supreme Court's decision to judge separately the two instruments is of a piece with an underlying theme in the statutory language—although it takes some effort to see the parallel. The case remains controversial. But we can see that what is difficult in *Marine Bank* has its origin in a conflict in statutory language, and exposes a basic tension in the substantive premises of securities law as well.²²³

Each of the two parts of the Supreme Court's opinion suggests elements of the explanation:

First, it is very clear that in Chief Justice Burger's discussion of the certificate of deposit the organizing perspective is comparative—the Chief Justice is undertaking a choice of law analysis. If a certificate of deposit is risk free, it is because the certificate is "is-

currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

Section 2(1) of the Securities Act of 1933, 48 Stat. 74 (codified at 15 U.S.C. § 77b(1) (1976 & Supp. 1981)), defines "security" in terms that, for present purposes, are interchangeable with those of section 3(a)(10). *But cf.* Comment, *The Commercial Paper Market and the Securities Acts*, 39 U. CHI. L. REV. 362, 397-400 (1972) (discussing significance of differing treatment of "notes" in §§ 2(1) and 3(a)(10)). In *Marine Bank*, Chief Justice Burger viewed the two definitions as "essentially the same." 455 U.S. at 555 n.3. He cited cases interpreting section 2(1) as also applicable to section 3(a)(10). *Id.* at 555-56. I will follow the same approach. The relationship of the Securities Act and Exchange Act also figures prominently in my ultimate assessment of *Marine Bank*. See *infra* text accompanying notes 260-71.

221. 455 U.S. at 558-59; see *id.* at 556.

222. *Id.* at 559. Chief Justice Burger emphasized the importance of context in attempting to limit the significance of the *Marine Bank* decision:

It does not follow that a certificate of deposit or business agreement between transacting parties invariably falls outside the definition of a "security" as defined by the federal statutes. Each transaction must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole.

Id. at 560 n.11.

223. The problems involved in defining the term "security" for purposes of federal securities law are the subject of an extensive case law and a considerable commentary. For an interesting critical summary, see Dillport, *Restoring Balance to the Definition of Security*, 10 SEC. REG. L.J. 99 (1982). There is a useful historical account in Long, *Introduction, Student Symposium—Interpreting the Statutory Definition of a Security: Some Pragmatic Considerations*, 6 ST. MARY'S L.J. 96 (1974).

sued by a federally regulated bank which is subject to the comprehensive set of regulations governing the banking industry."²²⁴ The fact that a certificate is risk free is decisive not so much because a "security" is supposed to be a risky investment (although there may be a trace of this idea in Chief Justice Burger's thinking as well),²²⁵ but because risk-free status is a sign that a legal regime other than securities law is already in place, rendering securities law superfluous. "It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws."²²⁶

Second, the organizing perspective in Chief Justice Burger's discussion of the arrangement between the guarantors and the debtor is also comparative. But now the reference is not (at least initially) to competing legal regimes but to different sorts of transactions. In distinguishing between "private" and "commercial" dealings,²²⁷ Chief Justice Burger seems to be of the view that "securities in the commercial world"²²⁸ are not so much contracts setting up relationships as species of property.²²⁹ Securities are in origin contractual, but the contract rights they describe are typically

224. 455 U.S. at 558.

225. One traditional test for determining the presence of a security has involved an emphasis on "risk capital." The point of securities laws, it has been said, "is to afford those who risk their capital at least a fair chance of realizing their objectives in legitimate ventures whether or not they expect a return on their capital in one form or another." *Silver Hills Country Club v. Sobieski*, 55 Cal.2d 811, 815, 13 Cal. Rptr. 186, 188-89, 361 P.2d 906, 908-09 (1961). The Supreme Court, however, has not employed the "risk capital" test as an explicit means of analysis. See, e.g., *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 857 n.24 (1975).

226. 455 U.S. at 559. The Supreme Court's refusal in *Marine Bank* to recognize a security, due in part to the existence of "another" legal regime governing the transaction at issue is consistent with the Court's earlier decision in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979). In *Daniel*, the Court, noting the then-recent enactment of ERISA, observed: "The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans." *Id.* at 569-70. See also *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 841, 859 n.26 (1975) (noting extensive state involvement in financing and planning of low cost co-op housing development and concluding that question of whether federal law should displace "the extensive body" of state regulation requires a more specific answer from Congress than the securities laws provide).

227. 455 U.S. at 559.

228. *Id.*

229. See also Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); cf. Macneil, *Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978) (discussing differences in contract governing discrete transactions and that regulating long-term relationships).

alienable: of value without regard to the identity of the holders, and therefore both readily reproducible and usually transferable. In prior cases, "instruments found to constitute securities" were the subjects of "offers to a number of potential investors";²³⁰ they "had equivalent values to most persons and could have been traded publicly."²³¹ By contrast, the peculiarities of the *Marine Bank* deal—the barn and pasture provision as well as the veto—identify the arrangement as a "unique agreement" that "was not designed to be traded publicly."²³²

230. 455 U.S. at 559.

231. *Id.* at 560.

232. *Id.* In previous decisions, the Supreme Court had not seemed to give a similar priority to considerations of marketability—at least in the sense of the susceptibility of an instrument to resale. In two leading early cases, the Court classified instruments as securities without considering the resale question at all. *See* SEC v. W.J. Howey Co., 328 U.S. 293 (1946); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943). The withdrawable capital shares in a savings and loan institution at issue in *Tcherepnin v. Knight*, 389 U.S. 332 (1967), were nonnegotiable, although assignable, under Illinois law, *see id.* at 337; the Supreme Court nonetheless regarded the shares as securities, declaring nonnegotiability to be beside the point: "This simply reflects the fact that such shares are not a usual medium for trading in the markets. The same can be said for the types of interests which we found to be securities in *Howey* and *Joiner*," *id.* at 343. *But see id.* at 339-40 (stressing transferability). In *Marine Bank*, the court of appeals relied heavily on *Tcherepnin* as support for the conclusion that the certificate of deposit was a security. *See* *Weaver v. Marine Bank*, 637 F.2d 157, 164 (3d Cir. 1981), *rev'd*, 455 U.S. 551 (1982). Its discussion, however, did not focus on resale potential, and Chief Justice Burger, similarly ignoring the question at this point, distinguished *Tcherepnin* by noting the greater (unregulated) risk involved in the investment at issue in that case. *See* 455 U.S. at 557; *supra* text accompanying notes 224-26. Finally, in the two cases preceding *Marine Bank* in which the Supreme Court held that the instruments at issue were not securities, its opinions either attached no significance to the fact that the instruments were not readily marketable, *see* *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979) (pension rights), or viewed resale potential as simply one among several relevant factors, *see* *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 851, 854 (1975).

Chief Justice Burger's focus on the "uniqueness" of the *Marine Bank* transaction (with respect to the arrangement between the debtor and the guarantors) is somewhat more consistent with earlier cases. The Court had previously noted mass marketing aspects in the offering of particular instruments, either for the purpose of treating the characterizations of promoters as themselves decisive, *see* *Joiner*, 320 U.S. at 346, 348-49, 351, 352-53, or in order to demonstrate the degree to which the return on investment depended on the acts of the issuer, and not the purchaser, *see* *Howey*, 328 U.S. at 295-96 & n.2, 300. The clearest precedent for the *Marine Bank* approach, however, is to be found not in the Supreme Court's earlier decisions, but in a recent essay by Professor FitzGibbon. *See* FitzGibbon, *What Is a Security?—A Redefinition Based on Eligibility to Participate in the Financial Markets*, 64 MINN. L. REV. 893 (1980). Chief Justice Burger explicitly refers to FitzGibbon's work only once, as support for the hardly controversial proposition that the Exchange Act "was adopted to restore investors' confidence in the financial markets." 455 U.S. at 555 & n.4. Nevertheless, the substance of the Court's analysis, at least insofar as it emphasizes the particular instruments, their potential marketability, and the disqualifying effect of their unique features, parallels FitzGibbon's argument almost precisely.

The two parts of Chief Justice Burger's analysis, we can see, are not entirely separate. The distinction between commercial and private transactions seems to explain Chief Justice Burger's abrupt refusal, in discussing the certificate of deposit, to analyze the certificate *as pledged*.²³³ Arguably, Chief Justice Burger insists on evaluating only the generic certificate because taking into account variations in use would relocate the discussion outside of the commercial sphere—the realm of standardized, freely exchangeable complexes of rights. Conversely, there is a choice-of-law assumption implicit in the commercial/private distinction. Chief Justice Burger does not mean to leave “private” transactions legally unregulated. Congress, however, “did not intend to provide a broad federal remedy for all fraud.”²³⁴ Perhaps traditional actions for fraud would be better able to bring out the salient aspects of the highly individualized transactions in *Marine Bank*.²³⁵

Marine Bank thus might rest on the following proposition: Securities law takes as its subject transactions that, whatever other relevant features they must also possess, involve (at minimum) transfers of contractual rights of an impersonal, freely alienable sort that are not otherwise subject to detailed legal regulation.²³⁶ This formulation accounts for the Supreme Court's decision to assess separately the two written instruments and emphasizes as well

233. “We reject respondents’ argument that the certificate of deposit was somehow transformed into a security when it was pledged, even though it was not a security when purchased.” 455 U.S. at 559 n.9.

234. *Id.* at 556.

235. *But see infra* text accompanying notes 259-71.

236. This formulation omits any reference to the *Howey* test—“whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.” *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). The Supreme Court initially framed this test as simply a summary of a settled state law definition of “investment contracts.” *Id.* at 298-99. The Court came to regard it, however, as a “shorthand form” for “the essential attributes that run through all of the Court’s decisions defining a security.” *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975); *accord International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558 n.11 (1979). *But see Dillport, supra* note 223, at 115 (not clear *Forman* intended for *Howey* to be universally applicable). *See also infra* note 238. In *Marine Bank*, the court of appeals held that the agreement between the debtor and the guarantors resembled a *Howey* investment contract sufficiently closely to make out a jury question—the open issue was whether the right to use the barn and pasture “was a primary rather than an incidental purpose of the transaction” *Weaver v. Marine Bank*, 637 F.2d 157, 162 (3d Cir. 1981), *rev’d*, 455 U.S. 551 (1982). Chief Justice Burger stated the *Howey* test, *see* 455 U.S. at 559, but did not apply it. Instead, he immediately took up the discussion of marketability. *See id.* at 559-60. Arguably, even if the *Howey* standards were met in *Marine Bank*, Chief Justice Burger may have been setting up the requirement that instruments be marketable as an additional, perhaps even prior, demand. Or perhaps the *Howey* test is now in disfavor; it has been criticized as more conclusory than instructive. *See, e.g., FitzGibbon, supra* note 232, at 898-907, 948.

the features of those instruments that the Court saw as removing the *Marine Bank* transaction from within the range of securities law. The pertinent statutory language, we might think, favors this approach. Section 3(a)(10) consists mostly of a list of the various contractual arrangements classifiable as "securities."²³⁷ Notably, this list seems to take for granted the fact of abstraction or reification. It does not refer to transactions directly, but deals only with instruments.²³⁸ We might imagine a statutory definition characterizing a "securities transaction" in functional terms, without reference to summarizing legal instruments—but this is not the format section 3(a)(10) follows.²³⁹

The language of section 3(a)(10) does introduce two complicating factors. At least at first glance, however, the statutory difficulties appear to be manageable. Not all the types of arrangements that section 3(a)(10) lists are in fact traditional financial forms.²⁴⁰ "Investment contract" is a catchall term that opens the way, within the framework of the list, for a functional inquiry.²⁴¹ And yet, it is surely not difficult to argue that "investment contract" is as much a reification as the other arrangements on the list.²⁴² "In-

237. See *supra* note 220.

238. Section 3(a)(10)'s (or its 1933 Act analog's) form as a list of instruments has introduced an element of confusion into the case law. Justice Jackson declared in *Joiner*, in referring to the list, that "[i]nstruments may be included within any of these definitions, as matter of law, if on their face they answer to the name or description." SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943); see *id.* at 355. Jackson's dictum (*Joiner* did not involve such an instrument) seemed to suggest that any instrument bearing on its face a section 3(a)(10) name, e.g., "stock," was a security. The Supreme Court rejected this idea in *Forman*, indicating that, although an instrument's name might be relevant, see *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 850 (1975), it was also necessary that "the underlying transaction embod[y] some of the significant characteristics typically associated with the named instrument." *Id.* at 851. *Forman*, we might think, ran to the opposite extreme, and made the fact of listing largely irrelevant insofar as Justice Powell proclaimed the *Howey* test to be "essential." See *id.* at 852; *supra* note 236. See also *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558 n.11 (1979) (essentiality of *Howey* test one reason for not considering whether pension right was a "certificate of interest or participation in any profit-sharing agreement").

239. This point has been made both by critics of the enumerative approach, see, e.g., Long, *supra* note 223, at 100-01, and by critics of the critics, see, e.g., Dillport, *supra* note 225, at 120; FitzGibbon, *supra* note 232, at 908-11.

240. See SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943).

241. Although the *Howey* Court treated "investment contract" as a term of settled definition, see SEC v. W.J. Howey Co., 328 U.S. 293, 298 (1946), it described that definition as one aiming at widespread relevance: "It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* at 299; see also *supra* note 236.

242. Interestingly, although "investment contract" is a catchall, the Supreme Court, in

vestment contract" thus carries with it the connotation (in common with the other listed forms) of abstraction and alienability, of susceptibility to exchange and thus legal enforcement without regard to the identity of the parties or the specific context of the transaction. Secondly, the section 3(a)(10) list is qualified by the introductory phrase, "unless the context otherwise requires" But if we recall that section 3(a) is a compendium of definitions for use in reading other parts of the Exchange Act, we can see that the reference to "context" does not so much point directly to the facts of a given transaction, but rather calls attention to the dynamics of particular Exchange Act provisions (perhaps illuminated by the facts of the particular case), and to the changes these provisions may require in the general statutory definitions.²⁴³ If "context" means "legal context" rather than "factual context," a choice-of-law awareness of the *Marine Bank* sort may seem appropriate as a threshold means of determining whether aggressive or extended enforcement of an Exchange Act provision is indeed necessary.²⁴⁴

All of this exegetical effort attempts to supply some credibility for *Marine Bank* by demonstrating that Chief Justice Burger's opinion rests on assumptions of a piece with statutory presuppositions. But the Supreme Court's analysis remains vulnerable to crit-

applying the *Howey* standard, frequently refers to the term "investment contract" as though it defined a distinct financial entity. See, e.g., *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979); *Tcherepnin v. Knight*, 389 U.S. 332, 338 (1967) ("Of the several types of instruments designated . . . by § 3(a)(10) . . . , the petitioner's shares most closely resemble investment contracts"). This is, we may suspect, a reflex carryover of the underlying theme of the statutory list.

243. See *SEC v. National Sec., Inc.*, 393 U.S. 453, 466 (1969). The *National Securities* Court refers to section 3(a) generally. In the specific setting of section 3(a)(10), however, it has seemed to several commentators that courts dealing with the status of notes erred in treating "context" as a reference to the economic environment in which an instrument is put to use. See, e.g., Sonnenschein, *Federal Securities Law Coverage of Note Transactions: The Antifraud Provisions*, 35 BUS. LAW. 1567, 1577 (1980). Some of the leading cases discussing the status of notes reveal careful efforts by judges to ground their references to the financial context in an initial discussion of essentially statutory matters. See, e.g., *Exchange Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1131-32, 1138 (2d Cir. 1976); *C.N.S. Enter., Inc. v. G. & G. Enter., Inc.*, 508 F.2d 1354, 1358-59 (7th Cir.), cert. denied, 423 U.S. 825 (1975). More minimally, other opinions connect the discussion of financial context with the judges' view of statutory purpose. See, e.g., *Lino v. City Investing Co.*, 487 F.2d 689, 694-95 (3d Cir. 1973). Of course, economic context may become relevant in assessing the applicability of the listed categories internal to section 3(a)(10) itself. See, e.g., *Tcherepnin v. Knight*, 389 U.S. 332, 336, 338-39 (1967).

244. But see Schwartz, *Re-Defining "Securities" Limitations on the Scope of the Securities Laws*, in 2 FOURTEENTH ANNUAL INSTITUTE ON SECURITIES REGULATION 697, 712 (P.L.I. 1982) (arguing that choice-of-law awareness is irrelevant for "garden variety securities" and noting that in *Marine Bank* "both the issuer and the instrument were subject to regulation").

icism. Ironically, this criticism is in essence an intensification, a more detailed working out, of the themes *Marine Bank* raises.

The starting point is the conflict built into the statutory definition of a "security." The body of section 3(a)(10) takes the form of a list, but the status of the list is put in question by the introductory qualifier, "unless the context otherwise requires" Section 3(a)(10) in a sense proclaims a lack of definitiveness in its own definition. The conclusions we may draw, for example, about free exchange and abstraction (conclusions inferred from the form of the list) can be no more than tentative, until we determine what "the context" indeed "requires." In principle, the particulars of the section 3(a)(10) list, as well as the very idea of ostensive definition—of listing—is open to challenge.

As we have seen, "context" in section 3(a)(10) refers primarily to the particular substantive Exchange Act provision at issue. In *Marine Bank*, the relevant context would be that established by rule 10b-5, and through it, section 10(b). There is, however, no investigation in *Marine Bank* itself of the definitional implications of rule 10b-5 and section 10(b). Instead, in the certificate of deposit discussion the existence of an alternative legal regime, already in place, is decisive. Apparently, securities law provisions and policies are automatically preempted. And in the analysis of the agreement between the guarantors and the debtor, the commercial/private distinction serves as a similar threshold screen. In light of the language of section 3(a)(10), something in the jurisprudence of rule 10b-5 and section 10(b) should justify the terms of the Court's analysis, if *Marine Bank* is indeed to be consistent with the statutory organization. Notably, the Supreme Court makes no effort to establish the link.

Or perhaps, as context, rule 10b-5 and section 10(b) are blank. Section 10(b), after all, does little more than authorize the SEC to adopt rules dealing with fraudulent practices in connection with securities trading.²⁴⁵ The relevant legislative history is minimal. It simply confirms what the face of the statute suggests: Section 10(b) is a catchall clause, enabling the SEC to proscribe whatever manipulative schemes warrant attention in addition to those

245. See *supra* note 210. The Supreme Court, however, has stated that the reference to "manipulative or deceptive device" in section 10(b) prevents the SEC from adopting rules that impose liability if traditional common law fraud rules, or at least the traditional scienter requirement, would not permit a finding of liability. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). But cf. *infra* note 272.

banned by the Exchange Act directly.²⁴⁶ Although the SEC has sometimes used this authority to promulgate quite specific rules,²⁴⁷ rule 10b-5 is not one of them. The language of the rule is extremely general, permitting its use as an all-purpose means of policing marketing deception.²⁴⁸ Neither section 10(b) nor rule 10b-5, it might seem, suggests very much about whether the section 3(a)(10) list, with its usual implications, is appropriate. Presumably, therefore, in *Marine Bank*, there was no reason not to work with the list after all.

The litigative setting of *Marine Bank* reminds us, however, that rule 10b-5 transcends its legislative and administrative origins. The rule supplies the predicate for a private right of action, recognized by federal courts notwithstanding the absence of any express statutory sanctions.²⁴⁹ And in the process of giving content to this action, the courts have had repeated opportunities to fill in the legislative and administrative blanks.²⁵⁰ If there is anything about rule 10b-5 or section 10(b) that would count as "context" for section 3(a)(10), it would be this judicial gloss. And in fact, the rich accumulation of rule 10b-5 case law is highly instructive. Specifically, two larger movements of ideas are visible in the midst of the elaborate mass of specific holdings and particularized subrules.

From one of these viewpoints, sometimes emphasizing the common law vocabulary of section 10(b), as well as the absence in statutory language of any specific provision for a differently set-up private right of action, the essential attributes and concerns of rule

246. The *Ernst & Ernst* Court drew its conclusions about the relevance of common law fraud notions primarily from the failure of statutory language or legislative history to suggest reasons for rejecting the analogy, and from language in other statutory provisions. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 202-11 (1976).

247. See, e.g., 17 C.F.R. § 240.10b-9 (1983) (setting conditions for "all or nothing" offers).

248. See *supra* note 209.

249. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729-30 (1975) (summarizing history of rule 10b-5 right of action). "When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn. . . . [I]t would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5." *Id.* at 737; see also R. JENNINGS & H. MARSH, *SECURITIES REGULATION: CASES AND MATERIALS* 808-09 (5th ed. 1982) (placing implied right under rule 10b-5 in context of recent implication decisions).

250. But cf. Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1289-1316 (1982) (frequently skeptical discussion of implied rights of action as one means for "beneficiaries" of administrative regime to extend law enforcement beyond an agency's own program).

10b-5 are those of the traditional fraud action.²⁵¹ Assessments of alleged rule violations posit, and then attempt to verify, the existence of a deceptive statement occurring within a highly personalized setting. Emphasis falls on the state of mind of the individuals involved,²⁵² on the nature of their relationship,²⁵³ and on the immediacy of the causal connection between misrepresentation and injury.²⁵⁴

The other perspective begins with the common law fraud model, but modifies the usual elements of the fraud action on the basis of a "systematic" or "functional" analysis.²⁵⁵ On this view, the residual role of section 10(b) and rule 10b-5, as legislatively and administratively established backups for other more specific regulatory provisions, suggests that the specific features of the rule 10b-5 action should depend in important part upon the context in which rule 10b-5 is brought to bear—upon which aspect of the

251. See, e.g., *Santa Fe Indus. v. Green*, 430 U.S. 462, 471-74 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). See also *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976)).

252. The scienter requirement, which addresses the nature of the defendant's state of mind, is well-known. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). The state of mind of a plaintiff may also become relevant, for example, if litigation puts in issue plaintiff's "due diligence." After *Ernst & Ernst* the "due diligence" inquiry often involves questions of recklessness rather than mere negligence. See, e.g., *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 77-79 (2d Cir. 1980), cert. denied, 449 U.S. 1123 (1981); *Dupuy v. Dupuy*, 551 F.2d 1005, 1013-24 (5th Cir.), cert. denied, 434 U.S. 911 (1977).

253. The Supreme Court's recent "duty" cases, see *Dirks v. SEC*, 103 S. Ct. 3255 (1983); *Chiarella v. United States*, 445 U.S. 222 (1980), involve government-initiated actions rather than private suits. But in both *Dirks* and *Chiarella*, the Court treated decisions involving private and government actions as equally pertinent. See, e.g., *Dirks*, 103 S. Ct. at 3261 & n.14, 3265 n.22, 3267-68 n.27; *Chiarella*, 445 U.S. at 227-28 & n.9; see also *Aaron v. SEC*, 446 U.S. 680, 689-95 (1980) (*Ernst & Ernst* scienter rule applies in SEC 10b-5 action—although not in all SEC actions under § 17(a) of the Securities Act). *Dirks* and *Chiarella* illustrate how the implied right of action case law in the rule 10b-5 context helps to fix the framework within which section 10(b) itself or SEC administrative policy are understood. See also *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979) ("On a number of occasions in recent years this Court has found it necessary to reject the SEC's interpretation of various provisions of the Securities Acts"). But see *infra* note 258.

254. See generally R. JENNINGS & H. MARSH, *supra* note 249, at 1044-57 (reliance and causation).

255. The clearest illustrations of the functionalist approach appear in the extensive commentary discussing insider (or similar) trading. Analysts frequently assume that, to an important extent, judgments about the propriety of rules limiting exploitation of informational advantages reflect views about the operational needs or normative implications of the securities markets in which information would be used. See, e.g., Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 326-33, 355-57 (1979); Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 29-55 (1980); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 330-38.

larger statutory structure the rule is put to use to protect. This approach is most obvious in cases involving allegedly fraudulent acts that occurred within the setting of an established securities market. Federal courts have, for example, substituted analysis of the materiality of misrepresentations for direct investigations of plaintiff reliance,²⁵⁶ emphasized policies of deterrence and disgorgement as well as individual compensation,²⁵⁷ and treated systematic factors like "market equity" as pertinent in fixing the content of the rule 10b-5 action.²⁵⁸ The common law fraud model is plainly not the inspiration for judicial work of this sort. The objective and impersonal character of public securities markets,²⁵⁹ and the perceived importance of investor confidence in market integrity,²⁶⁰ are seemingly the decisive influences.

Although these two approaches are sometimes in conflict in the rule 10b-5 case law, they coexist comfortably in the *Marine Bank* setting. The common law fraud model emphasizes precisely the concerns that are pertinent in the highly individualized *Marine Bank* affair. Whether bank officials knowingly misrepresented the future uses of the loan proceeds, whether the guarantors in truth

256. See, e.g., *Blackie v. Barrack*, 524 F.2d 891, 906-08 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); see also Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143, 1148-53 (1982) (collecting cases).

257. See, e.g., *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 170-73 (2d Cir. 1980).

258. "[T]he Rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information" *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied sub nom. Kline v. SEC*, 394 U.S. 976 (1969); accord, e.g., *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 236 (2d Cir. 1974). The "market equity" theory of insider trading regulation did not have its origin in judicial reactions to private litigation. See, e.g., *Cady, Roberts & Co.*, 40 SEC 907, 912 (1961). Indeed, insider trading regulation under rule 10b-5 may be more a product of SEC enforcement action than of private litigation. See Dooley, *supra* note 255, at 16-17, 55. Nonetheless, courts and commentators working with ideas of "market equity" and insider trading tend to frame their analyses as though the private action were primary; as though the nature of the relationships among market participants was the key. This tendency has worked both to favor and to undermine insider trading doctrine. See, e.g., *Dirks v. SEC*, 103 S. Ct. 3255, 3260-64 (1983); *Shapiro*, 495 F.2d at 240; Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?*, 54 S. CAL. L. REV. 1217 (1981). The title of Professor Wang's ambitious article summarizes the analytical paradox: markets are "impersonal" and yet inquiry proceeds in terms of the traditional litigative formula for describing the relationship of particular opposing parties.

259. See, e.g., Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584, 592-96 (1975).

260. See, e.g., *Symposium: Insider Trading in Stocks*, 21 BUS. LAW. 1009, 1010 (1966) (comments of William L. Cary) ("integrity in the capital markets is essential for mass capitalism").

relied on bank representations, whether the guarantors were seeking a safe investment or rather gambling—factors like these seem highly relevant for judging liability in *Marine Bank*, and they are also factors a traditional fraud action would seek to illuminate.

In the *Marine Bank* setting, moreover, the alternative model would counsel a similar approach. The systematic perspective does not assume that all trading in securities takes place through public marketing. It simply suggests that, in cases involving such trading, judicial enforcement of rule 10b-5 should reflect the twin efforts of the Exchange Act, evident in both statutory language and legislative history, to regulate and support public securities markets. Of course, no public trading was at issue in *Marine Bank*. From the systematic point of view, therefore, the question would become whether any provisions of the Exchange Act address private securities transactions. The shape and objectives of the rule 10b-5 action in this new setting should derive from these statutory terms.

At this point, the complexity of the Exchange Act's structure becomes pertinent. Through legislation and disclosure rules governing traded securities,²⁶¹ certification requirements for market institutions and professionals,²⁶² and various prohibitions,²⁶³ the statute addresses problems involved in maintaining "fair and honest" securities markets.²⁶⁴ But the Exchange Act also sets up what is effectively a second system of regulation drafting, by creating the SEC²⁶⁵ and delegating to that agency, in provisions like section 10(b), important rulemaking and adjudicatory responsibilities.²⁶⁶ Rule 10b-5 represents an exercise of this authority. Under the Exchange Act, the range of this second legal regime extends beyond the scope of the Act itself. For example, the SEC acquires responsibility for superintending the administration of the 1933 Securities Act,²⁶⁷ legislation specifically regulating offers of new issues of securities.²⁶⁸ The Securities Act, in imposing its own battery of registration, disclosure, and antifraud rules, also recognizes exceptions from its requirements, including an exception for transac-

261. Securities Exchange Act of 1934 (SEA), ch. 404, § 12, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78l (1982)).

262. SEA §§ 15, 19 (codified as amended at 15 U.S.C. §§ 78o, 78s (1982)).

263. SEA §§ 9, 11 (codified as amended at 15 U.S.C. §§ 78i, 78k (1982)).

264. SEA § 2 (codified as amended at 15 U.S.C. § 78b (1982)).

265. SEA § 4 (codified as amended at 15 U.S.C. § 78d (1982)).

266. See also SEA § 23 (codified as amended at 15 U.S.C. § 78w (1982)).

267. See SEA § 210 (codified at 15 U.S.C. § 78ii (text omitted) (1982)).

268. See Securities Act of 1933 (SA), ch. 38, § 4, 48 Stat. 74, 77-78 (codified as amended at 15 U.S.C. §§ 78d, 78e (1982)).

tions "not involving any public offering."²⁶⁹ This statutory withdrawal, however, is incomplete. Notably, it does not extend to antifraud rules.²⁷⁰ Moreover, SEC and judicial efforts to define what is "not . . . any public offering" often seem to imagine a transaction very much like that which the common law fraud action also treats as archetype—individualized, equal-footed, direct dealings.²⁷¹ In a setting like *Marine Bank*, the Securities Act provisions appear to supply the relevant context for rule 10b-5. The language of the rule itself certainly covers "new issues" trading as much as any other securities transaction. These provisions, we may conclude, both acknowledge a place for a securities antifraud rule in situations analogous to that in *Marine Bank*, and ratify resort, at least in this context, to the common law model as well.

Rule 10b-5, therefore, is hardly a blank background, without implications for purposes of applying section 3(a)(10). Indeed, if we take rule 10b-5 seriously as context, much in Chief Justice Burger's analysis in *Marine Bank* is open to question. On either view of rule 10b-5, Burger errs in his effort to portray the commercial/private distinction as one measure of the limits of federal securities law. The rule 10b-5 action is entirely capable of illuminating the personal or individual elements in a transaction—in every case under the common law approach; and at least in cases like *Marine Bank* under the systematic approach. Recent Supreme Court decisions enthusiastically preach the continued viability of the common law model.²⁷² It cannot be, therefore, that the "private" as-

269. SA § 203 (codified as amended at 15 U.S.C. § 77d(2) (1982)).

270. Section 4 of the Securities Act exempts designated transactions from the prohibitions of section 5 of the Act, which make it unlawful to deal in unregistered securities or to disseminate an unapproved prospectus. SA §§ 4, 5 (codified as amended at 15 U.S.C. §§ 78d, 77e (1982)). Section 4's exemption does not extend to sections 12(2) and 17(a), the antifraud provisions of the 1933 Act itself. See *id.* §§ 12(2), 17(a), 48 Stat. 74, 84-85 (codified as amended at 15 U.S.C. §§ 77l(2), 77q(a) (1976)). Nor does the section limit the reach of section 10(b) of the Exchange Act and rule 10b-5. Section 10(b) extends its prohibition of "any manipulative or deceptive device or contrivance" to include not only misrepresentations "in connection with the purchase or sale of any security registered on a national securities exchange," but also securities transactions involving "any security not so registered." SA § 10(b), 15 U.S.C. § 78i(b) (1982); see *Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 688 (1983) (section 10(b) protections are "available to all persons who deal in securities").

271. See generally *R. JENNINGS & H. MARSH*, *supra* note 249, at 235-58 (transaction exemptions available to issuers of securities).

272. See cases cited *supra* notes 251 & 253. I do not mean to claim that every recent Supreme Court decision characterizes the rule 10b-5 right of action in terms entirely consistent with the common law fraud model. Justice Rehnquist's opinion in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), refused to treat common law analogies as necessarily controlling. "[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years from the world of commercial transactions to which Rule

pects of a transaction mark it as outside the range of securities law. Moreover, if we accept a place for the traditional fraud action within securities law, Chief Justice Burger's reference to banking law's established and thus preemptive protection of certificates of deposit is also vulnerable to criticism. Given the fraud action, we cannot simply declare the pledge of the certificate to be an irrelevant "personalizing" detail. We must ask whether federal banking law works, as the securities fraud action would, to reduce the risk of the pledge itself. The answer, rather obviously, is that federal banking law does not address this crucial aspect of the *Marine Bank* transaction.²⁷³

But where does this leave us? The ways in which section 3(a)(10) and rule 10b-5 undermine Chief Justice Burger's particular arguments reveal little, it may seem, about the shape of a more appropriate analysis. The critique of the commercial/private distinction established only that the legal "context" in *Marine Bank* is *consistent* with recognition of a "security." Under section 3(a)(10), however, departure from the standard list presupposes a genuinely *insistent* context—one that "requires" rather than merely tolerates adjustment.²⁷⁴ And even if federal banking law

10b-5 is applicable." *Id.* at 744-45. Justice Rehnquist, however, was responding to the argument that common law requirements equivalent to the statutory purchaser/seller rule were eliminated in the late eighteenth century. *Id.* at 744. Justice Rehnquist defended his rigid reading of the purchaser/seller rule by noting that it responds to concerns that common law actions resolved automatically. Within the ordinary field of common law application, "privity of dealing or . . . personal contact between potential defendant and potential plaintiff" was commonplace. *Id.* at 745. In *Herman & MacLean v. Huddleston*, 103 S. Ct. 683 (1983), Justice Marshall displayed a similar skepticism, holding that a preponderance of the evidence standard, rather than the traditional rule of clear and convincing evidence, defines the burden of persuasion in a rule 10b-5 action. "Reference to common law practices can be misleading, however, since the historical considerations underlying the imposition of a higher standard of proof have questionable pertinence here." *Id.* at 691; *see id.* n.27. In an earlier part of the *Huddleston* opinion, Justice Marshall had held that a plaintiff could bring a rule 10b-5 action in the event of misrepresentations in a registration statement, even though such misrepresentations were also the explicit subject of a right of action defined by section 11 of the Securities Act, 15 U.S.C. § 77k (1967). *Id.* at 690. The overlap was tolerable, Justice Marshall explained, at least in part because section 11, while limiting the list of possible defendants, imposed either strict liability or a version of negligence liability. *See id.* at 687, 690 n.22. By contrast, rule 10b-5 governed a broader class of defendants, *id.* at 690 n.22, but required proof of scienter, *see id.* at 688-89. Thus, the conformity of rule 10b-5 and the common law fraud action figured prominently in Justice Marshall's initial statutory construction, even though Justice Marshall rejected the common law analogy subsequently.

273. Statutory provisions setting up the Federal Deposit Insurance Corporation address questions relating to the financial "soundness" of insured banks, and not the fairness of bank dealings with particular customers. *See* 12 U.S.C. §§ 1811-32 (1982). *See generally* Clark, *The Soundness of Financial Intermediaries*, 86 YALE L.J. 1 (1976).

274. *See* *Exchange Nat'l Bank v. Touche Ross & Co.*, 544 F.2d 1126, 1137-38 (2d Cir.

possesses no analog to rule 10b-5, and thus cannot protect the holder of a certificate of deposit against a misinformed pledge, there remains the true common law action for fraud. In the *Marine Bank* setting, presumably, this is a source of protection equally as good as rule 10b-5.²⁷⁵ The implications of its list, we may think, override section 3(a)(10)'s introductory qualifier. A "security," whatever else it must be, is at minimum an instrument describing impersonal, readily exchangeable complexes of rights. Nothing in *Marine Bank* or rule 10b-5 "requires" that we set aside this initial proposition.

This conclusion, however, comes too easily. The Securities Act distinction between "public" and "private" offerings does more than simply identify differing sets of transactions to which rule 10b-5 might apply. The Securities Act requires us to develop a view of the relationship of these two marketing forms. Both are subject to statutory regulation (albeit to differing degrees), and this extension of coverage presumably reflects some idea about what "public" and "private" offers have in common. Judicial and SEC efforts to elaborate and apply the distinction suggest elements of at least two such "connecting" theories. These theories, it turns out, supply starting points for alternative assessments of the *Marine Bank* result.

On one view, regulation of private offers is prophylactic. If the extensive disclosure requirements for public offerings are not to be evaded through ostensibly private transactions, private offers must be subject to a regime of definition and regulation in order to assure that securities transactions adopt the form that is true to their nature. From this perspective, private offers provoke suspicion. The working definition of such offers, as a result, will be quite narrow. The regulatory aim should not be to encourage such transactions, but to ensure that private offerings escape the full force of statutory obligations only when such offerings manifestly possess

1976).

275. In addition to their federal claims, plaintiffs in *Marine Bank* also raised claims of violations of the Pennsylvania Securities Act and of common law fraud. 455 U.S. at 554. The Supreme Court left open the question whether, after its decision that federal securities law was irrelevant, a federal district court might nonetheless retain pendent jurisdiction in order to adjudicate the state law claims. *Id.* at 561. On remand, the court of appeals held that pendent jurisdiction would not lie, but that the district court, pursuant to a Pennsylvania statute, could transfer the action to a state court without endangering the viability of plaintiffs' suit given state statutes of limitations. *Weaver v. Marine Bank*, 683 F.2d 744 (3d Cir. 1982).

none of the features the statute seeks to control.²⁷⁶

The second view holds that private offers deserve statutory protection to much the same extent as public offers. From this perspective, securities law is sensitive to, and indeed seeks to have an impact upon, the underlying dynamics of capital raising within the economy at large. Public and private offers are means through which capital moves to firms seeking to expand the scale of their activities or to alter the characteristics of their financial obligations. These two methods for obtaining funds are alternatives, not only to each other, but to other devices for securing access to capital—devices, for example, taking the form of traditional debtor/creditor relationships with financial intermediaries. Arguably, “public” and “private” offers frequently differ, not only with respect to the types of firms that find such offers useful, but also with respect to the sorts of investors to whom the offers appeal. The appropriate regulatory response is one that seeks to maintain the integrity of both public and private offers, regulating in the interests of investors, but attempting as well to avoid measures that would cause one or another of the offering firms to become a meaningless option, so encumbered by regulatory hazards or costs as to be of little use.²⁷⁷

The prophylactic theory of private offer regulation justifies recognition of a federal antifraud remedy in place of a similar state action on protective grounds²⁷⁸—as a means of policing (and per-

276. “The focus of inquiry should be on the need of the offerees for the protections afforded by registration.” *SEC v. Ralston Purina Co.*, 346 U.S. 119, 127 (1953). *Ralston Purina* initiated a line of cases in which the question of the need for registration was restated as an inquiry, for example, into the information available to offerees and into the financial sophistication possessed by the offerees. See, e.g., *Doran v. Petroleum Management Corp.*, 545 F.2d 893, 902-04 (5th Cir. 1977). These cases provided the foundations for former rule 146—an SEC effort to define a “safe harbor” transaction clearly exempt from registration requirements. Concerning rule 146, see Soraghan, *Private Offerings: Determining “Access,” “Investment Sophistication,” and “Ability to Bear Economic Risk,”* 8 SEC. REG. L.J. 3 (1980).

277. Emphasis on protecting the private offer as an independently significant means of business fundraising emerged as part of the debate over the usefulness of rule 146. See, e.g., Campbell, *The Plight of Small Issuers Under the Securities Act of 1933: Practical Foreclosure from the Capital Market*, 1977 DUKE L.J. 1139. Regulation D, recently adopted by the SEC as a replacement for rule 146, appears in large part to be a response to capital market concerns. See generally R. JENNINGS & H. MARSH, *supra* note 251, at 260-75.

278. The analogy is to those cases in which federal courts take, or Congress grants, jurisdiction over apparently “state law” questions in order to protect background federal interests. See generally Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982). With respect to private offers, of course, the inquiry is not strictly jurisdictional. The question is not whether federal courts should enforce state law, but whether they should limit or extend federal law.

haps thereby discouraging) private offers that may be substitutes, individually or as part of a larger series of transactions, for offers that would otherwise take the public form the Securities Act chiefly regulates. In *Marine Bank*, the pertinent arrangements neither involved a disguised public offer nor created instruments likely to enter into subsequent public trading. Under the prophylactic theory, the *Marine Bank* deal was not one that triggered federal concerns. There was no reason to override the conclusion suggested by the section 3(a)(10) list; no reason to find a "security." Whatever fraud took place could be left to state law.²⁷⁹

By contrast, within a regulatory regime sensitive to differentiated capital markets, the *Marine Bank* matter would be of real interest. The facts reveal an effort to bring "new money" into a business, albeit through the indirect route of the guarantee, without resort either to a public offer (or more relevantly) the creation of a true debtor/creditor relationship. The guarantors did not behave like creditors. They were obviously putting funds at risk in expectation of profit. The appeal of the deal could not have derived primarily from the safety of the guarantee investment, but from the possibility of an open ended return. It is easy, in other words, to characterize the guarantors as investors. The role of the bank in brokering the arrangements increases our awareness that the case involves an effort to tap an "alternative" capital market. Firms often make use of private offers because of rigidities perhaps inherent in debtor/creditor transactions with financial intermediaries. That reason was certainly present in *Marine Bank*—it describes precisely the motivation (of either the debtor or bank officials) for soliciting the guarantors (the indirect source of funds). The bank's alleged self-interested abuse of its broker's role triggers a central concern of the capital markets perspective. If plaintiffs are correct, the bank prevented the debtor from setting

279. At first glance, bankruptcy law, and not securities law, seems to be the more pertinent legal regime for purposes of federal judicial scrutiny of the *Marine Bank* transaction. The bankruptcy rules concerning preferential transfers, however, as well as associated principles deriving from the law of fraudulent conveyances, address transfers of the debtor's property. In *Marine Bank*, the certificate of deposit that the guarantors pledged was *their* property, and not the debtor's. From the bank's perspective, that was the whole point of the pledge. *Marine Bank* thus may resemble the standby letter of credit cases. Creditors' rights are rearranged without accompanying changes in a debtor's holdings. See, e.g., *In re M.J. Sales & Distribut. Co.*, 25 Bankr. 608, 613-15 (S.D.N.Y. 1982); *In re Page*, 18 Bankr. 713, 715-16 (D.D.C. 1982). Moreover, even if the proceeds of the second loan were recovered for the debtor's estate, and, passing over various timing questions, etc., the guarantor would seemingly remain subordinate to the other creditors, whose claims would presumably be reactivated, and thus the guarantor would gain nothing.

up a genuine alternative to the already established debtor/creditor relationship. Instead, the private offer simply became the means through which the bank, by in effect diverting the guarantor's funds, fully secured its position as creditor. There is plainly a role here for a federal antifraud action—to protect the integrity of the private offering mechanism in a situation obviously open to duplication in which the private offer is vulnerable to abuse. On this view, therefore, we might very well give priority to the “context . . . requires” proviso in section 3(a)(10), set aside the list, and recognize a “security.”

* * * *

We should take the *Marine Bank* discussion through one more stage, in order to provide some basis for choosing between the prophylactic and capital market approaches to private offer regulation. But this effort would quickly become a full-scale analysis of securities law generally. Moreover, the relevant question here is not the “correctness” of the result in *Marine Bank*. Instead, the conflict in the language of section 3(a)(10), the competition between the two theories of rule 10b-5, and the diverging views of private offer regulation are all of interest in themselves. All describe points within the larger structure of the Exchange and Securities Acts at which initially narrow questions of statutory construction quickly become matters that require interpreters to undertake a simultaneously formal and substantive reading of the statutory regime as a whole. The larger politics of securities regulation thus acquires a sequence of ostensibly limited skirmish sites. If this larger politics is controversial (as we all know it to be), the particular fights that express it are unlikely to become settled. The function of statutory construction, however, may not be to restore peace—but to impress upon a statute's readers the nature of the combat in which they find themselves participants.

V

The analysis of the arguments of Radin and Landis at the outset of this essay and the just completed investigation of the three Supreme Court opinions were in part efforts to establish the plausibility of the idea that statutory form is literally subject to construction. The work of construction not only yields an image of a given statute, it also may be instrumental in fixing the values of the interpreter. Statutory constructions are helpful artifacts—ways of representing, and therefore of both expressing and opening to criticism, the interpreter's point of view. The relevance of statu-

tory constructions for legal inquiry should be apparent. Sensitivity to the formal qualities that interpreters attribute to statutes may be crucial, for purposes of either description or assessment, in even the most substantively motivated enterprise.

This essay suggests no more than a starting point for a re-oriented theory of statutes. A proper study of the intellectual history of statutory interpretation would obviously take up writers in addition to Radin and Landis. Three cases are a manifestly inadequate sample for an examination of the attributions organizing judicial references to statutes. There are, moreover, important questions that this essay has not even begun to discuss.

For example, a truly comprehensive account of statutory constructions should explore not only judicial reactions to statutes but also judicial responses to the efforts of other interpreters. Administrative agencies and executive officials act on the basis of particular conceptions of statutes—as indeed do legislatures, not merely in adopting a particular statute, but also in reacting to the statute subsequently, in the course of codification or the passage of additional legislation. Judges may ignore or reject the work of these “other readers,” defer to that work, or take some intermediate tack. Perhaps we should regard judicial responses to institutional issues of this kind as simply another part of the process of construction. But perhaps there is also an important constitutional issue here, one that the introductory effort of this essay suggests as well.

Once we acknowledge that statutes figure as always under construction rather than somehow complete, is it possible to give priority to the work of any one participant in the process? If not, are competing interpretive institutions caught up in circles of irresolvable hermeneutic clash? Is there a way, in the end, to regard such conflict as other than chaotic? Traditional constitutional images of separation of functions, of balance, of spheres of competence and the sense of comity, seem less relevant. What new images are available?

This essay itself supplies no more than a primitive vocabulary for characterizing statutes. It should be possible, however, to enrich or add to notions of “relaxed” or “rigorous” statutory language, to pictures of statutes as separate from or incorporating “other” legal regimes, or to accounts of statutory structures as representing substantive conflicts by setting up seemingly “narrow” questions in “widening” terms. To this end, we may need to confront statutes directly, to conduct a series of exercises in which we

build up a sense of statutory features. For example, what notable features link or distinguish the statutes adopted by Congress in 1825? In 1875? In 1925? In 1975? Are there significant differences in the appearance of congressional statutes as we jump these fifty-year intervals? Is there, in other words, a history of statutory form? Efforts to answer questions like these might strengthen our capacity to recognize the shadings and shifts in the work of statutory interpreters, and thus might increase our ability to restate the formal element in statutory constructions in substantive terms. As one result, questions of institutional relationships may perhaps become open to more nuanced formulations. We might be able to discern, in the structure of particular statutes, both concessions and challenges to given hierarchies of readers. For example, important statutory conflicts might express themselves (in more detailed ways than I have described in this essay) through the emphases a statute gives to other legal regimes—other statutes, constitutional law, common law, administrative practice, etc.²⁸⁰ These references, we may conclude, suggest as corollaries views concerning the relative importance of interpreters of the statute who would bring to bear the perspective of these “other” materials. The priority of judicial interpretation, of an agency’s view, of the legislature’s own expectations, or of the revised assumptions of subsequent legislation, would thus enter into controversy. The controversy, however, would no longer (or at least not routinely) degenerate into a contest of slogans—anarchy and hierarchy. The status of interpretations would become an issue of a piece with the question of a statute’s substance.

In any event, it is hypotheses and projects such as these that this essay suggests. Their plausibility (or implausibility) is one measure of the essay’s success (or failure) in achieving its introductory ambitions. It should seem as though something should follow.

280. This perspective is more or less the reverse of the Hart and Sacks approach. See *supra* notes 3, 66.