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THE LEGISLATIVE BRANCH AND THE SUPREME COURT

*James Willard Hurst**

Statutory law is both central and basic to the legal order in the United States. It has been so since we became a nation, though through most of the nineteenth century the fact was obscured by the growth of common law in default of legislative action over large areas of private relationships. The importance of legislation was ordained in the distinctive array of powers which constitutions put in the legislative branch—authority to determine standards and rules of conduct in any area of social life legislators found to be of public interest, to allocate economic resources by taxing, borrowing, and spending, to create or legitimize forms of public and private organization for collective effort, and to investigate matters of fact which legislators decided might be relevant to general welfare. The growth of statutory law mounted steadily during the twentieth century. Between the 1920s and 1980s legislation developed providing standards and rules for major sectors of life—for the market (as in the law of commercial instruments and creditors' rights, of corporations, and of fair trade practices), for important non-market areas (as in public policy concern for the physical and biological environment), and for key constituent institutions (as in law affecting public and private welfare organizations, the family, and public and private educational facilities). Moreover, twentieth century statutory law legitimizes and structures the range of executive and administrative rules which have come to bulk large in many fields, including regulation of public utilities, corporate securities, and marketing of food and drugs. In this perspective common law and inherent executive prerogative powers appear as relatively limited parts of twentieth century legal order.

This sweep of legislative development has gone on within a constitutional tradition. Constitutional grants and limitations have provided the frame for legislative action, setting basic legislative structure and marking the outer bounds of legislative jurisdiction. Enforcement of constitutional grants and limitations has presented

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its own problems. To some extent general political processes have implemented the constitutional ideal. Legislators and chief executives, like judges, swear oaths to support constitutions. Appeals to constitutional principles and provisions have figured from time to time in legislative debate and decision. Most of the time, however, legislatures have shown more by their practice than by their speech the terms in which they have interpreted their authority. Thus, through the nineteenth century the extent of Congress's spending power emerged more from the facts of Congressional appropriations than from Congressional explanation. The constitutional ideal has been a living part of the country's political tradition, so that campaigners have been able to appeal to the voters in constitutional symbols. Usually, however, politics center on more specific issues. General political processes—whether in legislatures or at the polls—have thus left a distinctive role in enforcing constitutional principles and provisions to judicial review of the legality of official action. English common law tradition provided judicial review of what executive or administrative officers did. Our history developed the new element of judicial review of legislative determinations of public policy.

Judicial review developed as a distinctive institution, inherently presenting dramas of confrontation, thus encouraging exaggeration of its relative importance. We should put it in proper perspective in relation to the general weight of statutory law in the legal order. Measured against the whole range and density of legislative product, relatively little legislation has ever been reviewed by the judiciary, let alone been ruled invalid. The overwhelming bulk of the courts' work with statutes has concerned only their interpretation and application, not their validity. Courts have not been presented with constitutional challenges to most everyday affairs carried on under statutes laying taxes, providing public services, prescribing behavior for business firms, or protecting the welfare of workers, consumers, or the general public. On most matters legislative practice and judgment rather than court orders have determined the uses made of legislative authority.

There is inherent tension between the roles of the legislature and the court under the constitutional ideal. Normally elected, representative assemblies are the principal agencies to determine general public policy. This is done, however, within grants and limitations contained in constitutions. Tension is inescapable between constitutional provisions providing a frame of authority for

the long term, and legislative response to ongoing needs, wants, and changing social circumstances. Variety and change in social experience mean that no definitive code can finally resolve this strain. The system has worked only by developing and observing some procedures of comity among those who hold different roles in making public policy, but who share responsibility for respecting the constitutional frame.

I pass by the long, in some respects still hotly debated question, whether judicial review of the constitutionality of statutes is legitimate within our tradition of constitutional, republican government. Accepting judicial review as a material element of the working legal order, I inquire here only how legislators and judges have gone about trying to make it work in the twentieth century. Even within that limited definition of the subject, however, the issue of legitimacy of judicial review does not disappear. Among public policy makers, unease persists about the relation of judicial review to the proper role of legislatures. This unease has found expression in special procedures and limiting doctrines for judges in handling issues of the interpretation and constitutionality of statutes, and in the relevance of such judge-made doctrines to the definition and implementation of legislative authority.

THE TITLE OF THE LEGISLATURE

A court has the potential for most drastically affecting the status of the legislative branch when it entertains questions about the legitimacy of the other body as a law maker on any subject. Our system demands that the legislative body be fairly representative of the electorate, that its members be duly elected, and that they act as trustees of public interest. In all these respects judicial review has been quite limited, and with one important exception, twentieth century developments have continued that limited character.

Many factors—the distribution of wealth and income, religious, social, and ethnic loyalties, available lines of communication—affect the representative quality of elected assemblies. Formal structure enters in, fundamentally in provisions for determining who may vote and defining the districts from which elected representatives shall come. Constitution makers provided the basis for establishing the electorate, most decisively in the fourteenth amendment. But in the twentieth century, Congress and the Supreme Court—

notably in the Voting Rights Act of 1965[1] and in decisions which translated constitutional standards of equal protection into detailed bans on racial or wealth criteria for access to the vote[2]—added substantially to constitutional principle. The federal constitution left to the states the definition of districts for elections to Congress and to state legislatures. State constitutions commonly set standards intended to assure political fairness in districting, if not in apportionment of voters among districts. Nineteenth century state court decisions enforced such state standards against gerrymandering—arrangement of district lines calculated to give gross advantage to one political party over another.[3] The fourteenth amendment's equal protection clause held the potential for federal court review of state districting and apportionment schemes. In 1946, however, the Supreme Court appeared to bar fourteenth amendment challenges to the apportionment of voters among legislative districts as raising issues suitable only for disposition through political processes.[4] *Baker v. Carr*[5] removed that barrier, holding that malapportionment presented a justiciable claim under the equal protection standard. The decision stands as a major influence on relations between the legislative and judicial branches in our time. It has had a sharp impact on the structuring of congressional districts, since the Court applied its most strict scrutiny, refusing to accept any but minor variations in the voter population of these districts. The Justices have, however, underlined the extent of discretion they assert in this domain by applying a less severe test to apportionment of state legislatures. Though the equal protection standard still governs there, in recognition of proper regard for local government and community interests, the Court allows a state legislature a wider degree of variation in voter populations of state legislative districts than it will accept in congressional districts.[6]

In one important respect state and federal court decisions put

1. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976)).

2. Smith v. Allwright, 321 U.S. 649 (1944) (racial discrimination in voting); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax).

3. *E.g.*, State *ex rel.* Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1892); State *ex rel.* Attorney General v. Cunningham, 81 Wis. 440, 51 N.W. 724 (1892); *see* Stevens v. Faubus, 234 Ark. 826, 830, 354 S.W.2d 707, 710 (1962) (mere maintenance of status quo does not meet constitutional apportionment standard).

4. Colegrove v. Green, 328 U.S. 549 (1946).

5. 369 U.S. 186 (1962).

6. *Compare* Reynolds v. Sims, 377 U.S. 533, 578, *reh'g denied*, 379 U.S. 870 (1954). *Compare* Wesberry v. Sanders, 376 U.S. 1 (1964) (congressional districts) *with* Mahan v. Howell, 410 U.S. 315, *modified*, 411 U.S. 922 (1973) (state legislative districts).

an absolute limit on judicial enforcement of constitutional standards for legislative districting and apportionment. Litigants have standing to challenge the validity of such legislation by direct attack, that is, by asking a court to enjoin application of the districting or apportionment act itself. But they may not obtain a ruling on the validity of such a statute by collateral attack, that is, by asking a court to deny legal effect to other laws passed by a legislature on the ground that the legislature was malapportioned or wrongly districted. Logic might suggest a different outcome. Gerrymandered districting or grossly unequal allocation of voters among districts violates the basic criterion of representative character which legitimizes a legislative body; if that basis of legitimacy is lacking, the body has no title to legislate at all. However, this logic runs into separation of powers values which persistently bring into issue the legitimate extent of judicial review itself, questioning how far a small body of judges—many appointed rather than elected—are entitled to go in setting aside the actions of the other branches of the legal system. Moreover, the invalidation of all products of an allegedly malapportioned or wrongly districted legislature would inject profound uncertainty into the condition of the general legal order. Not surprisingly, courts have ruled that once a legislature sits, its output may not be challenged on the ground that the body was wrongly constituted. State courts had earlier ruled so under state constitutional provisions; in the aftermath of *Baker v. Carr*, federal decisions put the same barrier on invoking the fourteenth amendment.[7]

The political legitimacy of a legislative body rests also on proper election of its members. This is an area in which the courts, including the Supreme Court of the United States, have not attempted to intervene directly. Their abstention rests, in the first instance, on the provisions of the national and state constitutions which explicitly allocate to each legislative chamber the judging of the elections, returns and qualifications of its own members. Courts also refuse to upset legislation on the ground of alleged improprieties in election of members of the legislature; the concern not to unsettle the reliance people may reasonably put on the statute books has operated here as in the apportionment problem to fix an abso-

7. Dawson v. Bomar, 322 F.2d 445 (6th Cir. 1963), *cert. denied*, 376 U.S. 933 (1964); Ryan v. Tinsley, 316 F.2d 430 (10th Cir. 1963), *cert. denied*, 375 U.S. 17 (1963); State *ex rel.* Attorney General v. Cunningham, 81 Wis. 440, 470, 483, 516, 531, 51 N.W. 724, 729, 740, 745 (1892). *See* Buckley v. Valeo, 424 U.S. 1, 142 (1976).

lute limit on judicial review.[8] The strength of the tradition of judicial review has shown itself even in this domain. In *Powell v. McCormack*[9] the Supreme Court ruled that criteria of "qualifications" for membership are limited to those declared in the constitution—age, citizenship, and residence. The Court would not accord validity to the action of Congress whereby Congress excluded a member based on criteria outside the constitutional catalog.[10] Nevertheless, nothing in *Powell v. McCormack* warrants judicial review of the regularity of an election of a candidate under the constitutionally declared tests.

Legislators are to act as trustees for the public interest. If they violate their trust by acting to serve private interest, arguably courts should stand ready to deny legal effect to their faithless actions. Breach of trust, being hard to prove, is likely to occur under the guise of seeming propriety.[11] If breach of trust can be shown only on the part of some members but not by all, there is no ready measure to decide what proportion of faithless action should invalidate determinations made by the whole body. Hence Justice Marshall's ruling in *Fletcher v. Peck*[12] that alleged bribery of legislators does not present a justiciable basis for invalidating a statute, stands unquestioned today.[13] More difficult—as Marshall foresaw—is the question posed when legislators have not sought to sell their votes for a cash price, but for political advantage or the profit of a favored, narrowly focused interest in the community. The conspicuous examples are subsidy or regulatory laws passed in response to lobbying by economic special interest groups seeking to use the law to gain competitive advantage in the market. Loose language in some late nineteenth and early twentieth century judicial opinions indicated that proving that a statute allegedly passed for public purposes, would in fact serve a particular private interest would be sufficient to invalidate the act. This was an approach dubious in principle and impractical in operation. Much legislation which might serve a public interest was likely also to carry special gains to some limited interests and special burdens to others. If such a mix-

8. People *ex rel.* Drake v. Mahaney, 13 Mich. 481 (1865); State *ex rel.* Elfers v. Olson, 26 Wis. 2d 442, 132 N.W.2d 526 (1965).

9. 395 U.S. 486 (1969).

10. *Id.* at 550.

11. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810).

12. 10 U.S. (6 Cranch) 87 (1810).

13. *Id.* at 131. *See* Tenney v. Brandhove, 341 U.S. 367, 377 (1951); Calder v. Michigan, 218 U.S. 591, 598 (1910).

ture were enough to condemn a law, the result would be substantially to deny the interest-balancing function which our tradition early assigned to the legislature. Alexander Hamilton effectively pled this case to President Washington on behalf of the Hamilton program for funding the public debt.[14] In the following 150 years legislative practice implicitly ratified Hamilton's view. By mid twentieth century the United States Supreme Court had made this explicit doctrine: The fact that in operation a statute may concurrently work on behalf of both public and private interest does not deny validity to it; judges will not probe to examine whether the legislators' dominant motive is to benefit the private interest.[15] In late twentieth century decisions one exception stands to this general refusal to examine legislative motive. In the context of the fourteenth amendment's particular proscription of racially discriminatory laws, the Supreme Court has ruled that proof of such a discriminatory purpose will upset a statute, though the act may arguably also serve some proper public interest. Even here, however, the Court sets a substantial barrier to examining legislative motive. It is not enough for a challenger to show that the statute may in fact operate with disproportionate burden on a disadvantaged racial minority; the challenge must also establish a specific intent to discriminate.[16]

THE LEGISLATURE'S CONTROL OF ITS PROCEDURES

Kilbourn v. Thompson[17] left a legacy of doubt whether the Supreme Court might be prepared to exercise rather extensive review of the internal procedures of Congress. On a poorly defined appeal to separation of powers principles, the Court held that a witness called before a congressional committee was legally entitled to refuse to answer questions on matters on which Congress was not authorized to act.[18] The decision seemed to have the potential for greater extension of judicial review because of the contemporary situation in the state. The federal constitution set out only barebones

14. *See* Hurst, *Alexander Hamilton, Law Maker*, 78 COLUM. L. REV. 483, 526 (1978).

15. *E.g.*, Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); *cf.* United States v. Darby, 312 U.S. 100, 115-16 (1941) (analogous ruling under commerce clause). Contrast Powell v. Pennsylvania, 127 U.S. 678, 686-87 (1888) (*obiter*, statute may be invalidated if found enacted only under "pretense" of serving public interest).

16. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-68 (1977); Washington v. Davis, 426 U.S. 229, 243, 248 (1976); *cf.* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (blatant racial discrimination in apportionment).

17. 103 U.S. 168 (1881).

18. *Id.* at 199-200.

provisions for the procedures of Congress. Moved by some notorious scandals and the increasing press of business on inexperienced bodies, however, state constitution makers imposed a catalog of procedural limitations on state legislatures—requirements as to titles of bills, scope of subject matter, reference to committees, rollcall votes, and others. Through the nineteenth century state courts proved ready to entertain challenges to the validity of state legislation based on alleged violations of such procedural requirements. In the twentieth century state judges have shown markedly less enthusiasm for this role, but in the earlier period their example invited comparable expansion of federal court scrutiny of how Congress did its business. An important pattern of development in the Supreme Court since the 1920s has been on the whole to refuse to enlarge this aspect of federal judicial review.[19]

The most broad reaching limit on judicial review of Congress's procedures is one so much taken for granted that it has produced little overt challenge to elicit direct response from the Court. Executive or administrative law making looms large in the contemporary legal order, but it depends on statutory delegations which define the parties and subject matter with which such agencies may deal. Doctrines of standing, justiciability, and precedent limit law making by judges, but, in contrast to the position of common law or delegated legislation, no formal barriers of standing limit access to Congress, or to a state legislature. Anyone who can persuade a legislator to introduce a bill can cause the matter of his concern to be put into the legislative machinery. In the field of economic regulation, nineteenth and early twentieth century judicial opinions seemed to set a limited catalog of subject matter on which legislators were authorized to act, such as for public health, morals, or safety. From *Nebbia v. New York*[20] on, the Supreme Court has rejected the limited catalog, recognizing that a legislature is empowered to assess the public interest in each situation presented to it according to the context of that situation.[21] Moreover, the twentieth-century Court has repeatedly held that the novelty of a proposal for legislation, and particularly the fact that it will change prior common law, raises no legal

19. This pattern was set before the twentieth century in Field v. Clark, 143 U.S. 649 (1892). The Court refused to go behind a duly enrolled act of Congress to permit showing some procedural defect which might arguably invalidate the statute.

20. 291 U.S. 502 (1934).

21. *See id.* at 532-37. *But see, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).

bar.[22] Not even constitutional limitations prevent bringing a matter under legislative consideration. Legislators may vote down a proposal because they think it unconstitutional. If the measure is adopted, a court may later hold it unconstitutional. But in the first instance the legislature may receive and consider any introduced bill. A statute is generally presumed constitutional[23] because its passage is taken to imply that the legislators have already appraised it in light of their own oaths to support the constitution. To deny the legislators full prior authority to weigh any measure introduced before them would, in effect, allow judges to enjoin legislative operations. Contemporary decisions make it plain that this would offend separation of powers principles demarcating legislative and judicial functions.[24] The general proposition was underlined by sharp dissent in the Supreme Court to the decision which sustained the procedure set by the Voting Rights Act of 1965, requiring advance clearance by central federal authority for the operation of election laws of states found guilty of past racial discrimination in access to the ballot.[25]

If the legislature is constitutionally empowered to consider any matter introduced before it, it is also largely free of judicial restraints on the manner in which it goes about its business. Since the 1920s the Supreme Court has added materially to the definition of Congress's control of its own housekeeping. Procedural due process does not require that legislators make special investigation of relevant facts and values before they vote on a statute; they are entitled to act on the basis of the knowledge they bring with them when they are elected. Prudent sponsors are likely to lay a foundation for a bill by staff work or by hearings, against possible future challenge in court over substantive constitutionality or interpretation. But they are not under constitutional compulsion to do so.[26] There is no procedural due process requirement that the legislature give notice or opportunity to be heard to those who may be affected by proposed

22. Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962); Silver v. Silver, 280 U.S. 117, 122 (1929). See especially, Holmes, J., for the Court, in Noble Bank v. Haskell, 219 U.S. 104, 113 (1911).

23. *See* O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U.S. 251, 257-58 (1931).

24. *See* Public Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 245 (1952); Rose Manor Realty Co. v. City of Milwaukee, 272 Wis. 339, 345, 75 N.W.2d 274, 277 (1956); Goodland v. Zimmerman, 243 Wis. 459, 466, 10 N.W.2d 180, 182 (1943).

25. Allen v. State Bd. of Elections, 393 U.S. 544, 595 (1969) (Black, J., dissenting); South Carolina v. Katzenbach, 383 U.S. 301, 357-61 (1966) (Black, J., dissenting).

26. Maryland v. Wirtz, 392 U.S. 183, 190 n.13 (1968), *overruled*, 426 U.S. 840 (1976); Townsend v. Yeomans, 301 U.S. 441, 451 (1937).

legislation, however serious may be its impact. In practice contemporary legislatures are likely to provide some notice and opportunity to appear in committee hearings. But they do so wholly at their own discretion.[27] When legislative committees hold hearings, in most respects they have the last word on their procedures, free of limits set for proceedings in court by constitutions or by the law of evidence. Court-made rules of evidence do not govern; most striking, legislative hearings need not conform to rules against hearsay. The committee's discretion governs the order in which interested parties may produce evidence or testimony; whether affected parties have opportunity to attempt any rebuttal or to make timely rebuttal of adverse material is up to the committee. Committees rarely allow affected interests to cross examine those who present hostile material; the committee alone decides whether there shall be any cross examination.[28] Aside from some limited authority for barring invasion of rights of free speech and association protected by the first amendment, twentieth century Supreme Court decisions have imposed no constitutional limits on the subject matter of legislative investigations.[29] There is now precedent for applying to legislative hearings the privilege against self-incrimination and constitutional limits on search of papers, but this doctrine only narrowly qualifies the general discretion conceded to legislative process.[30] Overall, modern Supreme Court doctrine has developed to show that there are almost no judicially enforceable, constitutional limits on how the legislature chooses the subjects to which it attends and the procedures by which it goes about its business.

In practice there are some qualifications to put on this picture of the legislature's constitutional freedom to control its operations. Facts limit access to the legislature, though the law does not. Affected interests are not equal in wealth or sophistication; practical

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27. Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 304-05 (1933) (dictum). *See also* United States v. Florida E. Coast R.R., 410 U.S. 224 (1973) (no procedural due process requirements for notice and hearing before adoption of generalized delegated legislation by a regulatory agency).

28. *See* Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 304 (1933).

29. This is contrary to the earlier intimations in Kilbourn v. Thompson, 103 U.S. 168 (1881).

30. On the broad scope of subject matter allowed for legislative investigation, *see* Sinclair v. United States, 279 U.S. 263, 291-92 (1929); McGrain v. Daugherty, 273 U.S. 135, 173-75 (1927); *cf.* United States v. Rumely, 345 U.S. 41, 46-47 (1953) (narrow construction of authority of Congressional committee investigating lobbying). On application of the privilege against self-incrimination and the fourth amendment, *see* Watkins v. United States, 354 U.S. 178, 188 (1957); *cf.* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) (protection of right of association).

inequalities limit those who make themselves effectively heard in the legislative arena. This is a reality reflected in the fact that weak interests have sometimes obtained some satisfactions through lawsuits before they have gotten it through statutes, as happened in the matter of racial discrimination in public schools. Thus, twentieth-century resort to the administrative process—and judges' willingness to accept this development as lawful delegation of legislative powers—helped answer the need to respond to interests which from their diffuse character or want of resources could not win direct action from legislators. Moreover, legislative procedures have not been as wholly free from restraint as modern constitutional doctrine permits. Prudence may counsel providing special investigation and giving some notice and opportunity to be heard as matters of legislative grace where the Court has been unwilling to find constitutional command.[31] The Supreme Court has found limits on the subject matter and procedures of legislative investigations, which the Court will enforce in protection of witnesses.[32]

Nonetheless, with all qualifications imposed by practice and by constitutional requirement, the twentieth-century Supreme Court has on the whole kept judicial review out of the internal business of Congress. State constitutions include more detailed constitutional prescriptions on legislative procedure than the federal constitution contains. In the second half of the twentieth century, however, the record likewise shows relatively little intervention by judicial review affecting the in-house behavior of state legislatures.

Taking together the potential range of issues with which judges might grapple concerning either the title of the legislative branch or its modes of procedure, we emerge with a quite restricted judicial role. Because the drama of confrontations over the substantive powers of legislatures has tended to pre-empt attention, realistic perspective calls for holding this aspect of our inventory of judicial review well in mind.

THE SUBSTANCE OF STATUTORY POLICY: INTERPRETATION

No drafters, however skilled and foresighted, can anticipate the

31. *Cf.* Mayflower Farms, Inc. v. Ten Eyck, 297 U.S. 266 (1936) (emphasis on lack of legislative record justifying statutory classification).

32. Gojack v. United States, 384 U.S. 702 (1966); Russell v. United States, 369 U.S. 749 (1962); Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957).

full extent of issues which are likely to be produced within the range of a statutory text. Legislators tend to focus only on matters immediately pressed on them, often leaving unresolved the relation of a particular statute to other legislation dealing with related subjects. On occasion, political and interest-group bargaining results in a text of some calculated ambiguities. The press of business on limited legislative time makes for hurried work, not always finely adjusted to the complexities of problems. Such factors mean that administrators and judges inevitably must—in the name of statutory interpretation—provide a good deal of the practical content of policy declared in the statute books. Judges have taken the lead in formulating and legitimizing principles of construction, and in this enterprise the Supreme Court of the United States has provided especially influential models. Thus a major dimension of judicial review of legislative action consists in the Court's approach to the interpretation of statutes.

This role of the Court is more relevant in appraising the division of functions between judges and legislators. Judges must determine what a statute means before they can decide whether the legislature means to do something it may constitutionally do. This reality is one ground of the longstanding doctrine that, when reasonably possible, judges will interpret a statute in order to avoid presenting a serious issue of its constitutionality. It is a rule of prudence as well as of realism, reflecting judges' uneasiness over the extent to which judicial review of a statute's constitutionality conflicts with the tradition of electing representative assemblies to be the prime makers of public policy. The rule has taken notable prominance in twentieth-century decisions.[33] Its prominence is consistent with rising sensitivity in the Supreme Court to the uneasy fit between judicial review and the norms of republican, representative government.

This is not the place for a detailed discussion of the doctrine on statutory interpretation. I focus on two major points of comparison between approaches typical of the nineteenth and of the twentieth centuries, reflected in rulings of the Supreme Court. In one aspect there is important continuity of doctrine, in another an important shift. In both there is a common element, the extension of substan-

33. *See, e.g.*, United States v. National Dairy Prod. Corp., 372 U.S. 29 (1963); Kent v. Dulles, 357 U.S. 116 (1958); United States v. Harris, 347 U.S. 612 (1954); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932).

tial judicial judgment in providing specific content to statutory policy.

There has been continuity in the lead the Supreme Court has given in dealing with tension between form and substance in statutory law. A statute presents public policy in the frame of an authoritative text. Behind the text presumably is some substantive purpose. Imperfections in communication may mean that the text sometimes appears to point one way, while reasonable argument suggests that in a particular situation the legislature's substantive purpose would be fulfilled only by departing from the rigor of the formal words. Confronted with this tension, the Supreme Court continues in the twentieth century to assert, as it did in leading nineteenth-century decisions, that judges are not required mechanically to bring under the statute every situation the act's literal terms appear to govern. Such rulings continue the assertion of an important role for the exercise of judicial choice in determining the particular content of statutory policy. Assertion of this judicial power is still tempered by recognition that the statutory text—as the final, formal declaration of the body which is normally prime maker of public policy—should operate to allocate the burden of persuasion between contending parties. If on its face the text supports the position of one contestant, due regard to the text suggests that a substantial burden of persuasion should rest on the opponent to prove that the statute has a different meaning.[34] To define the force of the text is not to treat the text lightly; lawsuits are often won or lost according to allocation of the burden of persuasion. On the other hand, treating the matter so constitutes a significant claim of judicial authority with reference to statute law.

I have sketched this pattern of Supreme Court doctrine in sharper lines than one finds in many opinions. But I believe that my reading is faithful to continuing currents in the Court's behavior. The Supreme Court's lead was not clearly followed in a good deal of state court handling of state legislation in the nineteenth century. The literal treatment of statutory texts in state courts, however, seems—as in applications of the rule of strict construction of statutes in derogation of common law—sometimes to have expressed not ju-

34. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 187 n.33 (1978); Order of R.R. Telegraphers v. Chicago & N.W. R.R., 362 U.S. 330, 335 (1960); United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940). The treatment of such cases follows the classic pattern on effect of the text in allocating the burden of persuasion without assigning mechanical force to text, set in Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

dicial deference to the text so much as judicial jealousy of conceding broad scope to the legislature's policy making role. Twentieth-century state court handling of statutory interpretation appears to follow more closely the lead given by the Supreme Court in dealing with adjustments between form and substance in statutory law.[35]

The striking contrast between nineteenth and twentieth century treatment of legislation lies in the different focus in which judges have sought to view issues under statutes. Here the twentieth-century Supreme Court has led in an approach sharply different from the characteristic pattern set by state judges in the preceding century. In the earlier period state courts elaborated a network of rules of statutory construction, the common feature being their abstract quality. Thus, by the terms of the rule of strict construction of statutes in derogation of common law, it does not matter whether the statute deals with rights in personalty or in property, with land title or with liability for negligent behavior. If a given interpretation of the act would change existing common law, the presumption—says the rule—is that the legislators did not intend that result. Common sense, however, suggests that if the legislature intervenes in an area formerly governed by common law, it probably intervenes because it finds the common law in some way unsatisfactory and means to change it. In the proliferation of these rules, judges typically contrived for each rule a countervailing proposition. Thus the rule that a remedial statute should be liberally construed to effect its beneficial object offered an offset to the derogation rule. The net result was a diverse catalog which gave warrant to large and doctrinally unchecked judicial discretion in dealing with legislation. This diversity of abstract rules seems often to have cloaked judges' distaste for finding themselves displaced as prime policy makers.[36]

From about the 1920s the Supreme Court gave leadership to a quite different, more sharply focused approach to legislation. What it did typically involved legislation by Congress. But its example has found counterparts in main currents of state court handling of state legislation.

In the past sixty years the Supreme Court has turned treatment of questions of statutory interpretation away from reliance on ab-

35. *See* Jackson, J., for the Court, in Securities and Exch. Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350 (1943) (recognizes doctrine of construing act in conformity with expressed legislative policy).

36. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 206-12, 227-29 (1975); K. LLEWLLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521-35 (1960).

stract canons of construction to concentration on materials particular to the statute in issue. The typical approach now fulfills the admonition of Justice Holmes in 1916, that "every question of construction is unique, and an argument that would prevail in one case may be inadequate in another."[37]

The new emphasis on particulars does not ignore statutory text. Indeed, it gives the text more careful attention, but in a way that is not governed by highly generalized propositions about meaning. Thus the Court looks closely at context, at the drafter's choice of generic or specific words, or of words of specialized or of ordinary meaning with reference to an indicated subject, and at implications of exceptions or qualifying terms attached to the principal declaration. The Court recognizes that in the pragmatic realities of legislative process any given statute is more likely to be a product of accretion than of single stroke, comprehensive codification of public policy. Hence the Court is alert to guides provided by continuities and changes in successive acts on the same subject and by provisions of acts dealing with related subject matter.[38]

The most dramatic demonstration of this new focus on the particular context of a statute has been the Court's increased readiness to seek evidence of legislators' intention in the details of the legislative history of a bill. Thus the Court may compare an introduced bill with amendments proposed and adopted or rejected or modified in the course of passage, and may consider matter presented in hearings before legislative committees, in debate preserved in the Congressional Record, and in reports of legislative committees which worked on the measure.[39] As of the turn of the century, the Court sometimes spoke as if it would not allow consideration of such material extrinsic to the formal text. But steady expansion of practice over some sixty years now has made resort to legislative history rela-

37. Holmes, J., for the Court, in United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916).

38. *E.g.*, United States v. Cook, 384 U.S. 257, 261 (1966) (ordinary meaning); Baltimore & Ohio Ry. Co. v. Jackson, 353 U.S. 325, 330-31 (1957) (generic words); United States v. American Trucking Ass'n, 310 U.S. 534, 545 (1940) (statutes in *pari materia*); Gooch v. United States, 297 U.S. 124, 128-29 (1936) (context, presence of exception).

39. *See* Long Island R.R. v. Aberdeen & Rockfish R.R., 439 U.S. 1, 7 (1978) (subsequent amendment); Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395, 407-08 (1975) (committee report); S. & E. Contractors v. United States, 406 U.S. 1, 13 n.9 (1972) (hearings); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 463 n.8 (1937) (debate); Gooch v. United States, 297 U.S. 124, 128-29 (1936) (amendment by succeeding statute).

tively commonplace.[40] It may have become too commonplace, for the practice presents some troubling problems of reliability and propriety.

Let us accept as fact that behind the terms of a statute lie realities of division of labor in the legislative process. Under this division of labor the detailed content of an act is typically the product of a few legislators, staff, and lobbyists. Ordinarily the general membership contributes chiefly the sanction of their ability by their votes to ratify or reject or modify what these specialists do. This pattern provides legitimate resort to legislative history created by the activity of a limited number of individuals as a basis for finding the intent of the legislature.

There are reasons to question the degree of reliance judges should put on such evidence. Depending on the recorded circumstances, adoption, modification, or rejection of amendments may raise substantial inferences of deliberate policy choices made, but a bare record of amending history may reveal little. Pressures of time or extraneous bargaining considerations rather than the merits may determine what happens. Evidence at hearings is often to be discounted as the product of narrowly focused, selfish interests. Floor debate may be loose and unstructured, or alternatively may be contrived to plant material to support an outcome for which votes could not be mustered were the matter put plainly in the text of a bill. Committee reports may be most reliable since it is typically in committee markup sessions that the detailed look is done which yields a bill. But committee reports are often disappointingly perfunctory paraphrases of the formal text.

In various aspects the Supreme Court's practice reflects unease over such questions of reliability. The Court is likely to give weight to the history of amendments in the course of passage only where quite specific choices were presented.[41] Hearings evidence is likely to be invoked to prove only general goals rather than details of proposed legislation.[42] In recorded debate, remarks of members who have a specialist relation to the bill—members of the committee reporting it, sponsors, members in charge of floor debate time—may be given weight regarding detailed context as well as general goals.

40. *Compare* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897) *with* Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 463 n.8 (1937).

41. *See* Gooch v. United States, 297 U.S. 124, 128 (1936). *Accord* Ross v. Ebert, 275 Wis. 523, 529, 82 N.W.2d 315, 318-19 (1957).

42. *See* Chicago & North Western Ry. Co. v. United Transp. Union, 402 U.S. 570, 576-77 (1971); Allen v. State Bd. of Elections, 393 U.S. 544, 568 (1969).

But remarks of members lacking such specialist roles are likely to be considered only as they show general agreement on the large objectives of the measure.[43]

All the doubts about the reliability of using legislative history should remind judges of the fact that the enacted text is the most focused evidence of legislative intent, and the evidence on which ultimate votes were cast. The Court recognizes this by its continued insistence in formal doctrine that, prerequisite to using material outside the text, there should be a showing that the text is of uncertain meaning. Realism calls for caution in appraising this rule. The rule often seems to have impact by allocating a burden of persuasion. If on its face the statutory text conveys a reasonable meaning, the Court is likely to require a party who asserts a reading different from that apparently indicated by the text to meet a substantial burden of producing evidence and argument to sustain his position. This approach is a considerable reinforcement of respect for the separation of policy-making functions between legislature and court. On the other hand, the Court's general practice over the past sixty years denies a limitation which some opinions appear to lay down—that, unless textual ambiguity exists, all evidence extrinsic to the text is simply legally incompetent. In practice it seems plain that the Court treats the matter as one of the credibility and not of the competence of extrinsic evidence of legislative intent. The Court seems typically to weigh all matter and argument put to it, from both statutory text and from sources outside the text, and prefers the text when it finds the outside evidence too thin or diverse or otherwise unconvincing. Qualified by the use the Court makes of the text to allocate burden of persuasion, this outcome for a credibility rather than a competency test means that the Court asserts more discretion in determining the detailed content of statutory law.

Increased use of legislative history also marks twentieth-century state court treatment of state statutes.[44] Opportunities here are more limited, because state legislatures typically create much less of a printed record of the background of a statute than Congress does. In the states the most likely kind of legislative history material available will be sequences of introduced bills, amendments in course of

43. Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976). *See generally* Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 463, n.8 (1937); Duplex Printing Co. v. Deering, 254 U.S. 443, 474 (1921).

44. United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932); Boston Sand and Gravel Co. v. United States, 278 U.S. 41, 48 (1928).

passage, and final versions, together with such directions of policy as may be indicated by the course of successive acts on the same subject or of legislation *in pari materia*.[45] Whether in the federal or state domain, this evidence, by its nature brought to formal expression, does not raise the same questions of credibility that material from legislative hearings or debate raise. On the other hand, we should recognize that resort even to these more reliable materials may in practice increase the extent of policy making discretion wielded by judges.

Both under federal and state legislation, the last sixty years have seen increased resort to another kind of material outside the statutory text. Not surprisingly, the rise in importance of the administrative process has brought more and more attention to action of administrators as persuasive evidence of legislative intent. Use of this material is especially important regarding state statutes, because it is likely to be more available than any legislative history. Again betraying concern lest they be found exceeding their proper sphere, judges hedge in the use of administrative construction with an impressive catalog of qualifications. In the first place, here as with legislative history, courts say that a party who would invoke administrative construction must first show that the statutory text is of uncertain meaning. Then courts say that they will give weight to administrators' practice in applying the act only if the practice is that of officials charged with responsibility for carrying out the statutory policy, originates close to the time of enactment, is continued for a substantial period, is consistent, and stands without disavowal in the legislative record. Administrative construction may get positive reinforcement from later legislative history, if the legislature fails or refuses to respond to petitions to change what the administrators have done, or by specific appropriations provides continuing funds to sustain the administrators' activity.[46] These are limiting terms. Inherently they also leave scope for judgment in application, and variance in the decisions makes plain that, as with use of other extrinsic materials, resort to administrative construction enlarges judicial discretion in determining the detailed content of statute-based law.

Apart from questions of reliability there are factors of economy

45. *See, e.g.*, *In re* Shields' Adoption, 4 Wis. 2d 219, 89 N.W.2d 827 (1958); Ross v. Ebert, 275 Wis. 523, 82 N.W.2d 315 (1957).

46. Alstate Constr. Co. v. Durkin, 345 U.S. 13, 16-17 (1953); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 314-15 (1933); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 84 (1932).

and fairness to be weighed in using material outside the statute books. In the day-in, day-out press of conducting people's affairs within the law it would be impractical to require parties to consult legislative and administrative records before acting in reliance on the statute book. In practice most applications of statute law or of delegated legislation (administrative rules) are made simply on the basis of the formal text; the economy of a workable legal order makes this the norm. Moreover, in proportion as courts give determining weight to legislative and administrative records they create pressure on parties to turn to those records. Resort to such extrinsic materials spells more legal fees. The records are not available in many depositories, so that apart from money cost there may be problems of ready access to the material. These elements may tip the scales in favor of a party more fortunately located or possessing the bigger purse. These considerations of economy and fairness argue for assigning great weight to the statutory text, and give sound policy reasons for putting a substantial burden of persuasion on the party whose position calls for departing from a reading of the statute solidly supported by the text. The readiness with which the Court has embraced use of legislative history and administrative construction in the last generation suggests that judges tend to treat these value problems too lightly.[47]

THE SUBSTANCE OF STATUTORY POLICY: CONSTITUTIONALITY

Since the years of the Marshall Court the dramatic focus of legislative-judicial relations has tended to be on judicial review of the constitutionality of the substantive policy made by legislators. Judicial power made itself most manifest from the late 1870s into the 1930s, especially as the Supreme Court developed new potentials for its review role under the due process and equal protection clauses of the fourteenth amendment as restraints on state legislators. The years since the late 1930s, however, have witnessed an equally marked shift of direction as the Supreme Court has sharply reduced its reviewing activity in some spheres, sharply enlarged it in others, altogether making a pattern substantially different from that set in the late nineteenth and early twentieth centuries.

The principal impact of judicial review has always been more

47. *See* Jackson, *The Meaning of Statutes*, 34 A.B.A. J. 535, 538 (1948); United States v. Public Util. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395 (1951) (Jackson, J., concurring).

by enforcing constitutional limitations than by defining the extent of constitutional grants of authority to legislators. This emphasis was inherent in the character of state constitutions. At least in their origins, these specified curbs on power more than they conferred particular authority. By simply vesting otherwise undefined "legislative power" in elected assemblies, state constitutions endowed state legislatures with the traditional powers of Parliament, augmented by the prerogative powers of the Crown. Thus there was little occasion for state judges to spell out positive grounds of state legislative power.[48] In contrast, the federal constitution gave Congress only such authority as was contained under the heads listed in Article 1, Section 8. That Congress needed particular warrant for what it did was tempered by the sweep of the most important grant clauses, notably those conferring power to tax, borrow, and spend, to provide a money supply, to regulate interstate and foreign commerce, and to provide for the national defense. It inhered in the breadth of these grants that they would gain detailed content from legislative and executive practice and from decisions of the Supreme Court.[49]

In the nineteenth and early twentieth centuries a few Supreme Court decisions—of considerable political if not economic impact—limited the scope of Congress's power over federal territories,[50] over the money supply,[51] over interstate commerce,[52] and over taxes.[53] Viewed in relation to the whole, these rulings, though important, dealt only with limited portions of Congress's activities. For the most part it was Congress's own practice which defined the extent of Congress's powers. So far as the Court entered the scene—as in upholding Congress's regulation of interstate navigation in *Gibbons v. Ogden*,[54] or its creation of a national bank in *McCulloch v. Maryland*[55]—its action generally validated broad authority in Congress. The Court stirred acute controversy in the few earlier cases which denied congressional authority. But it was the rapid course of

48. *See* People v. Coleman, 4 Cal. 46, 49 (1854); People *ex rel.* Wood v. Draper, 15 N.Y. 532, 543 (1857); Bushnell v. Beloit, 10 Wis. 195, 225 (1860).

49. *See* Gibbons v Ogden, 22 U.S. (9 Wheaton) 1, 194-96 (1824).

50. Dred Scott v. Sandford, 60 U.S. (19 Howard) 393 (1857).

51. Hepburn v. Griswold, 75 U.S. (8 Wallace) 603 (1870), *overruled* by the Legal Tender Cases, 79 U.S. (12 Wallace) 457 (1871).

52. Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E.C. Knight Co., 156 U.S. 1 (1895).

53. Bailey v. Drexel Furniture Co., 259 U.S. 29 (1922); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

54. 22 U.S. (9 Wheaton) 1 (1824).

55. 17 U.S. (4 Wheaton) 316 (1819).

events from 1935 to 1937 which decisively limited the Court's impact on approving Congress's authority. In quick succession a series of decisions upset important elements of the New Deal programs designed to combat the depression, provoking high political dispute as well as President Roosevelt's proposal to enlarge the Court by enough new members to assure acceptance of his measures. The Court packing bill failed. However, following the triumphant reelection of the President and the sharpening of the issue of the legitimacy of the judicial review role, a majority of the Court validated Congress's monetary, fiscal and commerce powers with a sweep which in practical effect removed the Court as a material check on Congress's definition of its power over the economy.[56]

Two doctrinal developments after 1920 stand out as narrowing the Court's review role over the scope of the constitutional power of Congress. Federal spending has offered prime leverage for national policy over the economy. In a measure of self restraint remarkable for its timing, the Court in 1923 ruled that both a federal taxpayer and a state lacked standing to challenge the validity of a federal expenditure.[57] These decisions did not foreclose all possible resort to the courts to challenge national spending programs. In 1936, however, the Court in practical effect barred other avenues of attack. In calculated dictum in *United States v. Butler*,[58] the Court validated decades of congressional appropriations practice which had followed Hamilton's reading of the Constitution: Congress's power to appropriate federal moneys is not simply auxiliary to other granted powers; it is an independent authority, to spend for such programs as Congress reasonably decides will promote a national interest.[59]

A second major development in doctrine dealt with the commerce clause. Upholding a broad sweep of national regulation of

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56. R. McCLOSKEY, THE AMERICAN SUPREME COURT 169, 174-79 (1960). *See* Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); West Coast Hotel Co. v. Parrish, 301 U.S. 379 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

57. Massachusetts v. Mellon, and Frothingham v. Mellon, 262 U.S. 447 (1923). *Cf.* Helvering v. Davis, 301 U.S. 619 (1937) (tacit acceptance of standing of corporate stockholder in suit to enjoin corporation's compliance with federal tax).

58. 297 U.S. 1 (1936).

59. *Id.* at 64-67. *See* Hurts, *Alexander Hamilton, Law Maker*, 78 COLUM. L. REV. 483, 494 (1978). The practical impact of the Court's attitude reflected in the *Butler* dictum is reinforced by the fact that the Court silently ignored the standing problem of *Frothingham* in sustaining a federal tax against a taxpayer's challenge in Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

labor relations and of agricultural production, the Court sanctioned Congress's power under the commerce clause to regulate activity in production or distribution which Congress determined to have material effects on interstate commerce either through particular impacts or by the aggregate impacts of the regulated activity. Moreover, the Court's expanded reading of congressional power amounted to rejecting the tenth amendment as an independent limitation on use of national legislative authority. Marshall had early declared that where the Constitution gave Congress legislative authority, each grant must be taken to the "plenary," not to be restrained because of side effects on areas of policy otherwise open to state regulation. The Court's rulings of mid twentieth century now brought out the full meaning of Marshall's pronouncement, relegating to an historical lumberyard the strong tenth amendment bias displayed in the *E.C. Knight*[60] case and in *Hammer v. Dagenhart*.[61] There seems no basic change of direction intended by the 1976 ruling in *National League of Cities v. Usery*,[62] which held invalid legislation which applied the national Fair Labor Standards Act to municipal employees who rendered key, traditional public services as fire and police protection. *National League of Cities* seems sharply limited by its facts, carrying no indication that it will revive any general tenth amendment check on national programs directed at the private economy.

The principal exertions of judicial review—certainly those which evoked the most attention—between the 1870s and the early 1930s dealt not with constitutional grants but with constitutional limits on legislative power. The Supreme Court's actions in 1923 and 1936-1937 largely removed the tenth amendment as an independent limitation on congressional power to affect allocation of economic resources through public fiscal authority or to affect national regulation of the private economy. But under the due process and equal protection clauses of the fourteenth amendment, in the span from the late 1870s through the early 1930s, the Supreme Court asserted broad power to hold invalid substantive policy made by state legislatures regulating marketplace behavior. And in the

60. United States v. E.C. Knight Co., 156 U.S. 1 (1895).

61. 247 U.S. 251 (1918). *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (federal regulation affecting agricultural production); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (federal regulation of labor relations in relatively small business firms). *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheaton) 1, 197 (1824) ("plenary" nature of Congress's commerce power).

62. 426 U.S. 833 (1976).

early twentieth century the Court also found implicit in the fifth amendment a standard of equal protection as well as of due process binding the substantive policy making of Congress.[63] We should not exaggerate the negative impact of judicial review in these areas of constitutional limitations. By one count, in 197 cases between 1899 and 1937 the Supreme Court invalidated state or federal laws under the standard of substantive due process. Another estimate notes that between 1889 and 1918 the Court upheld 369 challenged statutes enacted under state "police power." Other tallies emphasize the more vigorous use of the judicial veto in the later years of the forty-year span; one count finds fifty-three state police power acts invalidated between 1889 and 1918, while another shows almost 140 laws held unconstitutional between 1920 and 1930.[64] However, we must keep the judicial vetoes in proper perspective; a great bulk of economic regulatory legislation never came under constitutional challenge in litigation.

Granted this last caution, the years from 1870 to 1930 saw development of a daunting catalog of constitutional limitations created by judicial fiat with scant justification in any other grounds of constitutional history. The Supreme Court was particularly concerned with protecting relatively large autonomy of action for the private market. To this end it spun out four lines of related limiting doctrine. First, it identified freedom of private contract as a key component of the "liberty" protected by the Court-made standards of substantive due process and equal protection. This doctrine climaxed in the pronouncement in *Adkins v. Children's Hospital*[65] in 1923—in odd juxtaposition to the 1923 rulings which denied standing to state or federal taxpayers to challenge federal spending—that freedom of contract was so far a constitutionally preferred value that a litigant relying on any statute limiting freedom of contract carried a heavy burden of persuasion to justify what the legislature had enacted. Second, the Court found warrant in the standard of substantive due process for holding legislatures to pursuit of a limited number of public-interest goals. It spoke often of legislative authority as the sum of a limited, closed catalog of purposes traditionally recognized as serving public interest—commonly, the protection of health, safety or morals. The force of these decisions was that a statute violated substantive due process if its objective did not

63. Bolling v. Sharpe, 347 U.S. 497 (1954).

64. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 435 (1978).

65. 261 U.S. 525 (1923).

fit readily under one of those familiar designations of public purpose.[66] Of special importance in this respect were rulings which limited statutory regulation of prices and services of private contractors to what judges regarded as businesses "affected with a public interest"—those conventionally deemed public utilities.[67] Third, substantive due process demanded that legislation serve what the Court regarded as the general welfare. Though a statute might appear to serve such a public goal as protection of health, it became suspect if it appeared that it also served a specialized private interest in a way different than might result from bargaining simply within the frame of the common law of contract or property. Judges would accept statutes that protected groups commonly recognized as subject to exceptional danger or weakness in bargaining power; thus the Supreme Court sustained a statutory limit on hours of miners working underground, and upheld a statutory limit on hours of work for women.[68] When a statute apparently sought to offset the weak bargaining power of workers in situations not conventionally tagged as deserving the law's special care, however, the fact that the statute would confer particular benefit on labor was sometimes deemed to show a lack of justifying public interest.[69] Fourth, the Court usually required a positive showing of a "real and substantial" relation between the legislature's goal and the means it provided to reach the goal. That the Court could conceive of other, less burdensome means of achieving the desired result was likely to be treated as a sufficient basis for invalidating the statute.[70]

In a sharp turn of direction, beginning in the late 1930s, the Supreme Court disavowed the terms on which it had set out these four doctrines of judicial review. In *United States v. Carolene Products Co.*[71] the Court showed that no particular constitutional sanctity attached to the "liberty" interests involved in private contract activity; all regulatory legislation affecting ordinary commercial

66. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923); Adair v. United States, 208 U.S. 161 (1908). Illustrative of the general formula is the opinion of Harlan, J., for the Court, in Powell v. Pennsylvania, 127 U.S. 678, 683 (1888), and the dissent of Field, J., *id.* at 695.

67. Tyson & Brother v. Banton, 273 U.S. 418 (1927).

68. Muller v. Oregon, 208 U.S. 412 (1908) (women); Holden v. Hardy, 169 U.S. 366 (1898) (miners).

69. Lochner v. New York, 198 U.S. 45 (1905).

70. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936), in substance overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *West Coast Hotel* also expressly overruled Adkins v. Children's Hosp., 261 U.S. 525 (1923). *See also* Lochner v. New York, 198 U.S. 45 (1905).

71. 304 U.S. 144, 152 (1938).

transactions enjoys the benefit of a presumption of constitutionality. More specifically, in *West Coast Hotel Co. v. Parrish*[72] the Court had already expressly overruled *Adkins v. Children's Hospital*,[73] and had held that the fact that a statute limited freedom of contract did not put a burden of justification on the supporter of the statute. Second, in *Nebbia v. New York*[74] the Court explicitly rejected the idea that there was some closed catalog of permissible objectives which legislatures might pursue. *Nebbia* held that a legislature might regulate business pricing practices outside the field of traditional public utilities, if legislators could reasonably find that regulation would serve some public interest. More broadly, the *Nebbia* opinion declared that though a statute intervenes in private market activity for a purpose not within familiar concerns of public health, safety, or morals, it is valid unless judges can determine that no reasonable legislators could find a public-interest justification for it.[75] Third, the Court made plain that a statute is not invalid merely because in serving some public interest it may operate concurrently to provide special gain to some private interest. In this sense judges were not to examine legislative "motive" as a basis for invalidating legislation.[76]

This seems appropriate. In this society of diverse, interweaving interests, concurrence of public and private gain from legislation is so common that judges materially abrogate the legislative function if they hold that such parallel effects alone make a statute unconstitutional. Finally, implicit in these three restrictions of judicial review has been strong application of the presumption of constitutionality on the question whether in marketplace regulation there is a substantial relation between the legislature's objective and the means it provides to reach the objective. It is now clear that the legislature enjoys a broad discretion in choosing points and instruments of intervention in regulating the economy.[77]

In the late 1930s the course of judicial review showed two sharply divergent currents. On the one hand the Court substantially withdrew from measuring the constitutionality of legislation regulating activity in private markets against the standards of substan-

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72. 300 U.S. 379 (1937).

73. 261 U.S. 525 (1923).

74. 291 U.S. 502, 536 (1934).

75. *Id.* at 537.

76. Williamson v. Lee Optical, 348 U.S. 483 (1955); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948).

77. Ferguson v. Skrupa, 372 U.S. 726 (1963); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Williamson v. Lee Optical, 348 U.S. 483 (1955).

tive due process and equal protection. In contrast, the Court enlarged and tightened its scrutiny of legislation regarding constitutionally preferred values in areas of policy other than the marketplace. In these areas the Court did not accord statutes the benefit of the general presumption of constitutionality, but instead—in somewhat varying degree according to category—put on the supporter of a challenged statute some burden of making a positive case on behalf of the act. It took the Court from Marshall's day into the 1930s to develop a fairly full pattern of what the presumption of constitutionality means to the moves and countermoves of lawyers and the analysis of judges in dealing with the validity of legislation. Since the Court began to elaborate preferred-values analysis only from the late 1930s it is not surprising that by the 1980s the Court has yet to achieve a consistent, detailed model.

Between 1939 and 1982 five main categories of preferred values have emerged, progressing from quite specific to quite indefinite boundaries. In all these categories the supporter of a statute must satisfy some substantial burden of persuasion to uphold challenged legislation. These categories concern (1) statutes which make race (or ethnic, alien, or religious origin) a criterion for determining the legal status of individuals or groups to the detriment of those historically disadvantaged on these grounds;[78] (2) state statutes which appear explicitly or in demonstrated practical effect to discriminate against interstate commerce;[79] (3) statutes which impede rational processes for shaping public policy, by limiting the right to vote, defining congressional districts of unequal numbers of voters, or limiting freedom of speech, assembly, or press relevant to public policy making;[80] (4) statutes which burden process of public communication outside the domain of public affairs, through the arts or through the press as these media address non-political matters;[81] and (5) statutes which in the Court's judgment deny the essential worth or dignity of individuals by intruding on areas of life which men and women value as private and not of public concern; those involving freedom of religion, the internal affairs of the family,

78. McLaughlin v. Florida, 379 U.S. 184 (1964).

79. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).

80. Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (vote); Mills v. Alabama, 384 U.S. 214 (1966) (press); Wesberry v. Sanders, 376 U.S. 1 (1964) (Congressional apportionment); Schneider v. State, 308 U.S. 147 (1939) (pamphleteering).

81. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial advertising); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (arts).

child bearing, and private pursuit of sex experience.[82]

Under doctrines developed in the past forty years, if one challenging a statute shows that by its explicit terms the act trespasses on a constitutionally preferred value or uses means inconsistent with that value the burden of justification is placed on the supporter of the statute. An example would be making the race of an accused a constituent element of the crime.[83] The matter is not as plain when the statute is not suspect on its face, but the challenger claims that its operating effect will burden a preferred value. If the challenger convinces the court that the statute's only predictable result will be such an invasion, he will have done enough to shift to the supporter a substantial burden of justification. If the statute may fairly be appraised as serving some valid public purpose, but the challenger presents persuasive evidence that in operation it will also have a disproportionately adverse effect on a specially favored constitutional value, the challenger may put on the supporter the burden of making a strong case that a legitimate goal may be served. If the supporter can meet that test, the Court will apparently reject the attack unless the challenger can prove actual legislative intent to invade the specially protected value, such as proof of actual intent to discriminate against a racially identified group.[84]

Some preferred constitutional values claim more deference than others, as measured by different levels of burden of justification that the Court now places on the supporter of a challenged statute. At the highest level of constitutional preference stand claims for racial equality under law and for free speech and kindred communications activities relevant to rational processes of making public policy. Where the statute invidiously makes race the criterion of its application, the legislation "even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . . and will be upheld only if it is necessary, and not merely rationally related to the accomplishment of a permissible state policy."[85] A statute which limits free speech in domains of public affairs or limits

82. Roe v. Wade, 410 U.S. 113 (1973) (child bearing); Eisenstadt v. Baird, 405 U.S. 438 (1972) (sex experience); Griswold v. Connecticut, 381 U.S. 479 (1965) (husband-wife privacy); Engel v. Vitale, 370 U.S. 421 (1962) (religious freedom).

83. McLaughlin v. Florida, 379 U.S. 184 (1964). *Cf.* Hood & Sons v. DuMond, 336 U.S. 525 (1949) (explicit state discrimination against interstate commerce).

84. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). *Cf.* Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (shift of burden of persuasion on showing of implicit disproportionate burden on interstate commerce).

85. McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

political participation must pass "exacting scrutiny" by the Court; its supporter must show a "compelling" justification.[86] A showing of "necessity" or "compelling" justification seems usually to mean a showing by the supporter that there is no reasonable alternative way to achieve a legitimate public interest goal advanced in support of the act.[87] Other constitutionally preferred values apparently do not call for so strong a showing by the proponent of a challenged statute. When the regulation deals with speech not in a political context, but in commercial advertising, the supporter is under a burden of justification, but he need only show that the act involves a substantial public-interest goal, has a substantial relation to that goal, and is no broader than needed to serve the objective.[88] A like requirement—less exacting than the "compelling justification" test—is imposed on a supporter of a statutory classification according to gender.[89]

The range of ends and means questions and responses involved in the past forty years' elaboration of preferred-value categories raises afresh issues of the legitimacy of judicial review. The country's constitutional history provides some substantial and quite specific warrants for strict judicial scrutiny against racial discrimination by law and against state legislation which discriminates against interstate commerce. Though there is no such specific historical base, there is persuasive logic for denying a presumption of constitutionality to laws which burden rational, representative processes of making law. The existence of such processes is a presupposition to the ordinary presumption of constitutionality. A statute which strikes at that base may well be deemed suspect. It may be more arguable to apply strict judicial scrutiny to legislation which limits communication in the arts or in the market. However, special protection to communications processes outside the arena of public affairs may be justified by concern that if judges are lenient toward encroaching laws in these non-political fields, the leniency may encourage spill-

86. First Nat'l Bank v. Belotti, 435 U.S. 765, 786 (1978); Williams v. Rhodes, 393 U.S. 23, 31 (1968); Bates v. Little Rock, 361 U.S. 516, 524 (1960).

87. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977) (discrimination against interstate commerce); Schneider v. State, 308 U.S. 147, 161 (1939) (pamphleteering).

88. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976).

89. Califano v. Westcott, 443 U.S. 76, 89 (1979), *aff'd*, 443 U.S. 901 (1979); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (majority), 286 (dissent) (1979); Craig v. Boren, 429 U.S. 190, 197 (1976).

over of legislative restrictions into such public policy process realms as access to the vote and political free speech.

More troublesome to those concerned about claims on behalf of judicial as compared with legislative policy making discretion are the decisions of the last forty years which enlarge judicial review on behalf of values of individual worth and dignity. Such are decisions which deal with statutes affecting child bearing, or sexual experience or the relative social position of men and women. Arguably, strict judicial scrutiny should apply here because such situations offer variants of threats, more overtly visible in the political arena, to interests which are disadvantaged because they lack equal access to processes of making public policy.[90] Given their proportion in the population, however, and with the guaranty of the nineteenth amendment, women seem not readily classified as a politically disadvantaged minority. By its own definition special constitutional concern for protecting individual privacy in choices about child bearing or sexual activity does not seem warranted by the concern of protecting public policy making processes. Argument might be made that such protection of privacy is another form of protection for politically disadvantaged minorities. The plea would be that the individual who confronts social conventions translated into law is likely to be at a hopeless political disadvantage unless strict judicial scrutiny of such regulatory laws somewhat redresses the imbalance. But this argument proves too much. In a society as marked as ours by the influence of public policy of organized groups, the argument would support wholesale rejection of the presumption of constitutionality. Most legislation reflects some collective pressure on individuals or small groups. Indeed, no area of policy is more marked by legislative victories of organized pressure over individuals or particular groups than legal regulation of the private market. Yet it is precisely in the broad field of legal regulation of the market that contemporary doctrine of the Court most vigorously applies the presumption of constitutionality.[91]

Much in the country's constitutional and political history teaches that law should respect the intrinsic dignity and worth of individuals. Yet it has never proved easy to secure firm agreement on what elements are essential to that valued individuality. When we enlarge judicial review to protect preferred values of individuality, we need to calculate how far we are willing to accept the fact

90. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).
91. *See supra* note 62.

that through this avenue a few judges, under no direct political accountability to the community, may impose upon it their personal ideas and rankings of values. The extent of judicial discretion involved is underlined by comparing two lines of decisions affecting individual values outside the context of the market. Rejecting the presumption of constitutionality, the Court has required that the supporter show compelling justification for some statutes punishing abortion or use of contraceptives. Court majorities have viewed the individual's opportunity of choice in bearing children as an essential element of protected privacy.[92] But the Court continues to apply the presumption of constitutionality on behalf of legislation which allocates tax derived moneys or other publicly owned economic assets. It has done so in favor of an appropriations act which denies public funds to pay for abortions desired by poor women.[93] It has done so in favor of a statute which limits public welfare money provided for poor families with children, refusing to add funds for families with children above a statutory ceiling.[94] It has done so in upholding against a fourteenth amendment challenge the broad discretion enjoyed by a state legislature in fixing the public funds to be available to support public schools.[95] In powerful dissents Justice Thurgood Marshall has argued that these cases should fall within the preferred-values area. To him, as much as in the abortion and contraceptive cases, basic human rights are at stake when law affects access to money which will allow poor women to choose whether to bear a child, which will provide food, clothing and shelter needed to sustain life, or which will give access to schooling which individuals need in the political process or in the job market.[96] Whether or not one agrees with him on extending strict judicial scrutiny to public spending programs in these fields, his argument throws into sharp relief the extent of policy making discretion inherent in what the Court has been doing. Here Court majorities in effect have been choosing to hedge from more direct involvement in issues over the distribution of wealth and income, however great the impact on the

92. On abortion: Roe v. Wade, 410 U.S. 113, 155-56, 163 (1973). On contraceptives: Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

93. Maher v. Roe, 432 U.S. 464, 479 (1977).

94. Dandridge v. Williams, 397 U.S. 471, 487 (1970).

95. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 23, 28, 43 (1973).

96. *See* Marshall, J., dissenting, in Beal v. Doe, 432 U.S. 438, 457, 458 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973); Dandridge v. Williams, 397 U.S. 471, 522 (1970).

quality of individual life.[97]

I return to the matter of proper perspective on relations of judicial review to legislative power. The Court's preferred-values analysis of the last forty years emphasizes choices important both to open political processes and to protect values of individuality. But the prominence of these developments should not lead us to exaggerate the judge's role. Judges have not been the only officials who have acted on behalf of these preferred values. Slow and unwieldy as it has been, the legislative process has also contributed, as it has done in laws increasing access to public records, regulating use of money in politics, and enlarging legal protection of civil rights. Moreover, the presumption of constitutionality continues to provide the frame within which the Supreme Court says we should appraise the validity of the great bulk of legislation. Though they deal with important matters, preferred-value categories, old and new, apply to only a small part of the whole body of statutory law. Finally, we should recognize that the drama of courtroom confrontations invites us to exaggerate their relative place in the operations of the legal order as a whole. Most statutory law, and most of the administrative rules which exist within statutory delegations, never come into any constitutional litigation. This is true of the great range of legislation and delegated legislation which lays taxes, appropriates and dispenses public moneys to provide services as well as to support regulation, regulates marketplace behavior, protects public health and safety, sets legal terms for existence of corporations, and deals with many other matters deemed of some public concern. Viewed in this perspective, the values to which the Court has been assigning constitutionally preferred status are in play only in quite limited sectors of the whole legal order. However active they have been, judges still

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97. *See* Maher v. Roe, 432 U.S. 464, 471, 479 (1977) and the dissent of Harlan, J., in Douglas v. California, 372 U.S. 353, 361-62 (1963). The extent of policy discretion exercised in elaborating preferred-value doctrine is also reflected in exchanges in Carey v. Population Serv. Int'l, among the plurality, 431 U.S. 678, 688 n.5, and 693 n.15 (1977), and Powell, J., concurring, *id.* at 705, and Rehnquist, J., dissenting, *id.* at 718. See a somewhat similar exchange between the majority and Rehnquist, J., dissenting (joined by Burger, C.J., Stewart and Blackmun, J.J.) in Trimble v. Gordon, 430 U.S. 762, 767, 769, 772, 781, 784 (1977). The Court has upheld judgments or decrees which require spending public money to bring matters into compliance with court orders. *E.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Griffin v. County School Bd., 377 U.S. 218 (1964). But such decisions probably reflect concern for the efficacy and status of judicial judgments; they do not focus on the legislature's general control of the public purse or point to such broad judicial scrutiny of the purse power as would be indicated if the Court ruled generally that differential impact of law on individuals of less means in itself puts the validity of law in question.

are a long way from monopolizing the determination of public policy.