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But this is a mere rule of construction, not derived from any positive rule of law but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law.

Alexander Hamilton[1]

I. Canons of Statutory Construction

Most people regard canons of statutory construction as disingenuous decorative rationalizations appended to opinions to justify decisions reached for other reasons. Not so. Canons of statutory construction invoked by a judge are often the most honest and revealing portions of an opinion. They reflect philosophical predispositions that a judge brings to the case and values read into the statute he construes.[2] Canons reflect and im-

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1. The Federalist No. 78, at 468 (A. Hamilton) (C. Rossiter ed. 1961).

2. Some canons of statutory construction may be described as value-neutral axioms of experience; they simply provide practical guides for ascertaining the actual intent of the legislature. Rules in this category include the idea that congressional conference reports are more probetive than floor comments and a sponsor's comments are entitled to greater weight than those of an opponent. Other canons of statutory construction may be described as substantive judicial conventions, which provide courts with justifications for leaning one way or another in the event legislative intent is unclear. This article discusses the latter canons.

For discussion of how judges interpret statutes, see R. Cross, Statutory Interpretation (1976); R. Dickerson, The Interpretation and Application of Statutes (1975); J. Hurst, Dealing with Statutes (1982); Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 Clev. St. L. Rev. 385 (1983-1984); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947); Landis, *Statutes and the Sources of Law*, in Harvard Legal Essays 213 (R. Pound ed. 1934); Landis, *A Note on "Statutory Interpretation,"* 43 Harv. L. Rev. 886 (1930); Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 Vand. L. Rev. 395 (1950); MacCallum, *Legislative Intent*, 75 Yale L.J. 754 (1966); Weisberg, *The*

plement deeply held beliefs judges follow when legislative intent is unclear.[3]

Because legislation is frequently ambiguous, inconsistent, or incomplete, canons play an important role in shaping law.[4] The Supreme Court often is divided as to the meaning of a statute, not because of differing perceptions of the legislative will, but because individual judges follow different canons when confronted with statutory ambiguity.

A. Restrictive and Expansive Canons of Construction

The conflict between restrictive and expansive canons of construction is illustrated in *Califano v. Westcott*.[5] In that case the Supreme Court declared that a welfare program unconstitutionally excluded a certain class of beneficiaries. The Court was then required to decide whether the program should be expanded to include the class or enjoined from operation until Congress passed a new law. The justices agreed that the choice

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Calabresian Judicial Artist: Statutes and the New Legal Process, 35 STAN. L. REV. 213 (1983).

3. For discussion of judicial conventions, see H. KELSEN, PURE THEORY OF LAW (1967); Edwards, *supra* note 2.

For discussion of whether our legal system may he described as "autonomous" (distinct from the moral and political spheres in general), see H.L.A. HART, THE CONCEPT OF LAW (1961); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977); Weinreb, *Law as Order*, 91 HARV. L. REV. 909 (1978).

4. For discussion of how appellate judges make rather than simply find law, see B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98 (1921); J. FRANK, LAW AND THE MODERN MIND 357 n.4 (Anchor Books ed. 1963); Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924); Traynor, La Rude Vita, La Dolce Giustizia; *or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 234 (1962).

Judge Joseph Sneed observed that often "legislative purpose . . . is too imprecise to furnish an unequivocal answer. True, certain answers are foreclosed, hut alternatives remain." Sneed, *The Art of Statutory Interpretation*, 62 TEX. L. REV. 665, 686 (1983). As a result, Judge Sneed notes, "*transcendant concerns* substantially influence and sometimes dominate the manner in which statutes are interpreted." *Id.* at 665.

Judge Harry Edwards observed that relatively few cases require resort to substantive canons or discretionary policy judgments. *See* Edwards, *supra* note 2, at 386.

For representative "legal realist" studies of the role of "discretion" in adjudication, see, *e.g.*, J. FRANK, *supra*, at 357 n.5; Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). Insightful secondary studiea of the movement and its legacy include E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 74-94, 159-78 (1973); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Schlsgel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

5. 443 U.S. 76 (1979).

depended on congressional intent—the Court should follow the alternative that Congress would have preferred if Congress had known that the exclusion was unconstitutional. The justices also agreed that Congress had neither considered the problem nor expressed a preference between the named alternatives.

The justices disagreed, however, as to the proper alternative, and their bases for disagreement showed their preferred canons of construction. Five justices—Blackmun, Brennan, Marshall, Stevens, and White—decided to expand coverage of the welfare program. They cited "equitable considerations" and the need to ensure continued payment of benefits to the "innocent recipients of government largesse" already receiving aid.[6] Four justices—Burger, Powell, Rehnquist, and Stewart—thought the welfare program should be enjoined until Congress passed a new law. Their position rested on principles of limited government and the need to avoid "irretrievable payment of funds to a class of recipients Congress did not wish to benefit."[7]

1. The competing traditions

The *Califano* decision illustrates the two main schools of thought on statutory construction. One school believes that ambiguous laws should be liberally construed to expand government intervention and promote economic equity. The other school believes that ambiguous laws should be strictly construed to restrict government intervention and promote self-reliance and economic freedom. When in doubt, the first school leans toward equitable expansion of remedial programs, and the second favors preservation of a more laissez-faire status.

These generalizations, of course, are subject to numerous qualifications. Few judges rigidly follow one school of thought to the total exclusion of the other. Most judges are influenced by the facts and equities of a particular case. Nevertheless, it is fair to say that some judges prefer expansive canons of construction while others prefer restrictive canons.[8]

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6. *Id.* at 90.

7. *Id.* at 96 (Powell, J., concurring in part, dissenting in part).

8. Judge Richard Posner has argued that use of restrictive or expansive canons of construction represents impermissible judicial activism. *See* Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

2. *Canons of economic regulation*

The tension between restrictive and expansive canons of construction is most evident in economic regulation. The perennial debate concerns whether ambiguous statutes should be construed to prohibit business conduct that, while not altruistic, has previously been considered lawful. Competing canons of construction lead in opposite directions on this question, and the Supreme Court has vacillated depending on its underlying sense of economic right and wrong.

From the founding of the republic until the New Deal, the Supreme Court favored economic freedom and, as a result, generally invoked restrictive canons of construction in business regulation cases. From the New Deal through the early 1970's, the Court emphasized economic equity and leaned toward expansive canons of construction. Today the general trend in business regulation cases is away from expansive New Deal canons and a philosophy of economic equity back to traditional restrictive canons and a philosophy of economic freedom. Therefore, study of the past may provide a vision of the future.

B. The Common Law Ideology of the Founding Fathers

The traditional restrictive canons of statutory construction that dominated American business law from the founding of the republic to the New Deal are best understood in light of the prevailing moral, economic, and political philosophy.

1. *The common law tradition*

America's early promise was opportunities, not guarantees. The dominant ideology celebrated economic freedom rather than economic equity and individual achievement rather than equal division of wealth. Equality, insofar as it was an ideal, meant equality before the law, a pledge of impartial government, a fair field, and no favoritism.

Common law principles reflected this philosophy. Its bases were the institution of private property and the enforceability of private contracts. Every man was entitled to use, trade, or dispose of his property as he desired, as long as he did not infringe upon the equal rights of others. As the Supreme Court stated: because of the "absolute power which a man possesses over his

own property . . . he may make any disposition of it which does not interfere with the existing rights of others."[9]

By the seventeenth century the common law had become the fighting faith of Englishmen. When Charles I tried to abridge it, he was beheaded. When James II tried to abrogate it, he was deposed. John Locke wrote that an Englishman's common law rights to life, liberty, and property were natural rights, ordained by God, which government was created to protect, not to infringe.

These concepts were part of the American heritage long before the founding of the republic. To attract settlers to the New World, England promised its colonists common law liberties. People came to America, drawn by this pledge of freedom and by the assurance that the fruits of their labors would be theirs to use and enjoy.

2. *Economic views of the founding fathers*

When England reneged on this promise of liberty, there was a revolution based on the "self-evident" truth that sovereign power could not abridge an individual's inalienable rights to life, liberty, and the pursuit of happiness. In his first inaugural address, Thomas Jefferson explained the practical implications of this theory of government:

> [A] wise and frugal government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned.[10]

Thomas Jefferson's views were not unique.[11] Alexander Hamilton used similar economic arguments to justify protecting private property and enforcing private contracts. For example, in a 1794 speech, which may well have been written by Hamilton,[12] William Smith explained that America should repay debts to British merchants contracted before the revolution: "[I]f in contempt of the Law of Nations we seize on private debts, we

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9. Sexton v. Wheaton, 21 U.S. (8 Wheat.) 229, 242 (1823). *See also* United States Rubber Co. v. American Oak Leather Co., 181 U.S. 434, 448 (1901) ("The common law recognizes in every man the right to dispose of his property as he pleases.")

10. 9 THE WORKS OF THOMAS JEFFERSON 197 (P. Ford ed. 1905).

11. For a discussion of John Adams' views on the importance of private property, see C. BEARD, ECONOMIC ORIGINS OF JEFFERSONIAN DEMOCRACY 304-11 (1915).

12. *Id.* at 276.

shall forever forfeit all credit; no trust can be reposed in our citizens, and no faith in our Government."[13] This loss of credit would have been disastrous to America: "*The truth is, that credit, though liable to abuse, is the substitute for capital in all trades,* and that it services to foster them, and increase the mass of industry, though the slothful and extravagant suffer by it. In a young country, like ours, it is an essential nutriment."[14]

Hamilton also saw property rights as necessary incentives for productivity, investment, and improvement. He reasoned that "a man will be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure by which he holds it."[15] Thus, one is likely to be "less attached to what he holds by a monetary or uncertain title, than to what he enjoys by a durable or certain title; and, of course, will be willing to risk more for the sake of the one than for the sake of the other."[16]

For James Madison, the father of the Constitution, the philosophy of economic freedom was a given. He assumed that every man had a natural property right to use resources to his best advantage as long as he did not infringe upon the correlative rights of others. To take away this freedom would be unthinkable. Economic liberty was as essential to a free and productive society as air was to life.

Madison also recognized that the exercise of liberty would inevitably lead to inequality since people naturally have different and unequal facilities. He further noted that inequality in the distribution of wealth would cause popular factions to demand "abolition of debts . . . equal division of property or . . . other improper [and] wicked project[s]."[17] Such projects should be thwarted since the first object of government was protection of "different unequal facilities of acquiring property."[18]

3. *Economic theory underlying the Constitution*

Madison's goals and concerns were shared by other constitutional framers.[19] John Marshall wrote that under the Articles

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13. 4 ANNALS OF CONGRESS 554 (1794).
14. *Id.* at 191 (emphasis added); *see also* C. BEARD, *supra* note 11, at 286.
15. THE FEDERALIST, *supra* note 1, No. 71, at 431 (A. Hamilton).
16. *Id.*
17. *Id.* No. 10, at 84 (J. Madison).
18. *Id.* at 78.
19. *See* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1936).

of Confederation legislative interference with private contracts had led to "a general discontent with the course of trade."[20] In *Ogden v. Saunders,* the Chief Justice explained:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith.[21]

In Marshall's view, two parties emerged from this crisis, each with different views regarding property rights and the sanctity of contracts. "[O]ne party struggled with unabated zeal for the exact observance of public and private engagements." Those belonging to this group viewed contracts as "a sacred pledge, the violation of which was equally forbidden by the principles of moral justice, and of sound policy." The distresses of individuals were "to be alleviated only by industry and frugality, not by a relaxation of laws or by a sacrifice of the rights of others."[22] The second party, "marked out for themselves a more indulgent course. Viewing with extreme tenderness the case of the debtor, their efforts were unceasingly directed to his relief. To exact a faithful compliance with contracts was, in their opinion, a harsh measure which the people would not bear."[23] The Constitution represented the triumph of the first group—those who believed that government should protect liberty and property.

4. Constitutional protection of common law rights

This philosophy appears most clearly in the constitutional prohibitions against state laws creating paper money or otherwise impairing the obligation of contracts.[24] In *The Federalist*

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20. 4 J. MARSHALL, THE LIFE OF GEORGE WASHINGTON 186 (1926 ed. Fredericksburg, Va.) (1st ed. Philadelphia 1804-1807).

21. 25 U.S. (12 Wheat.) 213, 354-55 (1827).

22. 4 J. MARSHALL, *supra* note 20, at 193.

23. *Id.* at 194.

24. C. BEARD, *supra* note 19, at 179 ("Contracts are to be safe, and whoever engages in a financial operation, public or private, may know that state legislatures cannot de-

Number 44 James Madison set forth reasons for the two prohibitions: the prohibition against state-created paper money was justified because of the "loss which America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government";[25] the contract clause provided an additional "bulwark in favor of personal security and private rights" which should "inspire a general prudence and industry, and give a regular course to the business of society."[26]

These same concerns indirectly influenced both the creation of a federal system and the separation of powers within the federal government. Division of authority among different institutions—each with their own separate membership, constituency, mode of selection, and term of office—was intended to forestall any faction achieving a monopoly of power that it could use to despoil the liberty and property of others.[27]

5. Role of independent judiciary.

The idea of protection of common law rights also animated creation of an independent federal judiciary. As Alexander Hamilton explained in *The Federalist* Number 78, federal judges were given life tenure so they could stand as independent bulwarks of liberty and property:

> In a monarchy [an independent judiciary] is an excellent barrier to the despotism of the prince; in a republic it is no less an excellent barrier to the encroachments and oppressions of the representative body. . . . If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that indepen-

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stroy overnight the rules by which the game is played.").

25. THE FEDERALIST, *supra* note 1, No. 44, at 281 (J. Madison).

26. *Id.* at 282-83.

27. In support of this system, Thomas Jefferson explained:

> An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others.

Id. No. 48, at 311 (J. Madison) (quoting Jefferson, *Notes on the State of Virginia*).

> dent spirit in the judges which must be essential to the faithful performance of so arduous a duty.[28]

Hamilton then argued that an independent judiciary would not only invalidate unconstitutional statutes but also limit application of special interest legislation:

> But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.[29]

In other words, federal judges were to protect common law liberty and property by striking down laws that transgressed constitutional limits and hy narrowly construing unjust, partial, or special interest legislation that injured the private rights of particular citizen classes.

C. The Supreme Court's Common Law Ideology

For many years the federal judiciary discharged its function precisely as Hamilton envisioned. Constitutional protections of common law liberty and property were broadly construed and strictly enforced. Special interest laws that abridged private rights of particular citizen classes were, when not invalidated altogether, strictly construed so as to mitigate their severity and confine their operation. Of the decisions holding provisions constitutionally invalid or narrowly interpreting statutory language, the constitutional decisions protecting common law liberty and property are the most famous and most revealing of the Court's values.

1. Inviolability of contracts

The sanctity of contracts was deemed to be of paramount importance. For example, in *Dartmouth College v. Woodward,* the Court held that state laws impairing the obligation of contracts were justly condemned by the Constitution because they "weakened the confidence of man in man, and embarrassed all

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28. THE FEDERALIST, *supra* note 1, No. 78, at 470 (A. Hamilton).
29. *Id.*

transactions between individuals, by dispensing with a faithful performance of engagements."[30] Consequently, the principle of "inviolability of contracts . . . was to be protected in whatsoever form it might be assailed."[31] Sixty years later, the Court held:

> There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well-ordered society, and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed.[32]

2. Freedom of contract

With somewhat less textual support, the Supreme Court interpreted the Constitution as prohibiting unreasonable legislative interference with the right to contract. For instance, statutes granting monopolies or otherwise restricting the right to work were considered constitutionally suspect.[33] Such laws abridge the inalienable "right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment."[34] "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable."[35]

In 1932 in *New State Ice Co. v. Liebmann*,[36] the Court applied the freedom of contract doctrine in striking down an Oklahoma statute requiring ice manufacturers to obtain certificates of convenience and necessity before commencing opera-

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30. 17 U.S. (4 Wheat.) 518, 628 (1819).

31. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 200 (1819).

32. Murray v. Charleston, 96 U.S. 432, 448-49 (1877).

33. Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746, 755-56 (1883) (Field, J., concurring). Justice Field in a concurring opinion reasoned that such statutes "destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities."

34. *Id.* at 757.

35. *Id.* (quoting A. SMITH, WEALTH OF NATIONS 121-22 (Modern Library ed. 1937)).

36. 285 U.S. 262 (1932).

tions. The Court reasoned that "the practical tendency of the restriction . . . is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public."[37] The Court also held that it was no defense to say that the law was a regulatory experiment: "the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection."[38]

The Court also opposed government attempts to prescribe the terms of private agreements or otherwise interfere with the freedom to contract.[39] In 1908 the Court declared:

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.[40]

As late as 1932, the Court reaffirmed that "freedom of contract is the general rule and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."[41]

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37. *Id.* at 278-79.

38. *Id.* at 280.

39. *See, e.g.*, Hunt v. Rhodes, 26 U.S. (1 Pet.) 1, 14 (1828):

> Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences.

40. Adair v. United States, 208 U.S. 161, 174-75 (1908); *see also* Adkins v. Children's Hosp., 261 U.S. 525, 545 (1923):

> [T]he right to contract about one's affairs is a part of the liberty of the individual protected by [the due process] clause. . . . Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.

41. Advance-Rumely Thresher Co. v. Jackson, 287 U.S. 283, 288 (1932).

II. Traditional Rules of Statutory Construction

In constitutional cases the Supreme Court's promotion of common law values was constrained by considerations of federalism, separation of powers, and judicial restraint. These constraints were largely absent, however, in cases interpreting ambiguous statutes. In such cases, the Court gave freer rein to its notions of sound regulatory policy. Sound regulatory policy, according to the Court, was embodied in the rules of the common law.[42]

A. Jurisprudential Foundations

Indeed, the Supreme Court's promotion of common law values in statutory construction required no judicial activism; the Court's basic jurisprudential doctrines presumed reliance on common law doctrines. For example, the Supreme Court believed that the common law and principles of equity formed the backdrop for federal economic regulation. Therefore, if congressional intent concerning a statutory provision was obscure, the Court naturally held that preexisting rules governed.[43] For example, in *United States v. Sanges*, the Court stated: "This statute, like all acts of Congress, and even the Constitution itself, is to be read in light of the common law, from which our system of jurisprudence is derived."[44] In *United States v. Detroit Timber and Lumber Co.*, the Court noted: "The principles of equity exist independently of and anterior to all Congressional legislation . . . . [W]e must bear in mind the general principles of equity and determine rights upon those principles except as they are limited by special statutory provisions."[45] Thus the common law and principles of equity provided the foundation for statutory construction.

The common law also provided American courts with restrictive canons of construction. Before the revolution, English courts adopted restrictive canons of statutory construction that preserved the common law. In *The Federalist* Number 83 Alex-

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42. "[W]e know of no surer guides to the principles of justice, than the rules of the common law." United States v. Arredondo, 31 U.S. (6 Pet.) 691, 716 (1832).

43. *See, e.g.*, United States v. Carll, 105 U.S. 611 (1881); Rice v. Railroad Co., 66 (1 Black) 358, 374-75 (1861); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 545 (1837).

44. 144 U.S. 310, 311 (1892).

45. 200 U.S. 321, 339 (1906).

ander Hamilton noted two such canons: (1) "A specification of particulars is an exclusion of generals," and (2) "The expression of one thing is the exclusion of another."[46] American courts adopted these and other English canons of construction along with most of the common law. In *Charles River Bridge v. Warren Bridge*, the Supreme Court gave this explanation for using English rules of construction in construing grants of monopoly:

> Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? . . . Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle; and for introducing a new and adverse rule of construction . . . while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception?[47]

B. General Principles

The Supreme Court, from the founding of the republic until the New Deal, followed restrictive canons of construction designed to protect common law freedoms from legislative interference. In 1817 the Court declared that "[w]hatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object."[48] Similarly, the Court has acted to protect the security of titles and other completed transactions.[49]

C. The Common Law Ought Not to Be Deemed Repealed

Whenever possible the Supreme Court interpreted regulatory statutes as declarations of common law rather than as at-

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46. THE FEDERALIST, *supra* note 1, No. 83, at 496 (A. Hamilton).

47. 36 U.S. (11 Pet.) 420, 545 (1837).

48. Rutherford v. Greene's Heirs, 15 U.S. (2 Wheat.) 196, 203 (1817).

49. In 1852 the Court stated, concerning property rights, that courts should be "astute in avoiding a construction which may be productive of much litigation and insecurity of titles." Doolittle's Lessee v. Bryan, 55 U.S. (14 Hos.) 563, 567 (1852). In 1898 the Court held that "when the good faith of all the parties is unquestionable the courts will lean to that construction of the statute which will uphold the transaction as consummated." Provident Life & Trust Co. v. Mercer County, 170 U.S. 593, 600 (1898).

tempts to alter common law. In 1812 the Court declared that "[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose."[50] In 1879 it asserted that "[n]o statute is to be construed as altering the common law, farther than its words impart. It is not to be construed as making any innovation upon the common law which it does not fairly express."[51] Furthermore, "a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required."[52] Finally,

> Where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any alteration in the common law, beyond what is expressed in the statute.[53]

United States v. Martin[54] exemplifies this attitude. The Court held therein that a federal statute prescribing eight hours as a "day's work" for federal employees did not bar the government from requiring some of its employees to work a twelve-hour day. The statute, the Court reasoned, was simply a general statement of policy. Congress could not have intended to mandate an eight-hour day for all federal employees or require payment of overtime to those who worked longer. Although in medieval times the law imposed extensive restrictions on the terms and conditions of employment, the Court argued that in modern times,

> [a] different theory is now almost universally adopted. Principals, so far as the law can give the power, are entitled to employ as many workmen, and of whatever degree of skill, and at whatever price, they think fit, and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested.[55]

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50. Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1812); *see also* J. KENT, COMMENTARIES ON AMERICAN LAW 433 (1826) (no presumption "that the legislature intended to make any innovation upon the common law, further than the case absolutely required").

51. Shaw v. Railroad Co., 101 U.S. 557, 565 (1879).

52. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907).

53. Ross v. Jones, 89 U.S. (22 Wall.) 576, 592 (1874).

54. 94 U.S. 400 (1876).

55. *Id.* at 403.

In *Brown v. Swann*, the Supreme Court narrowly construed a law that appeared to impair the creditor's equitable common law right to receive the principal and lawful interest on a usurious contract. The Court reasoned:

> Unless a statute then, in so many words, or by an inference which does not admit of a doubt, commands the courts . . . to give relief from usurious contracts . . . without requiring the borrower to pay principal and interest; the law should not be so construed. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.[56]

D. Statutes in Derogation of the Common Law Should Be Strictly Construed

If a statute clearly altered the common law, the Supreme Court would not extend it any further than its terms required. The Court held that "[s]tatutes passed in derogation of the common law . . . should be construed strictly."[57]

The Supreme Court consistently rejected the notion that regulatory statutes in abrogation of the common law could be expanded beyond their plain meaning in order to effectuate their alleged purposes.[58] In 1820 the Court stated:

> To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because

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56. 35 U.S. (10 Pet.) 497, 503 (1836).

57. Ross v. Jones, 89 U.S. (22 Wall.) 576, 591 (1874). The New York Court of Appeals approached statutory construction in a similar fashion: "The citizen is entitled to an unequivocal warning before conduct on his part, which is not *malum in se*, can be made the occasion of a deprivation of his liberty or property." People v. Phyfe, 136 N.Y. 554, 559, 32 N.E. 978, 979 (1893).

58. Thus the Court used nineteenth century canons of construction to preserve judge made common law from legislative interference. *See* J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION iii (1891) ("The natural tendency and growth of the law is towards system and towards certainty, towards modes of operation at once practical and just, by the process of its intelligent judicial administration; but this process is impaired by overwork and legislative interference."), *quoted in* SEC v. C.M. Joiner Leasing Corp. 320 U.S. 344, 350 n.7 (1943); *see also* Posner, *supra* note 8, at 821 (rule of strict construction "was used in nineteenth-century England to emasculate social welfare legislation"); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 14 (1936) (atatutes are "in the lew but not of it").

> it is of equal atrocity, or of kindred character, with those which are enumerated.[59]

In 1875 the Court espoused the doctrine that "[c]ourts cannot supply omissions in legislation, nor afford relief because they are supposed to exist."[60]

Thus, courts should not repeal common law rights by implication or subordinate normal freedoms to vague legislative intent. In *Merritt v. Welsh,* for example, the Court explained: "Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought, first, from the words they have used. If these are clear, we need go no further . . . ."[61] The Court continued:

> If the test adopted fails to effect the desired object, the inconvenience, or loss to the treasury, need only be temporary: it can be changed at any moment. And it is better to submit to a temporary inconvenience than to set the laws all afloat by laying down a canon of construction which leaves the plain words, and seeks to spell out, or guess at, the supposed intent of the legislature, contrary or supplementary to that which is clearly embodied in the words it has used.[62]

Therefore, in construing ambiguous or vague statutory language, the Court refused to diminish or abrogate common law principles; rather, it would strictly follow the literal meaning of the words in the statute.[63]

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59. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 96 (1820).

60. United States v. Union Pac. R.R., 91 U.S. 72, 85 (1875).

61. 104 U.S. 694, 702 (1881).

62. *Id.* at 702-03; *see also* Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 37 (1895) (citations omitted):

> [W]hat is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes. Where the language of the act is explicit . . . there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. . . . It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.

63. One example of this approach in the taxing context is Crooks v. Harrelson, 282 U.S. 55, 61 (1930). The Court reaffirmed that "in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used." *Id.* at 61 (quoting United States v. Merriam, 263 U.S. 179, 187-88 (1923)). The Court then cited with approval the English rule that "if the Crown, seeking to recover the tax, cannot bring the subject

E. Nonliteral Exceptions to Regulatory Statutes

This plain meaning doctrine limited the scope of regulatory statutes and preserved common law freedoms. However, the doctrine did not prevent creation of nonliteral exceptions. To the contrary, the Supreme Court believed a court should restrain a statute's "operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."[64]

A leading example showing judicial restriction of a statute's operation was *Church of the Holy Trinity v. United States.* There, an American church hired a minister from England to serve as its pastor despite a federal law which declared it unlawful for "any person, company, partnership, or corporation," to encourage the migration of a foreigner into the United States under a previous contract for the foreigner "to perform labor or service of any kind in the United States"[65] Despite the statute's clear language, the Supreme Court held that the church could not be prosecuted under it. The Court said that Congress could not have "intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[66] The Court noted that the statute, whatever its general language, was aimed at common laborers from China and therefore should not be held applicable to the Holy Trinity church:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.[67]

The Court followed similar reasoning in interpreting the

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within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." *Id.* (citations omitted); *see also* Holmes, *The Theory of Legal Interpretation,* 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

64. Petri v. Commercial Nat'l Bank, 142 U.S. 644, 650 (1892).

65. 143 U.S. 457, 458 (1892) (quoting Act of Feb. 26, 1885, ch. 164, 23 Stat. 825)).

66. *Id.* at 459.

67. *Id.* at 461 (citation omitted).

Sherman Act in *Standard Oil Co. v. United States*.[68] By its terms, section 1 of the Sherman Act declares unlawful "[e]very contract, combination . . . or conspiracy in restraint of trade."[69] But since every contract binds or restrains trade, the Supreme Court adopted a nonliteral construction of the statute, reading it to prohibit only unreasonable restraints. To justify this interpretation, the Supreme Court resorted to common law principles:

> [W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.
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> . . . .
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> . . . [I]t follows that . . . the standard of reason which had been applied at the common law . . . was intended."[70]

III. The New Deal

The common law tradition of economic freedom and individual responsibility has always been balanced by a countervailing tradition of economic equity—a sense of compassion for society's victims, an ethic of charity and mercy, and a belief in community and brotherhood. As Alexander Hamilton observed in *The Federalist* Number 80:

> There is hardly a subject of litigation between individuals which may not involve those ingredients of *fraud, accident, trust,* or *hardship,* which would render the matter an object of equitable rather than legal jurisdiction . . . . It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains: these are contracts in which, though there may have been no direct fraud or deceit sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties which a court of equity would not tolerate.[71]

A. The Attack on Laissez-Faire

For many years, the equitable tradition was subordinate to the tradition of economic freedom. However, in the late nineteenth and early twentieth centuries, notions of economic equity

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68. 221 U.S. 1, 59 (1911).
69. *Id.* (quoting the Sherman Act, 15 U.S.C. § 1 (1982)).
70. *Id.* at 59-60.
71. The Federalist, *supra* note 1, No. 80, at 480 (A. Hamilton).

found new life as the rise of big business transformed America. Large corporations, of unprecedented power and size, played dominant roles in more and more of the nation's economic relationships. Many workers, farmers, small businessmen, and reformers were aggrieved by the change. They argued that big business was abusing its power to exploit workers, dictate terms of contracts, and ruin competitors. These opponents of big business felt that government should step in and redress the imbalance. Traditional laissez-faire notions should not stay the government's hand. It was argued that laissez-faire theories were developed for a world of farmers and merchants, and had no application in a modern industrial society.

Legal reformers attacked the Supreme Court's defense of laissez-faire principles as being illegitimate "judicial attempts to force Benthamite conceptions of freedom of contract and common law conceptions of individualism upon the public of today."[72] For example, Roscoe Pound complained of

> two ways in which the courts impede or thwart social legislation demanded by the industrial conditions of today. The first is narrow and illiberal construction of constitutional provisions, state and federal. . . . The second is a narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language.[73]

Pound argued that this judicial attitude was entirely wrong and that instead courts should receive legislative innovation

> fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same subject; and so reason from it by analogy in preference to them.[74]

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72. Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 384 (1908) [hereinafter Pound, *Common Law*]. Pound criticized the Court's strict construction as being "spurious interpretation" and "judicial legislation":

> [T]he object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process. . . . Spurious interpretation is an anachronism in an age of legislation.

Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382-83 (1907).

73. Pound, *Common Law*, *supra* note 72, at 385.

74. *Id.*

B. The Coming of the New Deal

At first economic equity theories had only sporadic success. While business regulation became more common, laissez-faire philosophy prevailed, and common law remained the dominant regime. Then the Great Depression shook America's faith in capitalism, as the mighty engine of prosperity suddenly collapsed. Rugged individualism became known as ragged individualism. Freedom of contract and the rights of property, once shibboleths, became dirty words. The free market, once perceived as natural and beneficial, fell into disrepute.[75] During that period Justice Brandeis concluded: "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."[76]

The inauguration of Franklin Roosevelt in 1933 brought on the new order Justice Brandeis had contemplated. The federal government stepped in to revive the economy, regulate competition, control big business, correct perceived inequities in bargaining power, and generally provide a new deal for "the forgotten man at the bottom of the economic pyramid."[77]

C. Ideals of the New Deal Era

The Supreme Court first resisted the regulatory trend. But in the mid-1930's the Court acceded to it. A few years later—as Franklin Roosevelt's appointments filled the bench and the new

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75. The mood of crisis was well captured in Justice Brandeis's dissenting opinion in *New State Ice Co. v. Liebmann*, in which he wrote:

> The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system. Economists are searching for causes of this disorder and are reexamining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. . . . All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control.

285 U.S. 262, 306-08 (1932) (Brandeis, J., dissenting).

76. *Id.* at 311.

77. S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 948 (1965).

regulatory state ended the depression and won the war—the Supreme Court became an enthusiastic proponent of regulation.

1. Protecting the weak and gullible

New values quickly replaced old ones. The old ideal of freedom of contract was subordinated to the idea that government should intervene to correct imbalances in bargaining power and ability. The Supreme Court approved such an intervention in *West Coast Hotel Co. v. Parrish* when it upheld a statute setting a minimum wage for hotel maids:

> The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers.[78]

Consumers and investors were also deemed unable to fend for themselves in a free market and therefore entitled to protection from "unscrupulous" business practices. Thus, for example, the Court characterized the "selling of selected goods at a loss in order to lure customers into the store," as a "destructive means of competition" that "plays on the gullibility of customers by leading them to expect what generally is not true, namely, that a store which offers such an amazing bargain is full of other such bargains."[79]

Similarly, states could "protect" debtors by giving lawyers a monopoly over debt adjustment.[80] The old common law right to work became subordinate to the state's " 'power to legislate against what are found to be injurious practices in their internal commercial and business affairs.' . . . Legislative bodies have broad scope to experiment with economic problems . . . ."[81]

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78. 300 U.S. 379, 398-99 (1937); *see also* United States v. Silk, 331 U.S. 704, 713 (1947) ("The aim of the [National Labor Relations] Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions.").

79. Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, 360 U.S. 334, 340 (1959); *see also* Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944) ("The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies.").

80. Ferguson v. Skrupa, 372 U.S. 726 (1963).

81. *Id.* at 730 (quoting Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 539 (1949)).

2. Fair competition

The old idea of free competition gave way to the notion that business opportunities should be equitably shared among existing firms. Thus, freedom of trade disappeared as a constitutional right since free trade could drive weak firms out of business. In *Nebbia v. New York,* the Supreme Court approved a statute designed to prevent "ruinous competition" among dairy producers through the establishment of minimum milk prices. The Court explained that "[t]he Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases."[82] Legislatures may restrain competition if they conclude "that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests . . . or portend the destruction of the industry itself." The Court held that the "Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people."[83]

The ideal of equitable competition also led the Supreme Court to interpret antitrust laws to condemn mergers enhancing the competitive strength of dominant firms. Such mergers were contrary to the public interest because they created inequality of economic power and threatened the existence of weaker firms.[84]

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82. 291 U.S. 502, 527-28 (1934).

83. *Id.* at 538-39. For similar approval of legislative intervention in the form of regulation, see Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935). The Court held that states could prohibit advertising by dentists because "the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous." *Id.* at 612.

84. *See, e.g.,* United States v. Continental Can Co., 378 U.S. 441, 464 (1964) (Antitrust laws condemn merger "when a dominant firm in a line of commerce in which market power is already concentrated among a few firms makes an acquisition which enhances its market power and the vigor and effectiveness of its own competitive effort."); United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 669 (1964) (Merger condemned because it would hurt competitors of new firm; "the 'image' of 'bigness' is a powerful attraction to customers . . . [and] the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there."); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963) ("This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects.") (citations omitted).

3. Private property as a public trust: expanded state power over contracts

The new ethic of sharing also condemned selfish insistence upon property rights or the enforceability of contracts. The interest of the community became paramount. In *Veix v. Sixth Ward Building & Loan Association,* for example, the Supreme Court held that the state could prohibit a member of a building and loan association from withdrawing his investment even though his investment contract, which antedated the statute, gave him the right of withdrawal. The Court reasoned that all contracts are made subject to the state's paramount authority "to safeguard the vital interests of its people. Such authority is not limited to health, morals and safety. It extends to economic needs as well."[85]

The *Veix* Court acknowledged that cases recognizing state authority arose out of the depression but held that the end of the depression did not terminate the state's power:

> The emergency of the depression may have caused the 1932 legislation, but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue.[86]

In this new state of permanent emergency the traditional constitutional prohibition against state laws impairing the obligation of contracts faded almost into oblivion. For example, in *City of El Paso v. Simmons,* the Court explained that

> "the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula." . . . [T]he "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." The State has the "sovereign right . . . to protect the . . . general welfare of the people . . . . Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' "[87]

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85. 310 U.S. 32, 38-39 (1940) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934)).

86. *Id.* at 39.

87. 379 U.S. 497, 508-09 (1965) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428, 437 (1934); East New York Savings Bank v. Hahn, 326 U.S. 230, 232-33 (1945)) (citations omitted).

D. Statutory Construction in the Era of the New Deal

The Supreme Court's new attitude toward free markets and economic regulation naturally affected its interpretation of regulatory statutes. Old canons of statutory construction, designed to limit regulation and preserve the common law, were replaced by new canons of construction designed to expand regulation and constrict the common law.

1. Implied repeal of the common law

Thus, a presumption against repeal of the common law was replaced by a presumption promoting repeal of the common law. The common law, the Court now reasoned, was nothing but state law and "we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law."[88]

NLRB v. Hearst Publications, Inc.[89] exemplified the Court's new attitude. In that case the Court stated: "[T]o import wholesale the traditional common-law conceptions . . . hardly would be consistent with the statute's broad terms and purposes."[90] As a result of this approach, the Court held that "news boys" should be considered employees for purposes of the National Labor Relations Act even though they were "independent contractors" at common law:

> Inequality of bargaining power in controversies over wages, hours and working conditions may as well characterize the status of one group as of the other. The former, when acting alone, may be as "helpless in dealing with an employer," as "dependent . . . on his daily wage" and as "unable to leave the employ and to resist arbitrary and unfair treatment" as the latter. . . . "Union[s] . . . [may be] essential to give . . . [each group an] opportunity to deal on equality with their employer."[91]

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88. Jerome v. United States, 318 U.S. 101, 104 (1943).

89. 322 U.S. 111 (1944).

90. *Id.* at 125.

91. *Id.* at 127 (quoting American Steel Foundaries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921)).

2. Liberal construction

The old canon that statutes in derogation of the common law ought to be strictly construed was replaced: regulatory statutes ought to be liberally construed in accordance with their broad remedial purposes.

For example, in *SEC v. C.M. Joiner Leasing Corp.*, the Supreme Court held that oil leases were securities within the meaning of the Securities Act because "[t]he trading in these documents had all the evils inherent in the securities transactions which it was the aim of the Securities Act to end."[92] In applying this doctrine, the Court specifically rejected the argument—based on traditional canons of construction—that oil leases were not securities because they were not among the instruments enumerated in the act's definition of a security. The Court reasoned: "Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass." Statutory rules, the Court continued, have long been

> subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.[93]

The new rules of liberal construction soon dominated the field. Statute after statute fell. Thus, for example, Marine legislation was construed "to make effective its design to change the general maritime law so as to improve the lot of seamen."[94] The Longshoremen's and Harbor Workers' Compensation Act was "liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."[95] Exemptions to the Fair Labor Standards Act were "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit."[96]

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92. 320 U.S. 344, 349 (1943).
93. *Id.* at 350-51.
94. Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).
95. Voris v. Eikel, 346 U.S. 328, 333 (1953).
96. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960). There are many more

3. Broad, remedial purpose controls over narrower words

The Court's new canons of statutory construction quickly overpowered the old plain meaning doctrine. The key to statutory interpretation became the broad remedial purpose of the law as set forth in its legislative history.[97] Therefore, courts were not constrained by apparent plain meaning in giving effect to a statute's liberal purpose. "[W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination." ' "[98]

4. Deference to administrative expansion

Another canon that served to expand the reach of regulatory statutes was a rule of deference to administrative construction.[99] This doctrine enabled regulatory agencies to resolve statutory ambiguities in favor of greater regulation. For example, in *Griggs v. Duke Power Co.*, the Court adopted the EEOC's inter-

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examples from this period of liberal statutory construction. Amendments to the Transportation Act of 1920 authorizing ICC-supervised "pooling arrangements . . . [for] the prevention of destructive competitive practices. . . . [were] given liberal construction in aid of the purposes Congress had in mind." Escanaba & L.S.R.R. v. United States, 303 U.S. 315, 320 (1938). The securities laws should be broadly construed "[s]ince practices 'constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers' in the regulatory agency 'have been found practically essential' . . . . Section 10(b) [of the Securities Exchange Act of 1934] must be read flexibly, not technically and restrictively." Superintendent of Ins. v. Benkers Life & Casualty Co., 404 U.S. 6, 12, (1971) (quoting H.R. REP. No. 1383, 73d Cong., 2d Sess. 6 (1934)). *See also* Black v. Magnolia Liquor Co., 355 U.S. 24, 26 (1957) ("[W]e deal here with remedial legislation whose language should be given hospitable scope.").

97. During the first part of the New Deal era, commentators challenged and eventually repudiated the doctrine that statutes were limited by their plain words. *See generally* Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 393 (1947) (praising new "freedom from words and canons of interpretation"); Frankfurter, *supra* note 2; Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935). *But see* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (words must have a "core of settled meaning"); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 667 (1958) ("Can it be possible that the positivistic philosophy demands that we abandon a view of interpretation which sees as its central concern, not words, but purpose and structure?").

98. Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) (quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940)) (decision for government in tax case).

99. *See* Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.").

pretation of Title VII and held that "discrimination" included not only intentional discrimination but also "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, . . . which [operate] to exclude Negroes [and] cannot be shown to be related to job performance."[100] In adopting the EEOC's expansive definition of discrimination, the Court noted that "[t]he administrative interpretation of the Act by the enforcing agency is entitled to great deference."[101]

5. New Deal canons in practice

The combined impact of these canons of statutory construction was expansion of regulation and diminishing of common law.[102] For example, in *Vermilya-Brown Co. v. Connell,*[103] the Court held that a military base in Bermuda was a "possession" of the United States for purposes of the Fair Labor Standards Act and therefore was subject to the minimum wage law. The Court acknowledged that Bermuda was a British possession and that the military base was established there as part of the Allied effort in World War II. Nevertheless, the Court reasoned that the word "possession" could include a U.S. base on foreign soil and stated that "[s]uch a construction seems to us to carry out the remedial enactment in accord with the purpose of Congress."[104]

In *Sinkler v. Missouri Pacific Railroad,*[105] the Court held that independent contractors were "agents" of the employer within the meaning of section 1 of the Federal Employers' Liability Act, and that employers were therefore responsible for injuries caused by the contractors. The Court reasoned that "in interpreting the FELA, we need not depend upon common-law principles of liability." The Court concluded that the "broad purpose" of the FELA "controls our decision in determining whether the . . . [independent contractors] were 'agents' of the

100. 401 U.S. 424, 430-31 (1971).

101. *Id.* at 433-34; *see also* Canada Packers v. Atchison, T. & S.F.R.R., 385 U.S. 182, 184 (1966) (Douglas, J., dissenting) (ICC may order reparations for Canadian portion of trip even though statute applies to foreign commerce "only insofar as such transportation takes place within the United States").

102. The transition from traditional canons to New Deal canons was both gradual and uneven in the lower courts. As a consequence it is easy to find statements during this period from both sets of canons. *See* Llewellyn, *supra* note 2.

103. 335 U.S. 377 (1948).

104. *Id.* at 390.

105. 356 U.S. 326 (1958).

respondent within the meaning of the section. Plainly, an accommodating scope must be given to the word 'agents' to give vitality to the standard governing the liability of carriers to their workers injured on the job.[106]

In *United States v. Shirey,* a person who allegedly offered to donate $1,000 to the Republican party if a congressman would help him secure a postmastership was indicted for violation of a federal law that made it illegal to offer money to "any person, firm or corporation" in consideration of a promise to use influence to procure an appointive office.[107] The district court had dismissed the indictment because the Republican party was not a person, firm, or corporation. The Supreme Court reversed, holding that although the Republican party was "not a legal entity,"[108] it still could be considered a person for purposes of the law. The Court also said:

> Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." . . . Statutory meaning, it is so to be remembered, is more to be felt than demonstrated . . . "the art of interpretation is 'the art of proliferating a purpose."[109]

A final example of nonliteral expansiveness is *Perry v. Commerce Loan Co.*[110] In *Perry* a bankruptcy referee denied confirmation of a wage-earner extension plan because the debtor had received a discharge of an earlier bankruptcy within the prior six years. In reaching this decision the referee relied on two sections

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106. *Id.* at 329-31.

107. 359 U.S. 255, 255-56 (1959) (quoting 18 U.S.C. § 210 (1982) (formerly 18 U.S.C. § 214).

108. *Id.* at 257.

109. *Id.* at 260-61 (quoting United States v. Whitridge, 197 U.S. 135, 143 (1905); Brooklyn Nat'l Corp. v. Commissioner of Internal Revenue, 157 F.2d 450, 451 (2d Cir. 1946)) (citations omitted).

110. 383 U.S. 392 (1966). The activist expansion of regulatory statutes became more frank by the 1960's. *See, e.g.,* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392 (1970) ("[A] statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical."); H. HART & A. SACKS, THE LEGAL PROCESS 1410 (10th ed. 1958) ("The function of a court in interpreting a statute is to decide what meaning ought to be given to the directions of the statute in the respects relevant to the case before it . . . . [This] does not say that the court's function is to ascertain the intention of the legislature without respect to the matter in issue.").

of the bankruptcy law: one section precluded confirmation of wage-earner extension plans to debtors "guilty of any acts . . . which would be a bar to the discharge of the bankrupt";[111] the second section denied discharge if the bankrupt had "within six years prior to bankruptcy been granted a discharge."[112] Despite this clear statutory language, the Supreme Court reversed the decision of the referee and held that the plan should be confirmed because of a federal policy favoring wage-earner extension plans.[113]

IV. The Modern Era

A. New Deal Liberalism

The Supreme Court's enthusiasm for regulation coincided with the national mood. The regulatory state, after all, had ended the depression, saved the middle class, won the war, raised minimum standards for all, eliminated the troughs in the old business cycle, and brought America to the height of prosperity. Who could quarrel with success? And who could doubt that more would be better?

But just as the pride of the old order preceded its fall in 1929, so too did liberalism's unbounded confidence foreshadow its collapse. As liberalism reigned triumphant in the 1960's and prosperity seemed to be on a permanent plane, more and more Americans began to take economic security for granted.

In this fertile soil of public opinion, consumer advocates on the right and left planted seeds of doubt as to the value of government regulation of business transactions. Regulatory agencies, it was argued, have been captured by the industries they are supposed to regulate. Rather than helping consumers, they are used to enforce cartels, entrench the establishment, and promote the selfish interests of producers.[114]

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111. 383 U.S. at 397 (quoting The Bankruptcy Act, ch. XIII, § 656(a)(4) 52 Stat. 930, 935 (1938) (repealed 1978)).

112. *Id.* (quoting The Bankruptcy Act, ch. III, § 14(c)(5), 52 Stat. 844, 850 (1938) (repealed 1978)).

> 113. Even if a literal reading of these provisions suggested [their] application . . . to extension plans, we would have little hesitation in construing the Act to give effect to the clear policy underlying Chapter XIII. Even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.

Id. at 399-400.

114. *See, e.g.*, M. Friedman, Capitalism and Freedom (1962); R. Noll, Reforming

A variety of commentators expressed doubts about the value of government regulation. The failure of Lyndon Johnson's two wars—on poverty and in Vietnam—together with Watergate, the energy crisis, and persistent inflation in the 1970's led many people to believe that government could not do anything right. The concomitant explosion of rights, entitlements, and other nonnegotiable demands, along with one million new lawyers to enforce them, seemed to many to be fairness run amok.

At the same time, the stagflation of the 1970's and the rise of world competition reminded America of the costs of fairness and the need for productivity. This, in turn, led many to rediscover the virtues of the market in promoting efficiency and economic growth.[115] It appeared that perhaps there was something

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REGULATION (1971); PROMOTING COMPETITION IN REGULATED MARKETS (A. Phillips ed. 1975); G. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975); Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941 (1973); Stigler & Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J.L. & ECON. 1 (1962).

115. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 404 (2d ed. 1977) ("judge made rules tend to be efficiency promoting"). Considerable research supports this proposition. *See* Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 2-3 (1982) ("one important aim of such restrictions [on liability for economic loss in tort] is to achieve economic efficiency"); Jackson, *"Anticipatory Repudiation" and the Temporal Element of Contract Law: An Economic Inquiry into Contract Damages in Cases of Prospective Nonperformance*, 31 STAN. L. REV. 69, 69 (1978) (common law principle of "[c]ompensating the aggrieved party for its entire expectation loss, without overcompensating it, is an economically sound principle in that it facilitates the movement of goods and services to their highest value user"); Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 33 (1978) (privilege of nondisclosure in contract law "promotes efficiency by encouraging the deliberate search for socially useful information"); Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971) (economic model of efficient behavior by prosecutors and defendants empirically valid); Landes & Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 851 (1981) (most recent statement of "positive economic theory of tort law" is that the common law of accidents "promote[s] efficient resource allocation"); Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 128 (1977) ("[T]he rules of the judge-made law are best explained as efforts—however unwitting—to bring about efficient results."); Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 416 (1977) ("[C]ourts in gratuitous-promise cases have reached results generally congruent with the prescriptions of economic analysis."); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973) (many aspects of legal procedure and judicial administration enhance efficiency); Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977) (doctrine of impossibility in contract law is generally consistent with economically efficient behavior); Priest, *Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach*, 91 HARV. L. REV. 960, 1001 (1978) ("[C]ourts have extended Code principles beyond the letter of the Code in ways which minimize costs . . . . [and] have refused to adopt interpretations of the Code . . . which

after all to the old order's commitment to economic freedom. A wave of deregulation swept through Congress.[116] The nation elected, then overwhelmingly reelected, a president committed to free markets and to getting government off the backs of the American people.

B. The Return of Common Law Values

This same change in economic philosophy took place on the Supreme Court. The communal New Deal values of security, stability, equality, equity, and sharing gradually gave way to individualist ideals of freedom, incentives, competition, efficiency, and consumer welfare.[117] The return of individualist values revived the common law concepts through which individualist philosophy had traditionally been expressed—rights of property and freedom of contract.[118]

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increase the costs of sales transactions."); Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1347 (1981) (common law principle of allocating "responsibilities between manufacturers and different sets of consumers by standardized warranties is responsive to consumer preferences, and establishes coherent economic incentives for manufacturer and consumer investments to optimize productive services"); *see also* Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980); Cooter, Kornhauser & Lane, *Liability Rules, Limited Information, and the Role of Precedent*, 10 BELL J. ECON. 366 (1979); Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397 (1981).

116. *See, e.g.*, Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in scattered sections of 15, 26, 39 & 49 U.S.C.); Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011 (codified in scattered sections of 26, 28, 39 & 49 U.S.C.); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified in scattered sections of 11, 45 & 49 U.S.C.); Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered sections of 18 & 49 U.S.C.); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified in scattered sections of 12 & 15 U.S.C.); Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (codified at 15 U.S.C. §§ 3301-3432 (1982)); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified in scattered sections of 49 U.S.C.); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 15, 31, 45 & 49 U.S.C.).

117. *See generally* Easterbrook, *The Supreme Court, 1983 Term—Foreward: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

118. *See* C. FRIED, CONTRACT AS PROMISE 132 (1981) (common law contract rules are "the laws of freedom").

1. The rights of property

A good illustration of the reemphasis on property rights is *Kaiser Aetna v. United States.*[119] The owner of a private pond, after securing consent of the federal government, dredged a channel connecting the pond to a navigable bay. The federal government then ruled that the pond had become "navigable waters of the United States" to which the public had a right of free access. The Supreme Court disagreed and held that the government must pay just compensation if it "wishe[d] to make what was formerly Kuapa Pond into a public aquatic park."[120] The Court reasoned that "Kuapa Pond has always been considered to be private property under Hawaiian law"[121] and that "[a]n essential element of individual property is the legal right to exclude others from enjoying it."[122]

The *Kaiser Aetna* decision does not stand alone. In a series of decisions, the Court recognized that people need exclusive property rights in the fruits of their labor as an incentive to produce. In *Chiarella v. United States,*[123] and *Dirks v. SEC,*[124] for example, the Court held that people who legitimately obtain "inside" information about stocks may use it or sell it. The Court rejected the argument—based on considerations of equality and fairness—that it should be illegal for anyone to trade stock on the basis of material, nonpuhlic information obtained from a corporate insider.

> Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market. . . . It is tbe nature of this type of information, and indeed of the markets themselves, that such information cannot be made simultaneously available to all of the corporation's stockholders or the public generally.[125]

In other words, market professionals who honestly acquire inside

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119. 444 U.S. 164 (1979).

120. *Id.* at 180.

121. *Id.* at 179.

122. *Id.* at 180 n.11 (quoting Int'l News Service v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

123. 445 U.S. 222 (1980).

124. 463 U.S. 646 (1983).

125. *Id.* at 658-59.

information should be allowed to use or sell that information; otherwise, they would have no incentive to ferret it out.

Similarly, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court held that it was sometimes legitimate for manufacturers to give retailers exclusive distribution areas in order to "induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products."[126]

2. *Freedom of contract*

The Supreme Court also rediscovered "the high value the framers placed on the protection of private contracts."[127] The Court noted: "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."[128]

The Supreme Court also noted that regulations which interfere with this process curtail individual freedom, hurt consumers, and impede intelligent allocation of resources. For example, in *Bates v. State Bar*, the Supreme Court struck down a han on lawyer advertising. The Court observed: "Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange."[129] The ban on advertising by lawyers "[s]erves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced."[130]

The Court relied on similar economic arguments when it struck down a state restriction on tender offers in *Edgar v. Mite Corp.*:

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126. 433 U.S. 36, 55 (1977). The Court added, "Because of market imperfections such as the so-called 'free rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did." *Id.*; *see also* Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984) ("The purpose of copyright is to create incentives for creative effort. Even copying for non-commercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have.").

127. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978).

128. *Id.*

129. 433 U.S. 350, 376 (1977).

130. *Id.* at 377.

> The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial. Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.[131]

3. *The social costs of redistributing wealth*

The Supreme Court also rediscovered the virtue of occasionally allowing losses to remain rather than trying to reallocate them in the most equitable fashion possible. Litigation, the Court noted, is an imperfect process and can often lead to inequitable redistribution of wealth. In *Blue Chip Stamps v. Manor Drug Stores,* for example, the Court discussed policy reasons for limiting standing in securities fraud litigation: "[U]nduly expansive imposition of civil liability 'will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers.' "[132] Moreover,

> in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.[133]

The court continued by pointing out,

> [T]o the extent that [the prospect of litigation] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.[134]

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131. 457 U.S. 624, 643 (1982).

132. 421 U.S. 723, 739 (1975) (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 867 (2d Cir. 1968)).

133. *Id.* at 740.

134. *Id.* at 741.

C. *Modern Statutory Interpretation*

The Supreme Court's new attitude toward economic regulation naturally led it to construe federal regulatory statutes much more narrowly. The Court became less willing to interpret remedial statutes expansively so as to upset prior contracts or commercial transactions. For example, in *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*,[135] the Court adopted a narrow nonliteral construction of a remedial statute in order to uphold a good faith transaction.[136] The Court upheld the transfer of an easement allegedly violative of the Pueblo Lands Act of 1924 because the Pueblo Tribe's interpretation of that act would render the secretary of interior's approval meaningless and thus violate "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."[137]

In dissent, Justice Brennan, joined by Justices Marshall and Blackmun, chided the Court for ignoring federal policy against the alienation of Indian land. Such policy was designed "to insulate Indian lands from the full impact of market forces" and the "canons of construction deferring to that policy."[138]

1. *The common law ought not to be deemed repealed unless by clear and explicit statutory language*

The Court's changed attitude partially revived some traditional canons of construction. One revived canon was the presumption against implied repeal of the common law or other preexisting regulation. In *Santa Fe Industries, Inc. v. Green*,[139]

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135. 105 S. Ct. 2587 (1985).

136. In 1928, the Pueblo Indian Tribe, with the permission of the secretary of the interior, conveyed an easement for a telephone line to the telephone company. When the line was removed in 1980, the tribe sued for trespass alleging that the prior conveyance and occupancy violated the Pueblo Lands Act of 1924, which provided that Pueblo land could not be alienated except as provided by Congress and no such conveyance was valid "unless [it] be first approved by the Secretary of Interior." Pub. L. No. 68-253, § 17, 43 Stat. 636, 641-42. The tribe argued that since Congress never provided for alienation of Pueblo land, the conveyance was invalid.

137. 105 S. Ct. at 2595 (quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979)).

138. 105 S. Ct. at 2610-11 (Brennan, J., dissenting) (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 509 (1982)). In addition, Justice Brennan urged, "courts must resolve ambiguities in favor of preserving Indian rights and safeguards—a course dictated by 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' " *Id.* at 2610 n.66 (quoting Seminole Nation v. United States, 316 U.S. 286, 296 (1942)).

139. 430 U.S. 462 (1977).

for example, the Court held that the SEC Rule 10b-5 prohibition against securities fraud did not apply to an allegedly unfair Delaware short-form merger transaction used by the majority stockholder of a corporation to eliminate the minority interest. The Court reasoned that

> this extension of the federal securities laws would overlap and quite possibly interfere with state corporate law. Federal courts applying a 'federal fiduciary principle' under Rule 10b-5 could be expected to depart from state fiduciary standards at least to the extent necessary to ensure uniformity within the federal system. *Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities,* particularly where established state policies of corporation regulation would be overriden.[140]

The Court reached a similar conclusion in *Schreiber v. Burlington Northern, Inc.*,[141] although the statutory language in that case appeared more expansive. The Williams Act prohibits "any fraudulent, deceptive, or *manipulative* acts or practices, in connection with any tender offer."[142] In *Schreiber*, the plaintiff argued that withdrawal of one tender offer and substitution of another was manipulative within the meaning of the act even though there had been no fraud or deception. The Supreme Court unanimously disagreed, holding that the term manipulative meant deceptive or fraudulent. The Court reasoned that "manipulation" had a narrow meaning at common law and "it is a familiar principle of statutory construction that words grouped in a list should be given related meaning."[143]

The Court also deferred to common law principles in *Chiarella v. United States*, holding that Rule 10b-5 incorporated the common law rule that "one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so."[144] The Court expressly rejected the government's broader theory that there is

> a general duty between all participants in market transactions to forego actions based on material, nonpublic information.

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140. *Id.* at 479 (emphasis added).
141. 105 S. Ct. 2458 (1985).
142. 15 U.S.C. § 78n(e) (1982) (emphasis added).
143. 105 S. Ct. at 2462.
144. 445 U.S. 222, 228 (1980).

> Formulation of such a broad duty, *which departs radically from the established doctrine* that duty arises from a specific relationship between two parties, . . . should *not be undertaken absent some explicit evidence of congressional intent.*[145]

In *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Co.*,[146] deference to the common law was even more explicit. The Court held that a telephone company that was required to relocate some of its transmission facilities because of a federally funded urban renewal project was not a "displaced person" entitled to relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.[147] The Court reasoned:

> Under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities. . . .
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> . . . .
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> It is a well-established principle of statutory construction that '*[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.*' "[148]

2. *Statutes in derogation of the common law should be strictly construed and not expanded by implication*

The Supreme Court's attitude toward regulatory statutes that clearly alter the common law changed from boundless enthusiasm to simple or sometimes grudging acceptance. Thus, there was no longer any warrant for following the law's alleged "broad, remedial purpose" any further than statutory language dictated.[149] The statutory language was the line that Congress had drawn between broad remedial purpose and preexisting, countervailing common law policy. The Court should respect

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145. *Id.* at 233 (emphasis added).

146. 464 U.S. 30 (1983).

147. 42 U.S.C. § 4601-4655 (1982).

148. 464 U.S. at 35 (quoting in part from Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1812)) (emphasis added).

149. *See* Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982) (arguing that "private interest" statutes are legislative bargains with no purposes beyond their words); *see also* R. UNGER, LAW IN MODERN SOCIETY 68-69 (1976) ("The liberal type of social organization generates, and is reinforced by, a style of consciousness whose substance is the image of society as an arena of conflicting subjective interests.").

that standard, not alter it through loose construction. As the Court explained in *Mohasco Corp. v. Silver*, in which it dismissed a Title VII claim for failure to comply with statutory time limits, "the present language was clearly the result of a compromise. It is our task to give effect to the statute as enacted."[150]

A good illustration of the Court's preference for plain language over "broad remedial purpose" is *United States Railroad Retirement Board v. Fritz*.[151] The Railroad Retirement Act of 1974 provided that railroad retirees with between ten and twenty-five years of service and a "current connection" with the railroad industry as of 1974 could receive both social security and railroad retirement benefits, while similarly situated retirees without a "current connection" in 1974 would receive only social security benefits. A member of the disfavored group filed suit charging that his denial of extra benefits was irrationally inconsistent with the remedial purpose of the Act expressed in the legislative history and therefore unconstitutional. The Supreme Court disagreed. It declared:

> [T]he plain language of § 231b(h) marks the beginning and end of our inquiry. . . .
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> . . . .
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> . . . The language of the statute is clear, and we have historically assumed that Congress intended what it enacted. To be sure, appellee lost a political battle in which he had a strong interest, but this is neither the first nor the last time that such a result will occur in the legislative forum.[152]

The Court's new approach to statutory purpose led naturally to revival of a slightly modified version of the old plain meaning doctrine. "The starting point in every case involving construction of a statute is the language itself."[153] "When we

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150. 447 U.S. 807, 818-19 (1980).

151. 449 U.S. 166 (1980).

152. *Id.* at 176, 179. In dissent, Justice Brennan complained that the Court had adopted "a tautological approach to statutory purpose." He argued that

> [s]ince § 231b(b) deprives the members of appellee class of their vested earned dual benefits, the Court apparently assumes that Congress must have *intended* that result. But by presuming purpose from result, the Court reduces analysis to tautology. It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose.

Id. at 186, 187 (Brennan, J., dissenting) (emphasis in original).

153. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J.,

find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances."[154] "[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' Thus, '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' "[155]

3. *Plain meaning in action*

The Court's revised plain meaning approach has had substantial impact. Regulatory statutes are construed much more narrowly than they were twenty years ago. A few examples illustrate the change.

In 1963 in *SEC v. Capital Gains Research Bureau,* the Supreme Court held that securities "fraud" for purposes of the Investment Advisers Act of 1940 did not require proof of the common law element of intent to cause injury. The Court reasoned that "Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation . . . not technically and restrictively, but flexibly to effectuate its remedial purposes."[156] In 1980 in *Aaron v. SEC,* the Court held that securities fraud for purposes of section 10(b) of the Securities Exchange Act of 1934 did require proof of the common law element of scienter. In reaching this conclusion, the Court relied primarily on "the plain meaning of the language of § 10(b)."[157] The Court also noted that

> generalized references to the remedial purposes of the securities laws will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit. . . .

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concurring).

154. Rubin v. United States, 449 U.S. 424, 430 (1981) (internal quotations omitted); *see also* Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980) ("[O]ur obligation is to take statutes as we find them, guided, if ambiguity appears, by the legislative history and statutory purpose."); Piper v. Chris-Craft Indus., 430 U.S. 1, 26 (1977) ("Reliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously.").

155. American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (quoting Richards v. United States, 369 U.S. 1, 9 (1962); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); *see also* Escondido Mut. Water v. La Jolla, 104 S. Ct. 2105, 2110 (1984) ("Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive.") (citations omitted).

156. 375 U.S. 180, 195 (1963).

157. 446 U.S. 680, 690 (1980).

> Thus, if the language of a provision of the securities laws is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary to examine the additional considerations of policy . . . that may have influenced the lawmakers in their formulation of the statute.[158]

In 1964 in *J.I. Case Co. v. Borak,* the Supreme Court implied a private cause of action for damages for violation of the proxy rules of section 14(a) of the 1934 Act. The Court noted the "broad remedial purposes" of the law and reasoned that "it is the duty of the courts . . . to provide such remedies as are necessary to make effective the congressional purpose."[159] In contrast, in 1979 the Supreme Court refused to imply a cause of action for damages under section 17(a) against accountants who improperly audit misleading financial reports.[160] The Court noted that the question presented was one of statutory construction and that there was no evidence Congress intended to create such a right. Therefore, the Court concluded the private right of action should not be implied. The Court specifically found "invocation of the 'remedial purposes' of the 1934 Act . . . unavailing." The ultimate question was congressional intent, not "whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."[161] In *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* the Supreme Court also refused to imply a private right of action, declaring: "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies . . . . This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius.*"[162] Thus the Su-

158. *Id.* at 695 (citations and internal quotations omitted).

159. 377 U.S. 426, 431, 433 (1964).

160. Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

161. *Id.* at 578.

162. 414 U.S. 453, 458 (1974). The Latin phrase means "inclusion of one thing implies the exclusion of another thing."

Government regulation in other areas has been given broader scope. For example, the Gun Control Act prohibits persons "convicted" of a felony from buying guns. In *Dickerson v. New Banner Institute, Inc.,* the Supreme Court held that a prior conviction for purposes of the Gun Control Act did not require an actual judgment of conviction but could be satisfied by a plea of guilty that was expunged after successful completion of probation. The Court reasoned that the statute had to be construed in light of its broad, prophylactic purpose "to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incom-

preme Court has revived the plain meaning doctrine to protect good faith business transactions from government interference.

4. Although within the letter of a statute, an object may be outside the effect of the statute if it is neither within the spirit nor legislative intent of the statute

The modern plain meaning rule, like its nineteenth century counterpart, limits the scope of federal statutes in derogation of the common law. However, the doctrine does not prevent the Supreme Court from implying nonliteral exceptions to such statutes. For example, the Supreme Court has expanded the scope of the Sherman Act's rule of reason, even though the rule of reason is inconsistent with the act's plain language. The reasons for this nonliteral approach were explained in *National Society of Professional Engineers v. United States*:

> One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets . . . to function effectively.[163]

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petency.'" 460 U.S. 103, 118 (1983) (quoting Huddleson v. United States, 415 U.S. 814, 824 (1974)). The Court also noted that the facts of the case were "illustrative" of the need for a broad reading of the statute. In addition to probation, the gun applicant had "prior arrests for assault and battery of a high and aggravated nature and for child abuse" and there was little, if any, assurance he was the type of "person who can be trusted with a dangerous weapon." 460 U.S. at 120, 121 (internal quotations omitted).

In *Haig v. Agee*, the Supreme Court held that the secretary of state could revoke the passport of Phillip Agee because Agee was revealing the identities of undercover CIA agents. The Court acknowledged that the "Passport Act does not in so many words confer upon the Secretary a power to revoke a passport," but held such power should be implied because Agee's "conduct in foreign countries presents a serious danger to American officials abroad and serious danger to the national security." 453 U.S. 280, 290, 306 (1981).

Bob Jones University v. United States is also illustrative. There, the Supreme Court adopted a nonliteral construction of the Internal Revenue Code to deny a tax exemption to a racially segregated school. Segregated education was not shielded by the exemption for "educational" institutions because "a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." 461 U.S. 574, 586 (1983). The Court then noted that "racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." *Id.* at 593.

163. 435 U.S. 679, 687-88 (1978).

Similarly, in *NLRB v. Catholic Bishop of Chicago*, the Supreme Court fashioned a nonliteral exception to the National Labor Relations Act, holding that parochial schools should not be considered "employers" in "[t]he absence of an 'affirmative intention of the Congress clearly expressed,' . . . to bring teachers in church-operated schools within the jurisdiction of the [National Labor Relations] Board."[164]

Finally, in *United Housing Foundation, Inc. v. Forman*, the Court held that "stock" in a nonprofit housing cooperative was not a security within the meaning of the Securities Exchange Act of 1934 even though "the statutory definition of a security includes the words 'any . . . stock.' "[165] The Court noted that the economic realities of the transaction were different from those contemplated by Congress and invoked the "traditional canon of statutory construction: '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' "[166]

V. Conclusion

A. Where the Law Now Stands

The trend of recent decisions should not be overstated. The Supreme Court today is in a transitional period. While traditional restrictive canons of construction are more commonly used now than they were twenty years ago, their triumph is by no means complete. The Supreme Court will, on occasion, invoke expansive New Deal canons of construction, as will many lower courts.[167] And, of course, many cases are decided on the

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164. 440 U.S. 490, 506-07 (1979).

165. 421 U.S. 837, 848 (1975).

166. *Id.* at 849 (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)); *compare* Marine Bank v. Weaver, 455 U.S. 551, 558-59 (1982) ("The definition of 'security' in the 1934 Act provides that an instrument which seems to fall within the broad sweep of the Act is not to be considered a security if the context otherwise requires.") *with* Tcherepnin v. Knight, 389 U.S. 332, 339 (1967) (quoting SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943)) ("Instruments may be included within any of [the Act's] definitions [of a security], as a matter of law, if on their face they answer to the name or description.").

167. *See, e.g.*, Tony & Susan Alamo Found. v. Donovan, 105 S. Ct. 1953, 1959 (1985) ("The Court has consistently construed the [Fair Labor Standards] Act 'liberally to apply to the furthest reaches consistent with congressional direction.' ") (quoting Mitchell v. Luhlin, 358 U.S. 207, 211 (1959); Montana v. Blackfeet Tribe, 105 S. Ct. 2399, 2403-04 (1985) ("[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").

basis of the Court's perception of actual legislative intent without resort to canons of construction—expansive or restrictive.

Nevertheless, it is fair to say that strict construction of economic legislation is experiencing some revival. Restrictive canons of construction used in the nineteenth century are more common today than they were in the New Deal era; expansive canons of construction are less common than in the recent past.[168]

B. Return to the Original Understanding

There is much to be said for the recent trend back toward traditional common law canons of statutory construction—provided, of course, that the canons are used only to resolve ambiguities and not to defeat legislative intent.[169] First, traditional canons of statutory construction are more consistent with the American experiment in individual liberty, free enterprise, and limited government.[170] They support, rather than un-

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168. Some have attacked strict constructionism as incompatible with the needs of a liberal regulatory state. *See, e.g.*, Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 911 (1982) (arguing that the plain meaning rule expresses "[a] vague judicial hostility to regulatory legislation").

169. In his recent book Judge Richard Posner criticizes canons of statutory construction as disingenuous, opportunistic tools of judicial activism. Instead of using canons, Judge Posner urges courts to imaginatively reconstruct legislative intent and, if that fails, to "decide what attribution of meaning to the statute will yield the most reasonable result in the case at hand." R. POSNER, THE FEDERAL COURTS 287 (1985).

Judge Posner then goes on to argue that because many federal statutes are "radically unfinished," these open issues of statutory interpretation are really common law

> issues that—the literature on economic analysis of law suggests—are most often decided by judges as if their goal were to promote economic efficiency. Though perhaps startling at first glance, this conclusion becomes more plausible when one reflects on the lack of discipline of our legislative processes, which characteristically deliver to our judges radically unfinished statutes, and the continued if not unchallenged dominance of American law by utilitarian, pragmatic, 'free enterprise,' and 'balancing' thinking.

Id. at 314-15. Therefore, Judge Posner concludes, "on balance it seems likely that the common law, broadly defined, will continue to be an important and possibly dominant element of federal judicial decision making." *Id.* at 315.

170. In a leading commentary, Judge Frank Easterbrook argues that

> statutes are inapplicable unless they either plainly supply a rule of decision or delegate the power to create such a rule. Those who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government. There is still at least a presumption that people's arrangements prevail unless expressly displaced by legal doctrine . . . . a rule declaring statutes inapplicable unless they plainly resolve or delegate the solution of the matter

dermine, those values which make America great and make her a worthy model for the rest of the world.

Second, traditional canons are more consistent with the spirit of the Constitution. While the framers did not expressly mandate use of particular canons of construction, they certainly expected that federal courts, as courts of law and equity, would use traditional common law maxims of construction.[171] The framers expected that federal courts would, whenever practicable, resolve ambiguities in federal statutes in favor of those principles of common law and equity from which our system of jurisprudence derives and upon which our nation was founded.

Indeed, this expectation of a bias in favor of common law values was one reason for creating an independent federal judiciary as a bulwark of liberty. As Alexander Hamilton explained in *The Federalist* Number 78, "it is not with a view to infractions of the Constitution only that independence of the judges may be an essential safeguard . . . . [T]he firmness of the judicial magistracy is [also] of vast importance in mitigating the severity and confining the operation [of] unjust and partial laws" that injure the "private rights of particular classes of citizens."[172] In other words, Hamilton believed that because of traditional canons of construction, statutes encroaching upon common law liberties would be narrowly construed and legitimate doubts as to their coverage would be resolved in favor of preserving the common law and those equitable rights that exist independently of and anterior to all congressional legislation. A return to traditional canons of statutory construction marks a return to the role of the federal courts envisioned by the framers of the Constitution.

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respects this position.
Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 549-50 (1983).

171. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (framers familiar with common law rules of construction thought they would be used).

172. THE FEDERALIST, *supra* note 1, No. 78, at 470 (A. Hamilton).