

# SUPER-STATUTES

WILLIAM N. ESKRIDGE, JR.<sup>†</sup>

JOHN FEREJOHN<sup>††</sup>

## INTRODUCTION

Not all statutes are created equal. Appropriations laws perform important public functions, but they are usually short-sighted and have little effect on the law beyond the years for which they apportion public monies.<sup>1</sup> Most substantive statutes adopted by Congress and state legislatures reveal little more ambition: they cover narrow subject areas or represent legislative compromises that are short-term fixes to bigger problems and cannot easily be defended as the best policy result that can be achieved.<sup>2</sup> Some statutes reveal ambition but do not penetrate deeply into American norms or institutional practice. Even fewer statutes successfully penetrate public normative and institutional culture in a deep way. These last are what we call *super-statutes*.

---

Copyright © 2001 by William N. Eskridge, Jr. and John Ferejohn.

<sup>†</sup> John A. Garver Professor of Jurisprudence, Yale Law School.

<sup>††</sup> Carolyn S.G. Munro Professor of Political Science and Senior Fellow of the Hoover Institution, Stanford University. Michael Slumsky, Yale Law Class of 2003, provided needed and excellent research assistance as well as useful comments on an earlier draft of this Essay.

1. Indeed, the Supreme Court has created a presumption against construing appropriations laws to effect any change in substantive federal law. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

2. These statutes are legion. For two very different examples, compare the Alcohol and Drug Abuse Amendments, Pub. L. No. 98-24, 97 Stat. 175 (1983) (requiring the Secretary of Health and Human Services to report every three years on the “addictive property of tobacco”—a pallid response to the deadly effects of the drug nicotine), with the Hawaii Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws 2786, Act 383 (H.B. 118) (creating a new institution of “reciprocal beneficiaries” open to couples who cannot marry—namely, same-sex and couples related to one another—as part of a compromise that overrode constitutional arguments for same-sex marriage but did not satisfy the long-term demand for state recognition of same-sex relationships).

For an example of an aspiring super-statute, the success of which is dubious, see the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66.

A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute. Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem, but a lengthy struggle does not assure a law super-statute status. The law must also prove robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture. Sometimes, a law just gets lucky, catching a wave that makes it a super-statute. Other times, a thoughtful law is unlucky, appearing at the time to be a bright solution but losing its luster due to circumstances beyond the foresight of its drafters.

Super-statutes are applied in accord with a pragmatic methodology that is a hybrid of standard precepts of statutory, common law, and constitutional interpretation.<sup>3</sup> Although the courts do not have to consider the super-statute beyond the four corners of its plain meaning, they will often do so because the super-statute is one of the baselines against which other sources of law—sometimes including the Constitution itself—are read. Ordinary rules of construction are often suspended or modified when such statutes are interpreted. Super-statutes tend to trump ordinary legislation when there are clashes or inconsistencies, even when principles of construction would suggest the opposite. Occasionally, super-statutes can reshape constitutional understandings. Because super-statutes exhibit this kind of normative gravity, they have sufficient attraction to bend and reshape the surrounding landscape. Super-statutes do not always trump other sources of law, however, in part because they may clash not only with the Constitution but also with other super-statutes.

As we shall explain in the first part of this paper, super-statutes occupy the legal terrain once called “fundamental law,” foundational principles against which people presume their obligations and rights are set, and through which interpreters apply ordinary law. Today,

---

3. To overstate a bit, super-statutes become axiomatic for legislatures as well as courts. Just as Congress would not dare (because of ridicule) adopt a law directing the citizenry to accept that  $2 + 2 = 5$ , so it would not dare pass a law repealing the Sherman Act and allowing price fixing.

this kind of law might be considered “quasi-constitutional”—fundamental and trumping like constitutional law, but more tentative and susceptible to override or alteration by the legislature or determined judges and administrators. The third part of this paper will explore the implications of this idea for modern public law. For example, super-statutes are related to other phenomena in public law, such as canons of statutory construction reflecting constitutional precepts. They also bear interesting resemblance to, and can be contrasted with, theories by which the Constitution itself evolves outside of the formal amendment process of Article V.

Although they do not exhibit the super-majoritarian features of Article V constitutional amendments and are not formally ratified by the states, the laws we are calling super-statutes are both principled and deliberative and, for those reasons, have attracted special deference and respect. Indeed, the super-statute idea suggests a source of legitimacy for changes in fundamental law that is different from the formalism of Article V and the functional-formalism of “constitutional moments” theory. Legitimate change in fundamental law rarely occurs in a moment and sometimes comes over a period of several decades. An amendment may pass through the formal channels of Article V and not fundamentally change the way we understand the law, and a constitutional showdown (moment) may result in the triumph of a particular norm that does not stick. Contrariwise, a statutory scheme that reflects longstanding deliberation and announces a great principle sometimes sticks in the public culture in ways that more dramatic events do not. The legitimacy of treating these schemes as more normatively powerful than ordinary statutes rests upon something more than their great principles and their legislative deliberation. They are legitimated by the feedback from the populace, experts, and officials that allows these super-statutes to sink deeply into our normative consciousness.

## I. AN HISTORICAL INTRODUCTION TO SUPER-STATUTES AND HOW THEY FIT WITHIN AMERICAN CONSTITUTIONAL HISTORY

Although we are deploying the term “super-statute” in a novel way,<sup>4</sup> the core idea is a familiar one in the history of Anglo-American

---

4. The term “super-statute” has been used by legal commentators before, but not in the precise way we deploy the term here. Earlier writers have used the term to describe a constitution, e.g., A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 122 (1968) (stating that American lawyers in the eighteenth

law. The concept that certain statutes become axiomatic to a state's fundamental law can be traced back at least as far as early modern English legal theory and was implicit in some statutory schemes throughout American history. It is not until the New Deal, however, that the super-statute phenomenon became a big feature of American public law. The power of this idea continues even, and one might even say especially, in the post-New Deal era of the Rehnquist Supreme Court.

### A. *The English Background*

As an historical matter, writers have sometimes contrasted common law (English) systems with civil law (Roman) systems in the following way.<sup>5</sup> The baseline in civil law has traditionally been the *code*, which judges treat as a comprehensive body of rules, policies, and principles. Gaps in the code are filled in by a process civilians call the equity of the statute: judges reason by analogy from the most pertinent provision and its policy to supply the answer in the *casus omissus*, the unprovided-for case. New laws are integrated into the code either by the legislature and its drafters or by judges who reconcile its rules and policies with those of the code. The baseline in common law systems has traditionally been the *common law*, a comprehensive body of rules, policies, and principles. Gaps in the common law are filled by a process of reasoning by analogy, figuring out how a new problem is akin to, and different from, prior judicial determinations. New laws are integrated into the common law through two simple canons: ordinary statutes will be construed consistent with the common law and not in derogation of it, but remedial statutes might supersede the common law and be construed to trump it.

The foregoing contrast between civil and common law treatment of statutes is, of course, a great overstatement today. Interestingly,

---

century viewed the Magna Carta and the common law it was thought to embody "as a kind of superstatute, a constitution placing fundamental liberties beyond the reach of Parliament"), or, simply, a big statute with no force outside its four corners, *e.g.*, Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 522 (1989) ("Superstatutes do not seek to revise any of the deeper principles organizing our higher law; instead, they content themselves with changing one or more rules without challenging basic premises."). We owe these references to David Fontana, Yale Law School Class of 2002.

5. The rough contrast in text is drawn from JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1988); INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil McCormick & Robert S. Summers eds., 1991).

the contrast was never so striking, even in prior eras. Mathew Hale's treatise on the *History of the Common Law of England* distinguished between statutes enacted before the reign of King Richard I and those enacted afterwards.<sup>6</sup> Hale observed that the former were laws "before Time of Memory" because their records had been lost. Nonetheless, many of those early statutes "are now accounted part of the *Lex non Scripta*, being as it were incorporated into, and become a Part of the Common Law."<sup>7</sup> Such statutes "obtain their Strength by meer immemorial Usage or Custom."<sup>8</sup> Many statutes enacted during the "Time of Memory" had a similar fate, either because they were codifications of the common law or because they "made a Change in the Common Law," but "are yet so ancient, that they now seem to have been as it were a Part of the Common Law, especially considering the many Expositions that have been made of them in the several Successions of Times, whereby as they became the great Subject of Judicial Resolutions and Decisions."<sup>9</sup>

Thus, the Statute of Frauds and the Statute of Uses both changed the common law and became objects of evolution and judicial elaboration, common law-style.

Hale's treatise provides an historical precedent for two of the three features of super-statutes: they aspire toward changing the common law baseline, and they actually have that effect over time, which in turn means that they become the object of evolution and debate among judges as well as legislators. Our third feature of super-statutes is their expansive, imperial interpretation. That is not a matter that interested Hale, but other early English sources explored the question of how fundamental statutes ought to be construed.

A leading statement of precepts for interpreting statutes in the early modern period is *Heydon's Case*.<sup>10</sup> King Henry VIII broke with the Roman Catholic Church and established the Church of England as a separate faith. This break was accompanied by the seizure of Catholic Church property by the state. A statute listed specific property transfer devices that would be disregarded if used to avoid the king's seizure of Church property. The statute did not list copyhold interests, which were used to transfer Church property in

---

6. MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 9 (3d ed. 1739).

7. *Id.* at 2.

8. *Id.* at 2-3.

9. *Id.* at 9.

10. 76 Eng. Rep. 637 (Exch. 1584).

*Heydon's Case*. The court laid out its theory of interpreting statutes. First, consider the common law, the "mischief" that the common law did not solve, and the remedy devised by the legislature. Then, judges should "make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief."<sup>11</sup> Because the statute of Henry VIII sought to block evasions of the royal confiscations, the judges extended its ambit to include property interests that had been inadvertently omitted. The judges in *Heydon's Case* followed a broad remedial interpretative approach to help the legislator accomplish all he was trying to accomplish. *Heydon's Case* was a celebrated decision, and the remedial approach it exemplified was often deployed by English judges and celebrated by the commentators.<sup>12</sup> Blackstone referred favorably to *Heydon's Case* as an important statutory interpretation precedent,<sup>13</sup> and he adopted this form of the mischief rule: "[T]he most universal and effectual way of discovering the true meaning of the law, when its words are dubious, is by considering the reason and spirit of it . . . for when this reason ceases, the law itself ought likewise to cease with it."<sup>14</sup> This is the same Blackstone who firmly believed that the common law remained the ordinary baseline because of its elegant coherence and overall superiority to statutory law.

### B. *The Founding and Consolidating Periods of American History*

Virtually any lawyer in the American colonies was familiar with Blackstone, and most probably knew about Hale and *Heydon's Case* as well. As historians Gordon Wood and Jack Rakove have documented, the founding period (1776-1789) saw thoughtful Americans struggle with dueling notions of popular sovereignty and judicial independence protecting established liberties.<sup>15</sup> State

---

11. *Id.* at 638.

12. *E.g.*, 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW \*647 (W. Strahan, 4th ed. 1778) (1736); SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: OR, A COMMENTARY UPON LITTLETON § 21, at 24.b (Luke Hansard & Sons 16th ed. 1809) (1628). Compare WILLIAM D. POPKIN, STATUTES IN COURT 14-15 (2000) (taking a broad view of *Heydon's Case*), with S.E. THORNE, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 215-17 (1936) (viewing *Heydon's Case* as influential but not as bold as Popkin views it).

13. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*87 (21st ed. 1862).

14. 1 *id.* at 60.

15. See generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE

constitutions emphasizing the former yielded chaotic and frequently unjust legislation, and the Framers and defenders of the Constitution emphasized the role of the “judicial power” to contain the Congress and assure the rule of law.<sup>16</sup> Generally, the founding period did not focus specifically on the liberal application of statutes entailed in Hale and *Heydon’s Case*. Nonetheless, three general principles embodied in the Constitution and discussed during the ratification debates lend some support to the proposition that the new government was one where statutes should sometimes be considered sources of fundamental law.

First, the Constitution committed the federal government to popular sovereignty—“We the People” are the governors as well as the governed.<sup>17</sup> Popular sovereignty is hostile to a judge-created common law as the only basis for the rule of law, and the principle suggests that there ought to be some role for popular feedback in the process by which certain legal notions become fundamental law. Second, the Constitution committed the national government to lawmaking by elected representatives deliberating for the public good. Article I’s vesting legislative authority in Congress and Article III’s vesting the Supreme Court and inferior federal courts with jurisdiction to interpret federal statutes (and only implicit jurisdiction to hear federal common law claims) suggest the principle that the primary source of law at the federal level would be statutes—a striking contrast to England and the states, where Blackstonian common law precedents remained the main source of law.<sup>18</sup> That members of Congress were accountable directly to the people (House) and the states (Senate) meant that law would be subjected to popular influence.

---

MAKING OF THE CONSTITUTION (1996); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

16. William N. Eskridge, Jr., *All About Words: Original Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. (forthcoming June 2001).

17. RAKOVE, *supra* note 15, at 97-101. This was in striking contrast to England, where Parliament asserted itself as sovereign; the revolting colonists rejected this model. Martin Flaherty, Note, *The Empire Strikes Back: Annesly v. Sherlock and the Triumph of Imperial Parliamentary Supremacy*, 87 COLUM. L. REV. 593, 619 (1987).

18. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1498-1503 (1987) (explaining that statutes were expected to be the primary source of federal law but that judges were expected to follow common law reasoning from statutes in appropriate cases); Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 7-8 (1985) (arguing that federal courts were expected to have no common law power).

It is straightforward to deduce from these first two constitutional principles the proposition that statutes aspiring to create broader norms and structures for governance and showing robustness over time ought to be applied liberally (so long as they do not bump up against other sources of fundamental law, such as the Constitution). That deduction is not inevitable, however, for the Framers might have wanted as little law as possible, which would militate against any source of law being applied broadly.<sup>19</sup> A third constitutional principle presses us away from that possibility—but only for certain kinds of statutes. The Framers of the Constitution rejected the Articles of Confederation primarily because they failed to permit *energetic* governance at the national level.<sup>20</sup> Within their listed spheres of unique national competence—such as interstate commerce, bankruptcy, and foreign affairs (all listed in Article I, Section 8)—the Framers wanted Congress to be able to act decisively and to shift the terrain away from common law baselines if required for energetic governance in the public interest. Most of the time, this can be accomplished by normal legislation responding to parochial problems or addressing larger problems in a piecemeal way. The Constitution's structure and the expectations of the Framers left room for Congress to act in a bigger way, however, and with more pervasive effects on public norms.<sup>21</sup>

---

19. See generally John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 78-85 (2001) (discussing founding-period criticism of "equitable" interpretation such as that in *Heydon's Case*).

20. DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 35-58 (1984); RAKOVE, *supra* note 15, at 191.

21. Thus, both Article I, Section 7 statutes and Article II treaties are entitled to supremacy in state as well as federal courts, Article VI, meaning that they trump the common law regimes still prevailing at the state level. The Framers also anticipated that federal statutes would conflict with one another (and sometimes with the Constitution), with courts arbitrating these clashes. *THE FEDERALIST* NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Specifically, Hamilton wrote, "whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." *Id.*



The first Congresses adopted few super-statutes.<sup>22</sup> One was the law creating the Bank of the United States,<sup>23</sup> which was adopted only after a great normative debate. Hamilton and his allies maintained that a federal bank was necessary to operate the government in an orderly manner and to foster commerce and industry in the new Republic, while Jefferson and his allies maintained that the Bank was ultra vires the national government and contrary to the Arcadian republic of small farmers and shopkeepers that they envisioned.<sup>24</sup> The arguments against the Bank's constitutionality were those of normal interpretation. Because a federal bank would go well beyond the common law and would be inconsistent with state statutes, such a power needed to be named explicitly in Article I, Section 8's comprehensive listing of national powers, which, of course, it was not.<sup>25</sup> Defending the Bank, Hamilton started from a different interpretive baseline. The Constitution should be interpreted to carry out its ambitious purposes, and so Article I's grant of power needed to be "construed liberally" to support a national bank.<sup>26</sup>

This debate within the national cabinet and legislature prefigured an enduring contrast between laws that have dramatically shifted national policy or norms and those which have followed or marginally altered common law and other well-trod furrows. Most proposals for dramatic shifts have in fact been defeated, but Hamilton persuaded the President to support his plan for the Bank of the United States,

---

22. Most of the laws adopted in the first Washington administration were short measures addressing particular issues of maritime regulation, taxation and licensing, federal-state relations, and the mechanics of the new federal government. Some of these laws could be characterized as super-statutes. The Federal Judiciary Act of 1789, ch. 20, 1 Stat. 73, for example, set forth the structure and jurisdiction of the federal courts. It was a foundational statute and established a number of enduring policies. Most notable was the policy of § 34, the Rules Decision Act, now 28 U.S.C. § 1652 (1994), which required federal courts to apply state law in diversity cases. In this respect, the 1789 law was a super-statute, because it was more than structural; from its beginning, it represented a great principle of federalism. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71-73 (1938) (interpreting the Rules Decision Act to require federal courts to apply state common law in diversity cases).

23. Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

24. The debate about the Bank is told in Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 358-71 (1989) (explaining the Framers' intentions and views concerning the Bank's constitutionality).

25. 5 THE WRITINGS OF THOMAS JEFFERSON 284-89 (Paul Leicester Ford ed., 1895) (cataloguing Jefferson's view that the Bank was beyond the boundaries, both specific and general, enumerated in the Constitution).

26. 8 THE PAPERS OF ALEXANDER HAMILTON 97, 105 (Harold C. Syrett ed., 1965). For an excellent discussion, see David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755, 796-819 (2001).

which operated successfully for two generations. The law met the first criterion for super-statutes in setting an important national policy, and the second for enduring (albeit not for as long as most of the other super-statutes discussed in this paper). The national bank policy stuck in public culture in ways other Hamiltonian policies did not. When the first Act expired in 1815, Congress voted to renew the institution, but President Madison vetoed the law for practical reasons. Even though he had vigorously opposed the Bank for constitutional reasons in 1791, Madison in 1815 accepted its legitimacy but not its necessity. He reconsidered the latter conclusion in the next year, and the Second Bank of the United States, which lasted until the Jackson administration, was created in 1816.<sup>27</sup>

Whereas Madison and Jefferson had maintained that the Bank must give way to the Constitution, it was ultimately the Constitution that gave way to the Bank. By the time the issue finally reached the Supreme Court in *McCulloch v. Maryland*,<sup>28</sup> Chief Justice John Marshall was able to start his opinion with the observation that decades of experience with and acquiescence in the Bank of the United States gave it a heightened presumption of constitutionality.<sup>29</sup> Not only did Marshall then proceed to sustain the Bank against constitutional objections, but he set forth the most expansive theory for interpreting the Constitution ever penned by a U.S. Supreme Court Justice. After broadly construing Article I, Section 8, along the purposive and liberal lines originally suggested by Hamilton,<sup>30</sup> Marshall not only sustained the Bank's constitutionality but also invalidated Maryland's effort to tax the Bank as unconstitutional.<sup>31</sup> Presumably, the latter holding represented a judgment that state taxation was inconsistent with the efficient operation of a federally chartered bank—but that was a judgment made not on the face of the statute but that Marshall teased out of the nature of things.

In *Osborn v. Bank of the United States*,<sup>32</sup> Chief Justice Marshall created out of the Bank's authorizing statute an implied grant of federal jurisdiction over lawsuits in which the Bank was a party.<sup>33</sup> This

---

27. Bank of United States Act, ch. 44, § 7, 3 Stat. 266 (1816) (expired 1836).

28. 17 U.S. (4 Wheat.) 316 (1819).

29. *Id.* at 401-02.

30. *Id.* at 413-25 (interpreting the word "necessary" in the Necessary and Proper Clause broadly and concluding that the incorporation of the Bank was constitutional).

31. *Id.* at 425-37 (analyzing the constitutionality of the Maryland tax).

32. 22 U.S. (9 Wheat.) 738 (1824).

33. *Id.* at 828.

was not only a dynamic construction of the statute, which said only that the Bank could “sue or be sued” in state or federal circuit courts<sup>34</sup> but was also a preface to another breathtaking interpretation of the Constitution. Marshall construed Article III’s “arising under” grant of jurisdiction to extend so far as to include cases where federal law is “an ingredient” of the cause of action.<sup>35</sup> All of this was extraordinary and amounted to a dramatic judicial extension of both the statute and the Constitution. Yet, as Justice Johnson’s dissent wearily observed:

I have very little doubt that the public mind will be easily reconciled to the decision of the court here rendered . . . . The Bank of the United States is now identified with the administration of the national government. . . . [S]erious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned . . . .<sup>36</sup>

Although the Second Bank expired in 1836, its animating principles—that the federal government could charter corporations and create institutions to regularize and manage the nation’s finances—stuck in the public culture.

The Civil War produced some putative super-statutes, namely the Civil Rights Acts of 1866<sup>37</sup> and 1871.<sup>38</sup> These statutes announced great antidiscrimination principles but were narrowly construed by a post-Reconstruction judiciary afraid to disturb the political consensus in favor of racial segregation.<sup>39</sup> Hence, these were failed super-statutes—until the post-World War II civil rights movement revived interest in those laws and the Warren Court breathed new life into

34. *Id.* at 817-18 (asserting that the law permitting the Bank to sue and be sued in the circuit courts of the United States was an implicit vesting of federal jurisdiction for any case brought by the Bank and distinguishing *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809), which construed the first Bank authorization as not vesting federal courts with jurisdiction over such lawsuits). Marshall’s statutory claim was vigorously disputed by Justice Johnson’s dissenting opinion, *Osborn*, 22 U.S. at 871-84 (Johnson, J., dissenting) (following *Deveaux* and suggesting anomalies created by the Court’s broad construction).

35. *Osborn*, 22 U.S. at 823; see also *id.* at 818-28 (considering “the constitutionality of the clause in the act of incorporation, which authorizes the bank to sue in the federal courts”).

36. *Id.* at 871-72 (Johnson, J., dissenting).

37. 14 Stat. 27 (1866) (codified at 42 U.S.C. §§ 1981-82 (1994)).

38. 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1994)). A third statute, the Civil Rights Act of 1875, 18 Stat. 335, was invalidated by the Supreme Court in the *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that Congress had no authority under the Fourteenth Amendment to prohibit private discrimination in public accommodations).

39. *Blyew v. United States*, 80 U.S. 581, 595 (1871) (holding the federal Civil Rights Act of 1866 did not supply jurisdiction to a criminal case, thereby allowing the Kentucky statute prohibiting blacks from testifying against whites to apply).

them in the 1960s with liberal interpretations.<sup>40</sup> Dynamic readings extended the 1871 Act to provide a remedy against state and local governments for a range of federal constitutional and statutory rights violations and allowed complainants to sue for broad injunctions and damages that could include mental anguish, symbolic damages, and even punitive damages.<sup>41</sup> Although the Court has also set limits on relief under the 1871 Act, the Act has altered the federal-state balance in innumerable ways.<sup>42</sup> It is now truly a super-statute, albeit one whose morphogenesis was more delayed and twisted than most others. Other laws originating in the post-Civil War period had more immediate recognition as super-statutes: the Interstate Commerce Act of 1887, the Sherman Act of 1890 (discussed below), and the Pure Food & Drugs Act of 1906 (also discussed below).

### C. *The Modern Regulatory State*

The same post-Reconstruction judiciary that construed the early civil rights acts stingily protected common law baselines in a range of other cases, especially labor cases.<sup>43</sup> Surly judicial reception, however, hardly deterred legislatures from creating myriad new laws. Progressive supporters of the new legislation—critics of this common law formalism—not only argued that the judiciary was wrong in resisting humane and efficient employment policies but also argued that the common law itself should no longer be the reflexive baseline in the modern state.<sup>44</sup> Expanding upon and updating Hale's notion, a

---

40. *E.g.*, *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 702 (1978) (extending the 1871 Act to allow suits against municipalities engaged in policies or customs that violate the Constitution); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-44 (1968) (interpreting the 1866 Act to reach private discrimination); *Monroe v. Pape*, 365 U.S. 167, 192 (1961) (establishing the 1871 Act to allow suits against police officers). Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (1964) revived the 1875 Act, *see supra* note 38, under Congress's Commerce Clause power rather than its Fourteenth Amendment authority.

41. *Smith v. Wade*, 461 U.S. 30, 56 (1983) (allowing punitive damages); *Carey v. Piphus*, 435 U.S. 247, 264-66 (1978) (discussing symbolic damages and mental anguish).

42. Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 2 (1985) (noting that critics of the Court's § 1983 jurisprudence believe it has overburdened the federal system, allowed plaintiffs to bootstrap garden-variety state-law tort claims into federal court, and interfered in state affairs).

43. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 81-107 (1994) (examining the statutory labor injunction cases from the 1880s through the 1930s and finding a persistence of common law baselines in judicial interpretations even of pro-labor statutes).

44. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 614 (1908) ("That our case law at its maturity has acquired the sterility of a fully developed system, may be shown

number of influential legal scholars maintained that courts ought to consider statutes as a source of fundamental law. Thus Roscoe Pound maintained that “legislative innovation” should afford courts “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 general subject.”<sup>45</sup> Justice Harlan Stone agreed that “there is no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning.”<sup>46</sup>

These twentieth-century rationalists maintained that a pattern of statutory enactments reflecting a particular normative stance could shift fundamental law, which in turn could affect common law and constitutional law. A majority of the Supreme Court was resistant to this body of thought for several decades, but it became highly influential during the New Deal, which created a wave of super-statutes—such as the Norris-LaGuardia Act of 1932<sup>47</sup> (a precursor of the New Deal), the Securities Act of 1933,<sup>48</sup> the Securities Exchange Act of 1934,<sup>49</sup> the National Labor Relations Act of 1935,<sup>50</sup> the Fair Labor Standards Act of 1938,<sup>51</sup> and others. The New Deal and Warren Courts remolded constitutional law to accommodate these statutes, gave them broad constructions, updated them when useful, and drew from those laws principles to be applied in related cases, such as preemption of state law. The period of 1938-69 might at first glance be considered the golden age of the super-statute. It might even be said that the New Deal and Warren Courts treated most statutes like super-statutes.

---

by abundant examples of its failure to respond to vital needs of present-day life.”).

45. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908).

46. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12-13 (1936); see also James McCauley Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 214 (1934) (“[T]o admit the existence of wide areas for legal administration beyond the direct governance of statutes is not to assume that statutes have no part in the solution of problems impossible to bring within the reach of their terms.”). For an excellent analysis of the legal “rationalists” of the 1920s and 1930s, see generally Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601 (1993).

47. 29 U.S.C. §§ 101-115 (1994).

48. 15 U.S.C. §§ 77a-77bbb (1994).

49. 15 U.S.C. §§ 78a-78lll (1994).

50. 29 U.S.C. §§ 151-169 (1994).

51. 29 U.S.C. §§ 201-205 (1994).

The overall jurisprudence of the Burger and Rehnquist Courts does not appear as friendly to the super-statute idea, at least at first blush.<sup>52</sup> Those Courts have evidenced a relative nostalgia for common law baselines, purported to be more text-bound in their interpretation of statutes, and have been more reluctant to derive principles from federal statutes than the New Deal and Warren Courts were.<sup>53</sup> Theoretically, the recent Court stance could be justified on grounds of a formal theory of lawmaking, separation of powers, and federalism. Article I, Section 7 of the Constitution deliberately makes it hard to enact statutes and thereby makes it important that statutes laden with compromises not be construed too liberally nor beyond their textual plain meanings.<sup>54</sup> Federalism might be read to suggest that federal judges should not be eager to apply national statutes broadly to preempt traditional state regulations.<sup>55</sup> Separation of powers suggests to some Justices that the Court does not have a roaming power to update laws.<sup>56</sup>

The stylized formalism of the previous observations may be hard to defend theoretically,<sup>57</sup> and it is not always followed by the Court's moderate-conservative wing.<sup>58</sup> Something more is going on, and it has

---

52. Superficially, one would expect a sea change. Thirty-six years of Supreme Court appointments (1933-1969) by presidents who were either liberal Democrats or "me-too" Republicans (Eisenhower), have been followed by thirty-six years of appointments (1969-2005) by presidents who were either conservative Republicans or triangulating-centrist Democrats (Clinton). As we shall see, the Court's shift to the political right has only marginally affected its overall approach to super-statutes.

53. For an overview, see William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 56-71 (1994).

54. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 738-39 (1997) (arguing that textualism is preferable to the authoritative use of legislative history because no legislator votes on any piece of a statute's legislative history).

55. See generally Merrill, *supra* note 18 (arguing that the Framers intended for federal statutes to be applied according to their original meanings, in part because of the limitations of federal judicial power).

56. E.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7-15 (1994) (arguing that separation of powers requires judges to apply statutes as they are written).

57. See, e.g., Eskridge, *supra* note 18, at 1497-1511 (responding to Merrill, *supra* note 18); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755-76 (1996) (responding to Calabresi & Prakash, *supra* note 56); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1522-32 (1998) (reviewing SCALIA, *supra* note 56 (responding to the viewpoint held by Manning, *supra* note 54)); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755-76 (1996).

58. E.g., *Mistretta v. United States*, 488 U.S. 361, 408-09 (1989) (upholding the Sentencing Commission against a formalist challenge); *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988) (upholding the Independent Counsel law); *Commodity Futures Trading Comm'n v. Schor*, 478

to do with the nation's political culture.<sup>59</sup> The New Deal and Warren Courts operated in a public culture optimistic about the operation of government creating statutes conducing toward the public good. Our generation of law professors and judges lost that innocence, which has partly been overtaken with a public-choice understanding of government as a forum for rent-seeking by greedy groups. Under that vision, laws the New Dealers considered rational and public-regarding have been re-presented as more narrowly conceived and partial, at least at their birth. The Justices on the Burger and Rehnquist Courts were all appointed by presidents who promised to cut back on government, and some owed their jobs to administrations that treated government as the enemy of the people.<sup>60</sup>

Just as the stringent formalism in constitutional understanding has not swept the field, neither has the gloomiest public-choice understanding of government. What we should like to emphasize, however, is that neither the public-choice nor the formalist critique of New Deal lawmaking applies as well to super-statutes as it does to ordinary statutes. The intense public focus on super-statutes at various points in their life cycles helps insulate them from the normal politics of rent-seeking. Because super-statutes usually seek to change common law baselines, and do so after an open process of public debate and struggle, the constitutional formalism that trims back efforts to elaborate ordinary statutes might actually support efforts to elaborate super-statutes and apply them rather expansively.

Another key distinction between ordinary statutes and super-statutes is the durability of the latter over time. A statute that endures criticism and finds useful application by a range of officials (judges, executive branch officers, state officers) over time and across

---

U.S. 833, 858 (1986) (upholding the Commodity Futures Trading Commission's counterclaim jurisdiction). The Court is more consistently formalist in federalism cases, but even there it is hard to read the Court's decisions as well-reasoned along formalist lines. Compare *Printz v. United States*, 521 U.S. 898, 933-34 (1997) (holding that the federal government cannot compel local or state law-enforcement officials to perform background checks on firearm purchasers), with *id.* at 939 (Stevens, J., dissenting) (showing the Court's formalism to be unsupported by formal sources such as the text of the Constitution and the Framers' intent), and *id.* at 970 (Souter, J., dissenting) (same); see also Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2256-57 (1998) (calling for a more nuanced approach than strict formalism).

59. The account in the text that follows is taken from William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* li, cxxi-cxxv (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

60. See *supra* note 52.

different administrations is one that we expect to be “worked pure” of some of its glitches and give-aways. The key to super-statutedom is acceptance in public culture. That cannot be mandated, nor is it earned exactly. It is a trial-and-error process which, when successful, creates its own gravitational field. This process can be derailed. Thus, the Supreme Court’s periodically lethal formalism has felled several congressional enactments that were putative super-statutes—most notably, the Religious Freedom Restoration Act,<sup>61</sup> the Line Item Veto Act,<sup>62</sup> and an important portion of the Violence Against Women Act.<sup>63</sup> Once they have stuck in the public culture, however, laws do not require the Court’s enthusiasm for their success—they command it, often after a congressional correction of surly judicial constructions of foundational statutes. For laws that have already proven their super-statute status, the current Court has been acquiescent rather than formalist in its approach, as we shall show in the next part. As with previous Courts, the current one does have its own favored super-statutes, a point that will emerge most clearly in the final part.

## II. WHAT IS A SUPER-STATUTE? EXAMPLES OF SUPER-STATUTES IN ACTION

There is bound to be disagreement as to whether or not a law is a super-statute. Some laws are adopted with great fanfare but end up having little or no lasting effect on national policy or public norms. The national experiment with liquor prohibition is an example of a constitutional amendment whose failure was quick and complete. The national experiment with railroad regulation through filed tariffs is an example of a statutory scheme whose failure came much later and after long death-throes. Other statutes have lasted a long time. Are they super-statutes? How can you tell?

As the examples of Prohibition and railroad tariffs suggest, the test of a super-statute is neither how much public attention and enthusiasm accompanies a law’s adoption nor how long the law lasts. Our first criterion for super-statutes is that they alter substantially the then-existing regulatory baselines with a new principle or policy. Our

---

61. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act on federalism grounds).

62. *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (invalidating the Line Item Veto Act on Article I, Section 7 and separation of powers grounds).

63. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating portions of the Violence Against Women Act on federalism grounds).



second criterion, however, can be judged only over a period of time: the new principle or policy “sticks” in the public culture in a deep way, becoming foundational or axiomatic to our thinking. In addition to these two substantive ones, there is a procedural marker for super-statutes, for they are generated in a reflective and deliberative manner over a long period of time. Typically, a super-statute is not just a snap response to a fleeting crisis; instead, it emerges after a lengthy period of public discussion and official deliberation. More important, the super-statute that emerges from Congress is not a completed product. It requires elaboration from administrators and judges, whose work is then subject to meaningful scrutiny and correction by the legislature or even the citizenry. This feedback loop is an essential feature of super-statutes, but its operation is variegated and impossible to predict. Each super-statute has a pre-enactment history and a post-enactment history that are as important as—and usually more important than—its enactment history.

In light of these criteria, consider three very different kinds of super-statutes and a capsule history of the elaboration of their principles. Our first example is a market-regulatory law that had an inauspicious genesis and early history but has evolved into one of the most successful super-statutes in the nation’s history. The second example is our leading civil rights law, which was hailed as a super-statute from the beginning, but its principle has been subject to continual debate as to how it applies to unanticipated social circumstances. The third example is an environmental law designed to be a super-statute and embodying a great principle, but its future as a super-statute is not as clear as the first two because of doubts about the means Congress adopted to effectuate the principle.

#### A. *The Sherman Antitrust Act of 1890*

The Sherman Act of 1890,<sup>64</sup> prohibiting combinations and conspiracies “in restraint of trade,” as well as monopolies, is a classic super-statute. Scholars are divided as regards the actual goals of the Act’s framers, but most agree that the law was broadly enabling, as it implicitly authorized the judiciary and the Department of Justice to learn how markets work and to formulate rules and standards facilitating their operation and discouraging anticompetitive

---

64. 15 U.S.C. §§ 1-2 (1994).

practices.<sup>65</sup> That the law was enabling did not mean that it would work, and the early history of the Sherman Act is filled with false steps and odd decisions. It was a political struggle to get the law enacted; it proved to be an even greater struggle to develop precedents with bite against business combinations and practices that sound economic theory posits as restraining trade and impairing the efficient functioning of the market.<sup>66</sup> Nonetheless, it is now widely accepted that the Sherman Act does represent a great principle—competition in a free market—and that its principle has penetrated American law and society in a pervasive way.<sup>67</sup>

At the risk of abusing a metaphor, we believe that there was a kind of invisible hand guiding the evolution of the Sherman Act toward a robust economics-driven set of rules. Even though the statutory language invoked a common law concept (restraint of trade) and a jurisdictional requirement imposed by the Constitution (in or affecting commerce), the statute's inclusion of both public and private causes of action (and a treble damages incentive for private actions) created an ongoing economics-focused dialogue among judges, executive branch officials, private attorneys, academics (especially economists), and legislators and their staffs. The feedback loop facilitated by that dialogue corrected ill-advised paths and pressed the statutory scheme toward robust rules that have become deeply rooted in American public law because they make sense. Consider some examples of different feedback scenarios.

On the one hand, the Supreme Court's early decisions refusing to give the law a proper breadth were criticized and essentially reversed in the political process during the first Roosevelt and Wilson administrations.<sup>68</sup> Sometimes the Court has reversed itself, overruling

---

65. *E.g.*, HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 53 (1994).

66. Standard histories include HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937* (1991); WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1981); and HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1955) (acknowledged as the leading history of the Sherman Act).

67. That there is still debate as to the precise nature of that principle does not affect our analysis or conclusion. At a high level of generality, the principle can be expressed as anti-predation, the idea of free competition, and so forth. That is enough for our purposes.

68. *E.g.*, *Henry v. A.B. Dick Co.*, 224 U.S. 1, 30 (1912) (construing the Sherman Act not to prohibit tying arrangements) (overridden in the Clayton Act of 1914, 15 U.S.C. § 14 (1994)); *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895) (construing the Sherman Act to be inapplicable to the sugar trust). The *E.C. Knight* decision became a campaign issue in the 1896 election, and subsequently was rendered irrelevant by Sherman Act decisions written by judges appointed after the election. *E.g.*, *Swift & Co. v. United States*, 196 U.S. 375, 391-93 (1906)

or narrowing prior decisions that have been subject to persuasive economic critique.<sup>69</sup> On the other hand, ill-advised congressional amendments have been narrowly interpreted by the Court and sometimes abandoned by the political process. Most of the ill-advised amendments have been of the rent-seeking variety, where an industry group procures an exemption from the public-benefit law. For example, the Miller-Tydings Act of 1937<sup>70</sup> authorized the states to permit resale price maintenance contracts, a congressional authorization of practices that are usually anticompetitive. The Supreme Court in 1952 gave the special-interest amendment a narrowing construction, invalidating a Louisiana law requiring all liquor retailers to charge the price set by the distributor once any retailer agreed to the set price.<sup>71</sup> Congress itself repealed the law in 1975. Other statutory exemptions have survived,<sup>72</sup> but, as the Supreme Court has said repeatedly, “exemptions from the antitrust laws are to be narrowly construed.”<sup>73</sup> Generally, the Court has interpreted the amendments to minimize rent-seeking and to fit possibly valid market-based reasons for alternative regulatory schemes. Thus, firms

---

(construing the Sherman Act broadly because the challenged conduct furthered the pursuit of an interstate monopoly, unlike the challenged conduct in *E.C. Knight*, which furthered the pursuit of a purely intrastate monopoly).

69. *E.g.*, *Cont. T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977) (overruling the rule announced in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), that vertical restrictions in sale transactions have a pernicious effect on competition and therefore constitute a per se violation of the Sherman Act); *see also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1426-40 (1988) (listing Supreme Court cases, including Sherman Act cases, that overruled statutory precedent). Justice Stevens—the Court’s firmest adherent to super-strong stare decisis in statutory cases—exempts Sherman Act cases from that rule because the Sherman Act is a common law statute. *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 641-62 n.12 (1983) (Stevens, J., dissenting).

70. 50 Stat. 693 (1937) (codified as amended at 15 U.S.C. § 1).

71. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 388 (1952) (rejecting the dissenting Justices’ argument that Congress clearly intended to reach these “nonsigner” statutes).

72. *E.g.*, *McCarran-Ferguson Act of 1945*, 59 Stat. 33, 15 U.S.C. §§ 1011-1015 (1994) (exempting insurance and leaving that industry to state regulation); *Reed-Bulwinkle Act of 1948*, 62 Stat. 472 (originally codified at 49 U.S.C. § 5b, recodified at 49 U.S.C. § 10706 (1994)) (exempting railroad and trucking rate bureau meetings); *Clayton Act of 1914*, 38 Stat. 731, 15 U.S.C. § 14 (1994) (exempting labor and agricultural organizations).

73. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979) (adopting a narrow construction of the *McCarran-Ferguson Act of 1954*); *see also* *Fed. Maritime Comm’n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) (narrowly construing § 15 of the *Shipping Act*); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956) (strictly construing the *Miller-Tydings Act* and the *McGuire Act*).

that engage in predatory conduct have not usually been able to hide behind statutory exemptions.

The interpretive history of the Sherman Act provides a classic illustration of the gravitational force a super-statute exercises on the law, in contrast to that of other kinds of statutes. To begin with, a super-statute will generally be applied in a purposive rather than simple text-bounded or originalist way. It will generate a dynamic common law implementing its great principle and adapting the statute to meet the challenges posed to that principle by a complex society. Although the Sherman Act centrally deploys the common law term "restraint of trade" and its authors apparently thought they were federalizing the common law, the leading precedents have not confined the statute to those restraints which in 1890 were illegal under the common law.<sup>74</sup> Yale Law School Dean (and future Chief Justice) Taft's 1914 book on antitrust law openly endorsed the Sherman Act's dynamic application to address "the changes of business and social conditions" as well as prevailing economic norms.<sup>75</sup> This was certainly the approach taken by the New Deal and Warren Courts.<sup>76</sup> Although the Burger and Rehnquist Courts have emphasized plain meanings and common law backgrounds in statutory cases more than their predecessors, they have nonetheless construed the Sherman Act in the purposive, evolutive way the New Deal and Warren Courts did. Indeed, the boldest statement of this methodology came from archtextualist Antonin Scalia, who, after presenting an intricate economic analysis of a challenged vertical restraint, had this to say about the statute:

In resting our decision upon the foregoing economic analysis, we do not ignore common-law precedent concerning what constituted "restraint of trade" at the time the Sherman Act was adopted. But neither do we give that pre-1890 precedent the dispositive effect that some would. The term "restraint of trade" in the statute, like the

---

74. For example, Judge Taft's great decision in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 248 (1899), used and arguably distorted the common law as a backdrop for principles grounded in sound economic reasoning. Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1019 (1989) (arguing that, in 1890, the common law regarding competition was undergoing a revolution as a result of the death of mercantilism and the rise of classicism).

75. WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 47 (1914).

76. *E.g.*, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497-99 (1940) (concluding that the Sherman Act should be adapted to prevent modern conduct that caused the wrongs that the common law doctrine of illegal restraints on trade and commerce was aimed to prevent).

term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term “restraint of trade” was well recognized at the time the Sherman Act was enacted. . . . The Sherman Act adopted the term “restraint of trade” along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.<sup>77</sup>

A second feature of a super-statute in action is that its principle will have colonizing effects on other statutes. Given the Sherman Act’s expansive reach, its operation potentially conflicts with any statutory scheme regulating economic activity or an industry. From the beginning, the Sherman Act has occupied a favored position as the Supreme Court’s first major decision invalidating a railroad cartel, rejecting the argument that the ICC’s regulation of rail transport immunized the arrangement.<sup>78</sup> The Court held that the Sherman Act created an implied exception to the ICC’s otherwise exclusive regulatory jurisdiction over railroads. What about statutes adopted after the Sherman Act? Later-enacted statutes might alter the scope of earlier ones (as the Sherman Act did vis-à-vis the Interstate Commerce Act), but the Court has repeatedly held that “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have been found only in cases of plain repugnancy between the antitrust and regulatory provisions.”<sup>79</sup> The Court has allowed narrowly crafted exemptions only where “necessary to make the [subsequent regulatory scheme] work.”<sup>80</sup> Even when a federal agency has determined that a requested transaction was in the public interest, the Court has often allowed antitrust challenges to that action.<sup>81</sup>

---

77. *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 731-32 (1988). *But cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION 3-9 (1997) (denouncing vigorously common law-type reasoning as inconsistent with the premises of a representative democracy where most law is statutory).

78. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 314-27 (1896).

79. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 350-51 (1962), *quoted in* *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973) (following the *Philadelphia National Bank* holding); *see also* *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963) (reiterating that repeal by implication is not favored).

80. *Silver*, 373 U.S. at 357; *see also* *United States v. Nat’l Ass’n of Secs. Dealers, Inc.*, 422 U.S. 694, 729-30 (1975) (crafting an exemption to permit the SEC regulatory scheme to work).

81. *See Otter Tail Power Co.*, 410 U.S. at 372 (“Activities which come under the jurisdiction

Finally, the Sherman Act has exercised a gravitational pull on constitutional law itself. One of the earliest Supreme Court applications ruled that the Act could not be applied to the sugar trust because the Commerce Clause authorized congressional regulation of "commerce" but not intrastate manufacturing.<sup>82</sup> The Court's stingy opinion was a political sensation and an issue in the 1896 presidential campaign.<sup>83</sup> The post-1896 Court immediately adopted the Commerce Clause approach of the prior dissenting opinion, which permitted congressional regulation of intrastate activities which had an "effect" on interstate commerce.<sup>84</sup> In 1906, the Court adopted another expansive theory of the Commerce Clause when it upheld application of the Sherman Act to intrastate price fixing that entailed transactions in the "current of commerce."<sup>85</sup> Although the Sherman Act cases by no means rescued the Court from two generations of painful struggle with the Commerce Clause, they were a standing exception to stingy readings of that congressional power and were also a foundation upon which the New Deal Court built an expanded version of the Commerce Clause. Specifically, the "effect on commerce" and "current of commerce" theories in the Sherman Act cases were foundational ideas in the New Deal Court's liberalization of the

---

of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws."); *Philadelphia Nat'l Bank*, 374 U.S. at 351 (stating that the comptroller's actions under the Bank Merger Act are not immune from antitrust laws); *Silver*, 373 U.S. at 357-61 (holding that self-regulation under the Securities Exchange Act may still be subject to antitrust actions); see also *Calif. v. Fed. Power Comm'n*, 369 U.S. 482, 487 (1962) (holding that the FPC should not approve a merger while the validity of the merger is being challenged in federal court on antitrust grounds); *United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1959) (finding that FCC action does not preclude antitrust actions). A complex matter is the exception created for state-sanctioned businesses by *Parker v. Brown*, 317 U.S. 341, 350-52 (1943) ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state . . . from activities directed by its legislature."). *Parker's* current status is unclear; it was read narrowly in *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408-14 (1978), but was preserved in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109-11 (1978) (concluding that a regulatory scheme restricting the establishment of car dealerships fit the *Parker* state-action exemption).

82. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895).

83. Gilbert Fite, *Election of 1896*, in 2 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789-1968, at 1787, 1793-94 (Arthur M. Schlesinger, Jr. & Fred L. Israel eds., 1971); Allan Westin, *The Supreme Court, the Populist Movement, and the Campaign of 1896*, 15 J. POL. 3, 25-27 (1953).

84. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 229-31 (1899) (holding that the Commerce Clause extends even to private contracts that directly affect interstate trade, thus adopting something like the approach propounded by Justice Harlan's dissent in *E.C. Knight*).

85. *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1906).

Commerce Clause to permit expansive federal regulation of the economy.<sup>86</sup>

### *B. The Civil Rights Act of 1964*

The Civil Rights Act of 1964 prohibited or strengthened earlier measures against race discrimination in voting (Title I), public accommodations (Title II), public facilities (Title III), public education (Title IV), programs or activities receiving federal financial assistance (Title VI), and most workplaces (Title VII).<sup>87</sup> Sex discrimination is also illegal in the workplaces covered by Title VII of the law.<sup>88</sup> As with the Sherman Act, the Civil Rights Act is a proven super-statute because it embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life,<sup>89</sup> and has pervasively affected federal statutes and constitutional law. Again, as with the Sherman Act, Title VII's principle has been debated, honed, and strengthened through an ongoing give-and-take among the legislative, executive, and judicial branches. Unlike the Sherman Act dialectic, the Civil Rights Act's evolution has repeatedly been influenced by social movement ideas and popular pressure on the political process.

Naturally, the statute has been the situs of normative conflict, some of it still unresolved. (Given its commitment to a great principle and the requirement of deliberation, it is hard to imagine a super-statute that would not generate intense disagreements as to the application of the principle to particular cases.) For example, the 1964 statute on its face did not make clear the statute's application to employment policies having a disparate racial impact or seeking to remedy under-representation of minorities. Resolution of those issues required a refinement of the antidiscrimination principle: Does it entail actual integration or just equality of opportunity? The agency

---

86. See *Wickard v. Filburn*, 317 U.S. 111, 127-29 (1942) (accepting a broad version of "stream of commerce" theory); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31-32 (1937) (accepting a broad version of the "affecting commerce" theory).

87. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.) (1994).

88. *Id.* § 701(a)-(d), 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2(a)-(d) (1994)).

89. Indeed, the normative and political struggle needed to enact the Civil Rights Act was arguably the greatest and most difficult legislative campaign of the twentieth century. See generally CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE* (1985) (describing the political struggle).

charged with enforcing the statute (the EEOC) saw the statute's mission as integration.<sup>90</sup> The Supreme Court accepted that as the basis for its early interpretations in *Griggs v. Duke Power Co.*,<sup>91</sup> which established a cause of action for disparate-impact claims, and *United Steelworkers of America v. Weber*,<sup>92</sup> which permitted some voluntary affirmative action programs. Scholars were generally supportive of these interpretations, and the early Rehnquist Court reaffirmed *Weber* and extended its reasoning to allow at least some affirmative action programs benefiting women.<sup>93</sup>

In 1989, however, the Rehnquist Court bared its strict constructionist teeth in several employment discrimination cases.<sup>94</sup> For the particular Justices on that Court, there was nothing remarkable about their narrow construction in those cases. Majority opinions made it harder to prevail in a *Griggs* lawsuit and set forth several other narrowing constructions of Title VII. The Court's methodology was emblematic of its typical approach to statutory construction: hew closely to statutory plain meaning without undue intrusion into common law rights and obligations.<sup>95</sup> What the majority Justices did not appreciate sufficiently was that much of the public did not consider these ordinary cases. The decisions triggered a public normative alarm that a bedrock statute was being undermined. Large majorities in Congress approved the Civil Rights Act of 1991,<sup>96</sup> which

---

90. For excellent overviews from different perspectives, compare HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA, 1964-1971*, at 249 (1990) (describing the EEOC's appeal to the purpose of the Civil Rights Act of 1964 to get past the intent requirement of Title VII and shift toward a disparate-impact model of civil rights), with Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1725 (1991) (reviewing Graham's work and arguing that the EEOC's policy did not represent a shift in focus within the civil rights movement).

91. 401 U.S. 424, 431 (1971).

92. 443 U.S. 193, 204 (1979).

93. *Johnson v. Transp. Agency*, 480 U.S. 616, 620 (1987).

94. The main cases were *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989) (holding that 42 U.S.C. § 1981 prohibits discrimination only in the making and enforcement of contracts, and does not apply to other forms of employment discrimination); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (increasing the plaintiff's burden of proof); and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (Brennan, J., plurality opinion) (holding that the defendant must show by a preponderance of the evidence, not clear and convincing evidence, that an employment decision would have been the same without a focus on gender when the plaintiff proves that gender was a motivating part of the decision). In *Hopkins*, the plaintiff essentially prevailed, and in *Wards Cove* and *Patterson* the Court engaged in a delicate exercise of narrowing established precedents.

95. E.g., *Patterson*, 491 U.S. at 176 (narrowly construing 42 U.S.C. § 1981).

96. Pub. L. No. 102-166, 105 Stat. 1071 (1991). For background of the statute and discussion of the cases overridden, see generally William N. Eskridge, Jr., *Reneging on History?*:



reaffirmed *Griggs* (explicitly)<sup>97</sup> and *Weber* (implicitly).<sup>98</sup> This normative feedback had some effect on the Rehnquist Court even as its personnel became more conservative.<sup>99</sup>

Not only has the Court found a new appreciation for the *Griggs* precept that Title VII should be construed liberally and aggressively to achieve its integrative goals,<sup>100</sup> but the Court's newfound liberality in construing Title VII has also trumped some of its favorite clear-statement rules and (most notably) has generated some strong rules for regulating sexual harassment in the workplace. In a pair of 1998 decisions, seven-Justice majorities expounded upon the Court's decision in *Meritor Savings Bank, FSB v. Vinson*,<sup>101</sup> which had recognized claims for sexual harassment in the workplace. Although Title VII nowhere mentions such claims, which originated in feminist writings in the 1970s and then in EEOC guidelines developed during the Carter administration,<sup>102</sup> they have become a further elaboration of the antidiscrimination principle contained in Title VII. The two dissenting Justices complained about the "willful policymaking" by judges and bureaucrats this entailed.<sup>103</sup> The majority responded that such common law-type rules were needed to carry out the statutory goal and that such a process had been ratified by Congress in the 1991 Act.<sup>104</sup> Although we should expect future Courts (if populated with

---

*Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

97. § 3(2)-(3), 105 Stat. at 1071 (including in the purpose of the Act codification of *Griggs*'s approach to employment policies having a disparate impact upon minorities); see also *id.* § 105 (adding a new provision, 42 U.S.C. § 2000e-2(k)).

98. *Id.* § 116 ("Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.").

99. Thus, liberal Justice Brennan was replaced by moderate-conservative Justice Souter in 1990; liberal Justice Marshall was replaced by conservative Justice Thomas in 1991; moderate-liberal Justice Blackmun was replaced by moderate Justice Ginsburg in 1993; and moderate-conservative Justice White was replaced by moderate Justice Breyer in 1994. The first two appointments shifted the balance on the Court far to the right; the latter two had small effects in general.

100. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (unanimously finding statutory ambiguity, and relying on the statute's liberal purpose, to construe § 704, an anti-retaliation rule, to apply to past as well as present employees).

101. 477 U.S. 57 (1986).

102. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1696-1701 (1998).

103. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 772 (1998) (Thomas, J., joined by Scalia, J., dissenting).

104. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 803 n.4 (1998) (stating, in the companion case to *Ellerth*, that "[t]he decision of Congress to leave *Meritor* intact is

more conservative Justices) to cavil over the margins of Title VII, we do not expect such Courts to fuss with the now-expanded core of the jobs title.

As has the Sherman Act, the Civil Rights Act has pervasively affected the evolution of public law. Unlike the earlier statute, the civil rights law explicitly affects other statutory regimes. Title VI prohibits federally funded programs from discriminating on the basis of race, ethnicity, or religion.<sup>105</sup> Title VII, as amended in 1972, prohibits state and federal agencies from discriminating in their personnel policies.<sup>106</sup> These provisions contemplate that the antidiscrimination principle must animate most federal and state policies. Judges and administrators have internalized the idea well beyond the explicit commands of the statute. The most expansive example of the principle in operation is evident in the Supreme Court's decision in *Bob Jones University v. United States*.<sup>107</sup> Section 501(c)(3) of the Internal Revenue Code provides that "educational" institutions are entitled to an exemption from federal income taxation.<sup>108</sup> The IRS disallowed Bob Jones University's exemption, because its racially discriminatory policies were inconsistent with the overall "charitable" policy of the exemption.<sup>109</sup> Although the statutory text was broad enough to include schools like Bob Jones and the exemption was originally adopted during the apartheid era in our history,<sup>110</sup> the Court ruled that current federal policy disallowed the exemption. Of course, the main evidence of that current policy was the Civil Rights Act of 1964. In particular, the Court emphasized that Titles IV and VI were evidence of the important public principle that "racial discrimination in education violates a fundamental public policy."<sup>111</sup>

Just as the Sherman Act provided occasions for the Supreme Court to get beyond earlier stingy readings of Congress's Commerce Clause power, so the public accommodations provisions of the Civil

---

conspicuous").

105. 42 U.S.C. § 2000d (1994).

106. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 717, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-16).

107. 461 U.S. 574 (1983).

108. 26 U.S.C. § 501(c)(3) (1994).

109. *Bob Jones University*, 461 U.S. at 579.

110. Justice Powell maintained that the policy of the exemption is diversity, which might arguably be subserved by Bob Jones's ideology. *Id.* at 609-10 (Powell, J., concurring in part).

111. *Id.* at 594.

Rights Act prodded the Court to render its most expansive reading of the Commerce Clause to date.<sup>112</sup> The great normative principle of the 1964 Act pushed the Court to read the Constitution more broadly than it had done before or has done since. A less-noted chain of events was in some ways more remarkable. The Supreme Court ruled that state policies classifying people on the basis of pregnancy do not necessarily violate the prohibition on sex discrimination because they divide people into pregnant women and nonpregnant men and women.<sup>113</sup> When the Court extended this idea to Title VII, feminist groups engaged in a campaign to educate Congress about the many bars that various kinds of pregnancy-based discrimination posed to women's workplace advancement. Congress swiftly overrode the Court with the Pregnancy Discrimination Act of 1978.<sup>114</sup> The Court has not only followed the letter of the statutory response but has also liberally internalized its principle, that pregnancy-based discrimination is a major engine for disadvantaging women in the workplace. Hence, the Court has sweepingly applied the PDA to strike down arguably reasonable pregnancy-based discriminations<sup>115</sup> and has refused to invoke the statute against state policies that seek to remedy employment disadvantages resulting from pregnancy.<sup>116</sup> Because the new statutory policy applies to state and federal agencies, thanks to the 1972 amendments to Title VII, the PDA has essentially replaced the Equal Protection Clause as the foundational protection for women against pregnancy-based discrimination.<sup>117</sup>

---

112. *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (holding that Ollie's Barbecue could be regulated under the Commerce Clause); *see also* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (holding that a motel may be regulated by Congress, even if the operation of the motel is assumed to be "of a purely local character"). Although *United States v. Lopez*, 514 U.S. 549 (1995), called a halt to this expansion of the Commerce Clause, the Court was careful not to question the authority of the Civil Rights Act precedents. *Id.* at 558-64.

113. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

114. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (1994)) (expanding the definition of "sex discrimination" to include pregnancy as a basis for unlawful discrimination). The statute was meant to override *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (citing and following *Geduldig*). H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750.

115. *United Auto Workers v. Johnson Controls Inc.*, 499 U.S. 187, 191 (1991) (invalidating a rule prohibiting "women capable of bearing children" from working in a hazardous part of an industrial plant).

116. *Cal. Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (upholding a California law requiring employers to give parental leave to mothers but not to fathers).

117. Almost all pregnancy-based discrimination—ranging from job limitations to employment exclusions or forced leave to insurance and disability protection—is in the workplace, where Title VII applies. Because its rule is more protective than that of *Geduldig*,

Even more dramatic, but also more speculative, evidence of the Constitution-bending effect of the Civil Rights Act of 1964 came in *Romer v. Evans*,<sup>118</sup> where the Supreme Court invalidated a state constitutional amendment barring state or municipal governments from recognizing sexual orientation as a basis for “minority status, quota preferences, protected status or claim of discrimination.”<sup>119</sup> The Court’s broadly written opinion mainly emphasized the Justices’ fear that the amendment would deny gay men, lesbians and bisexuals “the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.”<sup>120</sup> The dissent responded that protection of gay people constituted “special rights,” which the state could refuse to confer on an unpopular group.<sup>121</sup> The majority saw nothing special about the rights taken away from this minority group. “These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”<sup>122</sup> The Court cited nothing for this proposition—nor was citation necessary in light of the way the Civil Rights Act’s antidiscrimination principle has saturated American social and political culture.

### C. *The Endangered Species Act of 1973*

As with the Civil Rights Act of 1964, the Endangered Species Act of 1973 (ESA)<sup>123</sup> certainly aspires to super-statute status: it was developed to foster a great principle and was drafted as expansively

---

which has not been overruled, plaintiffs rely on Title VII rather than the Equal Protection Clause. We should not be surprised to see *Geduldig* bite the constitutional dust someday in light of its obsolescence after the PDA. Moreover, even though the Supreme Court is now engaged in a campaign to preclude application of many federal regulatory schemes to the states, under the Eleventh and perhaps the Tenth Amendment, we think it unlikely that the Court will invalidate the 1972 amendments extending Title VII to the states.

118. 517 U.S. 620 (1996).

119. *Id.* at 624.

120. *Id.* at 630.

121. *Id.* at 638 (Scalia, J., dissenting).

122. *Id.* at 631. The Court then invalidated the amendment on the ground that its broad exclusion of lesbians, gay men, and bisexuals was “so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.” *Id.* at 632.

123. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended in scattered sections of 16 U.S.C. (1994)).

as possible to make that policy one that pervades the economic and political culture. The ESA rests on the biodiversity principle that it is in the best interests of mankind to minimize the losses of genetic variations. In pursuit of that principle, the law authorizes the Secretary of the Interior to declare species of animal life “endangered” and creates various protections for species so designated.<sup>124</sup> Section 2 states that the statute provides “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and directs that “all Federal departments and agencies shall seek to conserve endangered species and threatened species.”<sup>125</sup> Section 5 authorizes acquisition of lands needed to preserve endangered species. Pursuant to section 7:

Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.<sup>126</sup>

Section 9 makes it unlawful for any person subject to the jurisdiction of the United States to “take” an endangered species.<sup>127</sup> Compared with other recently enacted statutes, including the Civil Rights Act, this is not an elaborately detailed statutory scheme—but it has proven to be a far-reaching one in a relatively short period of time.

The key to the ESA’s aspiration, as with the Sherman and Civil Rights Acts, is that it consciously embodies a great principle: biodiversity. If we are to take seriously our humane and religious responsibilities as custodians of the earth and its life populations, this is an enduring principle of enormous consequence. That idea has not been lost on the officials charged with enforcing and construing the

---

124. 16 U.S.C. §§ 1533(a)-(c) (authorizing the Secretary of Interior to designate endangered species and habitats “critical” to their survival); *id.* § 1533(d) (authorizing the Secretary to issue regulations); *id.* § 1533(f) (requiring the Secretary to develop and implement “recovery plans” for such species); *id.* § 1534 (authorizing federal land acquisition to conserve endangered species); *id.* § 1538 (prohibiting actions jeopardizing the welfare of an endangered species); *id.* § 1540 (providing penalties for violations of the preceding statutes).

125. *Id.* § 1531(b)-(c); *see also id.* § 1532(3) (defining “conserve” as meaning “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by this statute] are no longer necessary”).

126. *Id.* § 1536(a)(2).

127. *Id.* § 1538(a)(1); *see also id.* § 1532(19) (defining “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”).

law—including the Rehnquist Court. That Court's most elegant internal debate in a statutory case is *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.<sup>128</sup> The issue was whether a private farmer's destruction of the habitat of an endangered species could be a taking in violation of section 9.<sup>129</sup> As most first-year law students learn, the common law understanding of "take" entails actual harm or control of a particular animal,<sup>130</sup> and the statute's structure lent considerable support to this common law view. Such arguments usually prevail in Rehnquist Court statutory cases, but not in *Sweet Home*, where they attracted only three votes.<sup>131</sup> The majority of the Court interpreted the anti-taking provision liberally to carry out its fundamental biodiversity-promoting purpose.<sup>132</sup>

The breadth of the ESA as applied is even more striking in its effect on other federal laws. If there was any doubt that the statute's bar to federal programs that harmed endangered species and their habitats needed to be taken seriously, it was laid to rest in the famous case of *TVA v. Hill*.<sup>133</sup> In the greatest statutory opinion of his career, Chief Justice Burger ruled that the ESA barred completion of a \$120 million dam because its completion would destroy the habitat of the endangered snail darter.<sup>134</sup> The Chief Justice's opinion is best-known as an exemplar of the plain meaning rule and a separation of powers rationale for such a rule,<sup>135</sup> but it also stands for the proposition that courts ought to apply statutes to carry out their purposes. Indeed, what is most excellent about the Chief's opinion is its synthesis of the two ideas: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act but

---

128. 515 U.S. 687 (1995).

129. *Id.* at 690.

130. *Pierson v. Post*, 3 Cai. R. 175, 179 (N.Y. Sup. Ct. 1805) (holding that rights to and possession of a wild animal required killing or controlling, and not merely pursuing the animal).

131. *Sweet Home*, 515 U.S. at 714 (Scafia, J., dissenting). Justice Scafia's dissent was joined by Chief Justice Rehnquist and Justice Thomas).

132. *Id.* at 699. The majority was not without good arguments drawn from the language and structure of the ESA, but on the whole those arguments made by the dissenters were better. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 249-71 (2000) (analyzing the various arguments extensively).

133. 437 U.S. 153 (1978).

134. *Id.* at 172-73.

135. Charles F. Lettow, *Looking at Federal Administrative Law with a Constitutional Framework in Mind*, 45 OKLA. L. REV. 5, 9 (1992).

also in literally every section of the statute.”<sup>136</sup> Thus, the Court insisted upon observance of the ESA’s directive, which trumped not only the government’s cost-benefit analysis but also appropriations laws adopted in and after 1973 that had continued to fund the dam in question, notwithstanding legislative notice that the completed dam would endanger the snail darter.<sup>137</sup>

There are limits to the ESA’s great principle, however, and these limits threaten the law’s success and future as a super-statute. An initial and wholly unsurprising limit is that in particular cases our political culture is not willing to protect great principles at any price. Thus, Congress responded to *Hill* with an administrative mechanism for providing variances from the strict requirements of section 7.<sup>138</sup> Congress responded to the agency habitat regulation at issue in *Sweet Home* by creating an administrative mechanism by which private landowners could apply for variances from the strict requirements of section 9.<sup>139</sup> (Both Supreme Court decisions generated vigorous dissenting opinions whose concerns were ameliorated, in part, by the legislation.) A more fundamental limit is the persistent questioning about the statute’s effectiveness relative to its substantial costs. According to the law’s critics, after almost a generation of statutory operation, some species have become extinct, and very few have been removed from the endangered list (and those that have graduated are said to owe little if any of their success to the ESA).<sup>140</sup> Although the ESA’s principle of biodiversity has stuck in the public culture, its mechanism for effectuating the principle—prohibitions against private-party and government-program harm rather than more proactive government programs—remains debatable.

136. *Hill*, 437 U.S. at 184.

137. *Id.* at 189-93. *Hill* is the leading case for the proposition that federal courts will presume that appropriations measures do not make substantive changes in the law. *See id.* at 190.

138. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3752-60 (codified as amended at 16 U.S.C. § 1536 (1994)); *see also* Energy and Water Development Appropriation Act of 1980, Pub. L. No. 96-69, tit. IV, 93 Stat. 437, 449 (exempting specifically the dam at issue in *Hill*); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 431-41 (1992) (following a statutory provision that clearly overrode the ESA as to specified forest land that had been protected as habitat for the endangered spotted owl).

139. 16 U.S.C. § 1539(a)(1).

140. *E.g.*, Timothy Beatley, *Preserving Biodiversity*, 66 J. AM. PLANNING ASS’N 5, 7 (2000) (observing that only eleven species “have recovered sufficiently to be removed from the [endangered species] list”); David S. Wilcove, *The Promise and the Disappointment of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 275, 277 (1998) (noting, as evidence of the “low success rate” of the ESA, that only “nine percent of our endangered species are improving in status”).

Moreover, and perhaps relatedly, it remains to be seen how strongly the ESA will affect the contours of constitutional law, as the Sherman Act and the Civil Rights Act have done. In recent years, the Rehnquist Court has undermined the ESA in an interesting procedural way: the Court's opinions have limited the ability of bio-conservationists to bring suit to challenge *underenforcement* of the ESA,<sup>141</sup> while expansively construing the statute to allow virtually any aggrieved landowner to bring suit challenging *overenforcement* of the statute.<sup>142</sup> A cautionary concurring opinion in the former case suggests that litigation may have been *sui generis*,<sup>143</sup> in which event concerns about the Court's procedural asymmetry would be greatly abated.

### III. ELABORATION AND RAMIFICATIONS OF THE SUPER-STATUTE IDEA

Our idea that a subcategory of statutes is special not only adds a new dimension to this country's statutory history but also helps explain most of the paradoxically liberal and purposive decisions by the conservative and textualist Rehnquist Court. If we are right that at least some laws are super-statutes, what implications should that insight have for legal doctrine and theory? It should be no surprise that we think there are many implications. In the process of exploring the implications, we shall also say more about the epistemology of super-statutes: how they come into being, how to recognize them, and how they interact.

#### A. *General Theory and Doctrines of Statutory Interpretation*

Our theory provides a principled and useful way to draw the vexing line between strict and liberal construction. The oldest

---

141. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557-67, 571-78 (1992) (holding that plaintiffs concerned with species preservation and who had in the past visited sites of endangered species had no standing to sue the Secretary for his opinion that the ESA has no application to federally funded projects outside the United States).

142. *E.g.*, *Bennett v. Spear*, 520 U.S. 154, 157-79 (1997) (allowing landowners objecting to species-preservation measures to bring suit pursuant to the ESA's citizen-suit provision and finding injury-in-fact through reasonable speculation).

143. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) (suggesting that Congress clearly has the authority to identify nontraditional injuries and extend chains of causation to satisfy Article III's injury-in-fact requirement but must do so in the statute, which did not help the instant plaintiffs). Interestingly, Justice O'Connor, the Court's most articulate stickler for standing requirements, joined two other Justices in dissent on the standing point. *Id.* at 589 (Blackmun, J., dissenting).



chestnuts in statutory interpretation doctrine have been that “statutes in derogation of the common law are to be strictly construed,” but “remedial statutes should be liberally construed.” What remedial statute is not also in derogation of the common law? A drawback of Warren Court-style activism is that too many statutes are construed liberally; the converse drawback of Rehnquist Court-style textualism is that too many statutes are construed too literally. The theory of super-statutes suggests this typology:

- *Super-statutes* should be construed liberally and in a common law way, but in light of the statutory purpose and principle as well as compromises suggested by statutory texts.
- *Ordinary statutes* should be construed with greater focus on the statutory text, but with attention to statutory purpose and legislative history when the statutory terms are ambiguous.
- *Penal statutes* should be applied strictly, reading statutory text no more broadly than the prototypical, core signification of its terms permit.

The liberal approach to super-statutes is of course suggested by the Court’s decisions interpreting the Sherman Act, Title VII, and the ESA, but it is particularly well-illustrated by the two sexual harassment cases decided in 1998. In *Burlington Industries, Inc. v. Ellerth*,<sup>144</sup> the issue was what responsibility an employer has under Title VII for a supervisor’s unwelcome sexual advances and threats of retaliation.<sup>145</sup> If Title VII were a criminal statute, the employer would not be liable for such advances absent a more specific scienter showing. If Title VII were an ordinary statute, it is not clear that courts should fashion detailed rules for figuring out when supervisor advances (unknown to the employer) constitute “discrimination . . . because of . . . sex.” It would be well within our legal process tradition for the Court to insist that any such rules be fashioned by Congress. It is notable that no Justice in *Ellerth* took this position; all nine Justices—none of whom is an open activist—were willing to fashion specific rules, common law-style, to guide the agency, courts, and attorneys in determining when the employer should be liable.<sup>146</sup> The

---

144. 524 U.S. 742 (1998).

145. *Id.* at 746-47.

146. *Id.* at 755-66 (deriving detailed standards from the common law of agency and adapting them to Title VII’s goals); *id.* at 767-71 (Thomas, J., dissenting) (advancing a simpler negligence

debate within the Court was entirely about what detailed set of rules the judiciary should read into the open-textured statutory text. Justice Kennedy's opinion for the Court came up with some moderately tough rules: when the harassing supervisor visits a tangible employment action on the employee, both the policy of Title VII and principles of agency render the employer vicariously liable; when there is no tangible employment consequence, Title VII policies suggest there should sometimes be liability for the employer, subject to a defense that the employer took due care to prevent harassment (such as through an anti-harassment policy and complaint procedure) and the employee failed to take advantage of the employer's internal protections.<sup>147</sup>

Although the rules developed by Justice Kennedy are not the most liberal, pro-plaintiff rules the Court could have derived, choosing such rules is not required under our theory. Conservative judges and commentators are certainly correct to point out that no principle must be pursued at any cost and even the most important public policy runs up against others that set limits on it.<sup>148</sup> These kinds of trade-offs and judgments have been the life of the common law. Thus, our super-statute rule of construction requires that interpreters develop the statute, common law-style, to carry out its robust principle and purposes, but remain cognizant of cross-cutting costs and countervailing policies. *Ellerth* is a classic case for this kind of reasoning.

### B. *Canons of Statutory Construction*

Judges and lawyers throughout American history have appreciated the importance of the canons of statutory construction.<sup>149</sup> Influenced or perhaps corrupted by Karl Llewellyn's list showing every canon to have a counter-canon negating it,<sup>150</sup> lawyers today are more reluctant to believe that the canons "determine" (ex ante)

---

standard, but also in a common law-style).

147. *Id.* at 764-66.

148. *E.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (conceding that his originalist theory would not allow barbaric punishments, for example, even if allowed by original intent circa 1791).

149. For a handy introduction, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* ch. 7 (3d ed. forthcoming 2001).

150. Karl N. 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, 401-06 (1950).

rather than “justify” (ex post) judicial decisions in the hard cases. The canons may nevertheless form an interpretive regime that at least puts the legislature and others on notice as to the rules of thumb judges will follow in applying statutes.<sup>151</sup> Our theory of super-statutes provides some ground rules for applying the artillery of canons. Consider how our theory illuminates some of the important textual, extrinsic-source (or deference), and even substantive canons.

1. *Textual Canons.* Among the most fundamental canons of statutory construction are the ordinary-meaning rule and its corollaries. The rule is that statutory terms are to be applied in the way an ordinary speaker of the English language would understand them. The theory of super-statutes suggests that even this simple rule must be understood in a more complicated way:

- For *penal statutes*, which are to be construed strictly, interpreters should not extend words beyond their prototypical, or core, meanings.<sup>152</sup>
- For *ordinary statutes*, which are to be construed in a regular way, interpreters should apply words in the normal range used by ordinary speakers of the language.
- For *super-statutes*, which are to be construed liberally and purposively, interpreters should apply words broadly and evolutively, the way the courts have applied terms like “restraint of trade” (Sherman Act), “discriminate” (Civil Rights Act), and “take” (ESA).

If you want to think about super-statutes as “common law statutes,” as suggested by Scalia’s antitrust opinion quoted above,<sup>153</sup> then the ordinary-meaning rule swiftly loses most of its force, as interpreters (like Scalia) are soon enough construing the precedents more than the text, and applying the statutory principle to new fact

---

151. ESKRIDGE, *supra* note 43, at 275 (“The canons . . . combine predictability and legitimacy in statutory interpretation: by applying the relevant canon(s), the lawyer can figure out what the legislature intended a statute to mean, which in turn is a sure prediction of how a judge will interpret it.”).

152. For an elaboration of the idea of applying “prototypical” word meanings in criminal cases, see Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 270-78.

153. See *supra* note 77 and accompanying text.

situations through the reasoning-by-analogy process characterized by the common law.

The operation of some of the famous textual canons of deduction from text also illustrates how they need to be applied differently to super-statutes. One popular canon is *inclusio unius est exclusio alterius*: the inclusion of one thing in a list suggests the exclusion of all others.<sup>154</sup> Law professors consider this canon unreliable or even bogus. Consider this thought experiment. Mother tells Sarah, "You may not kick or pinch your sister Marissa." Thinking *inclusio unius*, Sarah hits her little sister. That is an abuse of both logic and the sister, for the normative baseline against which Mother was speaking was the principle, "do not harm sister." On the other hand, if Mother had told Sarah, "You may have one scoop of ice cream and one cookie," *inclusio unius* properly suggests to Sarah that she is not authorized to eat a candy bar. The baseline is, "only a few teeth-destroying non-nutritious snacks for children." This thought experiment suggests that, for super-statutes, *inclusio unius* applies only when the new item on a list would derogate from the principle or policy that is the baseline for that statute.

The Burger Court invoked this idea to apply Title VII to law firm partnerships in *Hishon v. King & Spalding*.<sup>155</sup> Because partnerships were not included in the statutorily enumerated exemptions from coverage, the Court properly reasoned that partnerships were not exempt from Title VII. "When Congress wanted to grant an employer complete immunity, it expressly did so."<sup>156</sup> This was a valid inference only because the statutory principle (antidiscrimination) seems just as applicable to law firm partnerships as to other forms of business organization. Contrariwise, *inclusio unius* in *Weber* operated to trim back statutory coverage.<sup>157</sup> Section 703(j) says that Title VII should not be applied to "require" employers to grant preferences based on race or sex.<sup>158</sup> The Court reasoned from this prohibition that the statute could be applied to "permit" such preferences: because Congress had prohibited only mandatory preferences, it had not prohibited voluntary ones.<sup>159</sup> This is a plausible use of the canon—but

---

154. BLACK'S LAW DICTIONARY 1635 (7th ed. 1999).

155. 467 U.S. 69, 77-78 (1984).

156. *Id.*

157. *United Steelworkers v. Weber*, 443 U.S. 193, 202-04 (1979).

158. 42 U.S.C. § 2000e-2(j) (1994).

159. *Weber*, 443 U.S. at 202-04.

only if one assumes (as the Court did) that the baseline norm of Title VII is to redress historic racial segregation in the workplace and the exclusion of people of color from desirable jobs.

Other canons of construction should be understood the same way. For example, the canon *noscitur a sociis* (a thing is known by its associates) ought not be applied without consideration of statutory goals and purposes, as well as other legal values. Thus, the Court was correct in *Sweet Home* to read the statutory term “harm” in light of the strong purpose of the ESA to protect endangered species against indirect as well as direct threats.<sup>160</sup> Justice Scalia’s effort in dissent to invoke *noscitur a sociis* was potentially persuasive because “harm” was part of a list that included direct rather than indirect threats (“pursue,” “shoot,” “capture,” etc.)—but only if Congress had adopted the norm of state noninterference with private property use that did not directly threaten endangered species.<sup>161</sup> Because Congress in the ESA was decidedly changing common-law baselines, the Court majority had the better argument.

2. *Deference Canons.* Some of the canons of construction say that a judge should adopt interpretation “X” out of deference to a prior construction of the provision to mean “X.” Thus, a court might apply the ESA to bar private owners from affecting the habitat of an endangered species because (a) a prior court has so construed the ESA (as the *Sweet Home* Court did), or (b) an agency charged with implementing the ESA has done so (as the Department of Interior had done before *Sweet Home*), or (c) a committee or legislator who drafted and managed the ESA through Congress took that view (a perspective pressed by Justice Scalia’s dissent in *Sweet Home*). The theory of super-statutes suggests some variations on the conventional wisdom for two of these three deference canons.

In part because Congress is deemed the most appropriate forum for correction, most statutory precedents are entitled to a super-strong presumption of correctness, exceeding even that which stare decisis normally accords common law precedents. We have been critical of that super-strong presumption for ordinary statutes because there are many barriers (including inertia) to Congress’s correction of ordinary precedents.<sup>162</sup> The traditional rule will sometimes be

---

160. *Babbitt v. Sweet Home Chapter Comtys. for a Great Ore.*, 515 U.S. 687, 697-98 (1995).

161. *Id.* at 715 (Scalia, J., dissenting).

162. Eskridge, *supra* note 69, at 1385-1409.

appropriate for super-statutes, however, because Supreme Court constructions are likely to attract the attention of Congress and to be overridden if they misread the statute in light of its principle—as the Court did in the pregnancy discrimination cases of the mid-1970s (immediate and decisive override) and the Title VII cases of the late 1980s (immediate and angry override), but not in the sexual harassment cases of the late 1990s (Congress kept quiet). Where a statutory precedent has stimulated focused normative attention in the political process—and survived it intact—*stare decisis* values are and ought to be heightened.

The deference-to-agency canon is completely applicable to super-statutes but with some twists. The development of a super-statute and its principle is often going to be accomplished most productively at the agency level, and so deference is appropriate, as it was in *Griggs*, *Weber*, *Faragher* and *Ellerth*, and *Sweet Home*. The limit to deference, when the agency's position is at odds with the law, applies to super-statutes as well. Also, deference is not appropriate for agency litigating positions, such as the Department of Justice's positions in Sherman Act prosecutions. One twist arises out of the fact that super-statutory principles become part of the fundamental law—which the judiciary is uniquely charged with developing and applying. Thus, the EEOC's views, intelligent and well-formed as they may be, have not been a great situs for deference, because the Supreme Court is just as involved in articulating and deliberating about the antidiscrimination principle as the agency officials are. Another twist is that super-statutes are constantly at risk of rent-seeking exceptions and loopholes. Agencies are supposed to guard against this but are themselves susceptible to interest-group capture on at least some issues. To the extent that courts are less susceptible to such capture, they stand as an important monitor of agency weakness in this regard.

The committee-report and sponsor-statement canons have been under siege for half a generation. Although these canons have survived as a basis for construing and for limiting ordinary statutes, they are inappropriate for construing and especially for limiting super-statutes. Because they evolve, common law-style, super-statutes ought not be tied to the original expectations of their drafters to the degree that ordinary and penal statutes are. Just as the Sherman Act's "restraint of trade" language has not tied interpreters to nineteenth-century common law precedents, so the speeches of Senator Sherman or other supporters have little to teach us about the

statute today. Hence, it was ironic to see Justice Scalia, dissenting in *Sweet Home*, invoke sponsor statements as the only support for his central proposition that the ESA's government-purchase provision—and not its anti-take provision—was the only mechanism by which habitats on private land would be protected.<sup>163</sup> Apart from his own critique of relying on isolated snippets of legislative chit-chat, Justice Scalia's deployment of legislative history was even more inapt because whatever original understandings the drafters had for the ESA were overtaken by the statute's evolving implementation by the Department of Interior, the Supreme Court's broad construction of it in *TVA v. Hill*<sup>164</sup> (itself contrary to the expectations of the 1973 Congress), Congress's amendment of the law in 1982 to create an administrative mechanism for private landowners to sacrifice some habitat for legitimate land use, and so forth. Justice Scalia and his law clerks should be gently chided for smuggling in legislative history under these circumstances.<sup>165</sup>

3. *Substantive Canons.* There are more substantive canons of statutory construction than you can shake a stick at; many of them reflect constitutional values (more on that in the next section).<sup>166</sup> We do not dispute that those canons apply and ought to apply to super-statutes. Our theory would caution, however, that the substantive canons must be applied with due consideration of the statutory purposes and principle, and super-statutes ought not always bow to the canons. One of the Rehnquist Court's favorite canons is the rule against extraterritorial application of federal statutes. Notwithstanding this rule, courts have long applied the Sherman Act to cover activities outside the United States, with a variety of limiting principles.<sup>167</sup> We strongly support this relaxation of the rule, because

---

163. *Sweet Home*, 515 U.S. at 715 (Scalia, J., dissenting).

164. 437 U.S. 153 (1976).

165. Justice Scalia gets only a little slack for his stated reason: Justice Stevens, for the Court, was relying on legislative history, so this was just defensive stuff! *Sweet Home*, 515 U.S. at 728 (Scalia, J., dissenting). The majority was deploying such history only as evidence of statutory purpose, which Scalia ridiculed but did not deny, and not for any particular proposition. In other cases, Justice Scalia has refused to join *any mention* of legislative history. *E.g.*, *Assoc. Commer. Corp. v. Rash*, 520 U.S. 953, 963 (1997) (refusing to join a footnote of the opinion in which legislative history is discussed).

166. For a list, see Eskridge & Frickey, *supra* note 53, at 97 (listing canons followed by the Rehnquist Court).

167. *E.g.*, *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is

anticompetitive activities are necessarily going to occur outside the United States in many cases and the statutory purpose would be needlessly sacrificed by a strict limit to U.S. activities.

On the other hand, the rule is more logically applied to the ESA, as Justice Stevens has suggested.<sup>168</sup> Section 7 of the statute, construed in *TVA v. Hill*,<sup>169</sup> directs federal agencies to ensure that actions funded by them do not result in the destruction of the habitats of endangered species. The statute is written broadly enough to include overseas projects funded in part by foreign aid, and the biodiversity goal of the statute would be subserved by extraterritorial application of the law.<sup>170</sup> Counting against such application is the argument that such an interpretation would pervasively affect U.S. foreign relations in hard-to-predict ways. Because foreign relations are wholly reserved for Congress and the President, the ESA should not be hastily applied to overseas projects.

On yet another hand, the Court was wrong when it applied the canon in *EEOC v. Arabian American Oil Co. (Aramco)*.<sup>171</sup> The issue in that case was whether Title VII applied to an American company discriminating against an American employee in an office located overseas.<sup>172</sup> The statutory language was broad enough to include such cases, and some of the provisions seemed to assume that firms could be liable for overseas discrimination.<sup>173</sup> The EEOC read the law this way. The broad statutory purpose would support such a reading—yet the Court read Title VII more narrowly. Chief Justice Rehnquist's majority opinion refused to defer to the agency or to follow the statutory purpose and demanded a clearer statement on the face of

---

not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.”); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927) (holding that a conspiracy to restrain trade involving the importation of foreign goods that would increase prices in the United States falls within federal jurisdiction); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) (finding federal jurisdiction in an instance where defendants' actions “affected the foreign commerce of this country and [were] put into operation here”). *But see* *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909) (holding that anticompetitive practices undertaken *entirely* outside the United States are not subject to the Sherman Act when the acts are permissible under local law).

168. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 585-89 (1992) (Stevens, J., concurring) (maintaining that the statute's inclusive language is not sufficient by itself to overcome a presumption of extraterritorial application of the law).

169. 437 U.S. 153 (1998).

170. 16 U.S.C. § 1536(a)(2) (1994).

171. 499 U.S. 244 (1991).

172. *Id.* at 248.

173. *Id.* at 266 (Marshall, J., dissenting).



the statute that it would apply extraterritorially.<sup>174</sup> This was a wrongheaded application of the canon. The decision might be defended on the ground that the Court was reluctant to craft rules for when Title VII should and should not be applied for discrimination outside the United States—but federal courts have done precisely that in antitrust law,<sup>175</sup> and the facts of *Aramco* were so easy that the Court could have started with the narrowest possible rule: an American company discriminating against an American employee in its foreign office can be sued under Title VII.

The 1991 Civil Rights Act overrode *Aramco* and generally reaffirmed the antidiscrimination norm for employment. Has the 1991 Act's dramatic reaffirmation had an effect on the Rehnquist Court's willingness to apply Title VII's principle more expansively? Consider *West v. Gibson*.<sup>176</sup> Another of the Rehnquist Court's favorite canons is its super-strong rule against waivers of federal sovereign immunity.<sup>177</sup> The 1972 amendments to Title VII authorized the EEOC to enforce the antidiscrimination rule against federal and state agencies "through appropriate remedies."<sup>178</sup> The issue in *West* was whether that general provision authorized the EEOC to assess compensatory damages against the federal government for discrimination.<sup>179</sup> Justice Kennedy's opinion treated this as a routine case for application of this favored canon: the super-strong presumption requires more targeted statutory language than "appropriate remedies," and so U.S. sovereign immunity was not affected.<sup>180</sup> Moreover, in 1972, Title VII did not authorize compensatory damages, and so the original meaning of "appropriate remedies" did not include damages; that meaning was strongly reinforced by the canon *noscitur a sociis*, because all the remedies specifically mentioned in the 1972 amendments were

---

174. *Id.* at 258.

175. *E.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (holding that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States").

176. 527 U.S. 212 (1999).

177. *E.g.*, *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) ("We have frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign."); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (referring to "the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign") (citations omitted).

178. 42 U.S.C. § 2000e-16(b) (1994).

179. *West*, 527 U.S. 212.

180. *Id.* at 224-25 (Kennedy, J., dissenting). Justice Kennedy's dissent was joined by Chief Justice Rehnquist and Justices Scalia and Thomas.

equitable.<sup>181</sup> Concededly, the 1991 Act authorized compensatory damages—but only in court cases. Invoking the canon of negative implication, Kennedy contrasted the new § 1981a(a)(1), which constituted a specific waiver of sovereign immunity in civil actions brought against the United States in court cases.<sup>182</sup> So if Congress had wanted the EEOC to assess such damages, it could have used the same directed language.<sup>183</sup> This is the Rehnquist Court's normal deployment of this super-strong canon and some of the textual canons—but it was in dissent!

Justice Breyer's opinion for the Court in *West* followed an interpretive approach more appropriate for a super-statute. First, he refused to read the 1972 language in a static way. "Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic."<sup>184</sup> Thus, "appropriate remedies" meant something different after 1991. Second, this structural and liberal reading of the statute is consistent with its strong antidiscrimination purpose. "To deny that an EEOC compensatory damages award is, statutorily speaking, 'appropriate' would undermine this remedial scheme."<sup>185</sup> Finally, Justice Breyer disposed, at the end of his opinion, of the super-strong canon. Notably, he refused to require magic words on the part of Congress and found sufficient evidence of waiver from the statutory scheme as it has evolved, the purpose of the law, and common sense.<sup>186</sup> In its attention to the statutory purpose and principle as well as its text and structure, Justice Breyer's opinion is exemplary of how courts ought to interpret super-statutes, especially when they are confronted with substantive canons.

### C. *Super-Statutes in Collision*

The most dramatic examples of the complexity of our approach are cases where a super-statute hits up against another statutory scheme. We have already seen how super-statutes frequently trump

---

181. *Id.* at 225-26 (Kennedy, J., dissenting).

182. *Id.* at 226-28 (Kennedy, J., dissenting).

183. *Id.* (Kennedy, J., dissenting).

184. *Id.* at 218.

185. *Id.* Justice Breyer also invoked the legislative history of the 1991 Amendment. *Id.* at 219-21. Although we do not consider this necessary, either generally or in this case, it was "appropriate" because the amendments were so recent and the history instructive as to the way the 1972 and 1991 provisions fit together.

186. *Id.* at 222.

or modify other statutory schemes, but sometimes it is a super-statute that gives way. Consider *FDA v. Brown & Williamson Tobacco Corp.*<sup>187</sup> The case involved the FDA's finding that nicotine is a "drug" within the meaning of the Food, Drug, and Cosmetic Act of 1938 (FDCA).<sup>188</sup> At first blush, this case would appear easy: the FDCA allows the agency to regulate "articles (other than food) intended to affect the structure or any function of the body";<sup>189</sup> the Court has ruled that this statute is to be given "a liberal construction consistent with [its] overriding purpose to protect the public health";<sup>190</sup> the FDA found that nicotine affects the body through addiction and (based on more recent evidence) that cigarette manufacturers intended their product to have that effect. Surely the FDA has jurisdiction under the super-statute. Yet a narrowly divided Supreme Court said that it does not. The Court first invoked internal statutory inconsistencies that FDA jurisdiction over tobacco would produce,<sup>191</sup> but more persuasively relied on decades of congressional deliberation about cigarette regulation. During those deliberations, the FDA repeatedly took the position before congressional committees that it did not have regulatory authority over tobacco products, and Congress repeatedly adopted legislation regulating such products through education rather than through prohibitory rules.<sup>192</sup> Dissenting Justices disputed that Congress had relied on the FDA's statements and argued that such statements were made before the FDA had good evidence of the tobacco companies' "intent" that smokers should become addicted to nicotine so they would be assured of a captive market.<sup>193</sup>

The FDA tobacco case can be evaluated in a number of ways from the perspective of our theory. For starters, the theory lends much support to the dissenting Justices, if the FDCA is a super-statute. But is it? The FDCA, the successor to the Pure Food & Drugs Act of 1906, embodies a great policy—protection of the public from substances harmful to human life—that has stuck in our political

---

187. 529 U.S. 120 (2000).

188. 75 Pub. L. No. 717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. § 301 (1994)). This is the successor statute to the Pure Food & Drugs Act of 1906. Pub. L. No. 384, 34 Stat. 768.

189. 21 U.S.C. § 321(g)(1)(C) (1994).

190. *United States v. Article of Drug Bacto-Unidisk*, 394 U.S. 784, 798 (1969).

191. *Brown & Williamson*, 529 U.S. at 132-43. *But see id.* at 163-81 (Breyer, J., dissenting) (disputing any internal statutory inconsistencies).

192. *Id.* at 143-57.

193. *Id.* at 186-89 (Breyer, J., dissenting).

culture. Thinkers from virtually all perspectives would agree about that policy. The FDCA also easily meets the procedural test for super-statutes. The 1906 Act grew out of public outrage against unsanitary food processing,<sup>194</sup> and the 1937 Act reflected both intellectual and political feedback to prior regulation and expanded the FDA's jurisdiction further. Even critics of the law and of the FDA would agree that it has headed off many health disasters and has operated intelligently. One might disagree as to the FDCA's application to a drug (nicotine) that people choose to take because it gives them pleasure, but the process by which the FDA reached its conclusions was a deliberative and substantively thoughtful one.

In light of these criteria, we conclude that the FDCA is an important, robust law—a super-statute—whose broad protection of public safety ought not be sacrificed casually. This was the foundation for Justice Breyer's argument in the FDA tobacco case: after a long deliberative process, the FDA has found that tobacco products are highly dangerous and imperil public health in many ways; given the process and the unquestioned correctness of the FDA's conclusion, the statute would have to be dead against the agency for the Court to block its action.<sup>195</sup> Doubts should be resolved in favor of the agency's jurisdiction over this dangerous drug. On the whole, we find this a persuasive approach. The Court majority did not, however. Its argument that FDA jurisdiction over tobacco products is inconsistent with the FDCA's general statutory scheme is not persuasive—but that was probably not dispositive for the Court either.

One might read the Court's opinion for the proposition that even super-statutes must give way to detailed regulatory regimes intentionally adopted by Congress to be substitutes for the earth-shaking move of banning tobacco products or even regulating them heavily.<sup>196</sup> This move is, for better or for worse, consistent with super-statute theory. "In our anxiety to effectuate the congressional

---

194. JAMES HARVEY YOUNG, *PURE FOOD: SEARCHING THE FEDERAL FOOD AND DRUG ACT OF 1906*, at 292-93 (1989). *But see* GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916*, at 98-106 (1963) (offering a more skeptical view of the origins of the pure food and drug law).

195. *Brown & Williamson*, 529 U.S. at 189-92 (Breyer, J., dissenting).

196. This appears to have been the view of Justice O'Connor, author of the opinion for the Court. *Id.* at 143-57 (noting that, starting in 1965, Congress repeatedly adopted mild, educational statutes rather than prohibitory ones, with full knowledge that the FDA did not believe tobacco fell within its jurisdiction); *see also id.* at 157-60 (explaining that, given the "unique place" tobacco has in American cultural and economic history, the decision to ban or seriously regulate it must be made by Congress).

purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop,” said Justice O’Connor for the Court.<sup>197</sup> Substantively, Justice O’Connor expressed no view that disclosure laws are an effective way for the government to regulate deadly tobacco products, and there is no reason to think that she or her colleagues found that idea persuasive. Procedurally, however, she was impressed that Congress had deliberated on the issue for decades, that the FDA repeatedly reassured Congress that tobacco products did not fall within its jurisdiction, and that Congress, in her view, relied on those representations in crafting the milder statutory scheme.<sup>198</sup> One might be critical of the statutory scheme as a derogation from the FDCA’s great purpose, but even skeptics such as ourselves find Justice O’Connor’s detailed history of congressional tobacco regulation an excellent brief for overriding the agency. Both the rule of law and democratic values require super-statutes to give way to congressional judgments derogating from their principles.

Although not suggested by either opinion in the case, a further possible argument for the majority position in *Brown & Williamson* is that the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA)<sup>199</sup> is itself a super-statute. It bears at least some of the indicia, for it embodies a robust principle, that consumers should know the health risks of tobacco products and the government ought to compel the producers (among others) to inform them; its policy has been the basis for subsequent federal and some state laws. The Court has applied its balanced policy to preempt some state tort rules that could impose damages liability onto tobacco companies.<sup>200</sup> In that event, the FDCA and the FCLAA would be clashing super-statutes, and one would have to give—presumably the former in light of the FDA’s longtime representations that it did not have jurisdiction to regulate tobacco products and the fact that FDA regulation of

---

197. *Brown & Williamson*, 529 U.S. at 161 (quoting *United States v. Bacto-Unidisk*, 394 U.S. 784, 800 (1969) (quoting 62 Cases of *Jam v. United States*, 340 U.S. 593, 600 (1951))). *But see id.* at 182-89 (Breyer, J., dissenting) (arguing that the many tobacco-disclosure statutes are consistent with the agency’s unwillingness to act until it was sure the tobacco companies met the intent requirement of the FDCA).

198. *Brown & Williamson*, 529 U.S. at 145-46, 155-56.

199. 15 U.S.C. §§ 1331-1341 (1994).

200. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524-25 (1992) (Stevens, J., plurality opinion) (finding that, notwithstanding the traditional presumption that federal statutes do not preempt state tort law, some tort remedies are preempted by the FCLAA).

nicotine would render the FCLAA obsolete or even irrelevant virtually overnight.

This would be a tidy application of our theory, for in a nation brimming with super-statutes one would expect them to come into conflict frequently. Nevertheless, we resist that characterization as to the FCLAA. As we said, no Justice on the Court characterized the FCLAA in such glowing terms; nor do we. The statute is best treated as ordinary legislation, and perhaps not even that, as its regulatory regime emerges in retrospect as a cowardly one: in the face of mounting evidence that cigarette smoking is potentially lethal, Congress bowed to tobacco interests in requiring only the mildest form of regulation.

In any event, there are plenty of other examples of genuine super-statutes in conflict.<sup>201</sup> The Supreme Court has generally resolved those clashes through a rough *comparative impairment* approach: the Court will trim back the super-statute whose policy and principle would be relatively less impaired by nonapplication. Thus, if applying super-statute A to a case would centrally undermine the policy or principle of super-statute B, a court ought to and will decline to apply A if its policy or principle is not so centrally implicated.

For an example, consider the interaction between the Federal Arbitration Act (FAA) of 1926<sup>202</sup> and various super-statutory schemes. The FAA “reverse[d] the longstanding judicial hostility to arbitration agreements” and “place[d] arbitration agreements upon the same footing as other contracts.”<sup>203</sup> The statute not only abrogated the common law hostility to arbitration clauses but also established a procedural structure of rules for giving such clauses bite; it has been a super-statute and is now part of the fabric of the law. Thus, the Supreme Court has construed the FAA broadly, with a breadth sweeping well beyond the statute’s plain meaning and the probable expectations of its framers in 1925. For example, the Court in

---

201. *E.g.*, *Midlantic Nat’l Bank v. N.J. Dep’t of Envtl. Prot.*, 474 U.S. 494, 506-07 (1986) (noting the appearance of a clash between the Bankruptcy Act of 1978 and the CERCLA); *Morton v. Mancari*, 417 U.S. 535, 545-51 (1974) (discussing the potential clash between Title VII and the Indian Reorganization Act of 1934).

202. 9 U.S.C. §§ 1-14 (1994).

203. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 & n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)); *see also* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995) (invoking the same history).

*Southland v. Keating*<sup>204</sup> ruled that the FAA not only required arbitration in federal courts but also preempted state anti-arbitration laws to require enforcement of such remedies in state courts as well. This was a broad reading of the statute, probably beyond the contemplation of the Congress that adopted it.<sup>205</sup> The broad application represents an invasion of state autonomy unusual for a Supreme Court as supportive of federalism as the Burger and Rehnquist Courts have been.

The hard FAA cases in recent years have been those where plaintiffs suing under federal securities, antitrust, or consumer-protection laws have confronted defenses grounded upon arbitration clauses in adhesive contracts. Plaintiffs in those cases have maintained that the FAA policy must give way to those of other super-statutes. Some of the cases were easy for the Court. In *Alexander v. Gardner-Denver Co.*,<sup>206</sup> the Court ruled that arbitration did not bar an employee from bringing his Title VII claims to federal court. The Court found that the arbitral process, emphasizing local trade customs and business practices, was peculiarly inappropriate for evaluating antidiscrimination claims.<sup>207</sup> The policy of the FAA was not severely compromised by this exemption, because the FAA's core policy is arbitration of commercial and contractual disputes, and the policy of Title VII was thought to be jeopardized by preclusive effect of arbitrations. Generally, before 1985, the Supreme Court declined to apply the FAA to cases where colorable rights were pressed pursuant to federal super-statutes.<sup>208</sup>

---

204. 465 U.S. 1, 31 (1984). The Supreme Court considered and refused to overrule *Southland* in *Allied-Bruce*, 513 U.S. at 273. More recently, the Court has observed that Congress has not moved to amend the FAA in response to *Southland* or *Allied-Bruce*. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1312-13 (2001).

205. For careful examinations of the history of the 1925 Act that demonstrate the more limited aspirations of the framers of the statute, see *Circuit City*, 121 S. Ct. at 1314-16 (Stevens, J., dissenting); *id.* at 1318-22 (Souter, J., dissenting); *Southland*, 465 U.S. 19-21 (Stevens, J., dissenting).

206. 415 U.S. 36, 59-60 (1974) ("[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause . . . and his cause of action under Title VII.").

207. *Id.* at 56-57 (stating that the unique role of the arbitrator and the incomplete fact-finding process of arbitration make it an "appropriate forum for the final resolution of rights created by Title VII").

208. *E.g.*, *McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) ("[A]lthough arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitution for a judicial proceeding in protecting the federal statutory and constitutional rights

A turning point came in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>209</sup> where the parties had agreed to send antitrust claims to an international arbitral tribunal. The plain meaning of the FAA and the original legislative intent were unsupportive of an application of that statute to statutory claims generally.<sup>210</sup> Justice Blackmun's opinion for the Court refused to limit the statute in this way, however, and presumed that it should be applied to carry out its expansive purpose.<sup>211</sup> The hard issue was whether there was a conflict between the FAA and the Sherman Act. The dissenting Justices thought that international arbitration would derogate from the deterrent force of the law's treble damages remedy; under that premise, the FAA should probably not have applied, because it would have been too strong a sacrifice of Sherman Act efficacy.<sup>212</sup> Justice Blackmun was willing to accept this result in "the domestic context," but not in the context of an international transaction.<sup>213</sup> Because comity among nations warrants a particular regard for enforcing forum-selection and arbitration clauses in transnational agreements, and because the United States has agreed to abide by such obligations through an international convention, the FAA policy was unusually compelling in the transnational context.<sup>214</sup> The Court also concluded that arbitration would not impair Sherman Act policy or the efficacy of the treble damages deterrent and insisted on the authority of courts to review arbitral awards after the fact to assure themselves that appropriate laws had been applied.<sup>215</sup>

---

that § 1983 is designed to safeguard."); *Barrentive v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) ("[T]he FLSA rights petitioners seek to assist in this action are independent of the collective-bargaining process.").

209. 473 U.S. 614, 619-20 (1985).

210. *Id.* at 646-50 (Stevens, J., dissenting) ("The plain language of this statute . . . does not encompass a claim arising under federal law.").

211. *Id.* at 627-28.

212. *Cf. Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968). The Supreme Court reviewed and rejected this doctrine in *Mitsubishi*, 473 U.S. at 628-35.

213. *Mitsubishi*, 473 U.S. at 638 ("Yet the potential of these [international] tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested.").

214. *Id.* at 629-32.

215. *Id.* at 638-39. The dissenting Justices disagreed vigorously, presenting both factual and legal arguments. *Id.* at 651-55 (Stevens, J., dissenting) (concluding that the "importance" of antitrust cases, as seen through the history of antitrust enforcement in the United States, requires the rejection of the idea that "Congress would tolerate private arbitration" of these disputes).



Supreme Court decisions after *Mitsubishi* have revealed a judicial tilt in the FAA cases that is different from the tilt before 1985: the current Court is more insistent that the FAA reflects a critically important national policy and less likely to find inconsistency between arbitration and federal statutory schemes.<sup>216</sup> Consistent with super-statute theory, the burden is on the party resisting the FAA to show that a competing statutory scheme is inconsistent with the arbitral remedy. “These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions.”<sup>217</sup> All of the cases cited had dissenting opinions, but the dissenting Justices argued from within the super-statute paradigm: the central principle of the FAA is not implicated when a repeat player uses a boilerplate arbitration clause to gain an “unfair” advantage over consumers or to discourage useful litigation.<sup>218</sup>

This line of cases, where super-statutes have been in conflict, suggests that a comparative impairment approach will often depend on factual assumptions and legal priorities extrinsic to our basic theory. For example, one might read *Mitsubishi* as reflecting the Court’s great—and according to the dissenters misplaced—confidence that international arbitration can accommodate Sherman Act concerns. One can also crudely contrast *Gardner-Denver* with *Mitsubishi* along ideological lines: the Warren and early Burger Courts valued substantive super-statutes above the FAA, but the late Burger and Rehnquist Courts have valued the FAA more and the substantive statutes less. Our comparative impairment idea, therefore, merely suggests a framework for analysis and not a predetermined conclusion.

---

216. *E.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (“[T]he right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 [of the Act] is properly construed to bar any waiver of these provisions.”); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (concluding that there is “no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims” and narrowing *Wilko v. Swan*, 346 U.S. 427 (1953)); *id.* at 229 (“*Wilko* must be read as barring waiver of judicial forum only where arbitration is inadequate to protect the substantive rights at issue.”).

217. *Green Tree Fin. Corp.-Ala. v. Randolph*, 121 S. Ct. 513, 521 (2000) (quotations omitted).

218. *E.g.*, *id.* at 523-25 (Ginsburg, J., dissenting).

*D. Quasi-Constitutional Law: Putative Constitutions, Super-Statutes, and Clear-Statement Rules*

The idea of super-statutes is related to three other phenomena in law. We have already mentioned one phenomenon—the common law, which even today remains a pervasive background of legal rules and policies to which courts will turn to fill in statutory gaps or resolve ambiguities.<sup>219</sup> This was the role played by the common law in *Faragher* and *Ellerth*, for example. Some judges and commentators would read the common law to include the law of nations, which would expand its relevance for statutory law even further.<sup>220</sup> For example, Chief Justice John Marshall not only interpreted but also openly rewrote early federal statutes to reflect baselines drawn from the law of nations.<sup>221</sup> The Supreme Court of Canada is the most sophisticated court in the western hemisphere in this regard, for the Canadian Justices read both statutory and Charter provisions in light of international law and multilateral conventions entered into by our neighbor to the north.<sup>222</sup> The assumption in learned circles is that the current U.S. Supreme Court, sooner or later, will follow this transnational trend.

A second phenomenon is that many of the substantive canons of construction—such as the rule of lenity and the rule against sovereign immunity waivers—are animated by constitutional principles and policies. Thus, when a court refuses to apply a criminal statute

219. See *supra* notes 4-11 and accompanying text; see also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 537-45 (1999) (recognizing common law principles of punitive damages as an appropriate basis for creating standards for such damages under the 1991 Amendments to the Civil Rights Act).

220. E.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 80 (1804):

The law of nations in war, gives not only the right to search a neutral, but a right to recapture from the enemy. On this point the [common law] case of *Talbot v. Seeman* is decisive, both as to the law of nations, and as to the acts of Congress, and that the rule applies as well to a *partial* as to a *general* war.

see also *The Paquete Habana*, 175 U.S. 677, 700 (1900):

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators.

221. E.g., *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801) (“[T]he laws of the United States ought not, if be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law.”).

222. E.g., *Her Majesty The Queen v. Keegstra*, [1990] S.C.R. 697 (Can.) (upholding a hate speech statute, in part based on treaties committing Canada to protecting victims of racism and misogyny).

beyond the prototypical meaning of its terms, the court is implementing the due process idea that criminals should have clear notice that their conduct is unlawful and the nondelegation idea that the legislature and not the courts should update criminal laws.<sup>223</sup> Even if the application of the statute to a particular criminal would be constitutional, courts will often trim back the fuzzy margins of penal laws in this way. The sovereign immunity canon has a common law origin but also reflects separation of powers concerns.

A third phenomenon is that polities without written constitutions sometimes adopt super-statutes that recognize and protect important civil and other rights. The pre-Charter Bill of Rights in Canada, the Human Rights Act of 1977 in the District of Columbia, and the new Bill of Rights adopted in the United Kingdom are examples of this kind of statute. These statutes were adopted through the normal legislative process and do not pretend to have the trumping power that a constitution does, but they reflect important principles widely accepted within the polity and are expected to be interpreted liberally and imperially.<sup>224</sup> Although U.S. super-statutes adopted in a polity that has a Constitution are differently situated than D.C. or U.K. super-statutes, which do not compete with a constitution, the similarities are more striking.<sup>225</sup>

The common law and the law of nations, constitutional and common law canons, and super-statutes are certainly different from one another: the first is judge-made law that the legislature can override or ignore, the second is a body of interpretive precepts applicable to statutes the legislature enacts, and the third is adopted by the legislature but implemented by agencies and judges. What they have in common is that they form a normative backdrop, influencing

---

223. See Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (analyzing and criticizing due process and nondelegation principles as bases for the rule of lenity).

224. For example, the committee report for the D.C. Human Rights Act stated that it would “underscore the Council’s intent that the elimination of discrimination within the District of Columbia should have *the highest priority* and that the Human Rights Act should therefore be read in harmony with and as supplementing other laws of the District.” COMM. ON PUB. SERVS. & CONSUMER AFFAIRS, D.C. COUNCIL, REPORT ON BILL NO. 2-179, THE HUMAN RIGHTS ACT OF 1977, at 3 (1977) (emphasis added), *quoted in* Dean v. District of Columbia, 653 A.2d 307, 319 (D.C. App. 1995).

225. The analogy is a little complicated. D.C. law, of course, can be reviewed for consistency with the U.S. Constitution, and U.K. law can be reviewed for consistency with the Treaty of Amsterdam and other conventions setting forth the terms of the European Union. Our point is only that the D.C. Council or the U.K. Parliament are not directly subject to city or national constitutions.

the way statutes are read and applied; they constitute background principles without which statutory interpretation ought not proceed.<sup>226</sup> These background principles might be called “fundamental law,” reflecting their kinship to ideas about interpretation held by the early English writers such as Bacon and Hale. They might also be called “quasi-constitutional law,”<sup>227</sup> the term we prefer for the following reason.

American lawyers and political scientists have dichotomized American law between the “higher lawmaking” entailed in the Constitution and “ordinary lawmaking” entailed in statutes. Part of our project is to break down this dichotomy, which is intellectually reminiscent of Blackstone’s dichotomy between the common law (normative fabric) and statutes (intrusions tolerated at best). In the modern regulatory state, the fundamental normative debate associated with constitutionalism now frequently occurs in connection with statutory proposals and applications. For example, gay rights discourse has been thin and ill-informed in constitutional litigation, but much richer in legislative and administrative deliberations, a phenomenon illustrated by the Vermont Civil Unions Law of 2000.<sup>228</sup> Well-informed legislators and agencies now have much to contribute to these debates on their merits, and the legitimacy of their contributions is particularly compelling because of their greater connection to “We the People” than judges enjoy. As a normative matter, we urge that super-statutes be considered something more than ordinary lawmaking.

The foregoing proposition is relatively easy to sustain. More controversial, but no less compelling in our view, is the proposition that super-statutes are the most legitimate form of quasi-

226. Cf. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 507-08 (1989) (proposing principles for statutory interpretation in the regulatory state, albeit many of which are not supported by the Supreme Court’s current case law).

227. We used that term in discussing the Court’s super-strong canons in William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (observing that the Supreme Court has created a domain of “quasi-constitutional law” in certain areas by adopting super-strong clear-statement rules “to confine Congress’s power in areas in which Congress has the constitutional power to do virtually anything”). Justice Claire L’Heureux-Dubé has used the term to refer to Canadian super-statutes. *E.g.*, *Québec Inc. v. Quebec (Régie des permis d’alcool)*, [1996] S.C.R. 919, 923 (Can.) (stating that the Charter of Human Rights and Freedoms “has legal preeminence over common law because of its quasi-constitutional status”).

228. WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* ch. 2 (forthcoming 2001) (tracing the deliberations leading to Vermont’s recognition of same-sex unions by statute).

constitutional law in the modern administrative state politically grounded upon popular sovereignty. The common law remains a perfectly appropriate source of lore and gapfilling rules, but no longer as a source of fundamental trumping or norm-bending law. More important, the Supreme Court's episodic application of super-strong clear-statement rules—often formulated or applied in a novel way—is a form of higher lawmaking that ought to be curtailed or deployed more cautiously. Certainly, these rules ought not trump super-statutes, as they did in *Aramco* and as they might in a domestic version of *Mitsubishi*.

*E. Super-Statutes as a Mediation Between the Difficulty of Amending the U.S. Constitution and the Legitimizing Concept of Popular Sovereignty*

There is a potentially deeper relationship between super-statutory and constitutional law in our country, and it has to do with the way the Constitution changes. Compared with the constitutions of other nations and of our own states, the U.S. Constitution is relatively—and exceedingly—short, old, and difficult to change through the formal Article V process.<sup>229</sup> These three facts about the Constitution have supported its updating through dynamic judicial interpretation of its provisions. The Constitution's brevity entailed a commitment of its drafters to establishing the structure of government and several standards for its operation, rather than a set of detailed rules. Accordingly, the document did not settle all the public law issues that vexed the founding generation. The number of issues not squarely resolved by the document has, of course, only increased over time. That the Constitution is old means that it will not have contemplated modern problems that beset our democracy, ranging from intrusive technologies for government spying on its citizens to normative debates about the morality of contraception and abortion. After several generations of episodic intervention, the Supreme Court by the late nineteenth century stepped forward to settle most of these issues, and resolution by the Court has proven

---

229. This proposition is documented in Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 248-49, 254-67 (Sanford Levinson ed., 1995) [hereinafter *RESPONDING TO IMPERFECTION*].

easier for our system than the bulky process of formal constitutional amendment entailed by Article V.<sup>230</sup>

In order for any constitution to be enduring, it must be dynamic. Given the particular characteristics of our Constitution—its reliance on standards rather than rules and the difficulty of amending it through the formal process—the dynamism seems, at first blush, formally to have operated through judicial updating. This perception of judicial updating has called forth thousands of articles and books justifying or indicting or seeking to define the limits of judicial review.<sup>231</sup> One criticism of judicial review is that it supplants or drains energy from popular (“We the People”) participation in governance.<sup>232</sup> Many theorists have tackled the problem of reconciling the Constitution’s meta-principle of popular sovereignty with the apparent reality of extensive and hard-to-check constitutional lawmaking by unelected judges. Consider one important author.

Bruce Ackerman maintains that Article V’s rule of recognition is not necessary to change the Constitution even in a formal sense. Really fundamental constitutional enactments can occur outside the Article V procedures in special periods—*constitutional moments*—when the whole people are engaged and attentive to the establishment of a new constitutional ordering.<sup>233</sup> For Ackerman, what is crucial is not a detailed set of institutional requirements, but

---

230. Contrast the first fifteen amendments to the Constitution, added from 1791 to 1870, with the last twelve. The first fifteen are strongly substantive protections, including the Bill of Rights and the polity-transforming Reconstruction amendments. During this period, the Supreme Court rarely struck down federal laws pursuant to its power of judicial review. The last twelve, adopted between 1913 and 1992, are overwhelmingly procedural and tinkering amendments—except for the Eighteenth (Prohibition), which was overridden by the Twenty-First. It is during this period that the Court has exercised its power to review federal laws and done so with increasing bite.

231. The viewpoints of these articles and books range from the permissive review stance of James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), to the more activist stance of JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

232. E.g., JAMES BRADLEY THAYER, JOHN MARSHALL 103-07 (De Capo Press 1974) (1901):

[J]udging to disregard unconstitutional legislation . . . is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors.

233. BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* 10 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* 72 (1998). The theory is wonderfully digested in Bruce Ackerman, *Higher Lawmaking, in RESPONDING TO IMPERFECTION*, *supra* note 229, at 63-88.

the purpose served by such requirements: that the people, responding to a crisis pitting one institution against others, are engaged actively and purposively in reshaping the constitutional order. Whether or not they meet the Article V requirements, fundamental constitutional enactments, according to Ackerman's theory, ought to attract great deference from courts because they effect a change in the constitutional text, guided by deeply held principles of political morality, and because they are put in place deliberately by an aroused and serious public.

An extension of Ackerman's theory would be to view super-statutes as *statutory moments*. Thus, the Civil Rights Act can be read as a showdown between a normatively engaged political coalition in Congress and the determined southern Democrats in the Senate, who had repeatedly blocked antidiscrimination legislation during the Eisenhower administration. The election of 1960 offered proponents an opportunity to break this impasse, as it brought to power the Kennedy-Johnson administration, which pushed hard for civil rights legislation. In 1962-63, the debate over the civil rights bill engaged the entire country, with religious, business, and union groups joining civil rights groups in pressing for the adoption of this important legislation. The determined southern opposition was decisively defeated by a coalition assembled by President Lyndon B. Johnson and Senate Majority Whip Hubert Humphrey. In the election that immediately followed in 1964, Johnson (with Humphrey as his running mate) won a great landslide over a Republican who had voted against the Act for reasons of "states' rights." This scenario roughly follows Ackerman's formula for *higher lawmaking*, whereby the people are engaged in constitutional moments.<sup>234</sup> "We the People" have arguably endorsed civil rights over states' rights—a principle that has altered policy as well as constitutional discourse ever since. The year 1964 might be regarded as a statutory moment permanently altering the normative foundations of public discourse.

---

234. Ackerman's formula is this:

Interbranch impasse → Decisive election → Reformist challenge to conservative branch → Switch in time

ACKERMAN, FOUNDATIONS, *supra* note 233, at 49-50. Thus, the Civil Rights Act as a statutory moment might look something like this:

Interbranch impasse on civil rights legislation during the Eisenhower administration, with the Senate blocking it → Decisive election of Kennedy-Johnson in 1960 → Kennedy-Johnson reformist challenge to conservative branch (Senate), with 1963-64 civil rights bill → Switch in time, when the Senate finally breaks the Southern filibuster in 1964

The idea of statutory moments along Ackermanian lines is a neat project, but our super-statutes idea is broader still. Descriptively, the main difference between a concept of statutory moments and our notion of super-statutes is that the latter acquire their normative force through a series of public confrontations and debates over time and not through a single stylized dramatic confrontation. Thus, the Civil Rights Act of 1964, which was enacted in a particularly dramatic and publicly absorbing way, acquired only some of its normative force in 1964. The Act immediately transformed public culture in some ways but not in others. To take the most obvious example of the latter, the law did little to transform the workplace for women, but a series of public debates and confrontations in the 1970s and 1980s yielded consensus that the antidiscrimination principle ought to have bite for women in the workplace—and that the bite entailed protections against discrimination on the basis of pregnancy and sexual harassment in the workplace. The super-statute evolved through a series of debates and confrontations. One can call each of them a statutory moment, but few of such moments meet the Ackermanian model as well as the Civil Rights Act does,<sup>235</sup> and none engaged the public at the high level they were engaged in 1963-64.

Consider the following diagram as a rough model of how super-statutes evolve:

Responding to an important problem and after careful deliberation,  
Congress enacts a statute



Statute is implemented by judges and/or agencies, with feedback  
from Congress



Normative conflict, where one institution seeks to narrow the statute  
in a major way

- Legislature bows to pressure to create special-interest exceptions
- Court narrowly construes the statute
- Agency is captured by the regulated group or a special interest




---

235. For example, the extension of Title VII to protect against pregnancy-based discrimination can be modeled in this way:

Supreme Court construes Title VII to be inapplicable to pregnancy-based discrimination in *Gilbert v. General Electric Co.* → Public campaign resulting in congressional repudiation of *Gilbert* with the Pregnancy Discrimination Act → Court backs down and applies PDA vigorously



Public debate about the attempted narrowing

- Critical outrage seeking to engage the public
- Institutional opposition
- Statutory narrowing may become an election issue



Responsive to the normative debate, the government reaffirms or  
modifies the core principle of the statute



More crises, especially as the statute is adapted to ever newer  
circumstances

As does Ackerman, we understand lasting public norms to grow out of conflict. Unlike Ackerman, we also understand lasting public norms to form under conditions of consensus. Also unlike his theory, ours emphasizes evolution rather than revolution. A super-statute is not a moment, nor is it even a series of moments. Rather, it is a continuing process of deliberation, consensus-building as to some issues, conflict as to other issues.

The foregoing is our *descriptive* theory of how super-statutes evolve and affect American public law. Consider, finally, our *prescriptive* account of why super-statutes are a better way for public law to evolve than either formal constitutional amendments, constitutional moments, or unconstrained judicial review.

#### *F. Super-Statutes as a Normatively Attractive Way That (Quasi) Constitutional Norms Evolve*

The structure of our short, old, and hard-to-amend Constitution makes its dynamic interpretation inevitable—but does not assure a jurocracy. We think a jurocracy would be terrible.<sup>236</sup> Furthermore, it is super-statutes instead of constitutional moments that not only save us from a jurocracy but also replicate the legitimacy-enhancing features of Article V. Recall that Article V does not entail a popular vote on constitutional amendments, and so the legitimacy of changes to the Constitution is not directly popular. Because amendments must normally be adopted by supermajorities in Congress and then ratified by three-quarters of the states, they entail a lengthy deliberative process, and their animating principles must be broadly acceptable on

---

236. For a different but powerful critique of judicial review and the disadvantages of even a limited jurocracy, see, for example, GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (answering the question posed by the book's title in the negative).

their merits. That lengthy deliberative process and the requirement of a robust principle give constitutional amendments a legitimacy that both augments and transcends the rule of recognition available under Article V.

The genius of Ackerman's constitutional moments theory is that it exploits the legitimacy-enhancing features of Article V (deliberation about an important principle) and makes it operate without the now-unworkable Article V apparatus. Notwithstanding its genius, the theory may in fact sacrifice popular sovereignty for the sake of constitutional updating. For example, if Ackerman is read as requiring a constitutional moment as a precondition for real constitutional change, then his theory entails a narrow reading of some constitutional changes. (This is particularly true if his theory entails a narrow reading of some constitutional amendments, such as the Eleventh Amendment, that actually went through the Article V process.) Although there have been twenty-seven formal amendments to the Constitution, Ackerman identifies only three constitutional moments. In Ackerman's world, it is not clear how judges are constrained during the long periods between constitutional moments. The primary constraint seems to be the moral obligation of judges to engage in a process of *synthesis*, by which judges reconcile earlier versions of the Constitution (the Founding, Reconstruction) with the changes wrought by the most recent constitutional moment (the New Deal and the Switch in Time). This methodology does not strike us as a very constraining one.<sup>237</sup> If that is the case, Ackermanian judges can govern relatively unchecked for long periods of time, with no reason to fear popular intervention.

The tension between the desirability of normative updating and the need for it to be legitimate along lines of popular sovereignty is a pervasive problem for modern representative democracies. The United States is unusual in requiring constitutional change to traverse so many potential roadblocks. In many other countries, constitutional lawmaking does not require either supermajorities or the assent of other governmental institutions or the people through referenda, but

---

237. An attractive example of synthesis is Ackerman's defense of *Brown* along these lines. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 531-36 (1989) (arguing that *Brown* "turns on the crucial synthetic point: Twentieth-century developments since *Plessy* have undermined the interpretive premises that informed [the *Plessy*] reading of 'equal protection'"). The synthesis Ackerman suggests works only because we all share an admiration for *Brown* that was hard-earned. Synthesis as a methodology seems unlikely to be an effective constraint on judges.

only the repeated agreement by successive parliaments.<sup>238</sup> The normative advantage of such lawmaking is that it is not so difficult that it cannot be accomplished in the face of strong objection, yet the procedures (long deliberative history, repeated endorsement by differently constituted legislatures, multiple opportunities for critique and public feedback) vest its results with a great deal of legitimacy. This notion de-emphasizes the “momentary” aspect of constitutional or quasi-constitutional lawmaking. One reason for such a stance is that critical moments are as likely to be temporary and governed by passions as they are to be lasting and ruled by reason. Fundamental principles requiring constitutional protection are more likely to be discovered when the political process takes a more sober and reflective aspect. The point is that constitutional legislation is both principled and deliberative, even if it is not produced in a defined historical moment involving a normative showdown.

To the extent that such iterated legislation also reflects (or comes to reflect) a fundamental principle, it will sometimes be the functional equivalent of a super-statute. Correlatively, the super-statute idea shares the virtues of this kind of constitutional lawmaking: it is both a feasible and legitimate way for new fundamental principles to work their way into public law. A super-statute embodies a fundamental principle that has a claim to be deeply embedded in our national aspirations. One test of a super-statute is that whatever the circumstances of its enactment, it instantiates a principle that passes the test of time: it works, it appeals to multiple generations, and it sticks in the public culture. Accordingly, super-statutes also satisfy a strong deliberative test and a different kind of test from a statutory-moments kind of model. Typically super-statutes are extensively relied upon by the people and are repeatedly visited and endorsed by legislative, administrative, and judicial institutions in response to the actions taken by private as well as public actors. In that respect, super-statutes are not only expressions of deeply held principle but are also shaped by the realities of administrative implementation and in light of repeated litigation and new legislation. In this respect, the general principle embodied in a super-statutory regime is revisited and recrafted in light of experience. Such experience is necessary to fit the super-statute into the broader landscape of political principles reflected in the constitutional order. Also, because super-statutes grow and evolve through institutional conflicts, there is often a

---

238. Lutz, *supra* note 229, at 263.

charged normative debate that makes the statute's principle transparent to the populace and draws many citizens into the debate.

The absence of super-majoritarian requirements and the lack of formal requirements of state government approval are part of the attraction of the super-statute. Super-statutes reflect deliberative majority judgments in a way that countermajoritarian constitutional law cannot. In the face of a determined and stable majority, small, geographically concentrated minorities are not accorded the veto right they are given by Article V procedures.<sup>239</sup> Super-statutes have a claim to expression of the considered judgment of the nation as a whole. Although according quasi-constitutional status to expressions of majority will does risk injury to disadvantaged minorities, the fact that Congress, the Court, and agencies repeatedly revisit and revise the super-statutes in light of constitutional protections ensures that minority rights will not be lightly overridden in a super-statutory regime. In the end, if a super-statutory regime regularly violates constitutionally protected minority rights, it can be overturned by Congress or the courts.

We have put forward a different model of deliberation than is found either in standard constitutional theory or in Ackerman. Our model emphasizes dispassionate consideration of circumstances of injustice and careful, experimental attempts to ameliorate such circumstances. Such efforts at improvement need to draw from all the strengths of our democracy. We need the thoughtfulness of judges, the enthusiasm of interest groups, the policy expertise of agencies, and the moral concern (and sometimes outrage) of the people and their representatives. How these are to be integrated is a matter of meta-constitutional choice. Our Constitution, at least as it is read by most lawyers, imposes a kind of rigid hierarchical mode of integration—the people, their representatives, and their delegates make policy under the shadow of the Constitution. The problem with such a model is the Platonic one: the Constitution is interpreted by

---

239. Consider this thought experiment. Could the Civil Rights Act's antidiscrimination principle have been adopted by a constitutional amendment? It is almost inconceivable under Article V that it could be: the eleven states of the former Confederacy would never have ratified because their societies were built upon apartheid; it is doubtful that many of the six border states, all with either apartheid laws or local practices, would have ratified; other states, such as those in the West or plains, might not have ratified for reasons of apathy; and even antidiscrimination states would have faced tough arguments about whether the Constitution should prohibit private discrimination. As the experience with the Equal Rights Amendment (which only applied to state action) teaches us, even the antidiscrimination norm is hard to add to the Constitution.

judges who have powerful reasons to interpret it in terms of their own preferences and predilections. Given the uneven and glacial pace at which the Court's personnel changes, the rigidity of such a model is obvious, as is the tectonic nature of ensuing constitutional change.

We think that this model is not very attractive. It leaves the people and their representatives in a subordinate role and discourages them from taking seriously their role as full citizens—as agents who are responsible for the evils and injustices that persist among us. It puts judges in a position for which no one is well-suited: it encourages them, falsely, to see themselves as privileged guardians of a received constitutional order. They are encouraged to mask their influence on policy as the exercise of guardianship of a received sacred order and not to see themselves as citizens, no different really than the rest of us, who are privileged by their abilities and luck to occupy a valuable vantage point in the policymaking process. The judicial role is, indeed, critical to how things go but not because of who judges are or because the people cannot be trusted to govern themselves. Rather, the value that judges bring is that they get to see how it is that law (super-statutes) intersects with the lives of ordinary people and, from that perspective, to work to develop and refine the super-statute in light of such experience. Judges can make policy more precise, more intelligent, and more just, but they do not do these things by themselves.

#### CONCLUSION: SUPER-STATUTES, LAW'S HIERARCHY OF SOURCES, AND SOCIAL NORMS

Our project has been to identify a relatively novel way to think about the hierarchy of sources in law. The traditional distinction between ordinary law and higher lawmaking is not sufficiently fine-grained for the modern state. There is, and long has been, an intermediate category of *fundamental* or *quasi-constitutional* law. For most of American history, the common law played that intermediate role: even as it evolved in response to new phenomena and learning, the common law filled statutory gaps, affected the application of statutes, and influenced the evolution of constitutional law itself. The twentieth century inaugurated an age of statutes or, as we prefer, an era of super-statutes. It is no coincidence that the phenomena explored in our paper was coming into focus at the point in history when the common law fell from favor as the basis for fundamental

law, even as judges were updating the Constitution in default of its amendment through the formal Article V channels.

Prescriptively, super-statutes mediate the tension between democracy or popular accountability and the evolution of higher law at the hands of unelected judges. Our view is that super-statutes mediate this tension more effectively than either the formal mechanisms contained in the Constitution or leading academic theories such as Ackerman's. The constitutional processes would leave higher law stagnant, and the academic theories would leave it illegitimate. Super-statutes contribute to a complex process by which fundamental law evolves with a strong connection to the people and popular needs. They also contribute to a complex process by which law coheres, if not in a wholly consistent plan, at least in a roughly consistent collection of interrelated policies and principles.

Descriptively, super-statutes also relate to social norms. There is a large literature on the topic of social norms,<sup>240</sup> and this topic is beyond the scope of our Essay. Much of the literature takes a Hayekian view of social norms, as evolving through an organic process of trial and error.<sup>241</sup> Our view, tentative at this point, is that super-statutes both contribute to and feed off of social norms. Laws such as the Civil Rights Act of 1964 and the Endangered Species Act were responses to developing social norms, yet they also did more than their part in ensuring that those norms would stick in the entire country. The evolution of social norms and public values relating to discrimination has played out in political and legal activism surrounding the civil rights law. The relationship between social norms and super-statutes is too complex for full treatment here, but it is a relationship worth exploring.

---

240. E.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (advocating and applying to several areas of the law a model relationship between law and social norms in which individuals' concern with establishing cooperative relationships leads them to behave in certain ways, thereby generating behavioral patterns called social norms); Symposium, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996).

241. Cf. Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 754-60 (1999) (describing and vigorously questioning the Hayekian literature).