3-11-2015

New Wine, Old Bottles, and a Do-Nothing Congress

Michael E. Herz
Benjamin N. Cardozo School of Law, herz@yu.edu

New Wine, Old Bottles, and a Do-Nothing Congress

Author : Michael E Herz

Date : March 11, 2015

Jody Freeman & David B. Spence, Old Statutes, New Problems, 163 **U. Pa. L. Rev.** 1 (2014).

The Rivers and Harbors Act of 1899 was adopted to protect against hazards to and interference with navigation. It prohibited "creation of any obstruction to the navigable capacity of any of the waters of the United States" or altering or filling navigable waters (§10) and also made it unlawful "to throw, discharge, or deposit . . . any refuse matter" into navigable waters "whereby navigation shall or may be impeded or obstructed," although the Corps of Engineers could permit such a discharge if "anchorage and navigation will not be injured thereby" (§13). For two-thirds of a century, those provisions operated as one would expect. Then came the modern environmental movement, and in short order the courts and the executive branch turned these provisions about obstruction to navigation into a water-pollution control regime. As President Nixon drily put it in issuing an executive order that created a sweeping new pollution permit program under §13, the Act's "potential for water pollution control has only recently been recognized." Richard Nixon, Statement on Signing Executive Order Establishing a Water Quality Enforcement Program (Dec. 23, 1970).

This striking repurposing of a 19th century statute to solve 20th century problems is not unique. EPA's current reliance on the Clean Air Act to regulate greenhouse gases can be seen as another example, this time using a 20th century statute to solve a 21st century problem (though the gap between the original conception of the statute and its repurposing is *much* less dramatic in this later instance). Jody Freeman and David Spence have now provided a valuable, and quite sympathetic, analysis of the technique of using "old statutes" to address "new problems."

The authors' analysis is very much situated in the present day, which is characterized by profound congressional gridlock. Part II explains current congressional dysfunction and inaction, focusing in particular on the fact that "the ideological middle is unprecedentedly weak and growing weaker." The parties' respective means are further apart, and there are fewer moderates of either party in Congress. Absent a highly salient crisis, Congress is frozen. (An Appendix lays out a formal model of congressional politics in such circumstances.) This means that older statutes go unamended; if they are to be adapted to contemporary challenges, it will be agencies, not Congress, who do so.

And do so they have. The bulk of the article is devoted to two case studies of this phenomenon. One is the aforementioned regulation of climate change via the Clean Air Act; the other is FERC's effort to modernize electricity policy through new approaches to its authority under the Federal Power Act. While not identical, both settings raise the same basic questions about the legitimacy and consequences of aggressive interpretations of longstanding statutes to address problems unanticipated by the enacting Congress. These are deep dives, and the level of detail may be more than some readers feel they need. But the discussion is helpful in understanding the brass tacks of how, on the one hand, these agencies have engaged in "interpretive jujitsu" to adapt the statute to contemporary imperatives, but, on the other hand, are undeniably and genuinely constrained by the statutory regime within which they are working.

The final part of the article discusses the consequences of agencies' stepping into the vacuum created by congressional paralysis, exploring how "the de facto removal of Congress from this game changes the strategic environment for the other actors," producing relatively bolder action. This will be particularly so where the president's priorities and the agency's mission align. Still, boldness may be tempered by (a) what credible threats of *nonlegislative* congressional checking exist, (b) honest readings of statutory constraints, (c) the specter of judicial review (which matters both for the individual matter and for the agency's credibility and long-term reputation with the courts), and (d) regulatory review by OIRA.

The authors conclude with some reflections on judicial review in this era of congressional dysfunction. The core concern is whether courts giving agencies a relatively free hand will enhance or undermine democratic accountability. On the one hand, the standard assumption is that constraining agencies and thus relying on Congress for policy change is more "democratic." But the authors point out that if Congress is utterly polarized, it will often be unable to act, and when it *does* act it will be unable to move to the center. In those circumstances, the agency may have the edge in democratic legitimacy. This is particularly true if agencies are addressing problems not anticipated by the enacting Congress.

It is in this last section that the authors' largely implicit normative position—which is one of approval of muscular agency updating in the face of congressional dysfunction—becomes most explicit. It is a theory of the second-best. *Faute de mieux*, agencies should ensure that regulatory regimes are up to the task.

This brings me back to where I started. The 1970 permit regime created by what Richard Nixon referred to as a "more activist utilization of" the Refuse Act never quite took hold. But it presaged, and just two years later was supplanted, by the NPDES program created in the 1972 Clean Water Act. That sort of sensible, centrist, bipartisan congressional reaction to legal and real-world problems is exactly what, as Freeman and Spence convincingly explain, simply does not occur four decades later. And their essential point is that that reality will, and should, lead to more aggressive agency implementation of old statutes in light of new problems.

Cite as: Michael E Herz, *New Wine, Old Bottles, and a Do-Nothing Congress*, JOTWELL (March 11, 2015) (reviewing Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 **U. Pa. L. Rev.** 1 (2014)), http://adlaw.jotwell.com/new-wine-old-bottles-and-a-do-nothing-congress/.