

OKLAHOMA LAW REVIEW

VOLUME 57

SPRING 2004

NUMBER 1

JUDICIAL DISCRETION IN STATUTORY INTERPRETATION

FRANK H. EASTERBROOK*

I am delighted to deliver this year's Henry Lecture. It is named in honor of a distinguished judicial family, so I thought that I would tackle a judge's subject — though one that ought to be at the forefront of every lawyer's thought. It gives me an opportunity to work through a subject that has been troubling me for years — and should concern anyone who thinks about the process of interpreting legal texts. My question boils down to this: what is the right level of generality at which a *federal judge* should read a statute? This way of putting the question is important: I hope to persuade you that the identity of the interpreter affects the means of interpretation, and thus the meaning, of a statute. Some years ago I took up levels of generality for constitutional interpretation.¹ I'm reasonably satisfied with the result but have had trouble extending the approach to statutes. You can judge for yourselves whether this was trouble worth taking. But before tackling the argument — indeed, before defining what I mean by levels of generality — I want to cover some background.

Most statutes that produce litigation admit of multiple readings. I say this in the sense that people rarely come to court with clear cases. Why spend money butting your head against a wall? People come to court when texts are ambiguous, or conflict, or are so old that a once-clear meaning has dimmed because of changes in the language or legal culture.

© 2003 Frank H. Easterbrook

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, the Law School, the University of Chicago. Many of the ideas here are abstracted from a book in progress, tentatively entitled *Legal Interpretation*. Essays more or less related to this one were presented at the law schools of Florida State University, George Mason University, the University of Chicago, and Yale University; I appreciate the many comments received at or after those presentations.

1. Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992).

No simple approach to these problems is sensible, because words are not born with meanings. Words take their effect from contexts, of which there are many — other words, social conventions, the problems the authors were addressing. Texts appeal to communities of listeners, and we use them purposively. Readers' purposes, and so the meaning, will change with context, and over time.

Thus it is not surprising to find courts saying that, when an administrative agency encounters one of these ambiguities, it may adopt any reasonable construction of the law — and for this purpose “reasonable” constructions include those generated politically, by who gains and loses, and by the agency's view of good outcomes. An agency will announce that it chose a particular outcome because it pleases interest groups and members of Congress; a generally textualist Supreme Court will nod approvingly, even though the statutory text fades in the process. Similarly the Court, without blushing, will enforce one construction of the National Labor Relations Act when adopted by President Reagan's Labor Board, and a 180-degree opposite construction when adopted by President Clinton's Board. These days the word *Chevron*² sums up this approach.

Here is a recent example. *Lopez v. Davis*³ held that the Bureau of Prisons could use a particular law to deny most drug offenders any sentence reduction for completing drug-abuse programs, even though the statute says that the only prisoners ineligible for the credit are those whose *offenses* were crimes of violence. After Congress enacted this law, the Bureau issued a regulation saying that people whose *real conduct* included guns are disqualified, even if their *convictions* did not relate to firearms. Courts across the nation declared this understanding invalid, as it plainly was. Convictions are a subset of all wrongful conduct, and the statutory disqualification depends on conviction only. Then the Bureau changed its regulation to say, in effect: “Oh, we're just doing this as a matter of discretion.” Several courts of appeals condemned that maneuver, but the Supreme Court, citing *Chevron*, thought otherwise and said: “Discretion! Well, that's different!” The Bureau thus prevailed. Justices Scalia and Thomas, the most consistent textualists on the Court, joined Justice Ginsburg's opinion in *Lopez*. Both on and off the bench, Justice Scalia has proclaimed himself a fan of *Chevron*.⁴ It is hard to find thoroughgoing critics of that case and the doctrine it summarizes.

2. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

3. 531 U.S. 230 (2001).

4. *E.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1990). His view of *Chevron* differs, however, from that of his colleagues. *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

Although this attitude toward executive discretion is old — *Chevron* is just the latest iteration of an attitude that has long been employed, if not so clearly articulated — it should seem odd as well. Especially for textualist judges, who believe that meaning is encoded in texts that must be carried out rather than tinkered with. Everything an agency is likely to rely on — political pressure, the President’s view of happy outcomes, cost-benefit studies, legislative history (including letters or tongue-lashings from members of Congress, as well as the committee reports), and the other tools of policy wonks — is off limits to textualist judges. More than that. These days even the judges most attracted to the Hart and Sacks legal process school, which urged interpreters to find and extend the legislation’s spirit,⁵ disclaim entitlement to rely on personal, and perhaps idiosyncratic, views of wise policy. Yet “good” outcomes are exactly what an agency sets out to achieve when exercising discretion.

Let me put the problem more directly. Judges and scholars usually write about *Chevron* and deference to agencies as if the question on the table were *who* does the interpretation — a judge with tenure, an “expert” at an agency, or a political official serving at the President’s pleasure.⁶ I see the choice differently. The principal subject is *what methods of interpretation will be applied*. Judges in their own work forswear the methods that agencies employ — and that by invoking *Chevron* judges allow agencies to employ. A judge who announces deference is approving a shift in interpretive method, not just a shift in the identity of the decider, as if a suit were being transferred to a court in a different venue. What is more, the methods that agencies employ are entirely sensible ones.

If statutes *are* ambiguous, if it is *reasonable* or even *inevitable* for agencies to exercise discretion when interpreting laws, if there is *just no right answer*, then why can’t judges do as agencies do? If the statute is addressed to an agency, then the agency has discretion; if the statute is addressed to a judge, then the judge has discretion. Recall that many themes of textualism — such as disregard of legislative history because of the constitutional bicameralism rule⁷ and the idea that consistent interpretation over time is part of what it

5. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1111-1380 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

6. I put “expert” in quotations because agency members are not chosen for scientific prowess, rarely have skills in scholarly research or analysis, and almost never subject their conclusions to dispassionate scholarly study. References to “expertise” in administrative law are either rhetorical ploys or reflect ignorance about how commissions actually are chosen and operate. See *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993); *Elliott v. Commodity Futures Trading Comm’n*, 202 F.3d 926, 940 (7th Cir. 2000) (Easterbrook, J., dissenting); Frank H. Easterbrook, “*Success and the Judicial Power*,” 65 *INDIANA L.J.* 277 (1990).

7. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *COLUM. L.*

means to say that statutes are *law* rather than simply exhortations — seem to be as applicable to agencies as to judges. What is more, the foundation for textualist interpretation — that judges must be faithful agents of legislative decisions — seems no less applicable to agencies. Under Article II, the President and his staff are supposed to faithfully execute the law, not manipulate the law. So if discretionary interpretation is OK for officers under Article II, why is it not OK for officers appointed under Article III?⁸ If textualism is required for Article III officers, why not for Article II officers?

And if the judge has discretion, why *not* a policy-oriented discretion? Does it not seem inconsistent for judges to deny themselves a power that they grant to the Bureau of Prisons? Indeed, don't the rationales for deferring to administrative interpretations show that the foundation of textualism on the bench is quicksand? If there is no right answer for statutes addressed to agencies, there is no right answer for statutes addressed to judges, and we had best face up to that fact.

Resolution of this apparent inconsistency requires both unpacking multiple meanings of administrative discretion in interpretation and analyzing the differences between Article II officers and Article III officers. Let me start with the former, which the Justices themselves did in *United States v. Mead Corp.*,⁹ to which I will allude without attempting to parse. (*Mead*, the most important decision on the subject since *Chevron*, also *stopped* with the first question; the Court did not see, or at least did not discuss, the link between the identity of the decider and the appropriate interpretive norms. There are other shortcomings in that opinion, but it is not my goal to attend to these.¹⁰)

When judges speak of “deference” to an administrative decision, or proclaim that agencies have discretion, they may mean any of three things:

- *Delegation*. When Congress has given an agency the power to adopt legal norms via formal rulemaking or administrative adjudication, the court must accept action within the scope of the delegated power the same way it accepts legislation. The

REV. 673 (1997).

8. I'm not the first to ask this question. See Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663 (1991).

9. 533 U.S. 218 (2001).

10. One particular problem is that, although *Mead* treats deference as coterminous with delegation, it then equates the sphere of deference with decisions made in certain formal ways, such as through rulemaking. Yet it is hard to see how the agency's choice of *means* to carry out a delegated function demonstrates the *extent* of that delegation. The agency controls the means, but Congress and President together determine how much authority to delegate. For some other problems, see Adrian Vermeule, *Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 355-61 (2003).

agency is making rather than interpreting rules. What the statute principally encodes is *who* decides, rather than how that actor must decide. This, *Mead* insists, is the limit of *Chevron*.

- *Respect*. When the statute tells the executive branch to achieve a goal — that is, when the law specifies ends, such as clean air, rather than means such as the percentage of particulates to be filtered out — the choices made in pursuit of that objective are political in nature. The President rather than a judge decides how to execute the laws, and a court therefore must respect the discretionary choices of a coordinate branch of government. You can think of laws naming objectives rather than means as a form of delegation to whoever chooses how to achieve the objective.
- *Persuasion*. On a “pure” question of law, where nothing has been delegated, an agency’s views may persuade when they cannot compel. To the extent statutory text and structure are conclusive on the issue of meaning, an agency may persuade by illuminating how the pieces of the statute fit together. To the extent that other factors (collectively “legislative intent”) matter, the agency may have better access to indicators of this intent than do judges. This subject, according to *Mead*, is the scope of *Skidmore*¹¹ deference.

Using one word for three distinct subjects breeds confusion. Justice Breyer believes that it has done worse — that it sometimes has led courts to give more force to an agency’s legal arguments (the “persuasion” category) than to the agency’s choices about wise policy (the “respect” category), reversing the proper role of the political and judicial branches.¹² Furthermore, *Mead* thought that there were two boxes rather than three, which may cause problems down the line.

Most mentions of “deference” or “discretion” in the legal literature about agencies — and, worse, in opinions — are misleading because they do not differentiate among these senses of the words. Considerations applicable to one sense may be off the mark for another. I think that the only real domain of “discretion” is the domain of delegation — Congress may delegate a law-making power to the Executive Branch, whose decisions must be respected

11. See *Skidmore v. Swift & Co.*, 323 U. S. 134 (1944).

12. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

because they are ultimately political.¹³ So the Supreme Court said in *Mead*. And there is no constitutional problem with delegation. The Supreme Court hammered that point home in *Whitman v. American Trucking Ass'ns*,¹⁴ rejecting the D.C. Circuit's view that delegation broad enough to encompass real decision-making power violates a "nondelegation doctrine." Not so, the Court held. Delegation is constitutional; the first Congress itself delegated like crazy to both the President and the courts (as a part-time legislature must do);¹⁵ when there is *real* delegation, there is *real* discretion in the holder of the delegated power. And this kind of discretion must be identical for Article II and Article III officers.

Article III itself delegated to the Supreme Court a power to make up a law of interstate boundary disputes; the Justices have done this with gusto, never suggesting that there is any problem in implementing judicial views of sound policy about the right way to draw closure lines across the mouths of watercourses. The law of admiralty is an invention of federal judges, and like state tort law it has changed over time as the judges' views of wise policy has changed. So too with antitrust;¹⁶ what judges have done is little different from what the FTC does as one political party or another acquires control of that agency and endows it with a different economic perspective.

The Sherman Act bans contracts in restraint of trade.¹⁷ Yet as Justice Brandeis observed in *Chicago Board of Trade*,¹⁸ all contracts bind or restrain; that is what distinguishes contract from wishful thinking. No one supposes that Congress has made contracts illegal. So judges say, "Now why did Congress enact such a law?" They answer, "To protect consumers from monopoly prices." That implies a cast of mind, a menu of approaches, and even some legal rules, which courts have devised. But the judgment in an antitrust case does not carry out legislative words. To put this differently, delegation led judges to read the antitrust laws at a much higher level of generality than the tax laws. No one dreams of saying that the "goal" of tax

13. See *Krzalic v. Republic Title Co.*, 314 F.3d 875, 882 (7th Cir. 2002) (Easterbrook, J., concurring).

14. 531 U.S. 457 (2001).

15. For example, the first patent legislation authorized a panel comprising the Attorney General and the Secretaries of State and War to issue a patent for any "invention or discovery" (terms left undefined) that they deemed "sufficiently useful and important." Act of Apr. 10, 1790, § 1, 1 Stat. 109, 110. How "useful and important" was useful or important enough was delegated to the panel. See the discussion in DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 90-93* (1997).

16. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997), which is refreshingly candid about the common-law nature of the powers judges exercise in antitrust litigation.

17. 15 U.S.C. § 1 (2000).

18. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918).

is to raise \$X of revenue without too much economic dislocation, so that if because of a recession the Treasury is empty, or because of a boom people fork over too much, or because the laws cause too much allocative inefficiency, judges are privileged to change the marginal rates to make it all come out right. No, tax laws are read particularistically, as rules rather than standards, as specifying *required conduct* rather than *desired end states*. The big difference is the nature of delegation: zero power has been delegated to judges in tax cases.

Delegation to the judiciary (and the discretion that accompanies delegation) is much less common than delegation to agencies. Why is this? There are two sorts of reasons, one practical and the other rooted in the Constitution.

On the practical front, it helps to start with the recognition that delegation to an agency ensures that a single interpretation prevails. There is only one Secretary of Health and Human Services, but there are thirteen courts of appeals and about seven hundred odd district judges, some of them very odd indeed. A question is debatable when it could be decided in different ways by reasonable people; it is therefore predictable that debatable questions will be decided different ways by different judges. Worse, once these judges begin making inconsistent decisions, contradictions enter the stock of precedents; and with contradictory premises one can “prove” any conclusion. So the size of the judicial system plus a norm of reasoning from premises found in judicial opinions provide powerful reasons not to let judges make policy decisions — and this even without considering the voting paradoxes identified by Condorcet and his successors. Delegation to an agency permits a nationally uniform rule without the need for the Supreme Court to settle the meaning of every law or regulation.¹⁹ This also explains why courts almost always accept an agency’s understanding of its own regulations. Unless by “interpreting” a rule the agency is trying to evade the Administrative Procedure Act’s requirements for notice-and-comment rulemaking,²⁰ accepting the agency’s view produces uniformity at negligible cost.²¹

A second practical reason is this: delegation expedites change. Sometimes, as in labor law, it allows political adjustment to the fortunes of labor versus management, without the need for contentious debate in Congress. Often the

19. See Peter L. Strauss, *150 Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987); *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408 (7th Cir. 1987).

20. 5 U.S.C. § 553 (2000).

21. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 374 (1994) (observing that agency discretion is justified by a combination of political accountability, specialized knowledge, flexibility, and national uniformity that judges cannot duplicate).

adjustment is technical, however, and specialists are apt to make technical changes better than generalist judges who spend too much of their time handling cocaine cases.²² As we add to knowledge about how carcinogens work (and what things *are* carcinogens), the value of different health-promoting strategies changes. Unless the EPA had discretion to change its policy as a result, we would be locked into very bad strategies. This happened with the Delaney Clause²³ — the law forbidding the FDA to certify any new food additive that causes any cancer. In the years after its enactment, it became easier to detect low-level carcinogens, so more new food additives flunked the test (and it became more expensive to test all candidates). But the effect was not to promote safety. To the contrary, the Clause's effect was to keep new food additives off the market even when they were *much* safer than the existing products, which were grandfathered. Say what you want about cyclamates; they are safer than refined sugar! An agency with discretion might fix this — but that is likely the reason discretion was withheld for so long. Until recently, when the Delaney Clause was relaxed,²⁴ established interest groups were politically successful at protecting their products from competition.

Adjustment is chancy for agencies in an interest-group world and impossible for judges. Congress and the President can control bureaucrats; a Commissioner of the FDA who certifies too many, too few, or the wrong kind of food additives can be fired by the President or browbeaten in “oversight hearings”; the Commissioner's budget can be threatened. It is acceptable to give the Commissioner a long leash because, if he strays from his master's wishes, he can be reeled in (or replaced) at low cost. But if a judge strays, the only remedy is more legislation — which in political terms is *much* more costly.

Judges of course realize this, and they do stray — they are more tempted to stray from the political consensus than bureaucrats or even Presidents. This is independent of the incoherence problem caused by multiple judges and conflicting precedents.²⁵ Judges are more tempted to stray because there are

22. This also implies that textualist methods are best for generalist judges even though specialists would employ nuanced interpretive methods. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; see also Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 SUP. CT. REV. 267.

23. 21 U.S.C. § 348(c)(3)(A) (2000).

24. See, e.g., Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296; Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489. Together these acts effectively repealed the Delaney Clause.

25. See generally Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

fewer tools for reigning them in; essentially the only tool is a new statute, which may be impossible for reasons that I'll get to shortly. It is therefore predictable that, in a country where legislation is difficult, judges will claim more political leeway than in a country where legislation is easy. The difference between the relatively modest English judiciary and the relatively bold U.S. judiciary illustrates this point.²⁶ The terms of judicial tenure are identical on the east and west of the Atlantic, but English judges hold less sway in interpretation. They act under a parliamentary system, which can alter their decisions quickly, while U.S. judges enjoy more agency slack. This structural difference may well explain the difference in interpretive theory — but this is a positive point rather than a normative one, and the agency slack in the United States seems to me a cost rather than a benefit because it greatly complicates the legislative task when the legislature wants to adopt stable and mechanical rules.

Wait. Have I not just condemned the independent judiciary? To an extent I have, at least when independence is put to certain ends, and this brings me to the constitutional point of difference between Article II officers and Article III officers. The difference is tenure. When judges make policy — which is, after all, what discretion in interpretation means — you can't get rid of them. In a representative democracy, that is a powerful reason not to allow judges to make policy in the first place. This is especially true in a nation such as ours whose political system is designed to make it very hard to enact legislation that changes judicial decisions.

Tenure was created largely to protect individual litigants from political influence. No one charged with killing a police officer wants to be tried before a judge who must stand for reelection and fears that, if the defendant is acquitted, then the police union will wage a campaign against his retention. No one who operates an abortion clinic wants to face a judiciary whose election coffers are filled by the hard work of anti-abortion activists. The most practical way to ensure dispassionate *application* of law to fact is a judiciary with very long tenure.

In other words, judges have tenure to make it easier (because less costly) for them to be faithful to decisions taken in the past. If these decisions are to be updated, that should be done by those who are supposed to be sensitive to the contemporary will — administrative officials, Congress, the President. Although judges are more apt to be dispassionate than are political officials, their dispassion need not lead them to be more faithful to either old decisions or the median view of today's legal culture; it may lead them to be more

26. See Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349, 369 (1993).

faithful to their *own* views. This is the dark side of tenure.²⁷ Like the Force in *Star Wars*, tenure has both a good side and a dark side. Just as with the Force, the dark side is self-indulgence; if contemporary opinion and politics do not sway the judge, then the judge's own druthers become more important. If the Secretary of Transportation gets a swelled head, he can be Dingelized. (If you don't understand that reference, ask someone who remembers when the Democrats were a majority in the House of Representatives.) Judges can't be Dingelized, let alone sacked. And that is why people with tenure should not be exercising discretion in interpretation.

Public officials must give an account, not simply of meaning, but of why their view of meaning should be accepted. When meaning is contingent, how do people with tenure explain why you go to jail if you depart from their demands? This is a serious question for a nation whose Constitution lacks a judicial-review clause. Interpretive rules may differ according to the source of the demand to be obeyed. When the demand depends on recent election, a flexible contemporary reading may suffice. When the demand depends on a commission from a dead president, a more textual reading may be necessary as a *constraint* on the dead hand, a substitute for the political constraint.

How, then, would one set about a program of granting interpretive discretion to Article II officers but not Article III officers? Largely by controlling the level of generality. There is that phrase again.

When I say that a law is being interpreted at a low level of generality, I mean that it is taken as a code of things to *do* rather than a set of objectives to *achieve*. The tax code is a good model. It has many abstract terms, but all operate on inputs rather than outputs.

A more general statement, by contrast, abstracts away from inputs and concentrates on consequences. The statement "motorists must not exceed sixty-five miles an hour" is specific; the statement "motorists must use reasonable care under the circumstances" is highly general — much more so than the rule "motorists must drive more slowly than the speed limit during rain." The more abstract rule may call for detailed inquiries later (what, after all, is "reasonable care" in the circumstances?) or may not (the rule "do not discriminate on account of a speaker's viewpoint" eliminates the sort of balancing after the fact that is common in tort law).

Let me give you an example of how judges can play with levels of generality in a way that insulates a decision from legislative reaction. *California Federal Savings & Loan Ass'n v. Guerra*²⁸ dealt with a statute, the

27. See generally Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLORADO L. REV. 773 (1990).

28. 479 U.S. 272 (1987).

Pregnancy Discrimination Act, saying that pregnant women must “be treated the same for all employment-related purposes” as employees who are not pregnant.²⁹ The question was whether, after the PDA, employers ever may favor women over men by giving women, but not men, post-birth family leaves. The law does not say in so many terms. If the law had delegated a decision to the EEOC, the judiciary would accept almost any answer. But the PDA did not delegate, so the problem landed in the laps of the Justices.

The PDA was a reaction to *General Electric Co. v. Gilbert*,³⁰ which held that pregnancy discrimination is not sex discrimination. The PDA overturns *Gilbert*. Does it do more — does it give new rights to men who want to stay home with young children? The Court approached *Guerra* by changing the level of generality. Instead of asking “what rules does the phrase ‘treated the same as’ imply?,” the Justices chose to ask what kind of employment relation the statute was designed to produce. The majority did this by putting a hypothetical question to the drafters of the law: “Would you object if women got a little more than men?” They answered “no” for the silent drafters. The effect was to boost the level of generality: to look at the law’s effects rather than to formulate rules. One could readily pose a different question implying much lower generality: “Does ‘treated the same as’ mean ‘treated identically’?” Lots of options fall in between.

Is there any way to choose a single right level of generality? Some judges (or for that matter some legislators) favor formal equality on moral or prudential grounds; others want to minimize the role of law (or the role of feds vis-à-vis states); still others think law should do no more than protect victims of past discrimination while leaving men to fend for themselves; still others would say that there is no discrimination either way if we view the family unit rather than individual workers as the object of the law’s solicitude. These imply fundamentally different strategies for looking at rules versus effects. That’s why a judge would allow leeway if the EEOC had to give the answer.

So how should a tenured judge proceed? Recall the Court’s hypothetical question. Who gets this question? The sponsors? The median voters? The former choice is wrong, but the latter are silent! You will have to reconstruct the speaker in either case. If you reconstruct a person exactly like yourself (perhaps on the theory that everyone is reasonable, and you are a model of reasonableness), then the process of hypothetical querying is worthless. You might as well ask yourself what is wise and be done with the pretense. If you imbue the reconstructed speakers with different attributes, however, you get out only what you put in — and again the process is worthless. There just

29. 42 U.S.C. § 2000e(k) (2000).

30. 429 U.S. 125 (1976).

wasn't anything *there*. There were only the judge's views, made controlling not by anything in the text, but by the generality shift.

Perhaps coming at this from another angle would help make the point. Almost every law tackles multiple problems at once. Consider a *really* simple law: one that provides only a rule of decision and an enforcement budget.

Suppose 60% of Congress preferred the rule "treat women at least as well as men" (so the man loses *Guerra*). Suppose also that half of this 60% wanted cheap enforcement, and that other Members wanted a larger enforcement budget but formal equality. The rule "treat women at least as well as men" could pass independently but not when joined with enforcement questions; the larger budget also could pass independently but not when considered jointly. To get a larger enforcement budget for the EEOC, Congress must stop with formal equality (which a majority finds preferable to the status quo represented by *Gilbert*). Any interpretation that looks to the sponsors' preferences as a means to boost the level of generality inevitably misconstrues the law by imputing to Congress a result that could not have been enacted given the other issues on the table. If a court later "interprets" the equality rule as allowing a preference, Congress can't overrule it (60% of the Members will be opposed on this single-issue vote); but advance knowledge of this sequence would have ensured weak enforcement. *Ex ante*, such an approach would have killed the deal altogether.

Perhaps, instead of asking whether changes in the level of generality will disturb a statutory package, we should ask whether a two-dimensional deal has *any* meaning when the court comes to interpret a single dimension. Suppose the legislature could agree on (a) preference for women with low funding, or (b) formal neutrality with high funding. If sponsors refuse to budge from a preference with high funding, they get no law. And if you put either the preference or the funding individually, both would pass — but because some of those who favor a preference want low funding, you can't aggregate these outcomes. Now if you present the preference issue alone you get a misleading answer — indeed, *even trying to address it alone warps the answer*, or imputes one where there is none!

Isolating the issue also means, as I have stressed, that any judicial decision can't be undone by the legislature; only a *joint* decision is feasible politically. Unlike courts, agencies can and do make multi-dimensional decisions, creating packages to surmount political impasses. It is no accident that most rulemakings are complex. Both legislation and regulation depend on logrolling. Litigation breaks bulk, and this implies a big difference in appropriate interpretive strategy.

All in all, for judges compelled to consider issues in isolation, there just isn't anything *there* except for the text. And this problem can't be solved by

Akhil Amar's intratextualism, of which I am otherwise a fan.³¹ It was not possible in *Guerra* to compare how words were used across clauses — in part because the clause at hand used a different vocabulary from the budget provisions and those related to the statute of limitations, and in part because the political coalition was complex, so we can't expect either substantive or linguistic consistency across clauses. A statute such as the PDA not only lacks a linguistic concordance but also lacks an underlying spirit — not because the intent of the principal sponsors is hard to discover, but because a collective body doesn't have a brain. The body differs from the sponsors, and the body as a whole just votes. Compromises lack purposes. And *that* has powerful effects on interpretation. It means that boosting the level of generality — switching from rules to results — assumes away the only things Congress actually did. The result can't be called interpretation at all, and if there was no delegation to the judiciary then the result can't be called legitimate.

I drifted away into theory. Back to the concrete. Let me describe three cases that by my lights illustrate both sound application of textualism in court and how an agency might legitimately decide otherwise.

My first illustration comes from labor law. In *Guidry v. Sheet Metal Workers Pension Fund*,³² Curtis Guidry pleaded guilty to embezzling funds from a pension plan of which he was a trustee. Guidry was himself entitled to a pension from the plan, and the remaining trustees confiscated the value of his pension in partial fulfillment of Guidry's obligation to repay what he stole. Guidry filed suit, contending that this offset violated the anti-alienation clause of ERISA. He lost in the Tenth Circuit, which asked: what is the anti-alienation clause for? To protect pensioners from their own improvident spending, not to enable them to retain ill-got gains — which they could do if they were allowed to live high off the booty while putting their lawful income in trust and stifling the victims.³³ If the enacting Congress had been asked, "Would you make an exception to the anti-alienation clause for persons who steal from the pension fund?" it likely would have answered yes. So Guidry lost.

No surprise. Those of you who fancy the outcome of *Riggs v. Palmer*³⁴

31. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

32. 493 U.S. 365 (1990).

33. See generally *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 856 F.2d 1457, 1459-60 (10th. Cir. 1988).

34. 22 N.E. 188 (1889). This case is notable in part for the weight that scholars opposed to literalism place on it. E.g., RONALD DWORKIN, *LAW'S EMPIRE* 15-20 (1986); WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 565-67 (3d ed. 2002); RICHARD A. POSNER, *PROBLEMS OF JURISPRUDENCE*

could scarcely imagine a different outcome. *Riggs* held that, despite a statute calling for strict enforcement of wills, an heir who murdered the testator could not collect his bequest.

Yet the Court reversed in *Guidry*, and unanimously. It pretty much began and ended with the language of the statute. The anti-alienation clause contains no exceptions. Whatever Congress *might* have done, it had not done. To the extent that the Court referred to purposes at all, it conceived them concretely rather than abstractly. What is the purpose of an anti-alienation clause? It is to prevent appeals to the equities case by case. In other words, the Justices did not ask, “What is the value served by this particular rule?” Instead they asked, “What is the value served by *rules*, in general?” This led the Court to enforce the rule and to rebuff efforts at generalization and reconstruction. *Guidry* represents today’s norm in the judiciary, but for an agency a different outcome could be sustained easily. If the Department of Labor held delegated power, it could say that Congress enacted ERISA against the background of *Riggs* and similar cases, justifying a shift in the level of generality when embodied in prospective rulemaking.

My second example is an ethics case. In *Crandon v. United States*,³⁵ five of Boeing’s employees decided to go to work for the federal government. Although Boeing does not usually give departing employees severance payments, it awarded these five packages calculated to make up the difference between their federal salaries and their Boeing salaries for the anticipated period of their federal service. The government sued, arguing that these payments violated a law forbidding any person from “supplement[ing]” federal salaries. The Department of Justice relied on an impressive chain of cases, and an even more impressive series of opinions issued by the Office of Legal Counsel in the Department of Justice, taking a purposive view of the law.

Assistant Attorney General Rehnquist and Assistant Attorney General Scalia had signed some of these opinions when they headed the Office of Legal Counsel. The opinions went like this: Why have such laws? Why, to prevent federal employees from being unduly grateful to private benefactors. Supplementation smells like bribery even if it does not entail a quid pro quo. Ethics laws prevent the appearance of impropriety. Such an appearance arose here, and the employees doubtless felt grateful to Boeing and so might favor it. Following the Rehnquist-Scalia interpretive line, the court of appeals held the payments illegal.

106-07 (1990).

35. 494 U.S. 152 (1990).

Not the Supreme Court, which reversed unanimously in an opinion revealing that Antonin Scalia has a very different view of judicial and administrative authority.³⁶ His concurring opinion observed that there are many ways to write ethics laws, and that a law in the present tense dealing with receiving supplements to salary differs in form from a law dealing with the appearance of impropriety or acts prior to entering government service. To honor the legislative choice, the Court must enforce the device that was chosen. Otherwise, in writing what the judges believe is a better law to achieve Congress' ends, the court may actually be changing the nature of those objectives. In the process, the court would also deprive the addressees of the law of fair warning. So the government lost. This case is particularly instructive not only because it is unanimous but also because it comes against such an extensive background of purposive, high-generality construction of similar ethics laws. This was a case where an agency *had done it differently*. But when there was no delegation, and the Court had to interpret directly, the Court chose low generality and the implementation of form over function.

My third case is *Circuit City Stores, Inc. v. Adams*,³⁷ which considered whether the Federal Arbitration Act applies to a contract between a retailer and its employees. Circuit City and Adams agreed to arbitrate all employment-related disputes, including those under federal statutes. When such a dispute arose, however, Adams headed to court, contending that the arbitration agreement was invalid under California law. This supposed, of course, that California law governed, and Circuit City replied that the agreement was enforceable as a matter of the Federal Arbitration Act, which had already been construed to reach all contracts within the limits of the federal commerce power. As the employee's claim arose under federal anti-discrimination law, there could be no doubt about federal power. But Adams argued that section 1 of the Act excluded his situation. This section provides, in part, that "nothing herein . . . shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."³⁸

There are at least two ways to read this language — which means that if implementation had been committed to the EEOC, the agency could choose freely. One way to read the text emphasizes "any . . . workers engaged in foreign or interstate commerce." We know that includes Adams, for the Commerce Clause was the hook for his federal claim. On this view, section 1 means that the FAA does not cover labor relations, which are left to the

36. *Id.* at 168-84 (Scalia, J., concurring).

37. 532 U.S. 105 (2001).

38. 9 U.S.C. § 1 (2000).

National Labor Relations Act and, for unorganized workers, state law. The other way to read it starts at a lower level of generality by emphasizing the list: “seamen, railroad employees, or any other *class* of workers.” This sounds like an exclusion of the transportation industries, extensively covered by other federal laws and agencies. On this reading, section 1 of the Federal Arbitration Act partitions the world between administrative and judicial domains.

Is there some way of deciding which reading is right without boosting generality and asking (as an agency would do) what is a good outcome, or who is in the political driver’s seat? Both sides’ arguments are anachronistic, for the administrative apparatus for transportation claims was not completed for another seven years after the Arbitration Act (enacted in 1925) — and the structure of federal labor law, on which the broad reading of the exclusion depends, was not put in place for another thirteen years. The majority tried some intratextual tools, contrasting section 1 (which says “engaged *in* commerce”) with section 2 (which says that the Act covers contracts “affecting” commerce) — and the difference implies that section 1 did not carve out all contracts with workers. This was a decent, but not conclusive, move. What particularly impressed me, and should interest you, however, was the debate about the right level of generality.

Adams relied heavily on legislative history — not committee reports and other efforts at *explanation*, but the background of the law: Who lobbied for it? Who lobbied against it? What did they tell Congress this law would do? In many ways this type of legislative history is superior to legislators’ words, which can be cooked; it is a more objective deployment of the linguistic and political context of legislation, where it is the context that conveys the information. Here is how the Court replied:

We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal — even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case. It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.³⁹

This is a clean statement of the difference between courts and agencies in interpretive discretion. But it would have been even better had the Court said, instead of, “we don’t attribute purpose X based on input Y,” something like,

39. *Adams*, 532 U.S. at 120.

“we don’t care about the purpose, because ‘purpose’ is all about outcomes while we are trying to determine the rules of the game.” The passage follows the common strategy of professing to care about the “intent of Congress” and then making that intent objective, converting it back to meaning along the lines of Holmes, who observed:

[A statute] does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law.

. . . .
We do not inquire what the legislature meant; we ask only what the statute means.⁴⁰

As you may know, this case had four dissenters. But the dissenting view becomes enfeebled once it goes beyond the textual reading that emphasizes the “in commerce” language. Both Justices Stevens and Souter wrote dissents loaded with references to “inequality of bargaining power,” a political slogan having no ascertainable economic content. To load up an opinion with such things is to sound like an agency — which, oddly, the dissenters professed not to do. The concluding passage in Justice Stevens’s opinion reads:

This case illustrates the wisdom of an observation made by Justice Aharon Barak of the Supreme Court of Israel. He has perceptively noted that the “minimalist” judge “who holds that the purpose of the statute may be learned only from its language” has more discretion than the judge “who will seek guidance from every reliable source.” *Judicial Discretion* 62 (Y. Kaufmann transl. 1989). A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.⁴¹

40. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-19 (1899), reprinted in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 204, 207 (1921).

41. *Adams*, 532 U.S. at 133 (Stevens, J., dissenting).

To seek guidance on value-free adjudication in the views of a judge who describes himself as a “radical activist”⁴² is risible. Can it be that Justice Stevens did not know the judicial record of the person whose words he was quoting? Has Justice Stevens forgotten Harold Leventhal’s jibe that using legislative history is like looking over the crowd at a cocktail party and picking out your friends? Judge Leventhal’s remark encapsulates much of what I have been saying. The crowd contains the many dimensions of politics; to have access to all dimensions when the judicial task is limited to one issue is to preclude any possibility of coherent, principled decision.

In closing I want to emphasize that mine is not a hermeneutical theory of interpretation. “Plain meaning” as a way to understand language is silly. In interesting cases, meaning is not “plain”; it must be imputed, and the choice among meanings must have a footing more solid than a dictionary — which is a museum of words, a historical catalog, rather than a means to decode the work of legislatures.⁴³

Any theory of meaning must be jurisprudential. What does the Constitution require legislatures to do to produce a law? What is the proper relation between tenured judges and the evolving political branches of the government? To the extent the constitutional rules permit this inquiry, what are the relative costs of error from expansive versus beady-eyed readings? These are the right questions, and I have endeavored to show that the answers lie in a relatively unimaginative, mechanical process of interpretation *in court*, coupled with a richer, more contextual method out of court.

One theme you hear in the press, the halls of Congress, and the legal academy is that the move to textualism is political, a conservative reaction to

42. Justice Barak’s self-description as a “radical activist” is quoted in STEPHEN BURBANK, JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 261 (2002). See also Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

43. *Country Mut. Ins. v. Am. Farm Bureau Fed’n*, 876 F.2d 599, 600 (7th Cir. 1989); see also Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998); A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71 (1994); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Remains a Fortress: An Update*, 5 GREEN BAG 51 (2001). Finding definitions outside of dictionaries is even more risky, a point that the Justices missed when turning to newspapers and biblical quotations in a vain effort to cabin the meaning of the word “possess.” See *Muscarello v. United States*, 524 U.S. 125, 129 (1998). The Justices missed the point that the context of a word depends on the linguistic community of addressees and not the full range of how a word ever has been used. Dictionaries are not better just because their etymology sections now can be researched online!

laws enacted by Congresses to the left of those appointing the judges. Yet many of Franklin Roosevelt's justices relied on plain language. (Have we forgotten Justice Black so soon?) Other nations treat simplicity of interpretation as a guarantee of faithfulness to the legislature. England is one, France another. After the Revolution, France's new democratic government imposed a highly formal style on the predominantly aristocratic bench.⁴⁴ It believed that a formal, plain-meaning approach would prevent the bench from straying too far.

If the textualist interprets laws written in a more conservative era, the results appear "conservative" to modern eyes. Sometimes, however, the difference runs the other way. When the text is to the left of the judge, textualism produces results that are politically "liberal." To see this, consider a highly publicized case of a decade ago.

The Pregnancy Discrimination Act, which in *Guerra* was treated to a boost in the level of generality, returned to the Supreme Court in *UAW v. Johnson Controls, Inc.*⁴⁵ Johnson Controls makes batteries, which use lead. Lead can cross the placenta during pregnancy and injure the fetus, although the degree of risk is open to question. There is also some risk from the father's side, although again "how much" is a big medical question. Johnson Controls responded to these risks by banning all fertile women from its industrial work force to minimize the risk to the next generation.

A majority of my court followed the approach of *Guerra* and boosted the level of generality.⁴⁶ They first asked why there is a Title VII, and why a PDA. They answered, to prevent invidious discrimination against women. Johnson Controls, though, expressed concern for children of both sexes and had no animus against women. Thus, they concluded, its policy was not sex discrimination.

Two can play at the generality game! In *Johnson Controls*, it allowed judges to indulge their preferences about wise policy — for the appellate majority in *Johnson Controls* very much approved of the employer's decision. Low generality, lashing adjudication to text, worked in the politically liberal fashion: the text says that an employer may distinguish between the sexes only to the extent that men and women differ in their ability to do the job. Effects on the next generation do not matter to a worker's current productivity. So there may be no distinction, whether or not one would be wise in a long-run perspective. That is indeed what the Supreme Court said, with the blessing of

44. See Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 733 (1992) (crediting Tony Honoré with the point).

45. 499 U.S. 187 (1991).

46. *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (en banc).

Justice Scalia, that champion of textualism.⁴⁷ Equal means same. So there. The women prevailed.

Now consider again: is choosing the method of interpretation inherently political? That most of the decisions I have discussed are unanimous — or lopsided with no apparent political spin to the voting — suggests not. It can *be* political if the interpreter is intellectually dishonest, switching between “plain meaning” and more expansive styles according to the judge’s estimate of the preferable outcome. It can be political if the interpreter uses the rhetoric of low generality to disguise other methods. But of course the search for “intent” in the large, accompanied by boosting the level of generality, is more indulgent of the judge’s druthers than the methods I have discussed. When we worry about tenured officers exalting their will over that of the legislature — that is, all the time — we ought to prefer a model of construction under which this is a sin rather than one under which it is the norm.

47. Justice Thomas, who is a more rigorous textualist than Justice Scalia, was not on the Court at the time and thus lacked an equivalent opportunity.