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Frank H. Easterbrook

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LEGAL INTERPRETATION AND THE POWER OF THE JUDICIARY

FRANK H. EASTERBROOK*

Judges interpret words. And words do not bind the interpreters; rather the interpreters give meaning to the words. The meaning of words is not the same as the "intent" of the writers. Often writers have no pertinent intent or have several intents. When they have an intent it does not control, because words are mere instruments for conveying thoughts to others. The critical people are the users, not the writers, of words.

Words have meaning only to the extent there is some agreement among a community of users of language. Unless both writers and readers understand the same thing by some construction of words, the writing either fails of any purpose or, as with literary interpretation, liberates the reader to supply his own meaning or story. This creates a fundamental problem for understanding the appropriate roles of courts, because courts are users of words yet are not supposed to possess much, if any, power to create legal rules.

Many times written words give rise to shared interpretations. When they do, there is no great problem for judges. Indeed, when words are clear, there is not even likely to be litigation. People do not routinely spend time and money trying to persuade judges that words mean something that all fair-minded readers will conclude they do not mean. The real problem with statutes and constitutions is that in every *interesting* case — every case in which skilled users and readers of words can reach contrary conclusions from the text — there is no community of understanding among writers and readers of words, no meeting of minds. I return to this in Part II.

I. THE PROBLEM OF DECISION

Interpretation of words is hard even when they were written by a single person who could dictate the outcome of the product, rather than by a collectivity with many minds and desires that tug in different directions and leave a product bearing traces of the struggle.

* Professor of Law, University of Chicago. This essay makes use of ideas that have appeared elsewhere. See Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 90-94; Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

Interpretation is hard even when the writer had years to focus energies on a single document. The problems that arise in the interpretation of simple writings are bound to be multiplied by the legislative process. Consider these obstacles:

1. Legislatures lack time to resolve every problem. Usually their understanding is shallow. Even when it is not, new cases arise that they did not or could not have foreseen. Yet lack of foresight does not authorize the reader to supply what the writer omitted, because in the legislative process lack of time is a vital constraint. Lack of time is why one legislature does not try to do everything, why the 73d Congress did not answer every problem we face today. (Who would want such a thing, anyway?)

Lack of time is connected to the separation of powers. What the legislature did not solve, the executive did not address. What was not presented for veto is no law. If all members of the last Congress reassembled next week and agreed to a few bills, saying that they lacked time to get around to them in 1981-82, a court would ignore their rump session. Is there greater warrant for treating empty statutes as vessels into which judges pour what they think such a rump session (and a "rump President?") would have done had they thought of the problem now facing the court?

2. We do not necessarily get a more certain meaning when something was present in the minds of the drafters. Bodies with many members have no common meaning. Each member may have his own meaning. Each one is difficult to discover. Collectively, the meanings may be opaque, contradictory, or both.

3. Often the most acute awareness of a problem leads to the least resolution of it. It is well known that collective bodies do not answer the problems that vex them most deeply. Divisions of opinion take time to resolve, and time is not free. Proposals stall, and the bodies move on to other things. There are other procedural hurdles, such as unpopular riders and filibusters, that prevent translation of majority will into law. Thus even if judges knew the will of a majority of the members of a group, they could not routinely treat that will as law without disregarding other important parts of the deliberative system.

4. Most laws are compromises. Sometimes the essence of a compromise is to do nothing, to leave the issue for the future. A compromise is harder to strike if those working on it believe that it will be altered by outsiders without the striking of a new bargain, without a new give and take. Efforts to fill in gaps in language may

unsettle what was decided and prevent new compromises from arising.

5. One need not confine attention to compromises among selfish interests to see the problems of line drawing. When Congress acts in the “pure public interest” (whatever that may be), it may try to exhaust the available gains from legislation. Take the Truth in Lending Act as an example of public interest legislation. (Whether it is one we need not decide.) A question arises that the statute leaves obscure, say, whether the lender must disclose its retention of “unearned” insurance premiums that are not rebated on early repayment of the principal.¹ Does the statute require this disclosure? This turns quickly enough into the question: Is more disclosure better?

Knowing that the statute is “pro-disclosure” won’t help you answer that question. The existence of a “value” of disclosure does not say how much Congress thought it wise to sacrifice in pursuit of that value. By specifying what was to be disclosed, Congress may well have thought it already had come right up to the point at which the costs of disclosure, including those created by cluttered disclosure documents that baffle more than they enlighten, outweighed the benefits of more disclosure. When a document specifies a means to attain the ends the drafters had in sight, it contains its own limiting principle — if only we can locate it.²

II. THE PROBLEM OF INTERPRETATION

The problem put in focus by these five considerations is that statutes and constitutions are unlikely to contain “answers” to the problems courts find hard. Words are tricky to start with; words in legal documents are worse.

Take a law requiring the leashing of dogs. Does it also cover cats (because it really covers animals), wolves (canines), or lions

1 See *Anderson Bros. Ford v. Valencia*, 452 U.S. 205 (1981).

2 Because documents describing the means to pursue ends — instead of just specifying ends — have built-in limits, Michael Perry is wrong in believing that he can distinguish “extra-constitutional” from “contra-constitutional” decisions by judges. See Perry, *Judicial Activism*, 7 HARV. J.L. & PUB. POL’Y 69 (1984) [hereinafter cited as Perry, *Judicial Activism*] and M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* ix, 17-36 (1982). Perry says that courts may pursue to undefined extents, any value they find in the Constitution. He seems to assume that the drafters of the Constitution had never heard of too much of a good thing. That’s not very likely, and the whole structure of the Constitution implies that the rights specified there were limited because the creation and maintenance of rights is very costly.

(dangerous animals)? A court will find these questions were not present in the minds of the legislators, who might have chosen any of these had they thought about it. Similarly, take something that looks very clear indeed, the requirement that the President be thirty-five years old. Does thirty-five denote a number of revolutions of the Earth around the Sun, or was it designed as a percentage of the average life span (so today the President must be forty-five)? Or could the language conceivably denote some number of years after puberty (so today one could be President at thirty)? Each is supported by a constellation of plausible "values." The forty-five year interpretation would ensure that the President is relatively mature and respected compared with others in government; the thirty year rule would allow a gifted person to serve after passing a set of number of years in "adult society," where he or she learned the necessary skills to carry out the job. Indeed, almost any interesting interpretation of old language will have the support of some plausible constellation of "values."

This may appear to be an absurd example, but it is not. Other parts of the Constitution are as clear in the abstract as the thirty-five year rule, yet their meaning has been blurred in the process of interpretation because of difficulty in ascertaining the ends the words were designed to serve.³ One cannot say that "thirty-five" is "clear" without invoking some community of understanding, which in turn depends on agreement about what function the

3 For example, the provision that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts" (U.S. CONST. art. I, § 10, cl. 1) has been treated as if it were immediately followed by "unless there is a good reason for doing so." See *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). The requirement that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him" or vetoed and overridden (U.S. CONST. art. I, § 7, cl. 3), has been construed not to require presentation of constitutional amendments to the President, even though no amendment may be sent to the states except by concurrence of the Senate and House. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), a case subsequently described as creating an "exception [sic!] to the Presentment Clauses." *INS v. Chadha*, 103 S. Ct. 2764, 2786 n.20 (1983). The first amendment, which says that "Congress shall make no law . . . abridging the freedom of speech," has been taken — even by Hugo Black, that most literal of Justices — as if it read "No part of the government shall do anything . . . abridging the freedom of speech." Black parted ways from his colleagues only because he refused to go along with their addition of "unless, on balance, the circumstances warrant the abridgement" to this reworded clause. The fifth amendment, which contains a due process clause but no equal protection clause, has been read as identical in meaning to the fourteenth amendment, which contains both. *Bolling v. Sharpe*, 347 U.S. 497 (1954). A Court capable of going in the teeth of language of this sort would not find the age limitation for the President much of a hurdle.

denotation serves. To invoke a plain meaning rule is to beg the central question of meaning, to sweep under the rug, to hide, the means by which meaning is established. This may be why resting on the “plain meaning” is so popular as a method of construction; it relieves judges of the burden of justification.

Yet without a settled way of deriving meaning for an enactment, meaning lies in the selection of a rule. The rule selection process is discretionary. Discretion belongs to judges. And discretion is power, which most people like having.

Thus, it is no surprise that the rules of statutory construction are a total jumble. Karl Llewellyn listed them in *The Common Law Tradition*. Playing the role of a legal Isaac Newton, he showed that for every rule there is an equal and opposite rule.⁴ Statutes in derogation of the common law are strictly construed, but remedial statutes are liberally construed. It turns out that every remedial statute is in derogation of the common law, so the judge has discretion aplenty.

Attempts to resolve the jumble have not been successful. They never will be, for one consequence of the Court’s status as a collective body reaching decisions by majority vote is that it is bound to produce conflicting decisions. The theory of public choice tells us that when a body with more than two members has more than two choices, it cannot exclude the possibility of self-contradiction. The more decisions and members there are, the more likely contradictions become. I therefore do not blame the Court for having so many approaches to interpretation. The concern here, rather, is with the possibility that none of the approaches is very desirable.

Think for a moment about the rules that enable a court to get away from the vagaries of the canons. The “plain meaning” rule is plainly ridiculous, for reasons that should be plain by now. The “clear statement” approach, a universal strict construction rule that is a cousin to the plain meaning rule, fails because it is invoked at random, when a judge is “surprised” by a result, rather than uniformly.⁵ And uniform application of a clear statement rule

4 K. LLEWELLYN, *THE COMMON LAW TRADITION* 521-35 (1960).

5 Last year the Court invoked the “clear statement” approach when it was surprised that Congress had made an amendment to the bankruptcy laws effective retroactively. *United States v. Security Industrial Bank*, 103 S. Ct. 407 (1982). There was only a little problem: the statute was as clearly written as it possibly could have been. The “construction” the Court gave it was a backhanded way of invalidating the law to avoid facing a constitutional question. Why the Court thinks it is entitled to avoid constitutional questions by doing the opposite of what Congress said has never been made “clear”.

wouldn't work either, because often the legislature wants to enact a principle rather than a code of rules. The Sherman Act is a good example of a statutory principle, free trade, which the courts must flesh out.

The clear statement rule thus cannot guide judicial decision making. A different method is to think oneself into the minds of the enacting legislators and imagine how they would have decided. Great judges, from Hand and Frankfurter to several now sitting, have adopted one or another variant of this approach. Yet the method asks the impossible when the plaintiff invokes one statute and the defendant another, from a different legislature. Into whose minds must the judge delve? The legislators may well have answered the questions differently. Which group controls? ("The latter group" is an easy but wrong answer; the maxim "repeals by implication are not favored" honors the work of the first group and is based on a belief that legislatures neither try nor can be expected to tidy up all of the work of earlier sessions.)

The method of imagining how legislators would have answered questions that never occurred to them is questionable for another reason, this one quite fundamental: it calls on judges to override the procedural, coalition building, want of time, and veto constraints on the legislative process, treating them as mere falderal. By moving directly from presumed intent to legal rule, the court bypasses these constraints.

Ultimately this approach fails because no one can do what it requires. How many judges could think themselves into the minds of members of Congress sitting in 1871 and 1929, or know what clauses capable of enactment in 1930 were out of the question in 1931 because of subtle changes? We know that there are such changes; look at the differences over a period of six months in today's Congress. What we know about the current Congress applies to earlier ones too.

The judge's role must be limited to protect against wilful judges who lack self-restraint and to protect the principle that private order prevails unless clearly displaced. But this is not enough. Even the most humble judge will fail if given a charge to recreate in his own mind the 535 minds that contemplated yesterday's problems and to continue legislating on their platforms. Even the best judge will find that the imagined dialogues of deceased legislators have much in common with today's judges' conceptions of the good.

Where does this leave us? My principal argument is that there is no satisfactory solution to the problem with which I began — that meaning lies with the reader rather than the writer — so long as we assume that readers should read and interpret. But why must this be so? The act of interpretation assumes that for any given dispute, there is *some* law, and it only remains for the judge to pronounce that law. What happens if we entertain the thought that on some questions there is no law?⁶ The judge, having picked up the statute or constitutional provision, puts it down again.

The usual assumption of parties and judges in litigation is that Congress or the Framers of the Constitution have solved, or authorized judges to solve, all questions that arise later on. Surely this is nothing but a conceit. Congress has not begun to think of all questions; it could not yet have supplied all answers. And in a generally (classical) liberal society, Congress would not confess to having supplied rules of decision for all disputes. Some things remain in the private domain.

If judges are to say: “We have no answer to this dispute,” on what grounds do they do so? They could invoke a presumption against legal regulation, but this would be hard to justify. Perhaps Congress has established pervasive rules for some whole classes of disputes. It seems preferable to do for statutes what we do for contracts: create a set of background understandings that enable the parties to reach agreements and communicate their meanings with maximum facility.

Such a rule for statutes might be the following: if a legislature authorizes the creation of a common law, then judges may supply rules in hard cases, but according to their lights rather than those of the enacting Congress. In such a case, the rule carries out the legislative plan, even if it is not the rule Congress would have selected. The Sherman Act is an example, the National Labor Relations Act (delegating to the NLRB rather than the courts) is another. The transfer of responsibility for decision must be clear, else it is hard to find assent by both legislature and executive. When the

6 To many other questions there are answers — right answers. Often people agree on meaning; text and history supply guides. I do not for a second suppose that law is mush. *Most* questions have answers, which can be supplied without resort to politics. As I emphasized at the beginning, however, it is not my purpose to review the easy cases, which can be resolved without appellate litigation. The analysis here takes up the questions of interpretation on which reasonable people disagree.

transfer occurs, however, courts have ample justification for proceeding.

When, on the other hand, the statute appears to establish rules in the name of the enacting legislature, then the presumption must be one of compromise and consequent judicial passivity. Judicial interpretation that supplies more rules, even those that advance the same set of values that informed the statute, upsets the compromise and also allows the legislature to live after its term. This is objectionable if it means more laws without the usual procedures and possibility of veto, objectionable too if it means judges implementing their own ideas of the good but palming them off as the ideas of others and thus avoiding responsibility.

III. THE PROBLEM OF JUDICIAL AUTHORITY

There is a problem underlying all of the issues raised above. It is the problem of legitimate authority. The usual debate about what judges do or should do starts with an argument by one disputant that we live in a representative democracy, that democracy means that only the elected (responsible) officials should make important decisions, and that judges, who are not elected and who possess tenure to make them not answerable for their decisions, therefore should not make important choices. This is especially so, the argument concludes, for constitutional choices, because the elected representatives cannot override the judges' decisions.

The arguments in reply come from a number of traditions. One tradition emphasizes the "imperfections" of representative democracy; because the "real" will of the people does not get carried out by the legislatures, and because judges may have a comparative advantage over legislatures in making some kinds of decisions (those involving fundamental values, for example), we should entrust these decisions to judges. Another kind of response emphasizes that the Framers gave us a document that limits the scope of representative democracy, and that judges, implementing fundamental principles of the republic, are part of the limit.

Both of these lines of argument can be forced, with only a little violence,⁷ into the "perfect constitution" mold, which has the following syllogism: (1) The Constitution (or statute) requires

⁷ Of course no one will admit to supporting the syllogism in such a bald form, and I do not offer it as a representation of any one person's views. I resort to this reduction of serious arguments only in order to avoid making this essay tedious.

what is wise, just, and good. (2) Judges are authorized to interpret the Constitution (or statute), and their decisions are binding on the other branches of government. (3) Policy *P* is wise, just, and good [here insert whatever policy is being disputed]. Therefore (4) A judge properly may order other branches of government, or private parties, to follow policy *P*. Corollary: Any judge who, for whatever reason, will not order *P* to be carried out, must be disagreeing with the desirability of that policy (premise (3)). If, by the same premise, policy *P* is good, the judge must be bad.

Those who doubt the wisdom or propriety of judges' possessing expansive powers usually engage by denying premise (1) or premise (3). Premise (2) seems to have been settled since John Marshall.⁸ Over and over the Court says, to an acquiescing audience, that it has the power to declare what the law is, and others, including the President, must hop to it.⁹ But what happens if on some subjects there is no law at all to apply — or at least if “the law” is not some rule firmly grounded in a decision by people authorized to act but is created by a process of perilous inferences? When the status of “the law” is open to question, so is premise (2).

Let me turn the question around for a moment. Why *do* we obey judges, as premise (2) says we must? The argument Chief Justice Marshall gave in *Marbury v. Madison* was not an argument for judicial supremacy. Marshall never claimed for judges any superior wisdom or comparative advantage in deciding constitutional or other questions, and he did not argue that people owe allegiance to judges. The Court said in *Marbury*, rather, that certain decisions had been made long ago. The Framers decided what the scope of the Court's original jurisdiction was to be; the Court could ascertain what the limit was; and faced with a conflict between Constitution and statute, the Court had to follow the Constitution. The Justices had taken an oath that (like the Supremacy Clause) put the Constitution first. The Court imposed no duties on outsiders, and by its rationale it had no right to do so. Quite the contrary, on the reasoning of *Marbury* every other officer of government has the same duty of responsible reasoning as every Justice. The oath and Supremacy Clause place the Constitution over the decision of a coordinate branch. Thus the Court could

⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Cooper v. Aaron*, 358 U.S. 1 (1958).

⁹ *E.g.*, *United States v. Nixon*, 418 U.S. 683 (1974).

disregard what Congress said. Then the President, by the same process of reasoning, could disregard what the Court said, if he thought the Court mistaken. Whichever governmental official had the last word on a subject, given the nature of the dispute, would make the constitutional judgment.¹⁰

This last-responsible-official approach seems to leave rights up in the air. No one would have the power to give definitive views. Some have thought the need for definitive answers to be a sufficient reason for allowing courts to have the last word. I'm not so sure of this. First, because courts fall prey to self-contradiction, they cannot offer definitive answers for many legal problems. Second, the observation that the ability of the President to disregard the Court (when the allocation of powers in Articles I and II gives the President the last word) gives the President a constitutional bazooka, an unchecked power foreign to our governmental structure, proves too much by far. The Constitution is full of doomsday weapons, disused largely because of their potency. The Congress can strip the executive branch of employees and cut off the President's funds if it wants; there is real power for you. We do not try to make it go away just because it is overarching. The principal control is not denying that the power exists but that all power has a price under the Constitution, and the President has weapons of his own. A power in the executive to say "No" to some judicial decisions is no more destructive than the judicial power to say "No" to Congress or the legislative power to say "No" to the President.

Not until long after *Marbury* did the Court begin to say that its power of interpretation excluded the exercise of similar powers by other branches. Not until 1958, in *Cooper v. Aaron*,¹¹ did the Court explicitly say that the Constitution confided the ultimate powers of interpretation exclusively to judges, and the statement in *Cooper* was dictum because that case involved the application of the Supremacy Clause to the states rather than allocation of authority among branches of the national government. The Court implicitly had taken the *Cooper* position long before *Cooper*, however; the Court's position just confirmed what had been practice for a long, long time. The power of judges to have the last word on the meaning of statutes and constitutions has carried the

¹⁰ Learned Hand attributes this view to Jefferson, but the presentation seems to have more of Hand than of Jefferson in it. L. HAND, *THE BILL OF RIGHTS* 3-30 (1958).

¹¹ 358 U.S. 1 (1958).

day only in the court of history, not in the court of logic. It has proven a (generally) satisfactory way to allocate functions in a very complex government. It is by no means necessary — most other civilized societies exist quite well without anything like it — but it has been useful.

But the transmutation of the nature of judicial review from a power to guide one's *own* conduct by one's best lights into a power to dictate how others shall behave has some implications for the quality of the justifications that a judge must supply. A judge cannot expect obedience just because he announces what he thinks a wise and just result would be. He must always be prepared to give an answer to the question: Why should other people pay attention? Why is the opinion any more binding than a law review article?

The reason the judge gives about why obedience must be forthcoming usually will take the form of asserting that someone other than the judge really decided the issue. The question was settled by the Framers of the Constitution or the drafters of a statute. There is a rule, binding on judges and others alike, to which all must conform. The judge's authority to compel obedience comes from that external decision, not from the judge's own desires.

This is not to say that judges must "find" rather than "make" law. Finding versus making is a false dichotomy. All interpretation involves meaning added by the reader. The point of this discussion is that the more meaning added by the judge, the less powerful the judge's claim to obedience.

When a judge issues a ruling under the authorization of a statute or proviso entitling a judge to invent a common law on the subject (antitrust law and the "reasonableness" clause of the fourth amendment are again good examples), the court's claim to obedience is as strong as if the judge were enforcing a "plain" statute. The judge can point to an external rule of calling for obedience — in one case to the "plain" rule, in the other to whatever rule the judge makes up using the grant of law-making authority. The judge's claim is at least as good as Congress's claim to be obeyed in executing power under the Commerce Clause.

When a court's claim to obedience is based on its belief that it is doing what legislators would have wanted had they thought about the subject, it is on much weaker ground. If the legislators did not settle some issue and did not authorize courts to fill in the blanks, why should anyone listen to what the judge says? The judge's

claim to obedience is little better than that of a professor of law. Similarly, a judge who claims power to make decisions based on a noninterpretive approach to the Constitution is bold indeed. Why should people obey if all the judge can say in support of the decision is that (a) the decision lays down a good rule, and (b) the decision is not "contraconstitutional" in the sense that it is not starkly contrary to an actual decision of the Framers?¹²

My point is simple, although often missed. Both judges and the overwhelming majority of scholars who write on constitutional and statutory interpretation assume that vague statutes and constitutions lift the fetters that bind courts. If history and language do not supply a certain meaning for a text, the argument goes, then judges are entitled to supply meanings, and they should choose the meaning that best accords with wise and just government. Because words often lack definite meanings, because the Constitution and many statutes were drafted a very long time ago, and often neither language nor history meshes well with current problems, these people conclude that judges have substantial discretion over almost every dispute.¹³

The premise may be true. Words often do not have fixed meanings. I have tried to give a number of reasons why statutes and constitutions are bound to speak poorly or not at all to essential questions. But the conclusion does not follow. It confuses legal with literary interpretation. The ambulatory nature of statutes means that judges have *less* power, not more. The more we doubt the power of words to convey meaning, the more we must doubt the authority of judges to coerce compliance with their conclusions, and the more modest judges must be about their demands.

This is a mere sketch of a position. It is possible to state a number of objections (as Richard Epstein does in the next paper).¹⁴ But this is a field in which all positions are untenable. Insoluble

12 This seems to be Professor Perry's position, and many others take a similar stand on the breadth of judicial power (although not necessarily on its sources). See Perry, *Judicial Activism*, *supra* note 3, at 72-73.

13 For just a few of the many arguments along such lines, see G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Perry, *Judicial Activism*, *supra* note 3; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983). These arguments use very different routes to their conclusions, but the conclusions are similar.

14 Epstein, *The Pitfalls of Interpretation*, 7 HARV. J.L. & PUB. POL'Y 101 (1984).

problems do not lead to neat answers. Whatever one makes of the suggestion that judges be more willing to put statutes back down, read but unconstrued, our objective must be to establish a consistent and principled set of rules for legal interpretation, so that drafters have a set of norms to use in communicating. That we are farther from this objective two hundred years into the republic than at its beginning may mean that it is a Sisyphean task, but the task is too vital for us to admit this, even to ourselves.

