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Frank H. Easterbrook

THE ROLE OF ORIGINAL INTENT IN STATUTORY CONSTRUCTION

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Statutory construction has been the backwater of legal theory. For constitutional interpretation, a debate rages among originalists who look to history and intent; structuralists who look to the problems at hand and the structure of the document; nonoriginalists who look to "values" implicit in the document and say that anything achieving more of an identified value is permissible; and finally to those (inventionists?) who want to treat the Constitution as a sort of floating seminar and liberate judges to whatever Plato would do with the problem. The debate mirrors differences that have affected moral philosophy and jurisprudence for a long time.

For statutes, however, there is no similar debate. The Supreme Court reels off unanimous opinions containing a formula that is roughly: first look to the language of the statute; if that is clear then stop; if it is not clear then turn to the legislative history; if the legislative history is not clear then do whatever the agency says; and if none of the above is clear then either go with the values underlying the statute or put in a hypothetical question. Ask what the legislature that passed this bill would have done had the issue been before it explicitly. This rump legislature, sitting in the mind of the court, then gives an authoritative answer. The judges are its oracles. Few dissent from this method, even though there are many debates about the application of the method to a particular law.[1]

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1. Not quite no one. Justice Scalia did so recently, one of the rare open breaks. It is a bit discomforting, however, that the same position on his part produced one majority opinion and one dissent, with his colleagues doing a neat turn between cases. *Compare* Lukhard v. Reed, 107 S. Ct. 1807, 1812 n.3 (1987) ("The dissent apparently thinks it appropriate to speculate upon what Congress *would* have said if it *had* spoken. . . . [T]he legality of Virginia's policy must be measured against the AFDC statute Congress passed, not against the hypothetical statute it is most 'reasonable to believe' Congress would have passed had it considered the question . . . ."), *with* Johnson v. Transp. Agency of Santa Clara County, 107 S. Ct. 1442, 1471-76 (1987) (Scalia, J., dissenting).

For the more common argument that it is appropriate to ignore what Congress said to arrive at what the judge thinks Congress should have said (the equivalent of "would have said had it thought about the matter more fully"), see Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986).

This method incorporates a principle of original intent—intent of the subjective variety. Its fundamental assumption is that whatever Congress thinks, is law. The role of the judge is to figure out the mental pattern of the legislature. This usually appears through the words of the statute. There is enough shared agreement about words that the writing conveys a single, controlling meaning. Such cases rarely are litigated. People spend the money to come to court only when it is possible to draw conflicting inferences from the words alone. When the words leave doubt, we turn to the legislative history. What we find there is raw intent. The import of the statutory language may be left behind, may be replaced by this subjective vision. The drafters of the words tell us how they intended the statute to work. We take this at face value and carry out their wishes. We shall ruefully turn to other tools when the legislative history is unilluminating. Original intent controls, if only we can find it.[2]

Why is this the appropriate way to proceed? Statutes are not exercises in private language. They should be read, like a contractual offer, to find their reasonable import. They are public documents, negotiated and approved by many parties in addition to those who write the legislative history and speak on the floor. The words of the statute, and not the intent of the drafters, are the "law."

One way to this end is to attack the use of legislative history. In an opinion written while on the D.C. Circuit, Justice Scalia observed that committee reports are written by staff and rarely read, that they may be the work of people who couldn't get a majority for their statutory language, that words uttered on the floor are more apt to reflect Quixotic views of maverick legislators than the sense of the whole body. After all, Congress votes on the bill, not on the reports. No one can vote against a report, and the President cannot veto the language of a report.[3]

My concern is different. The common uses of legislative history assume that intent matters. The judge rooting about in the history of the statute assumes, in other words, that the written word is but an imperfect reflection of the real law. The true

2. Train v. Colorado Public Interest Group, Inc., 426 U.S. 1 (1976), is a wonderful example of this approach.

3. Hirschey v. FERC, 777 F.2d 1, 6-8 (D.C. Cir. 1985). Former Senators have expressed the same view as judges. *See* Electrical Workers v. NLRB, 814 F.2d 697, 707-15 (D.C. Cir. 1987) (Buckley, J., concurring).

law, the governing rule, is not down on paper; it is in the minds of the legislators. The true rule applies no matter what the words say. If the statute is just evidence of the rule, the debate must go on.

The principle that the written word is just evidence of the law, rather than the law itself, is novel. It has snuck into American legal discourse almost without being noticed. Holmes could say in 1899 that "We do not inquire what the legislature meant; we ask only what the statute means."[4] He was denying that original intent, as opposed to the original meaning, mattered. And what he said was as uncontroversial then as the original intent approach is today. Original meaning is derived from words and structure, and perhaps from identifying the sort of problem the legislature was trying to address. What any member of Congress thought his words would do is irrelevant. We do not care about his mental processes. Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem. This slide from meaning to intent has occurred almost without notice. Yet the movement is of great consequence.

I offer two cases for examination. One is *United States v. Locke*,[5] and the other is *California Federal Savings and Loan Ass'n v. Guerra*.[6] They were written by the same Justice, so we are not looking at differences among the Justices. The question in *Locke* was whether claims to federal land could be filed on December 31, when the statute said that all claims must be filed "prior to December 31." *Guerra* dealt with a statute saying that pregnant women must "be treated the same for all employment-related purposes" as employees not so affected. The question was whether employers who favor women over men, giving women alone leaves of extended absence, comply with this rule.[7]

The interpretive problem in *Locke* was whether Congress possibly could have intended to injure claimants, who thought that "prior to December 31" meant "before the end of the

4. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899), *reprinted in* O. W. HOLMES, COLLECTED LEGAL PAPERS 204, 207 (1920).

5. 105 S. Ct. 1785 (1985).

6. 107 S. Ct. 683 (1987).

7. *Guerra* actually involved the preemption of a state statute, but only Justice Scalia thought that this made a difference. I happen to agree with Justice Scalia's treatment of the case, but I shall ignore that complication to examine how the other eight Justices looked at the problem of interpretation.

year." Anyone who thought those two the same was in for a shock. Justice Marshall found the language clear and stopped. "Prior to December 31" means on or before December 30. All lines are arbitrary. End of case. The dissenting opinions thought this loony.[8] There was no evidence that Congress intended to sandbag claimants. Indeed, a review of the debates left the impression that some members of Congress thought "prior to December 31" equivalent to the end of the year. So the dissent put the hypothetical question: Is there any reason to believe that Congress wanted to set a trap for careless readers? Answering no on the basis of intent, the dissent would have changed the numeral in the statute.

Then there is *Guerra*. The phrase "treated the same" in the statute seems equally "clear." It calls for identical treatment of pregnant and non-pregnant employees. This time, however, the majority of the Court looked right through the language and turned to intent. It observed, accurately, that the statute had been passed for the benefit of female employees, and overturned a case that had allowed employers to discriminate against pregnant employees.[9] Then it put the hypothetical question of intent: Would the sponsors of this legislation have objected to preferential treatment of pregnant workers? It answered no to this question, which concluded the case.

Notice what is going on. The use of original *intent* rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court.

FIRST, the court may choose when to declare the language of the statute "ambiguous." There is no metric for clarity. The court's answer often will depend on the decision to move past the surface of the language—which means that the answer is up for grabs and controlled neither by the reasonable import of the language nor by the subjective intent of the drafters.

SECOND, the court may choose the hypothetical question to put to the legislative body. In *Guerra*, it asked the following question: Would you object if women gained a little more? And since it put this belated question to the sponsors of the bill, the answer was no. But suppose it had put the question: Should the words "be treated the same as" be construed whenever they

8. As does Judge Posner. *See* Posner, *supra* note 1, at 204-05.
9. General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

appear in a statute to permit preferential treatment? Then surely even the sponsors would have answered no. The result is the same if you put the question to the written committee report rather than to the minds of the sponsors; choice of question determines what answers are to be found. The power of the question to influence the answer is well-known in opinion polling; the technique is even more powerful when the judge will invent the answer as well as the question.

THIRD, the court has endless flexibility in selecting *who* is asked the question. The court in *Guerra*, and the dissent in *Locke*, asked either the sponsors or the staff (that is, the authors of the committee reports). No one asks those who disapprove. More to the point, no one asks the vast group of legislators who are silent on any particular bill until they vote. It would be better to pop the question to the *median* legislator, the one whose vote could change the outcome. Suppose you put the question in *Guerra* to a swing legislator. The prospect of favoring one sex might lead him to change his vote. To put it differently: If you put the question of intent only to fervent supporters, the answer will not be useful.

You could avoid this problem by asking still a further question: If the meaning the Court gives to the law today had been spelled out, together with its implications, would the bill have been passed? The answer often will be no. That answer should reveal the problems of the technique. It produces "laws" that could not be passed. Equally bad, the fear of Congress that its words will come back with meanings that could not have passed will stifle new legislation. Members will vote no for fear that what they have done will be turned on its head.

To ring still another change on this theme, the original intent approach to legislation ignores the fact that laws are born of compromise. Different designs pull in different directions. To use an algebraic metaphor, law is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified. All are important. This is something the Court is beginning to see. As the Justices put the matter recently: [N]o legislation pursues its purpose at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates

rather than effectuates legislative intent to assume that *whatever* furthers the statute's primary objective must be the law."[10]

FOURTH, there is a question of legitimacy. As I've said, the technique assumes that intentions are "the law." Why are they? If we took an opinion poll of Congress today on a raft of issues and found out its views, would those views become the law? Certainly not.[11] They must run the gamut of the process—and process is the essence of legislation. That means committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on. In the one house veto case[12] the Court emphasized the importance of process. Indeed creating the structure of

10. Rodriguez v. United States, 107 S. Ct. 1391, 1393 (1987) (emphasis added). *See also* Board of Governors v. Dimension Fin. Corp., 106 S. Ct. 681, 689 (1986): "Application of the 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the 'plain purpose' of the legislation at the expense of the terms of the statute itself takes no account of the process of compromise and, in the end, prevents the effectuation of Congressional intent." These are themes I have been sounding for some time. *E.g.*, Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); In re Ericson, 815 F.2d 1090, 1094 (7th Cir. 1987); Burlington Northern R.R. v. BMWE, 793 F.2d 795, 802-03 (7th Cir. 1986), *aff'd*, 107 S. Ct. 1841 (1987); Walton v. United Consumers Club, Inc., 786 F.2d 303, 310-11 (7th Cir. 1986); United States v. Medico Industries, Inc., 784 F.2d 840, 844 (7th Cir. 1986); Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 271 (7th Cir. 1985). Yet I wonder if the Supreme Court takes its own language seriously. If the passages from *Rodriguez* and *Dimension Federal* I have cited above were followed consistently, there would be a revolution in construction. It would not be possible to put general questions to the "whole Congress," because it would be clear that the answers just point in a direction without disclosing the critical information—how far, by what means?

11. *See* Easterbrook, *supra* note 10, at 537-39, for some examples. The effect of private beliefs on public law extends to all interesting legal questions. Suppose Representative Bingham thought that Justice Chase's views of substantive due process in Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-89 (1798), were "the law" when debating the Fourteenth Amendment, forgetting Justice Iredell's powerful refutation, *id.* at 398-400, and the later decision in Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272 (1856). If Representative Bingham assured other members that his new Due Process Clause should have the same effect as the Due Process Clause of the Fifth Amendment, would the effect be Representative Bingham's private mistake or the publicly ascertainable views of the Supreme Court? Or suppose that Congress should pass an amendment to the Hart-Scott-Rodino Act extending to sixty days the merger notification period, privately believing that this would put a stop to tender offers. Let us even suppose that a ban on tender offers would have passed, if put to a vote on the floor (though maybe it couldn't have got to a vote or withstood a veto). Does the sixty-day rule now ban tender offers, or does it have only such effects as it achieves? The interaction between predictions about effects of rules, and the rules themselves, has always been messy. *See* Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 364-65 (7th Cir. 1987). The prevailing "intentionalist" approach to construction does not even offer a way to think about the problem.

12. INS v. Chadha, 462 U.S. 919 (1983).

government, the process of legislation, was the most important achievement of the Constitution. As Madison said in Federalist No. 10, the cumbersome process of legislation is the best safeguard against error; a process through which people wrestled for power in a Republic with many loci of power was, he thought, the best way to tease public spirit out of self-interested voters.[13]

Yet the whole process of interpretation from intent is an end run around process. It is a translation from intent to law that we would find repulsive if proposed explicitly. Imagine how we would react to a bill that said, "From today forward, the result of any opinion poll among members of Congress shall have the effect of law." We would think the law a joke at best, unconstitutional at worst. This silly "law" comes uncomfortably close, however, to the method by which courts deduce the content of legislation when they look to subjective intent.

FIFTH, the whole method of inquiry seems to obfuscate the law. Often Congress wants a rule—that is, a mechanical device. Rules overshoot or undershoot. But Congress may think the costs of rules less than the combined costs of vagueness and the risk that courts will set off in the direction the law points without seeing the stopping point. *Guerra* may be such a case. A method of construction that looks to intent makes rules impossible. It is always possible to turn a rule into a vague standard by looking at intent. Intent will be less clear, because less focused. Ultimately, then, universal reference to original intent of legislation denies the possibility or desirability of rules.

You are entitled to ask, what I would replace intent with? My answer lies along the path of Holmes. We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words. Words appeal to the reasonable man of tort law; private language and subjective intents should be put aside. The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person.

If this method yields no confident answer, we may put the statute down—the question is not within its domain. There is no presumption that every statute answers every question, if

13. THE FEDERALIST No. 10, at 77-81 (J. Madison) (C. Rossiter ed. 1961).

only we could find or invent the answer. Some statutes simply do not address the problem. The novelty of a question suggests that the legislature did not answer it. To claim to find an answer by "interpretation"—when the legislature neither gave the answer nor authorized judges to create a common law—is to play games with the meaning of words like "interpretation." The process is not interpretation but creation, and to justify the process judges must show that they have been authorized to proceed in the fashion of the common law. To claim to find missing answers by "interpretation" is to seize power while blaming Congress. An appropriately modest judicial role would depend less on imputed intent—"intent" that ultimately can be found only in the mind of the judge.