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David A. Strauss

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# *Statutes' Domains and Judges' Prerogatives*

David A. Strauss†

## INTRODUCTION

Statutory interpretation has been a principal scholarly interest of Judge Frank Easterbrook.<sup>1</sup> But Judge Easterbrook's first entry into the field was *Statutes' Domains*, an article he wrote in 1983, before he became a judge.<sup>2</sup> *Statutes' Domains*, like its author, has had an excellent career. It is widely regarded as a foundation of both public choice and textualist approaches to issues of statutory interpretation.<sup>3</sup> The themes that Judge Easterbrook developed in *Statutes' Domains* echo in his later work on statutory interpretation, as well.

*Statutes' Domains* begins with a question: "When does a court construe a statute, treaty, or constitutional provision and when hold it inapplicable instead?"<sup>4</sup> It is a question, Judge Easterbrook acknowledges, that "has received almost no attention from courts or scholars."<sup>5</sup> At first glance one might think: deservedly so. If a court is going to rule against you, why does it matter whether the court declares the statute on which you rely to be "inapplicable" or instead "construes" the statute in a way that is unfavorable to you?

Judge Easterbrook explains why that matters; he has a series of answers to the question of when a declaration of inapplicability, as

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† Gerald Ratner Distinguished Service Professor of Law, The University of Chicago Law School.

<sup>1</sup> See, for example, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv J L & Pub Pol 59, 60 (1988); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 Chi Kent L Rev 441, 441 (1990); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv J L & Pub Pol 61, 63–64 (1994); Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 Harv J L & Pub Pol 13, 15 (1998); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo Wash L Rev 1119, 1119 (1998); Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 Okla L Rev 1, 3 (2004); Frank H. Easterbrook, *Originalism and Pragmatism: Pragmatism's Role in Interpretation*, 31 Harv J L & Pub Pol 901, 904 (2008).

<sup>2</sup> Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533 (1983).

<sup>3</sup> See, for example, Peter L. Strauss, *Legislation: Understanding and Using Statutes* 396, 403–07 (Foundation 2008); Note, *Textualism as Fair Notice*, 123 Harv L Rev 542, 551–53 (2009); Saul Levmore, *Ambiguous Statutes*, 77 U Chi L Rev 1073, 1085–86 (2010).

<sup>4</sup> Easterbrook, 50 U Chi L Rev at 533 (cited in note 2).

<sup>5</sup> Id.

opposed to a construction of the statute, is appropriate; and he has an account of what to do when there is no applicable law. I am not sure that all of his arguments are persuasive. But his article tells us a lot about both the strengths and weaknesses of the influential approach to statutory interpretation that he, as much as anyone, has pioneered. In many respects his claims are unanswerable. But at the end of the day, Judge Easterbrook's arguments point to a conclusion that may, I think, be a little surprising: restricting statutes' domains in the way he proposes means expanding judges' prerogatives.

### I. ARE TWO STEPS BETTER THAN ONE?

Judge Easterbrook argues that, when a party to a case invokes a statute, the courts should undertake a two-step inquiry. The first step is to ask whether the statute applies to the case at all. Then, only if the answer is yes, the second step is to interpret the statute to decide which side it favors. Why the first step? Judge Easterbrook's explanation is that statutory interpretation can require "judicial creation or re-creation."<sup>6</sup> That process is error-prone. But if a court "finds a statute inapplicable to the subject of the litigation, it never begins this task of creative construction"<sup>7</sup>—and is therefore less likely to construe the statute incorrectly.

One difficulty with this argument is that a judge can make a mistake at the first step, too. A two-step inquiry is an improvement only if (to put the point in economic terms) the expected error costs of the two-step process are less than the expected error costs of a one-step, simple construction of the statute. That will depend on how likely judges are to conclude, mistakenly, that a statute is inapplicable, and how damaging those mistakes are (a mistaken conclusion that a statute is applicable in effect just reverts to the one-step process). Later in the article, Judge Easterbrook gives an account of how one might determine whether a statute is "applicable"; the process he envisions is complex enough that mistakes are certainly possible.<sup>8</sup> So his conclusion on this point—that the two-step process is less likely to lead to judicial error—does not seem airtight. We just do not know, in general, whether the one-step or the two-step process will produce more (or worse) errors.

Having said that, though, there is no question that Judge Easterbrook is on to something. There is a difference between, on the one hand, statutes that apply to a case and must be construed and, on the

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 533–34.

<sup>8</sup> Easterbrook, 50 *U Chi L Rev* at 552 (cited in note 2).

other, statutes that are simply inapplicable. If a case involves, say, pensions, and has nothing to do with water pollution, we would say that the Employee Retirement Income Security Act of 1974<sup>9</sup> (ERISA) might apply but that the Clean Water Act<sup>10</sup> does not apply. We would not ordinarily say that the Clean Water Act, properly construed, does not help either party, although that is literally true. So the question raised in the first sentence of Judge Easterbrook's article—when should a court construe a statute, and when should it just conclude that the statute is inapplicable—is a legitimate question that requires an answer.

Moreover, there is something to be learned from the implicit premise of Judge Easterbrook's explanation of why the question is important—that the two-stage process will introduce fewer errors (or errors that are less bad) than the one-stage process. Judge Easterbrook's premise suggests that, in his calculations, an erroneous conclusion that a statute is inapplicable is less of a problem than an erroneous assumption of applicability, the assumption that is made in the one-stage process. To speak imprecisely, Judge Easterbrook's premise is that we should be less troubled by an erroneous conclusion that leaves a matter free of legal regulation than by an error that leads to unwarranted regulation. Later, Judge Easterbrook makes this premise more or less explicit.<sup>11</sup> That premise identifies an important issue at the heart of Judge Easterbrook's article.

## II. DEFINING A STATUTE'S DOMAIN

Judge Easterbrook proposes this approach to determining if a statute applies to a dispute:

My suggestion is that unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process. Unless the party relying on the statute could establish either express resolution or creation of the common law power of revision, the court would hold the matter in question outside the statute's domain.<sup>12</sup>

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<sup>9</sup> Employee Retirement Income Security Act of 1974, Pub L No 93-406, 88 Stat 829, codified at 29 USC § 1001 et seq.

<sup>10</sup> Federal Water Pollution Prevention and Control Act ("Clean Water Act"), Pub L No 92-500, 86 Stat 816 (1972), codified at 33 USC § 1251 et seq.

<sup>11</sup> Easterbrook, 50 U Chi L Rev at 550 (cited in note 2) (expressing hope that the "orgy of statute making" never reaches the point at which leaving private decisions unregulated becomes the exception).

<sup>12</sup> *Id.* at 544.

Judge Easterbrook calls this a “sketch” of a rule for determining if a statute applies, and he acknowledges that it would be “fatuous to suggest that this is the only plausible candidate.”<sup>13</sup> But, he says, unless the applicability of a statute can be established, according to these or some other suitable criteria, “[t]he statute would become irrelevant, the parties (and court) remitted to whatever other sources of law might be applicable.”<sup>14</sup>

These two criteria—“express resolution or creation of a common law power of revision”<sup>15</sup>—are surely plausible, but they raise some questions, and they may lead in directions that Judge Easterbrook does not wish to go. To say that a statute will be applicable only to those cases that the legislature “anticipated . . . and expressly resolved” raises familiar questions about the appropriate level of generality to use in interpreting statutory or constitutional provisions.<sup>16</sup> What does it mean to say that the legislature anticipated and expressly resolved a case? Every case has many features. Obviously no legislature could anticipate every single feature. So, on Judge Easterbrook’s approach, which ones does the legislature have to have anticipated and resolved?

Take, for example, *Tennessee Valley Authority v Hill*,<sup>17</sup> a familiar statutory interpretation warhorse. The snail darter, a three-inch long, apparently rather unimpressive species of perch, was discovered near the site on which the Tennessee Valley Authority was building the Tellico Dam.<sup>18</sup> Not long after the snail darter was discovered, the Secretary of the Interior listed it as an endangered species.<sup>19</sup> The Endangered Species Act<sup>20</sup> (ESA) requires all federal agencies to “tak[e] such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of . . . endangered species . . . or result in the destruction or modification of habitat of such species.”<sup>21</sup> By the time the snail darter was listed, the construction of the Tellico Dam was nearly completed, but opening the dam’s gates would have destroyed the snail darter’s habitat and, it was be-

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<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Easterbrook, 50 U Chi L Rev at 544 (cited in note 2).

<sup>16</sup> For Judge Easterbrook’s treatment of these issues in the context of constitutional interpretation, see Frank H. Easterbrook, *Abstraction and Authority*, 59 U Chi L Rev 349, 380 (1992).

<sup>17</sup> 437 US 153 (1978).

<sup>18</sup> Id at 158–59.

<sup>19</sup> Id at 161.

<sup>20</sup> Endangered Species Act, Pub L No 93-205, 87 Stat 884, codified as amended at 16 USC § 1531 et seq.

<sup>21</sup> *TVA v Hill*, 437 US at 160, citing 16 USC § 1536 (1976).

lieved at the time, would have jeopardized the continued existence of the species.<sup>22</sup>

In *TVA v Hill*, the Supreme Court held that the language of the ESA was clear and that it forbade the TVA from operating the dam.<sup>23</sup> Assuming that the language was, in fact, unambiguous, is this an instance in which the legislature expressly resolved an issue, in Judge Easterbrook's terms? There is no reason to think that Congress anticipated this very case: one involving a little-known and apparently unremarkable species of fish, on the one hand, and, on the other, an expensive, essentially completed, public works project that would have to be rendered a white elephant in order to protect the species. (If one wanted to be pettifogging, one could say that there is essentially no chance that Congress anticipated a case involving, specifically, the snail darter and the Tellico Dam, and events that occurred on the particular dates that the events of *TVA v Hill* occurred, and involving the same people, and so on.) But it would be very odd to say that if this particular constellation of circumstances never occurred to Congress, then the ESA does not apply to the case.

Judge Easterbrook seems to address this problem by relying on something like the ordinary meaning of words. The example he gives is that a statute requiring that "dogs" be leashed applies only to dogs, not to all canines, or all animals, or all dangerous animals.<sup>24</sup> But that cannot mean that a statute's domain extends only as far as its unambiguous language. Justice Lewis Powell's dissenting opinion in *TVA v Hill* argued that the term "actions" in the ESA did not unambiguously reach nearly completed projects like the Tellico Dam.<sup>25</sup> But even if he were right, it would be extravagant to claim that, because the ESA was ambiguous, it simply did not apply. The point of Judge Easterbrook's project in *Statutes' Domains* was to try to avoid putting judges in the position of rendering controversial (and therefore potentially erroneous) interpretations of statutes—to cut off the inquiry at the first step. If the first step requires a judge to resolve a question like the one that divided the majority and dissent in *TVA v Hill*, that would defeat the whole purpose of having a first-stage inquiry into applicability.

So Judge Easterbrook's first criterion—"express resolution"—must end up being something like: when there is no plausible under-

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<sup>22</sup> *TVA v Hill*, 437 US at 162.

<sup>23</sup> *Id.* at 173 (stating that the language of the Endangered Species Act could not be "plain-er" and "admits of no exception" in requiring that federal agencies not jeopardize the existence of endangered species).

<sup>24</sup> Easterbrook, 50 U Chi L Rev at 535–36 (cited in note 2).

<sup>25</sup> *TVA v Hill*, 437 US at 202–05 (Powell dissenting) (arguing that the term "actions" should be construed to include only prospective actions).

standing of the language of a statute that would address the issue in the case, the statute is inapplicable. As Judge Easterbrook says about the dog leashing statute, “[M]ost people would say that the statute does not go beyond dogs, because after all the verbal torturing of the words is completed it is still too plain for argument what the statute means.”<sup>26</sup> That seems fair enough, but I am not sure it accomplishes very much. If the only point of the first part of the two-stage inquiry is to steer judges away from interpretations that most people think are plainly wrong—“too plain for argument”—then that inquiry will hardly ever be necessary. As Judge Easterbrook said on another occasion:

Most statutes that produce litigation admit of multiple readings. . . . [P]eople 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.<sup>27</sup>

So it remains a little unclear what Judge Easterbrook means by “express resolution,” and why it is useful to tell judges to make an initial, first-step inquiry into applicability before they interpret a statute. If the statute fails the first step only when it is “too plain for argument” that the statute does not apply, then the judge might as well skip the first step and just construe the statute: only one construction is plausible. On the other hand, if the inquiry into applicability means that the judge has to resolve a controversial question, like the one in *TVA v Hill*, then requiring the judge to make that inquiry does not reduce the likelihood of error.

Judge Easterbrook’s second criterion for determining applicability asks whether the legislature has empowered the courts to develop a body of judge-made law to implement the statute.<sup>28</sup> Here again Judge Easterbrook’s point is clear. But this criterion seems to ask a question rather than answer it. As Judge Easterbrook says,<sup>29</sup> the standard example of such a statute is the Sherman Act.<sup>30</sup> Section 1 of the Sherman Act forbids contracts in restraint of trade.<sup>31</sup> All commercial contracts, in some sense, restrain trade, and Congress could not have meant to

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<sup>26</sup> Easterbrook, 50 U Chi L Rev at 535 (cited in note 2).

<sup>27</sup> Easterbrook, 57 Okla L Rev at 1 (cited in note 1).

<sup>28</sup> Easterbrook, 50 U Chi L Rev at 544 (cited in note 2).

<sup>29</sup> *Id.*

<sup>30</sup> An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies (“Sherman Act”), 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7.

<sup>31</sup> 15 USC § 1 (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

outlaw all contracts.<sup>32</sup> So the courts have treated the Sherman Act as an authorization to create a complex body of judge-made law.<sup>33</sup>

But the Sherman Act does not explicitly authorize the courts to create judge-made law. That authority is, at best, an inference about what Congress must have meant and, at worst, a deliberate reconstruction of the statute.<sup>34</sup> The question then is: what other statutes should be treated in more or less the same way, as the basis for a body of judge-made law, even if (like the Sherman Act) they do not explicitly authorize judges to create such a body of law? Judge Easterbrook does not seem to give us a way to answer that question.

The issue is raised by another famous case involving the interpretation of a statute, *United Steelworkers of America v Weber*.<sup>35</sup> *Weber* held that Title VII of the Civil Rights Act of 1964,<sup>36</sup> which forbids racial discrimination in employment, sometimes allows an employer to adopt a race-conscious affirmative action plan that gives a preference to minority employees.<sup>37</sup> Justice Harry Blackmun's concurring opinion in that case (which many people believe gives the best justification for the decision<sup>38</sup>) acknowledged the difficulty of deriving that result from the language and legislative history of Title VII.<sup>39</sup> But Justice Blackmun said that "additional considerations, practical and equitable, only partially perceived, if perceived at all, by the [enacting] Congress, support the conclusion reached by the Court today."<sup>40</sup> His argument was that "[i]f Title VII is read literally, on the one hand [employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks."<sup>41</sup> This "practical problem in the administration of Title VII [was] not anticipated by

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<sup>32</sup> See *Chicago Board of Trade v United States*, 246 US 231, 238 (1918) (holding that only those restraints of trade that destroy or suppress competition are illegal), cited in Easterbrook, 57 Okla L Rev at 6 (cited in note 1).

<sup>33</sup> See, for example, *State Oil Company v Khan*, 522 US 3, 20–21 (1997) (noting the accepted view that Congress expected courts to shape antitrust laws by "recognizing and adapting to changed circumstances and the lessons of accumulated experience"), cited in Easterbrook, 57 Okla L Rev at 6 n 16 (cited in note 1) (approving of the case as "refreshingly candid").

<sup>34</sup> Consider *United States v Trans-Missouri Freight Association*, 166 US 290, 328 (1897) (declining to read an exception into the Sherman Act for reasonable contracts as this would amount to rewriting the Act's plain language).

<sup>35</sup> 443 US 193 (1979).

<sup>36</sup> Title VII of the Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253, codified at 42 USC § 2000e et seq.

<sup>37</sup> *Weber*, 443 US at 208.

<sup>38</sup> See, for example, William N. Eskridge, Jr, Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 103–04 (West 4th ed 2007).

<sup>39</sup> *Weber*, 443 US at 209 (Blackmun concurring).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 210.

Congress”;<sup>42</sup> it was a second-generation problem that arose after the issue that preoccupied the enacting Congress’s attention—uprooting a rigid system of racial segregation and exclusion directed at African-Americans—had been brought under control.

Justice Blackmun was saying, essentially, that courts interpreting Title VII should treat it as an authorization to do what is necessary to construct a workable scheme of employment discrimination laws. He was not claiming as much leeway as courts exercise under the Sherman Act, but his principle was not too different. It does not make sense to interpret the Sherman Act to outlaw all commercial contracts, and it does not make sense to interpret Title VII to put employers in a position where they would be liable no matter what they did. It was much more sensible to interpret Title VII in a way that solved an unforeseen problem that arose in the administration of that far-reaching and ambitious statute.

Whatever one thinks about *Weber* and Title VII in particular, there is a general issue here: under what circumstances should courts attribute to Congress (or to a state legislature) an implicit instruction to make a statute work in a sensible fashion by elaborating some principles of judge-made law? The well-established example of the antitrust laws demonstrates that Congress need not give that instruction explicitly. On the other hand, it would go much too far to say that the courts may routinely elaborate on statutes in this way. Perhaps the idea is to limit this kind of judicial power to what might be called quasi-constitutional statutes that address complex problems in a way that is intended to change the legal landscape significantly and for a long time.<sup>43</sup> In any event the answer is not clear.

This is, of course, not Judge Easterbrook’s problem alone. But his second criterion for determining applicability seems to present the issue squarely. That raises questions about how useful that criterion—and Judge Easterbrook’s proposed first-step inquiry into applicability—will be in accomplishing his objective (everyone’s objective, really) of limiting the occasions on which judges impose their own policy views in the guise of statutory interpretation.

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<sup>42</sup> *Id.* at 211.

<sup>43</sup> See, for example, William N. Eskridge, Jr and John Ferejohn, *Super-Statutes*, 50 Duke L J 1215, 1246–48 (2001) (distinguishing between ordinary statutes, which should be construed based on their plain language, and “super-statutes,” which should be construed liberally to give effect to the legislature’s broad goals).

### III. PURPOSES AND BACKGROUND UNDERSTANDINGS

Judge Easterbrook has one clear target, in particular, in *Statutes' Domains* and in his other writings on statutory interpretation. The target is a certain kind of legal process purposivism.<sup>44</sup> It is exemplified in one argument that might be offered for allowing implied private damages actions—that is, for allowing private individuals to sue for damages for the violation of a statute that, by its terms, allows only for enforcement by a government agency. The Federal Food, Drug, and Cosmetic Act<sup>45</sup> (FDCA), for example, prohibits the marketing of drugs without certain approvals and in certain ways.<sup>46</sup> The United States Food and Drug Administration and the Department of Justice are explicitly empowered to enforce the Act.<sup>47</sup> If an individual is injured by conduct that violates the Act, can that individual sue for damages, even though the Act makes no provision for such suits?

At one time, the Supreme Court generally gave an affirmative answer to this kind of question.<sup>48</sup> In the last few decades, the Court has turned sharply in the other direction.<sup>49</sup> But one too-simple argument for creating implied rights of action goes along these lines: the FDCA (for example) has, as its purpose, protecting individuals from unsafe drugs. Allowing private damages actions will further that purpose; therefore such actions should be allowed. Judge Easterbrook is emphatic, and convincing, in his criticism of this argument. It makes no sense, he says, to attribute a single purpose to any statute.<sup>50</sup> No statute is designed to pursue a single objective no matter what the cost; every statute acknowledges limits imposed by other objectives. The FDCA does not require that all of the nation's resources be devoted to pro-

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<sup>44</sup> For the legal process approach to statutory interpretation generally (not the particular view described in the text), see Henry M. Hart, Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1111–1380 (Foundation 1994) (William N. Eskridge, Jr and Philip P. Frickey, eds).

<sup>45</sup> Federal Food, Drug, and Cosmetic Act (FDCA), Pub L No 75-717, 52 Stat 1040 (1938), codified at 21 USC § 301 et seq.

<sup>46</sup> See, for example, 21 USC § 355.

<sup>47</sup> 21 USC § 337(a) (requiring that enforcement proceedings be “by and in the name of the United States”).

<sup>48</sup> See, for example, *J.I. Case Co v Borak*, 377 US 426, 435 (1964) (holding that corporate stockholders may sue for remedial relief under the Securities Exchange Act when a merger is authorized pursuant to deceptive proxy statements).

<sup>49</sup> See, for example, *Touche Ross & Co v Redington*, 442 US 560, 568, 579 (1979) (stating that the Court's role is “limited solely to determining whether Congress intended to create the private right of action” under § 17(a) of the Securities Exchange Act and concluding that Congress did not have such an intent); *Cannon v University of Chicago*, 441 US 677, 718 (1979) (Rehnquist concurring) (finding an implied private cause of action under Title IX, but cautioning that the Court should be “extremely reluctant” to imply causes of action in the future).

<sup>50</sup> Easterbrook, 50 U Chi L Rev at 547 (cited in note 2) (“Because legislatures comprise many members, they do not have ‘intents’ or ‘designs[]’ . . . only outcomes.”).

tecting consumers from unsafe drugs; it does not impose the most severe possible penalties on violators. It has limitations, exceptions, and qualifications. All of these things are true of all statutes.

Beyond that, many statutes, Judge Easterbrook emphasizes, are the products of compromise.<sup>51</sup> In constructing such a compromise, it will often be very useful for legislators to trade off some enforcement in exchange for, perhaps, a broader substantive reach. If the courts take it upon themselves to authorize a level of enforcement that the legislative compromise has deliberately rejected, then the compromise is undone and the legislature's power has been usurped.<sup>52</sup> So the idea behind the argument that Judge Easterbrook criticizes—the more enforcement, the better, because it advances the purposes of the statute—is specious.

Judge Easterbrook's arguments on this point are entirely convincing. It is not clear, though, that they justify a wholesale condemnation of implied private rights of action (nor is it clear that Judge Easterbrook intends them that way, although there are passages that suggest that he does<sup>53</sup>). If Congress were to bar private rights of action explicitly, then the courts could not create them; everyone agrees on that. So it is all a matter of what to do when Congress is silent, and the answer to that question should depend on the background understandings against which Congress legislates. If the governing assumption is that a regulatory law providing for public enforcement will also authorize an implied private damages action, then, in the absence of some special circumstance making private enforcement inappropriate, the courts should generally create private rights of action, even without express authorization. In the era in which the courts freely created implied rights of action, that may have been the assumption.

Judge Easterbrook's writings on interpretation are emphatic, and clearly correct, in saying that context and background assumptions are indispensable in interpreting statutes. He seems to have in mind assumptions that help define the meanings of words more narrowly.<sup>54</sup> But context and assumptions can govern other matters as well. In fact, Judge Easterbrook has said as much: "Language takes meaning from its linguistic context, but historical and governmental contexts also

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<sup>51</sup> *Id.* at 540.

<sup>52</sup> *Id.*

<sup>53</sup> See, for example, *id.* at 542 (discussing the regulation of tender offers, enforced by the SEC and through criminal law, and arguing that allowing individuals to bring enforcement actions would overprotect investors by raising costs of bidding, and proposing that "a rule of no-application" alleviates this risk).

<sup>54</sup> Easterbrook, 11 *Harv J L & Pub Pol* at 65 (cited in note 1).

matter.”<sup>55</sup> Every statute “calls for decision according to the legal system’s accepted procedures, evidentiary rules, burdens of persuasion—and defenses.”<sup>56</sup> Judge Easterbrook’s specific point was that a criminal statute should be understood to incorporate a necessity defense, even though the statute did not explicitly provide for such a defense.<sup>57</sup> “New statutes fit into the normal operation of the legal system unless the political branches provide otherwise.”<sup>58</sup>

The same things might be true of implied rights of action. Implied rights of action are probably not as deeply rooted in the legal system as is a necessity defense to a criminal charge. But an implied right of action might still be part of the “historical and governmental context,” one of “the legal system’s accepted” remedies and part of the “normal operation of the legal system” that need not be provided explicitly.<sup>59</sup> It all depends on the background assumptions, which will not always be easy to ascertain and which may vary from one era to the next. One cannot say that the creation of an implied right of action is a usurpation without accounting for those background assumptions. To that extent, Judge Easterbrook’s occasional apparent dismissiveness about implied rights of action seems mistaken. Questions about implied private rights of action—like questions about when courts should interpret statutes as authority for creating judge-made law—are not so easy to answer.

#### IV. THE PARADOX OF *STATUTES’ DOMAINS*

So we are left with a bit of a puzzle. *Statutes’ Domains* says that judges should make a threshold inquiry into whether a statute is applicable and embark on the interpretation of the statute only if the answer is affirmative. But it is not clear what is gained by requiring that threshold inquiry. There does not seem to be any reason to believe such an inquiry will, on the whole, produce fewer or less damaging judicial errors. The criteria for determining applicability that Judge Easterbrook specifies either do not advance the ball (if they rule out only cases in which it is “too plain for argument” that a statute is inapplicable) or raise issues indistinguishable from those the judge would confront if she skipped the inquiry into applicability and just interpreted the statute (such as the degree to which the statute au-

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<sup>55</sup> Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 Harv L Rev 1913, 1913 (1999).

<sup>56</sup> *Id.* Judge Easterbrook’s specific point was about criminal statutes, but what he said is true of statutes generally.

<sup>57</sup> *Id.* at 1913–14.

<sup>58</sup> *Id.* at 1914.

<sup>59</sup> Easterbrook, 112 Harv L Rev at 1913–14 (cited in note 55).

thorizes judicial lawmaking). So what is the point of asking whether a statute applies to a case?

One possible answer, as I suggested earlier,<sup>60</sup> is Judge Easterbrook's premise that it is better to err on the side of finding statutes inapplicable—it is better to leave matters unregulated by statute. At one point in *Statutes' Domains*, he seems to make this premise explicit:

Those who wrote and approved the Constitution thought that most social relations would be governed by private agreements, customs, and understandings, not resolved in the halls of government. There is still at least a presumption that people's arrangements prevail unless expressly displaced by legal doctrine. All things are permitted unless there is some contrary rule.<sup>61</sup>

Adding a first-step inquiry into the applicability of a statute—instead of just assuming that a statute applies, and proceeding to its interpretation—may or may not reduce errors, but it seems likely to bias the set of errors towards deregulation: it will make it more likely that judges will conclude that statutes are inapplicable, thereby leaving matters to “people's arrangements . . . [un]displaced by legal doctrine.”

That seeming bias toward deregulation can arguably be found in other places in Judge Easterbrook's writings. Take, for example, Judge Easterbrook's emphasis (in *Statutes' Domains* and elsewhere) on the fact that statutes are routinely the product of compromise among interest groups<sup>62</sup>—an emphasis that is at the core of the public choice approach to statutory interpretation.<sup>63</sup> Judge Easterbrook insists that judges should enforce the compromise, instead of attributing to the statute a “purpose” that was, in fact, the purpose of only one of the contending groups. That seems unexceptional—if the case can be decided by enforcing the compromise. But what if, with respect to the issue before the court, it is unclear what the compromise was? Or what if the case presents an issue (as, say, both *TVA v Hill* and *Weber* may have presented) that was not anticipated by the parties to the compromise? Then, Judge Easterbrook seems to say, the statute says nothing about the issue; in the terms of *Statutes' Domains*, there may be no statute that is applicable. The matter is unregulated by any federal statute.

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<sup>60</sup> See note 11 and accompanying text.

<sup>61</sup> Easterbrook, 50 U Chi L Rev at 549–50 (cited in note 2).

<sup>62</sup> See, for example, *id.* at 540–41; Easterbrook, 17 Harv J L & Pub Pol at 67–68 (cited in note 1) (providing eight propositions in support of textualism, including the assertion that legislation is a compromise, due in large part to the influence of interest groups).

<sup>63</sup> See, for example, William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va L Rev 275, 288 (1988).

Of course, the fact that no *federal* statute applies does not mean that no law applies. As Judge Easterbrook says elsewhere,<sup>64</sup> if no statute resolves a case, the courts should resort to administrative agencies' interpretations. If there is no federal law, prescribed by statute or administrative ruling, then state law governs the case. The "deregulatory" bias in Judge Easterbrook's approach is, more precisely, a bias toward leaving matters unregulated by federal statutes. It may easily have the effect of leaving a subject more intensely regulated by state law.<sup>65</sup> So his approach is not biased in any overtly political sense—that is an important point to make about a judge who has been as committed to the rule of law as Judge Easterbrook is. It reflects a bias toward limiting the scope of federal statutes. *Statutes' Domains*, it seems, effectively creates a presumption in favor of concluding that matters lie outside the domains of federal statutes.

It is not clear that this presumption is justified. The abstract claim that "those who wrote and approved the Constitution" favored private orderings is surely too general, and crude, to justify it. Rhetoric about the importance of limiting government is prominent in American traditions, of course, but it is not clear that it is more than rhetoric. More to the point, when Congress has acted in a particular area—the protection of endangered species, or the elimination of employment discrimination, or any other area—why shouldn't the presumption be overcome, or even reversed? Perhaps once Congress acts, the presumption should be in favor of federal regulation in that area rather than private ordering: not, of course, to the point of extending the statute beyond what Congress has enacted, but perhaps in filling gaps or resolving ambiguities in the statute.

Be that as it may, the net effect of Judge Easterbrook's approach may be the opposite of what he intends. The inquiry into applicability—and the related emphasis on not going beyond the compromise reflected in legislation—may just be additional weapons in a judge's arsenal. *Statutes' Domains* urges that judges add an additional step

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<sup>64</sup> See Easterbrook, 17 Harv J L & Pub Pol at 68 (cited in note 1) ("When the text has no answer, a court should . . . go to some other source of rules, including administrative agencies, common law, and private decision.").

<sup>65</sup> For a vivid illustration, see Justice Clarence Thomas's concurring opinion in *Wyeth v Levine*, 129 S Ct 1187 (2009). The issue in that case was whether the Federal Food, Drug, and Cosmetic Act, and regulations issued pursuant to it, preempted a requirement, imposed by Vermont's common law of torts, that the manufacturer of a drug provide certain warnings to consumers. *Id.* at 1193. Justice Thomas, in an opinion that echoed many of the themes of Judge Easterbrook's writings, argued that courts should not preempt state law on the basis of conclusions about the "purposes and objectives" of federal law, when those purposes and objectives "are not embodied within the text of federal law." *Id.* at 1205. The effect of Justice Thomas's approach was to subject the manufacturer to a state regulatory regime that was more extensive than the federal regime.

when faced with a claim that invokes a statute; the additional step may be another opportunity for a judge's policy views to influence her decision, consciously or unconsciously. A judge who is told to focus on the question of applicability, independent from any other issues of statutory interpretation, has an additional temptation to indulge her disagreement, if she has one, with the policy goals of the statute. A judge who is told to enforce rigorously the legislative compromise, and to take not one step further, will find it easier, if she is so inclined, to interpret the statute too narrowly. That may be the ultimate paradox of Judge Easterbrook's intriguing article: that an effort to limit the power of judges may, ultimately, only empower them further.