Statutes’ Domains

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I

When does a court construe a statute, treaty, or constitutional provision and when hold it inapplicable instead? This question has received almost no attention from courts or scholars. They usually assume that when a party in litigation relies on a statute, it must be construed—that is, it must supply an answer to the question presented in the case, whether or not the answer is favorable to the party relying on the provision.¹

Yet to construe a statute at all is to resolve an important question in favor of the party invoking it. The interesting questions in litigation involve statutes that are ambiguous when applied to a particular set of facts. The construction of an ambiguous document is a work of judicial creation or re-creation. Using the available hints and tools—the words and structure of the statute, the subject matter and general policy of the enactment, the legislative history, the lobbying positions of interest groups, and the temper of the times—judges try to determine how the Congress that enacted the statute either actually resolved or would have resolved a particular issue if it had faced and settled it explicitly at the time.² Judges

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¹ I refer hereafter to statutes, without necessarily excluding treaties or constitutions. Similarly, I refer to construction by courts and judges without necessarily excluding construction by the executive branch and administrative agencies.


Some say that because of the imprecision of language, or the passage of time between enactment and interpretation, the appropriate goal of construction is not the implementation of the design (real or imputed) of the legislature but the creation of such rules as judges conclude best serve the common weal. E.g., G. Calabresi, A Common Law for the Age of Statutes (1982); Levinson, Law as Literature, 50 Tex. L. Rev. 373 (1982). Arguments such as Levinson’s overstate the vagueness of language. Wittgenstein showed that no system of language can be self-contained and that meaning thus must depend in part on logical struc-
have substantial leeway in construction. Inferences almost always conflict, and the enacting Congress is unlikely to come back to life and "prove" the court's construction wrong. The older the statute the more the inferences will be in conflict, and the greater the judges' freedom.

If, however, the court finds a statute inapplicable to the subject of the litigation, it never begins this task of creative construction. Even if the judge knows how Congress would have handled the question presented, the court will do nothing. It will say to the litigant: "Too bad, but legislative intentions are not legal rules." Whoever relies on the statute loses. The court will tell the litigant to seek a statute embodying the never-expressed conclusions of the legislature.

The choice between construction and a declaration of inapplicability thus may make all the difference to the case. This essay is a sketch of some considerations affecting that choice. I suggest that the conventional assumption, that all statutes supply or authorize the creation of an "answer" (even if unfavorable) to the question posed by the litigants relying on them, is difficult to sustain.

II

A paper about the domain of statutes needs a preamble about its own domain. Throughout this paper I discuss the difference between "construing" and "not construing" a statute. The reader is entitled to object that there is no such distinction, that to declare a statute and understandings supplied by a community of readers, but this does not establish that words contain no meaning or that judges may disregard such meaning as most readers would find. There is no "private language"; meaning lies in shared reactions to text. If readers have a common understanding of structure they may decipher meaning accurately. The appropriate treatment of language skepticism ultimately is not much different from that of Humean fact skepticism. See generally Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, 90-94; Kurland, Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is," 23 Ariz. L. Rev. 581, 592-97 (1981); White, Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev. 415, 421-28 (1982). If statutes' words do not convey meaning and bind judges, why should judges' words bind or even interest the rest of us? Arguments such as Calabresi's err in supposing that only the designs of today's legislators count and that the application of the common law method can yield principled (which is to say consistent) rules. Judges' claim of the power to adjudicate supposes that at least some of the decisions of people now dead must still be enforced, cf. Mikva, The Shifting Sands of Legal Topography (Book Review), 96 Harv. L. Rev. 534, 543-44 (1982) (discussing judicial updating of statutes), and the belief that courts can establish a principled jurisprudence is simply fallacious. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 811-32 (1982).

Nonetheless, although I think the original-meaning approach to statutory construction right, I do not defend it in this essay. My purpose is to show the difficulty of justifying the search for and implementation of that meaning in a class of cases.
statute inapplicable to a dispute is an act of construction, and that I am therefore talking nonsense. There is certainly a sense in which every time a judge picks up and reads a statute, if only to put it down immediately, he has "construed" or "interpreted" it. Why else did he put it down? In distinguishing between construction and nonconstruction, I do not mean to deny the importance of finding the meaning of the enactment. Finding the meaning is the aim of picking up the statute in the first instance. I address instead some of the considerations pertinent to deciding whether the statute indeed supplies an answer or whether it is to be put down and disregarded.

One can think of this as an exercise in finding a general rule of construing statutes to find their boundaries. The terminology is unimportant, and my meaning (the essay's domain) should be clear if you think of it as an effort to identify some principles useful in deciding when to act as if no law on the subject had been passed.

Consider, for example, whether a statute providing for the leashing of "dogs" also requires the leashing of cats (because the statute really covers the category "animals") or wolves (because the statute really covers the category "canines") or lions ("dangerous animals"). Most people would say that the statute does not go beyond dogs, because after all the verbal torturing of the words has been completed it is still too plain for argument what the statute means. Perhaps it is a quibble, but in my terminology this becomes a decision that the statute "applies" only to dogs. For rules about the rest of the animal kingdom we must look elsewhere.

The distinction between application and interpretation is a line worth drawing—however difficult to maintain—because of the malleability of words. To find the leash statute limited to dogs af-

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3 "Meaning of the enactment," and not the "intent of its framers." A statute has meaning apart from the drafters' personal intentions, and to speak of intent is to commit the "intentional fallacy" properly denounced in literary criticism. Thus Holmes had it right:

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

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


ter a bout of interpretation inevitably has the air of arbitrariness. Why not treat it as a statute about "animals" or "dangerous animals" or "canines"? The invocation of "plain meaning" just sweeps under the rug the process by which meaning is divined. Too often the meaning of a statute is smuggled into the rules that determine when, and why, to cut off debate. The philosophy of language, and most particularly the work of Ludwig Wittgenstein, has established that sets of words do not possess intrinsic meanings and cannot be given them; to make matters worse, speakers do not even have determinative intents about the meanings of their own words. Thus when a speaker says "dogs" we cannot be certain that he did not mean "dangerous animals" unless that question was present to his mind and the structure of the utterance indicates his resolution of the problem. When Congress enacts a $10,000 jurisdictional amount, we cannot be certain whether it means $10,000 in nominal dollars or real (inflation-adjusted) ones. When the Constitution says that the President must be thirty-five years old, we cannot be certain whether it means thirty-five as the number of revolutions of the world around the sun, as a percentage of average life expectancy (so that the Constitution now has age fifty as a minimum), or as a minimum number of years after puberty (so the minimum now is thirty or so). Each of these treatments has some rational set of reasons, goals, values, and the like to recommend it. If the meaning of language depends on a community of understanding among readers, none is "right." But unless the community of readers is to engage in ceaseless (and thus pointless) babble—and unless, moreover, the community is willing to entrust almost boundless discretion to judges as oracles of the community's standards—there is a need for some broader set of rules about when to engage in the open-ended process of construction.

In a world of language skepticism, every attempt to "construe" a statute is a transfer of a substantial measure of decision-making authority from the speaker to the interpreter. To find that there is "law" on a given subject is to endow the courts with authority they lacked before. It is therefore worthwhile to demand that, before courts begin the process of "construction," they ascertain that the legislature has conferred the power of interpretation. Thus I ask for indulgence in referring to a first step, the step of determining the application or applicability of a statute.

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I put to one side the possibility that determining the statute's applicability always is the same thing as determining whether the statute supports the party relying on it. The decision to construe the statute at all cannot be based on the legislature's actual decision, for if it made an ascertainable decision there is no difficult question of construction. Take, for example, the question whether the Federal Communications Commission, which under the Communications Act regulates the practices of radio and television broadcasters, also may regulate the practices of cable television operators. If the Communications Act said something like "the FCC may not regulate anything or anyone other than the practices and parties named in this Act," there would be nothing to discuss. One could invoke an actual decision of Congress concerning the domain of its enactment.

Statutes rarely contain anything like this, in part because Congress does not anticipate each problem that subsequently arises and in part because members of Congress know that zipper clauses in statutes just invite clever evasions. Thus the statute does not choose between the opposing lines of argument that, on the one hand, cable systems compete with over-the-air television and may, unless regulated, upset or undo the regulation of TV expressly created by the statute and that, on the other hand, the only reason for regulating over-the-air TV was the problem of many signals competing for few frequencies and interfering with one another, a problem that never arises for cable systems.

If the question of a statute's domain may not often be resolved by reference to actual design, it may never properly be resolved by reference to imputed design. To impute a design to Congress is to engage in an act of construction. There must be some reason, independent of the answer the court thinks Congress would give (or would have given) to the question under consideration, that justifies the court in supplying that answer in litigation.

The point may be clearest if we take a case in which the court can determine the legislators' design or meaning with certainty. Suppose that within a month after Congress passed the Communications Act a court declares the statute inapplicable to cable television. The FCC consequently lacks regulatory jurisdiction. Immediately thereafter, during the same session of Congress that passed

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the Communications Act, the pertinent committee in each house of Congress reports out a short amendment giving the FCC jurisdiction. The texts of the amendments are identical, and the unanimous committee reports state that the amendment is necessary to correct a terrible oversight. Each report states that the committee originally intended to confer on the FCC jurisdiction over cable systems, but that during the session the members of the staff charged with drafting the language to implement the design resigned, and their successors, unaware of the original plan, had not carried it out. As a result the legislation did not implement the agreed-on plan, and this technical amendment would perfect the statute.

Suppose further that the leaders of both parties endorse the amendment, and the President expresses willingness to sign it when it reaches his desk. Yet although the amendment encounters no opposition, it also does not pass. Perhaps it never is scheduled for time on the floor because other, more pressing legislation consumes the remainder of the session. Perhaps members who support the amendment hold it hostage in an effort to secure enactment of some other bill over which there is vigorous debate. Perhaps the bill is so popular that it becomes the vehicle for a school prayer amendment or some other factious legislation, in the hope that it will carry the disputed legislation with it, but the strategy succeeds only in killing both proposals. There are a hundred ways in which a bill can die even though there is no opposition to it.

What should a court do with this unambiguous evidence of legislative design or meaning? The conventional answer is that an abortive attempt to enact a bill has no effect. Despite the information it conveys about the meaning of Congress, it neither adds to nor detracts from the meaning of the legislation actually enacted. It is even conceivable, although on the facts of this hypothetical

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7 E.g., American Trucking Ass'ns v. Atchison, T. & S.F. Ry., 387 U.S. 397, 416-18 (1967) (an agency may change its regulations and statutory interpretation even though Congress refused to amend the statute to authorize the new rules); FTC v. Dean Foods Co., 384 U.S. 597, 608-12 (1966) (failure to enact amending legislation conferring jurisdiction is of no moment one way or the other); Wong Yang Sun v. McGrath, 339 U.S. 33, 47 (1950) (same). Cf. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979) (committee report from later session is of no effect even though subsequent legislation passed and the committee was dominated by members of the committee that drafted the original legislation); Commissioner v. Acker, 361 U.S. 87, 92-93 (1959) (legislative intent is ineffective unless embodied in statutory words); Iselin v. United States, 270 U.S. 245, 251 (1926) ("What the Government asks [and does not get] is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope.")
unlikely, that the failure to amend the statute will be taken as endorsement of the initial judicial treatment of it. And this rule works in both directions: if the initial Act had granted jurisdiction over cable systems, subsequent failed amendments could not have diminished that power.

The treatment of subsequent events as ineffective to alter the meaning of a statute is based on a realistic perception of the legislative process. Often proposals with wide support fail of enactment because the legislature lacks the time to enact them or because agreed-on bills become pawns in larger struggles. A court could not treat these widely-supported but never-enacted proposals as law without dishonoring the procedural aspects of the legislative process, in which lack of time is a vital ingredient. Under article I of the Constitution, not to mention the rules of the chambers of Congress, support is not enough for legislation. If the support cannot be transmuted into an enrolled bill, nothing happens. The world goes on as before.

If such powerful evidence of the intent of Congress about the domain of its statutes is not dispositive in matters of construction versus inapplicability, the usual kind of evidence is even less helpful. To delve into the structure, purpose, and legislative history of the original statute is to engage in a sort of creation. It is to fill in blanks. And without some warrant—other than the existence of the blank—for a court to fill it in, the court has no authority to decide in favor of the party invoking the blank-containing statute.

IV

All of this means that there must be a meta-rule of statutory construction, a rule about when to engage in construction. The decision to engage in construction must depend on something other than the substantive answer that a constructive exercise would supply.

One may object that the search for such a rule is itself illegitimate, because the establishment of any rule reduces the power of Congress by forcing it to enact around the rule if dissatisfied. Because displacing any rule, however useful ordinarily, is costly, and because Congress is not always willing or able to bear these costs, this argument would run, judges must refrain from adopting any background rule and approach each statute with empty minds.

This argument would prove too much. It would require abandoning not only meta-rules but also ordinary rules of construction—including judges' resort to their understandings of English—that aid in deciphering or constructing a legislative meaning. At least some rules of statutory construction are useful for the same reason rules are useful in interpreting contracts. They spare legislators the need to decide and announce, law by law, the rules that will be used for interpreting the code of words they select. The general reduction in the costs of legislating makes up for the costs of reversing the background rule in the event it should be ill-adapted to some given statute. Rules are desirable not because legislators in fact know or use them in passing laws but because rules serve as off-the-rack provisions that spare legislators the costs of anticipating all possible interpretive problems and legislating solutions for them.9

What, then, is the appropriate background rule? One possibility, not excluded by the discussion in parts II and III, is the rule now followed by default: treat as applicable all statutes invoked by the parties. This is not, however, a very satisfactory rule. In choosing background rules for understanding and completing contracts, courts ordinarily select the options they think the parties would have picked had they thought of the subsequently surfacing problems and been able to bargain about them beforehand at no cost. Such an approach minimizes both bargaining costs and the number of mistakes. A similar approach to selecting the meta-rule of construction suggests that "every statute applies" is not a good candidate for adoption.

Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved. Whether these issues have been identified (so that the lack of their resolution might be called intentional) or overlooked (so that the lack of their resolution is of ambiguous portent) is unimportant. What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.

This concern for balance is not confined to interest group (pie-slicing) legislation, in which different people tug different ways on legislators for larger shares of a fixed pie, and the statute fixes the

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Balance is as important in public interest (pie-enlarging) legislation, for the structure of the statute will determine how the public interest is to be achieved. Is it to be done strictly through governmental rules and regulation (in which case the statute supplies a rule of decision) or in part by the interactions and bargains of private parties (in which event the statute does not apply)? Legislators seeking only to further the public interest may conclude that the provision of public rules should reach so far and no farther, whether because of deliberate compromise, because of respect for private orderings, or because of uncertainty coupled with concern that to regulate in the face of the unknown is to risk loss for little gain. No matter how good the end in view, achievement of the end will have some cost, and at some point the cost will begin to exceed the benefits.

Thus it is exceptionally implausible to suppose that legislatures, faced explicitly with the task of selecting a background rule, would decide that all statutes invoked by litigants should be deemed to govern their disputes. Such a rule is the equivalent of charging courts with supplying, in cases of doubt, “more in the same vein” as the statute in question. In the case of interest group legislation it is most likely that the extent of the bargain—the pertinent “vein”—is exhausted by the subjects of the express compromises reflected in the statute. The legislature ordinarily would rebuff any suggestion that judges be authorized to fill in blanks in the “spirit” of the compromise. Most compromises lack “spirit,” and in any event one part of the deal is to limit the number of blanks to be filled in. (Sometimes the compromise is on a principle to be applied later, and I suggest below that such statutes should be applied more readily than other compromises.)

In the case of public interest legislation it is more likely that the legislature would authorize blank filling, but the extent of this preference is far from certain. If the purpose of the public interest statute is to come as close to the line of over-regulation as possible—that is, to achieve the benefits of regulation right up to the point where the costs of further benefits exceed the value of those benefits—then to authorize blank filling defeats the purpose of the statute. If the court always responds to the invocation of this statute by attempting to read the minds of its framers and supply “more in the same vein,” and makes its share of errors, every one of them will carry the statute to where costs exceed benefits. It will

either do nothing or produce too much of a good thing.

An example may be helpful. Congress has regulated tender offers for corporate stock by establishing disclosure rules and minimum durations for such offers. The public interest justification advanced for the statute is that the time and information enable investors to make intelligent decisions and so perfect the market for corporate control. Another public interest justification, advanced more recently, is that the time enables auctions for targets to develop. The statute provides for enforcement by the SEC and the criminal law. It does not, however, address enforcement by means of suits filed by firms that are objects of offers. When a target files a suit, should the court fill in this blank by applying the statute and divining how Congress would have resolved the problem, or should it declare the statute inapplicable (and thus no support for the suit)? If the statute is a public interest statute that already has come right up to the line in offering protections for investors, and the court undertakes to construe this and similar laws, the process harms those the statute meant to protect.

A rule of no-application would avoid this risk.

This is not to argue that a uniform rule of no-construction in such cases best implements Congress's plan, or even that in the tender-offer case a decision permitting suits by targets would harm the group Congress wanted to help. The point, rather, is that a legislature rationally may conclude that the rule "apply all statutes as written" is the better rule. The judicial treatment of suits by targets has been to construe the statute and, generally, to use the statute as the basis of the suit. E.g., Prudent Real Estate Trust v. Johncamp Realty, Inc., 599 F.2d 1140 (2d Cir. 1979) (Friendly, J.). But cf. Piper v. Chris-Craft Indus., 430 U.S. 1, 24-42 (1977) (bidder lacks a claim for damages under the statute).

The Supreme Court sometimes recognizes that more of what the legislature wanted is not always better. See Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980).

It should be plain that there is such a line. Its existence is the basis of Edgar v. MITE Corp., 102 S. Ct. 2629 (1982) (holding that additional protection offered by state statutes would "overprotect" investors to their detriment). See also Easterbrook & Fischel, Antitrust Suits by Targets of Tender Offers, 80 Mich. L. Rev. 1155 (1982). For a debate on the costs and benefits of tender offer auctions, which may be initiated or prolonged by litigation, see Easterbrook & Fischel, Auctions and Sunk Costs in Tender Offers, 35 Stan. L. Rev. 1 (1982); Bebchuk, The Case for Facilitating Competing Tender Offers: A Reply and Extension, 35 Stan. L. Rev. 23 (1982); Gilson, Seeking Competitive Bids Versus Pure Passivity in Tender Offers, 35 Stan. L. Rev. 51 (1982).
utes" is undesirable even if all statutes are public interest statutes. The nature of the optimal meta-rule of construction depends not only on whether the statute at hand is private-interest or public-interest legislation but also on whether the legislation comes close to the line at which benefits begin to exceed costs. If the legislature regularly passes laws that, in its view, approach this line, then it may rationally prefer courts to tend to limit the domain of laws that do not speak directly to a subject. If, however, the legislature regularly passes public interest laws that still have some distance to go before they reach the point at which detriments begin to exceed benefits, it would be more sanguine about a rule of universal construction.

When enacting public interest laws legislators regularly attempt to approach that critical line—at least in light of the gains and losses they then perceive. A legislature that created a basket of laws containing many interest group statutes and many exhaustive public interest statutes would not be likely to adopt today's implicit judicial approach of universal construction. It would try to distinguish statutes to be applied (construed) from statutes to be declared inapplicable in the event of substantial ambiguity.

There is a further reason why a legislature able to specify a rule at no cost would not select universal construction. A rule of universal application breaks down when each party invokes an ambiguous statute. In almost any dispute it will be possible to point to a series of statutes enacted at different times. The dominant purpose of some labor laws is to curb what is seen as the excessive power of employers over their workers; the dominant purpose of others is to curb what is seen as the excessive power of unions. What is a court to do when the union invokes one, the employer invokes another, and each asks the court to determine the case by construing the law—that is, by determining how the legislature that passed the law would have resolved this kind of case, had it been put? The outcome of the case will depend on which session of the legislature the court selects as the controlling one, and that cannot be done with a rule of universal construction.

A court might try to escape this bind by choosing to apply the more recent law, but that would arbitrarily deny effect to the design (both substantive and with respect to rules of construction) established by the earlier legislature. The court could not justify this choice as one of construction, because each of the two meetings of the legislature might want its "spirit" to control in the event two ambiguous laws, neither expressly governing, should be invoked. Only a rule imposed from outside the legislative process
could break the deadlock.

If a rule of universal construction is unsatisfactory, what of a rule of universal refusal to apply statutes whose domains do not clearly include the subject of the litigation? Here courts would encounter difficulties almost the mirror image of those produced by a rule of universal construction. A rule of universal refusal to extend a statute’s domain would deny to the legislature the option of enacting public interest laws that, stopping well short of the point where they produce too much of a good thing, charge the judiciary with the task of creating remedies for whatever new problems show up later on. The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of common law. These laws “apply” even though they do not always supply a rule of decision; the “state action exemption” to the antitrust laws is a good example of how a statute may apply to all combinations in restraint of trade but forbid only some. 1 Unless such generative statutes are unconstitutional there is little warrant for refusing to implement them through the guise of adopting a meta-rule of statutory construction.

V

If the limiting cases—no rule, a rule of universal application, and a rule of severely restricted domain—are not plausible candidates, what is? In this part I sketch and offer the skeleton of the defense of a more plausible rule. It would be fatuous to suggest that this is the only plausible candidate. My purpose is not to exclude all competing candidates but rather to offer a starting point for analysis.

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. The statute would become irrelevant, the parties (and court) remitted to whatever other sources of law might be applicable.

This approach overlaps the “clear statement” principle of con-

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struction that is often, but erratically, invoked by courts that deny the power to resolve the issue put to them.\textsuperscript{15} The court will say something like: "The legislature may well have supported the party relying on the statute, had it thought about this problem, but if the legislature expects us to reach such a result in so sensitive an area, it must state its conclusion clearly." The court then explains why it thinks the subject matter of the legislation counsels hesitation. Perhaps it affects state-federal relations, perhaps it creates startling remedies, perhaps it raises serious constitutional questions, perhaps it departs from the common law (and so from the judges' conception of the good).

As others have pointed out, the "clear statement" principle usually fails as a useful tool of construction because it cannot demonstrate why the legislature would have wanted the court to hesitate just because the subject matter of the law is "sensitive."\textsuperscript{16} Likely it thinks that making hard decisions in sensitive areas is what courts are for. The "clear statement" principle can be used by courts seeking to decide by indirection (the very thing they ask the legislature not to do) and to elide responsibilities given by statutes. Invocation of the "clear statement" rule thus has been taken by some as a sign of wilful misconstruction of the statute.\textsuperscript{17}

The "clear statement" approach nonetheless reflects the truth that some statutes support judicial gap filling more than others do. The problem in the "clear statement" approach lies not in the declaration that courts sometimes will demand explicit legislative resolution and will refuse to fill statutory gaps, but rather in the conditions giving rise to that demand. The meta-rule I have suggested above is a "clear statement" approach revised to turn on the method the legislature has adopted. If it enacts some sort of code of rules, the code will be taken as complete (until amended); gaps will go unfilled. If instead it charges the court with a common law function, the court will solve new problems as they arise, but using today's wisdom rather than conjuring up the solutions of a legislature long prorogued.

This is just a slightly different way of making the point that

\textsuperscript{16} H. Friendly, \textit{supra} note 2, at 210-12; Posner, \textit{supra} note 2, at 815-16.
judicial pursuit of the "values" or aims of legislation is a sure way of defeating the original legislative plan. A legislature that seeks to achieve Goal X can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. In that event, the subsequent selection of rules implements the actual legislative decision, even if the rules are not what the legislature would have selected itself. The second approach is for the legislature to pick the rules. It pursues Goal X by Rule Y. The selection of Y is a measure of what Goal X was worth to the legislature, of how best to achieve X, and of where to stop in pursuit of X.¹⁸ Like any other rule, Y is bound to be imprecise, to be over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule Y on the argument that, by doing so, it can get more of Goal X. The judicial selection of means to pursue X displaces and directly overrides the legislative selection of ways to obtain X.¹⁹ It denies to legislatures the choice of creating or withholding gap-

¹⁸ The stopping place problem is well illustrated by Thomas v. Washington Gas Light Co., 448 U.S. 261, 280 (1980), in which a plurality of the Court permitted successive awards of workers' compensation, under the laws of different states, on the reasoning that because each state had an "interest in providing adequate compensation of the injured worker," neither's policy would be offended by allowing the worker to obtain two awards and then collect the more generous. Yet all workers' compensation schemes involve a tradeoff between the level and probability of the award. Suppose State A has a maximum award of $200 per month for a certain disability, and a worker who was injured in particular circumstances has a 95% probability of receiving the award. Then the worker's application for benefits and the employer's obligation have expected values of $190 per month each. State B has a much higher maximum benefit of $380 per month, but because an injury of this sort is only debatably within the statute the worker has a 50% chance of recovery. Again, the worker's expected value is $190 per month, identical to the employer's expected cost. If the worker first applies in State A and then applies in State B, and is entitled to the higher of the awards (provided he prevails in State A first), then the expected value of the applications for benefits is $275.50. (Computed from $0.05 \times 0.00 + 0.95 (0.5 \times 200 + 0.5 \times 380) = 275.50$.) He gets more than either state provided, and each state's decision that the employer's liability per similarly-situated worker be fixed at $190 per month is frustrated.

¹⁹ For a striking illustration of the difference between pursuing the legislature's methods and pursuing the legislature's goals, compare Golden v. Garafolo, 678 F.2d 1139 (2d Cir. 1982) (Winter, J.) (methods) with Sutter v. Groen, 687 F.2d 197 (7th Cir. 1982) (Posner, J.) (goals). See also Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S. Ct. 1556, 1560-61 (1983) ("although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment") (footnote omitted) (emphases in original); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 145 (1973) (Stewart, J., concurring) (discussing "the dangers that beset us when we lose sight of the First Amendment itself, and march off in blind pursuit of its 'values'"); Exchange Nat'l Bank v. Touche Ross & Co., 544 F.2d 1126, 1138 (2d Cir. 1976) (Friendly, J.) ("courts had better not depart from their [statutes'] words without strong support for the conviction that . . . they are doing what Congress wanted when they refuse to do what it said").
filling authority. The way to preserve the initial choice is for judges to put the statute down once it becomes clear that the legislature has selected rules as well as identified goals.

This approach is faithful to the nature of compromise in private interest legislation. It also gives the legislature a low-cost method to signal its favored judicial approach to public interest legislation. A legislature that tries to approach the line where costs begin to exceed benefits is bound to leave a trail of detailed provisions, which on this approach would preclude judges from attempting to fill gaps. The approach also is supported by a number of other considerations. First, it recognizes that courts cannot reconstruct an original meaning because there is none to find. Second, it prevents legislatures from extending their lives beyond the terms of their members. Third, it takes a liberal view of the relation between the public and private spheres. Fourth, it takes a realistic view of judges' powers. I elaborate on these below.

1. **Original Meaning.** Because legislatures comprise many members, they do not have "intents" or "designs," hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes. It is not only impossible to reason from one statute to another but also impossible to reason from one or more sections of a statute to a problem not resolved. This follows from the discoveries of public choice theory. Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.\(^{20}\) Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made. Legislatures customarily consider proposals one at a time and then vote them up or down. This method disregards third or fourth options and the intensity with which legislators prefer one option over another. Additional options can be considered only in sequence, and this makes the order of decision vital. It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support.\(^{21}\) The existence of agenda control makes it impossible for a

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\(^{21}\) See Levine & Plott, Agenda Influence and Its Implications, 63 Va. L. Rev. 561 (1977), Long & Rose-Ackerman, Winning the Contest by Agenda Manipulation, 2 J. Pol'y Analysis & Mgmt. 123, 124-25 (1982), and Weingast, Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships, Law & Contemp.
court—even one that knows each legislator’s complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.

One countervailing force is logrolling, in which legislators express the intensity of their preferences by voting against their views on some proposals in order to obtain votes for other proposals about which their views are stronger. Yet when logrolling is at work the legislative process is submerged and courts lose the information they need to divine the body’s design. A successful logrolling process yields unanimity on every recorded vote22 and indeterminacy on all issues for which there is no recorded vote.

In practice, the order of decisions and logrolling are not total bars to judicial understanding. But they are so integral to the legislative process that judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses, and thus to lack the legitimacy that might be accorded to astute guesses. Moreover, because control of the agenda and logrolling are accepted parts of the legislative process, a court has no justification for deciding cases as it thinks the legislature would in their absence. It might as well try to decide how the legislature would have acted were there no threat of veto or no need to cater to constituents.

2. Legislatures Expire. Judicial interpolation of legislative gaps would be questionable even if judges could ascertain with certainty how the legislature would have acted. Every legislative body’s power is limited by a number of checks, from the demands of its internal procedures to bicameralism to the need to obtain the executive’s assent. The foremost of these checks is time. Each session of Congress, for example, lasts but two years, after which the whole House and one-third of the Senate stand for reelection. What each Congress does binds the future until another Congress acts, but what a Congress might have done, had it the time, is simply left unresolved. The unaddressed problem is handled by a new legislature with new instructions from the voters.

If time is classified with the veto as a limit on the power of legislatures, then one customary argument for judicial gap filling—that legislatures lack the time and foresight to resolve

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22 See Becker, Competition Among Pressure Groups for Political Influence, 98 Q.J. Econ. (forthcoming 1983).
every problem—is a reason why judges should not attempt to fill statutory gaps. The shortness of time and the want of foresight, like the fear of the veto and the fear of offending constituents, raise the costs of legislation. The cost of addressing one problem includes the inability, for want of time, to address others. If courts routinely construe statutory gaps as authorizing “more in the same vein,” they reduce this cost.

In a sense, gap-filling construction has the same effects as extending the term of the legislature and allowing that legislature to avoid submitting its plan to the executive for veto. Obviously no court would do this directly. If the members of the Ninety-third Congress reassembled next month and declared their legislative meaning, the declaration would have absolutely no force. This rump body would get no greater power by claiming that its new “laws” were intimately related to, and just filled gaps in, its old ones. Is there a better reason why the members of the Ninety-third Congress, the Eighty-third, and the Seventy-third, “sitting” in the minds of judges, should continue to be able to resolve new problems “presented” to them? The meta-rule I have suggested reduces the number of times judges must summon up the ghouls of legislatures past. In order to authorize judges (or agencies) to fill statutory gaps, the legislature must deny itself life after death and permit judges or agencies to supply their own conceptions of the public interest.

3. Liberal Principles. A principle that statutes are inapplicable unless they either plainly supply a rule of decision or delegate the power to create such a rule is consistent with the liberal principles underlying our political order. 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 con-

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It is easier for an agency to justify the revocation of rules (or simple nonregulation) than the creation of new rules. A rule declaring statutes inapplicable unless they plainly resolve or delegate the solution of the matter respects this position. It either preserves the private decisions or remits the questions to other statutes through which the legislature may have addressed the problem. A rule of universal construction, in contrast, assumes that statutes supply an answer to all questions.

Perhaps one day the "orgy of statute making" will reach the point at which the preservation of private decisions is the exception, but that point is not yet here and, one hopes, will never arrive. Like nature, regulation abhors a vacuum, and the existence of one law may create problems requiring more laws. Until the legislature supplies the fix or authorizes someone else to do so, there is no reason for judges to rush in.

4. Judicial Abilities. Statutory construction is an art. Good statutory construction requires the rarest of skills. The judge must find clues in the structure of the statute, hints in the legislative history, and combine these with mastery of history, command of psychology, and sensitivity to nuance to divine how deceased legislators would have answered unasked questions.

It is all very well to say that a judge able to understand the temper of 1871 (and 1921), and able to learn the extent of a compromise in 1936, may do well when construing statutes. How many judges meet this description? How many know what clauses and provisos, capable of being enacted in 1923, would have been unthinkable in 1927 because of subtle changes in the composition of the dominant coalitions in Congress? It is hard enough to know this for the immediate past, yet who could deny that legislation that could have been passed in 1982 not only would fail but also could be repealed in 1983? The number of judges living at any time who can, with plausible claim to accuracy, "think [themselves] . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at

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25 This approach, explicit in the federalists' idea of limited government, also underlies the contemporary state action cases, which assume that the government is responsible for action only when it either acts directly or supplies the rule of decision that private parties must use. Compare Lugar v. Edmonson Oil Co., 102 S. Ct. 2744, 2748-54 (1982) (finding state action) with Rendell-Baker v. Kohn, 102 S. Ct. 2764, 2770-71 (1982) (finding no state action) and Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 149-66 (1978) (same).


bar,”
may be counted on one hand.
To deny that judges have the skills necessary to construe statutes well—at least when construction involves filling gaps in the statutes rather than settling the rare case that arises from conflicts in the rules actually laid down—is not to say that stupid and irresponsible judges can twist any rule. Doubtless the “judge’s role should be limited, to protect against willful judges who lack humility and self-restraint.”
Yet there is a more general reason for limiting the scope of judicial discretion. Few of the best-intentioned, most humble, and most restrained among us have the skills necessary to learn the temper of times before our births, to assume the identity of people we have never met, and to know how disparate characters from regions of great political and economic diversity would have answered questions that never occurred to them. Anyone of reasonable skill could tell that some answers would have been beyond belief in 1866. After putting the impossible to one side, though, a judge must choose from among the possible solutions, and here human ingenuity is bound to fail, often. When it fails, even the best intentioned will find that the imagined dialogues of departed legislators have much in common with their own conceptions of the good.

VI
This is most certainly not to say that statutory construction is a bad, or even that it is a necessary evil. Most statutes contain a substantial core of understandable commands. Most exercises of construction are ordinary attempts to supply a meaning where legislators plainly intended the statute to apply but did not say what the application entailed. It is clear they did something, and the question is what, particularly, with respect to some unanticipated set of events. Finding out what the statute means, even if this calls for creation as well as re-creation, is an essential part of government, lest statutes become brittle and fail of their essential purposes. I have been addressing the problems that arise when legislators did nothing about some sizable class of cases, when the

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28 Posner, supra note 2, at 817.
community of readers does not agree on meaning, and agencies or judges must determine whether to take the legislators at their (non) word, and declare the legislation inapplicable, or leap into the gap with an exercise of construction, as if the legislators had spoken.

Declaring legislation inapplicable unless it either expressly addresses the matter or commits the matter to the common law (or administrative) process would not produce unalloyed benefits. It is easy enough to imagine some horror in which nonapplication perpetrates gross injustice. The price principals pay for reducing the discretion of their agents includes the lost opportunities to carry out the principals' goals in ways the principals could not have anticipated when they issued their commands. Yet it is well understood that a decision to grant or withhold discretion from agents requires a careful balancing of costs. A reduction in discretion may mean lost opportunities, but an increase in discretion may mean that agents distort or deviate from the principals' plans.

The choice between the costs of too much and too little discretion properly lies with the legislature. There is no basis for a presumption against applicability; there is no basis for a rule preserving private orderings; there is not even a basis for the assumption (employed tacitly so far) that there are only two outcomes, application and nonapplication. There are shades of applicability, with color densities properly a legislative matter. Perhaps substantive rules and remedial rules require different approaches. This essay does not begin to exhaust the considerations. The meta-rule I have suggested, calling for "construction" only when the statute either plainly addresses a problem or requires someone else (judges or administrators) to supply their own solutions, best approximates the choice legislators would reach if they could select an option—and enforce it, no small matter!—at no cost. The rule would enhance the power of the legislature by specifying a vocabulary for conveying its decisions to its judicial agents. The suggestion is tentative, and the arguments are far from complete. But it is, I think, more faithful to the organizing principles of our government than the usual assumption of universal construction.