

CHALLENGES IN READING STATUTES

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Yesterday the Supreme Court agreed to review 17 cases. If you read the *New York Times*, you learned that one of these deals with a challenge to execution protocols under the 8th Amendment, and that another deals with the constitutional validity of Indiana's photo-ID requirement for voters. If you read the *Chicago Daily Law Bulletin*, you learned that a third deals with the constitutional limitations on states' taxation of capital gains from the sale of corporate subsidiaries. Another 14 cases went unmentioned. Of these, 13 concern statutory interpretation.

Constitutional cases get the lion's share of public attention, but these days most of the Court's docket concerns federal statutes and rules. When there is any public notice of statutory cases, attention usually is limited to who wins and loses, rather than whether the Court honestly implemented the political compromise encoded in the statute. Editorial-page writers rarely bother to read the statute. Even veteran Supreme Court reporters quote at length from representatives of the pleased or offended interest groups. No one calls up a professor with a question such as: "Now, did the Justices properly use the doctrine of *noscitur a sociis* in this decision?"

My job—and the Justices' job—is to deal correctly with these low-visibility statutory questions. Congress passes laws, but they are not self-interpreting. No matter how clear the statute, every time a legislature draws a line there will be cases very close to it on either side. The line is thin, the cases almost

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indistinguishable, and often the stakes are high enough to pay for lots of legal assistance.

How are these decisions to be made? Not the editorial-page way, by who wins and loses. Every judge takes an oath not to do that. No one would hand over to someone you can't turn out of office a power to decide in favor of the judge's political or philosophical preferences. Tenure is supposed to insulate judges *from* the editorial pages and interest groups, so they can be honest agents of the compromises made by the elected representatives.

But when the close case arises, what does it mean to be an honest agent? For a substantial fraction of the 20th Century, the answer was that the judge should look for the "intent of the legislature". The canonical way to do that was to look at what legislators said—at legislative history. One wag—who happened to serve on the Supreme Court—quipped that the judge would turn to the statute only when the legislative history was unclear. (For those of you wondering, that wag was Felix Frankfurter.) The assumption underlying this model was that intent was the real law, and the enacted text just evidence of intent.

That model has collapsed. It collapsed in part because people came to realize that law is compromise, and compromises lack spirit. Deals are *facts*, and the only thing on which Members of Congress agree with each other, and with the President, is the text. The Constitution specifies how texts are approved, not how intents are delved into. Some members vote for a text because they like it, some because this is part of a logroll with someone else, and some because they dislike it but the alternative is worse. A compromise lacks spirit.

If Congress enacts a rule and commits enforcement to an agency, no judge these days takes the line of *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), and says: "Well, we could get more

enforcement by creating a private right of action too.” If the deal lacks a private right of action, that’s conclusive.

Judges see that laws have both costs and benefits. A private right of action may produce more of the benefit—but at more cost in litigation, and if litigation leads to errors then the costs of errors may be high too. A sensible compromise may be to create a right but limit enforcement to agencies. And *whether* a given compromise is sensible is for the legislature rather than the judge, for it is a political decision.

That understanding knocks out not only the law-as-intent school but also the Hart & Sachs legal-process school in which a judge would try to discern what the legislature was “driving at” and produce a little more of it. These days such arguments bring this reminder from the Justices: “[N]o legislation pursues its purposes 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 simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (emphasis in original). The opinion from which I have quoted was unanimous.

The law-as-intent approach fell not only to questions about democratic legitimacy and practicality, but also to the fact of strategic behavior. Once judges began to rely on legislative history, legislators saw an opportunity to maneuver. They added to the Congressional Record statements never uttered on the floor. One faction (a majority of the majority that controls the staffs) would pad committee reports with assertions that it had been unable to get into the statute itself for lack of majority support. Justices began to see this—and also saw that committee reports were never subjected to a vote on the floor or submitted for veto by the President. Under our Constitution it takes a majority vote (or 2/3 to override a veto)

to create a law. Assertions by committee staffers, however earnest, do not meet that test and so are not law.

Some of you may be bristling at this point. You may know that there is a lively debate on the Supreme Court about legislative history. These days few opinions advert to legislative history, but when they do Justice Scalia protests, and Justices Stevens and Breyer may defend its use.

The nature of this debate, however, is about subjects very different from the way legislative history was used 30 years ago. Today all nine Justices agree that legislative history should be used only when the law is ambiguous, and that only *reliable* legislative history is useful—which is to say, history that reflects *consensus* across party lines, rather than strategic behavior. The upshot is that legislative history has not changed the outcome of one single case for at least a decade, and perhaps longer; when it would affect the outcome, as in *Exxon Mobil v. Allapattah Services*, 545 U.S. 546 (2005), and *Arlington School District v. Murphy*, 126 S. Ct. 2455 (2006), the claim based on legislative history loses.

Some of you may be bristling on a different point. I say that the judicial approach these days is textual, yet you continue to read phrases such as “we must interpret the law to carry out the intent of the legislature.” True enough, but one must not take a figure of speech as if it were an algorithm for decision. Justice Holmes once remarked that these formulaic references to intent are like references to the reasonable person in tort law: they are objective rather than subjective. As Holmes put it, we ask what the legislature meant *by what it enacted* rather than what it meant in the abstract. There was a time during the 20th Century when some judges got confused and thought they were looking for subjective intents, but except on the 9th Circuit that time is over—and decisions of the 9th Circuit don’t fare well in the Supreme Court.

Where then are the points of division? Most statutory cases come out unanimously these days, but not all do. Sometimes the textualists disagree among themselves; so do Justices who the press calls “liberal.” Why so?

One reason is that Justices (and judges at my level) disagree profoundly on what to do if the text points to an “absurd” or at least incongruous outcome. Everyone asserts that laws should be construed to make sense rather than nonsense; that is both a measure of respect to the legislature and of justice for the litigants. Yet what *is* an absurd or incongruous outcome? To state this rule is to invite a judge to reflect private preferences, for laws are not “harsh” or “pointless” in any value-free framework; they seem harsh or pointless by reference to a judge’s beliefs about how things ought to work. From my perspective, this is why a claim of power to revise “harsh” or “pointless” laws elevates the judicial over the legislative branch and must be resisted.

Textualists (and I include myself in this group) limit the anti-absurdity canon to laws that are *linguistic* garbles; if the law parses but the outcome seems harsh, then they must be enforced and the problem referred to the legislative branch. Pragmatists such as Justice Breyer and my colleague Richard Posner think that laws may be deemed absurd when their real-world application is too jarring. This can produce big disagreements. I’ll give an example in a minute.

A second source of disagreement concerns how to fill gaps in statutes. No system of texts is complete. It is always possible to come up with situations that are not covered; and these tend to be litigated, while clear applications of the law don’t come to court or are settled. How do judges handle lacunae? One approach, which I recommended in my capacity as a professor before becoming the bureaucrat that I am today, is that the judge should acknowledge the gap and move on, resolving the dispute some other way—by reference to a different law, or by

judge-made law, or by saying that private ordering will prevail until a new law is enacted.

The opposing position, espoused by distinguished judges such as Learned Hand, Henry Friendly, and Richard Posner, is to ask what the legislature would have done had it considered the issue. This goes by the name “imaginative reconstruction.” It too is a source of disagreement—and again I’ll give an example shortly.

Finally, judges come to disagree when changes in the interpretive system overtake static laws. I’ve mentioned *Borak*, decided in 1964, which implied a private right of action under §14(d) of the Securities Exchange Act. Many decisions between 1960 and 1975 assumed a power freely to enlarge remedies. That power was foresworn in 1975 (the big decision was *Cort v. Ash*, 422 U.S. 66 (1975)). How should the judiciary deal with laws enacted when the legislature might have anticipated freewheeling interpretation? Do we use the approach in force when the statutes were enacted, or today’s? Similarly, judges who turn to dictionaries must choose between dictionaries that were current when the law was enacted, and today’s.

A philosopher of language would describe the problem as one of identifying the appropriate interpretive community. Words don’t have intrinsic meanings, nor (after Wittgenstein) does any student of language believe that we can get traction from speakers’ intents. Language takes its meaning from how the community of users understands the words. But *which* community? The community at the time of enactment, or of interpretation? You can see in this problem the roots of much debate about constitutional law as well. No Justice is today an inventionist in the mold of Justice Douglas, but sitting Justices do strenuously debate whether it is best to apply linguistic conventions of 1789 or 2007 when reading old words.

I’ve promised some illustrations. That’s risky for a judge, who is not supposed to discuss pending litigation. But putting

issues in context is best done by example. To avoid ethical risks, I must take the risk of appearing self-centered. I'll discuss two of my own cases that the Supreme Court has agreed to review this coming Term. The first of these is *Logan v. United States*, 453 F.3d 808 (7th Cir. 2006), and the second is *CBOCS West v. Humphries*, 474 F.3d 387 (7th Cir. 2007).

The issue in *Logan* is whether a misdemeanor under state law counts as a violent felony for purposes of a federal recidivist enhancement to a criminal sentence. Ah, now there's an issue only a lawyer could love! Turns out that federal law defines a "felony" as any conviction for which the maximum sentence exceeds one year, while Wisconsin authorizes up to three years in prison for domestic battery. So the state misdemeanor is a federal felony—unless a person's civil rights have been restored. The federal statute excludes from the definition of "conviction" any offense that "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored ... unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. §921(a)(20).

Now things get interesting. Wisconsin strips felons of their right to vote, hold office, and serve on juries, so at least in principle those rights may be "restored" and the state conviction no longer count for federal purposes. But persons convicted of misdemeanors in Wisconsin do not lose any civil rights, so they can't be restored. This creates the possibility that state misdemeanor convictions will lead to longer terms in federal prison than state felony convictions. Absurd? Jarringly harsh? A statutory omission calling for imaginative reconstruction? You can see what is coming.

This question has arisen in three circuits. The second circuit, per Judge Leval, said that the statute is clear: rights can't be "restored" if they have never been taken away. The first circuit, per Chief Judge Boudin, agreed that this is the natural

reading of the word but added that Congress could not possibly have considered the question at hand, because the result is anomalous. Why treat the less serious state crime as the basis of a longer federal sentence? Some judges might have called the law “absurd,” but Judge Boudin had none of that. He agrees with the textualist position that the absurdity doctrine should be limited to linguistic problems; otherwise the judiciary can assume too much power by waving its hand and declaring “absurdity” whenever the law produces an unpleasant result.

But although the law is not absurd, it also shows no sign of legislative attention to the issues that can arise when a state deems a crime so slight that it does not take away the accused’s civil rights even for a day. How would a sensible legislature have handled such a problem?, Judge Boudin wondered. He was confident that Congress would have equated the situations of persons who never lost their civil rights to those who lost their rights and had them restored. So the first circuit ruled in the defendant’s favor.

Whatever the source of this disagreement, it is *not* political ideology. Judge Leval was appointed by Presidents Carter (to the district court) and Clinton (to the court of appeals); he is usually accounted a liberal. Judge Boudin was appointed by the first President Bush to the district court and then to the court of appeals; he is usually accounted a conservative. But those labels, and whether a judge is “tough on crime,” have nothing to do with the interpretive issues at hand. That’s all to the good.

When the question came to the seventh circuit in *Logan*, we had to decide whether the law as written was “absurd” (as the defendant argued) and, if not, whether it had an omission that could be fixed by imaginative reconstruction. We first held that only linguistic absurdity allows resort to the anti-absurdity canon—for reasons that I have already given—and then refused to use imaginative reconstruction.

Why not follow Hand, Friendly, Posner, and Boudin? Because the genesis of the imaginative-reconstruction approach is in private litigation—contracts rather than public law. In his book on jurisprudence, Judge Posner urges us to treat a statutory gap just like as a garbled command to a secretary (“cancel today’s lunch date with X”, when the calendar shows that the date is with Y), or to a platoon leader (“Go [static]”). Everyone can tell that action is essential, but what action? The secretary or platoon leader had best make a quick choice, and in neither case is literal compliance appropriate.

A good secretary or sergeant avoids empty-headed literalism. We hire agents for their expertise and judgment as well as for their ability to follow orders; good agents know when to deviate from a command in order to achieve more of the principal’s objective. Still, it does not follow that courts ought to treat legislation the way secretaries treat scheduling. Examples concerning secretaries, soldiers, and the like have several things in common: they posit a *single* living principal, a *single* agent, a *single* maximand. None of these hold true when the time comes to interpret statutes.

Statutes are drafted by multiple persons, often with conflicting objectives. There will not be a single objective, and discretionary interpretation favors some members of the winning coalition over others. (Maybe it favors the losers!) An agent’s hands are more closely tied when the principal names a means without having a clear objective. Moreover, the parallel to a private agent such as the secretary supposes an ongoing relationship, one in which discretion by the agent best serves the principal’s current objectives. With legislation, the “principal” is not the sitting Congress but the enacting one (or perhaps the polity as a whole). This brings into play the many rules that tie the hands of those principals—and perforce of their agents, as it is difficult to give a constitutional theory that endows the judiciary with greater legislative discretion than

Congress possesses. Legislators cannot create laws without satisfying constitutional requirements (bicameral approval and the like), plus internal requirements (consideration by committees, and so on). The drafters go out of office and lose the ability to update their decisions; the current legislature may update or be passive (and passivity may stem from still more procedural obstacles rather than agreement with the rules in place).

Still more differences separate the legislature-judge relation from the common principal-agent one. Laws are designed to control the conduct of strangers to the transactions, not just of the judges. Rules must be publicized to be effective (to be “rules of *law*” at all). Addressees need predictability so they may plan—for compliance, for the rearrangement of the rest of their lives. Usually the addressees are not judges. They are businesses or the executive branch of government. They may be hostile to the constraints; their purposes diverge from the legislators’ objectives. If they do not obey, they are not fired (as private agents may be); instead they are brought to court. If addressees must be able to vary the commands in order to fulfil their objectives, then undermining is likely too. Judges too may be hostile to the commands, or may believe that the supporters did not do “enough”. Private agents acting on these views would be discharged; judges have tenure.

My point is simple: an understanding of agency appropriate to one-on-one transactions is not appropriate to the business of writing and implementing statutes. To the extent it is a useful analogy, it shows why the laws’ addressees—private persons or the executive branch—should have discretion in interpretation. It may show, for example, why courts defer to administrative agencies’ interpretation of the

law,¹ and why public officials have immunity from liability in damages. So used, however, this analogy *diminishes* the role of the courts in governance.

There's one final problem with imaginative reconstruction: attempts to replicate something that never happened in Congress are impossible. Legislation doesn't happen in a vacuum. A proposal to add a subsection about state-law misdemeanors may be met with an amendment about abortion, or about building a new post office in some legislator's district, and may fail because there isn't time on the floor. Confident predictions about what Congress "would have done" are very likely to reflect the judge's druthers rather than the actual legislative process.

The recidivist statute at issue in *Logan* illustrates this nicely. Section 922(g)(9) of the criminal code makes it unlawful for anyone "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm that is connected with interstate commerce. This section has a definitional provision corresponding to §921(a)(20). That provision, 18 U.S.C. §921(a)(33)(B)(ii), reads: "A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." This tracks §921(a)(20) in treating expungement, pardon, or restoration of civil rights as canceling all effect of the conviction—but it shows that the "restoration of civil rights"

¹ I expand on this in *Judicial Discretion in Statutory Interpretation*, 57 Ok. L. Rev. 1 (2004).

clause is inapplicable to one whose civil rights were never taken away. For such persons, expungement and pardon are the only ways to regain the right to possess firearms. In other words, when Congress addressed this subject directly, it supported Judge Leval's conclusion, not Judge Boudin's.

What the Court must decide in *Logan* is how far one can get with imaginative reconstruction, if it is to be used at all. It should be an interesting opinion.

Now let me mention *Humphries*—though only briefly, as I want to leave some time for questions. *Humphries* believes that Cracker Barrel, his former employer, fired him because he complained about discrimination. This is, in other words, a suit about retaliatory discharge. Title VII of the Civil Rights Act of 1964 forbids retaliatory discharge. But *Humphries* missed the deadline for filing with the EEOC a charge under Title VII, so he sued under 42 U.S.C. §1981, part of the Civil Rights Act of 1866, which says that black persons have the same right as white persons to make and enforce contracts.

One would think this rule unrelated to retaliatory discharge, a concept unknown in 1866. But there are two complications. First, in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), a decision written by Justice Douglas and so elliptical that Justice Harlan dissented on the ground that he could not discern the holding, the majority appears to have concluded that §1982 of the 1866 Act contains an anti-retaliation requirement. Second, in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the Court held that Title IX of the Education Amendments of 1972—which forbids educational programs that receive federal funds from discriminating on account of sex, 29 U.S.C. §1681(a)—allows the judiciary to define the word “discriminate” in a way that limits retaliatory discharge. One of the majority's main arguments in *Jackson* was that in 1972 Congress likely would have thought, on the basis of decisions such as *Sullivan*, that

any civil-rights statute would be interpreted to forbid retaliation.

What, then, is one to make of §1981? On the one hand, it is right next door to §1982, and it seems odd to update §1982 to late-20th-Century sensibilities about retaliatory discharge while leaving §1981 tethered to the 19th Century. On the other hand, there is nothing anachronistic about treating a 1964 law one way and an 1866 law another; the interpretive communities were vastly different. Reading the 1866 law to occupy ground covered by Title VII doesn't provide employees with full rights so much as it eviscerates a compromise struck in 1964: extra rights came with the cost of a short statute of limitations and a need to exhaust administrative remedies.

Many of you surely will recognize this kind of fight. It has come up under §1981 repeatedly, as plaintiffs try to find ways to sue even after missing the Title VII deadline. One famous decision, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), held that this 1866 law should be given its 1866 meaning; Congress responded in part, via the Civil Rights Act of 1991, by adding to §1981 a provision that *Patterson* held it lacked. That led the third circuit to conclude that *Patterson* had been "overruled" and that §1981 could be read with a modern sensibility; not long ago a unanimous Court held, in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), that the events of 1989 and 1991 show the opposite: that §1981 should be read as its text implies and new developments left to the legislature.

When to bring a law up to date, and when to leave it alone, is before the Court in another case this year, one involving aiding and abetting or accessorial liability under the Securities Exchange Act. The Justices have been inconsistent in securities laws, sometimes updating and sometimes not. And the same is true in civil rights. In *Humphries* my court held that §1981 should be treated as if Justice Douglas continued to command a majority on the Supreme Court (I dissented); while the first

circuit held in an almost identical case, but under the ADEA, that updating is inappropriate. Certiorari has been granted in both of these decisions; I hope that the Justices thrash the problem out, though I fear that they won't. Often the most intractable issues never get settled, because interpretive methods are not fully resolved even for the Justices themselves. But that's what makes my life interesting!

Before I invite questions, some tidbits about the seventh circuit. Judge Kennelly asked me to say a few things about changes on my watch as chief judge.

That can be short, because nothing major has changed. We continue to add features to our web site. We now offer downloads of oral arguments (you can subscribe via iTunes!) and have set up a legal-practice wiki. You know the Wikipedia—contributions from everyone accepted, in the belief that collective wisdom will beat any expert. It is doing very well, so I decided to set up a legal wiki. We started it with the text of the practitioner's guide, which you may edit freely online. Bring it up to date with latest statutes, rules, and decisions. Add other entries about practice and procedure. If you go wrong, someone else will edit your work in turn. It is a great info-aggregation device, and I urge you to try it. Link on our web site.

While surfing the web, check out the AO's site on federal rules, and the Supreme Court's site for its own rules. Standing Committee has published a revision of essentially *all* deadlines in *all* federal rules. No more extensions for periods of 10 days or fewer. Comments by February 2008. Read it or buy malpractice insurance.

You may have read, or read of, the Breyer Committee's report on the handling of complaints under the Judicial Conduct and Disability Act of 1980. Some things you may not know about that procedure. The Act covers judicial *disability* as well as judicial misconduct. All of us age, and sometimes the

aging is not graceful. Illnesses can diminish judicial capacity, and that may imply changes in how many cases a judge handles. I try to keep an ear to the ground, as does our capable circuit executive, Collins Fitzpatrick. But you can help to flag issues that need monitoring. Observations can be relayed to the court anonymously, or through the board of the Seventh Circuit Bar Association. As Chief Judge, I administer the Act for all judges of my court, the district courts, the bankruptcy courts, and the magistrate judges; any helpful information should be sent my way directly or indirectly.

At the Supreme Court, new rules take effect next Monday. The Court follows Fed. R. App. P. 32 in replacing page limits with word limits. More than that, briefs now *must* be in a typeface from Century family—Century, Century Schoolbook, New Century Schoolbook. But if set in Times New Roman, Arial, Helvetica, or Courier New, the petition or brief will be rejected.

The Justices are tired of bad typography, home-brewed by lawyers just because word-processing software allows you to bypass professional printers. Unfortunately, you and your staffs have not gone to printers' school. Desktop publishing does not imply a license to use ugly or inappropriate type and formatting—and I assure you that Times New Roman is utterly inappropriate for long documents despite the fact that it is the default in some word-processing programs. It is designed for narrow columns in newspapers, not for briefs.

You should learn from the Supreme Court and the Solicitor General. Both use Century. Both set briefs and opinions professionally. Both make their products freely available on their web sites, where they serve as models of good form. The Seventh Circuit web site has a style guide plus an article called "Painting with Print" that gives good pointers. No architect would pitch a proposal to a client without professional models

and drawings. Why should lawyers think that their pitches can be physically ugly and hard to read, yet still go over well?

Finally, make sure that you are ready to produce your briefs and motions in Acrobat format. Mandatory e-filing comes to the Supreme Court next Monday, and the Seventh Circuit will convert next year. Today you need to file briefs both electronically and on paper in CA7; it will not be long before *everything* (all motions, all documents of any kind) must be electronic, and paper will no longer be received. Away with those heavy neutrons and protons that make up paper; electrons are so much easier to carry around!

That's all I have for you; questions on either interpretation or the operation of the seventh circuit would be welcome—and those of you who need to make a train, there's no shame in that either.