

## JUDGES AS HONEST AGENTS

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I'm here to defend the proposition that, when implementing statutes, judges should be honest agents of the enacting legislature.

The honest-agent part is not controversial. It isn't just that Hamilton said in *The Federalist* that judges would play this role.<sup>1</sup> It is that faithful application of statutes is part of our heritage from the United Kingdom, and thus what the phrase "the judicial Power" in Article III means.

Constitutional structure tells us the same thing. The President must take care that the laws be *faithfully* executed. Judges, who are not elected, cannot have a power to depart from faithful implementation, when the elected officials are lashed to the statute. It would be insane to give revisionary powers to people you can't turn out of office. The trade in Article III is simple: Judges get tenure in exchange for promising to carry out federal laws. Tenure is designed to make judges more faithful to statutes, rather than to liberate them from statutes. It liberates them from today's public opinion, so that they can be faithful to yesterday's rules (whether in the Constitution or in the United States Code).

So the real question at hand is the second part of the proposition: must the judge be faithful to the *enacting* legislature or instead to the sitting one, as Professor Eskridge argues?<sup>2</sup> Or perhaps should the judge be more faithful to later-enacted statutes, and treat earlier ones as if they were part of the common rather than the statutory law? That's the position Judge Calabresi took in 1982,<sup>3</sup> although he spoke as a professor and perhaps has come to see matters otherwise after joining the bench.

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1. See THE FEDERALIST NO. 78 (Alexander Hamilton).

2. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

3. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

I think that the judge must carry out the policy created by the enacting Congress, even if later laws are in tension with the older ones, and even if the judge is convinced that the sitting Congress would amend the law were it to visit the subject anew. I have three principal reasons.<sup>4</sup>

*First*, our Constitution makes certain procedures essential to enacting law. Congress must act by majority vote. Both Houses must enact the same text during the same Congress. And the President must give assent unless two-thirds of each House votes to override a veto. The terms of political officials are limited to two, four, or six years, after which they must face the people. A judge cannot conceive of legislators as homunculi who have perpetual tenure and always can revise their work. Only what officials do *during their terms* counts as law—and then only to the extent that what they do *meets the forms of bicameral and presidential agreement*. An opinion poll of legislators is not law, because it does not satisfy the forms, even if the judge is sure that the poll reflects what legislators favor. And thus only the actual work of an actual enacting legislature counts. That legislators serving at different times produce different rules is an attribute of a democratic system, not an objection to it or a reason for judges to become legal entrepreneurs.

The Supreme Court made this point in *West Virginia University Hospitals, Inc. v. Casey*.<sup>5</sup> Plaintiffs won a civil rights suit and asked the court to award them not only attorneys' fees, but also the fees they paid to expert witnesses. Although the statute, enacted in 1871, covers only attorneys' fees, more recent statutes allow the award of expert fees too. The winner expressed confidence that, if Congress considered the issue either in 1871 or today, it would include expert fees. But the Justices thought the exercise illegitimate—not wrong in the sense that the litigant had misunderstood the likely behavior of the legislative

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4. I develop these reasons elsewhere at greater length. See, e.g., Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

5. 499 U.S. 83 (1991).

branch, but wrong in the sense that judges are not authorized to engage in the exercise. Here's what the Court said:

This argument profoundly mistakes our role. Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional "forgetfulness" cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the *better* disposition. But that is not for judges to prescribe. We thus reject this last argument for the same reason that Justice Brandeis, writing for the Court, once rejected a similar (though less explicit) argument by the United States: "[The statute's] language is plain and unambiguous. What the Government asks 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. To supply omissions transcends the judicial function."<sup>6</sup>

In a footnote to this paragraph, the Court added:

[The litigants] at least ask[] us to guess the preferences of the *enacting* Congress. Justice Stevens apparently believes our role is to guess the desires of the *present* Congress, or of Congresses yet to be. "Only time will tell," he says, "whether the Court, with its literal reading of § 1988, has correctly interpreted the will of Congress." The implication is that today's holding will be proved wrong if Congress amends the law to

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6. *Id.* at 100–01 (alteration in original) (citations omitted).

conform with his dissent. We think not. The “will of Congress” we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment. Otherwise, we would speak not of “interpreting” the law but of “intuiting” or “predicting” it. Our role is to say what the law, as hitherto enacted, *is*; not to forecast what the law, as amended, *will be*.<sup>7</sup>

*Second*, limiting interpretation to the work of the enacting Congress honors the reality that laws are enacted as packages. Arguments that today’s Congress would do X or Y or Z with a given issue suppose that the legislature will act on *just that issue*, and that an opinion poll (or the report of the majority party’s whip) tells us what outcome a majority favors on that issue. But if proposal Z has widespread support, someone will add an amendment about a contentious subject in order to help a less-favored proposal move. Think of the anti-abortion clause that was tied to the proposal that eventually became the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: the clause tied the bill in knots for years and almost led to its defeat.<sup>8</sup> Suddenly things are not so clear in the legislature.

The Civil Rights Act of 1991 is another example. This statute changed several provisions in civil rights laws that the Court had construed favorably to employers,<sup>9</sup> and that Justices in dissent were sure the legislature would overturn.<sup>10</sup> But it *also* changed some decisions that had favored plaintiffs (such as *Albemarle Paper*, which had allowed differential validation of employment tests<sup>11</sup>), and it set caps on damages awards. The pro-worker provisions could not have passed without the pro-employer provisions. Any attempt by the judges to discern what Congress would have done on one issue, standing alone, would have misunderstood how legislation works, as well as bypassed the Constitution’s forms for lawmaking.

*Third*, judicial attempts to predict what Congress will do come croppers more often than not. My favorite example is *Ill-*

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7. *Id.* at 101 n.7 (citations omitted).

8. See William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 169–171.

9. See Theodore McMillian, *The Civil Rights Act of 1991—One Step Forward on a Long Road*, 22 STETSON L. REV. 69, 69 (1992).

10. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 671–72 (1989) (Stevens, J., dissenting).

11. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

*nois Brick Co. v. Illinois*,<sup>12</sup> which held that only direct purchasers may sue under the antitrust laws. So if steel makers conspire, the right plaintiffs are the immediate buyers, such as auto manufacturers, rather than consumers who buy cars that contain steel. In his dissent, Justice Brennan predicted that *Illinois Brick* would be short-lived, because Congress was sure to allow indirect-purchaser suits.<sup>13</sup> Like Justice Stevens in *Casey*,<sup>14</sup> he called on his colleagues to recognize that political reality and to interpret the law to allow these suits without all the fuss and muss of getting the amendment through Congress.<sup>15</sup> The majority was unpersuaded. Here we are thirty-three years later, and Congress has not allowed suits by indirect purchasers, despite persistent proposals.

Judges may be bad at understanding what can be enacted, but they are good at understanding their own views of wise policy. When a judge says “I’m confident that today’s Congress will enact X,” what this really means is “I favor X.” But a judge’s preference for X is a bad reason to declare that X is the law. Again we must remember that our Constitution’s design is to keep policymakers on short temporal leashes. Judges don’t stand for election, and it follows that they can’t adopt their own legislative proposals.

What I have said about using the sitting Congress as the basis for interpreting older statutes also goes for the method of imaginative reconstruction—that is, asking what the enacting congress would have done about something, had it thought about the topic. Such an approach ignores the package-deal nature of legislation. And if judges are bad at predicting what *today’s* Congress would do about a topic, think how awful they

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12. 431 U.S. 720 (1977).

13. See *id.* at 758 (Brennan, J., dissenting) (“The Court’s tortuous efforts to impose a ‘consistency’ upon this area of the law that Congress has so clearly rejected is a return to the ‘legal somersaults and twistings and turnings’ of the Court’s earlier opinions that ultimately led to the passage of the Clayton Act in 1914 to salvage the ailing Sherman Act.”).

14. See *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) (“In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress’ actual purpose and require it ‘to take the time to revisit the matter’ and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error.” (citation omitted)).

15. See *Illinois Brick*, 431 U.S. at 758 (Brennan, J., dissenting).

would be at estimating how people who died fifty years ago would have handled a topic.

My example is *Logan v. United States*.<sup>16</sup> The issue was 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! Federal law defines a "felony" as any conviction for which the maximum sentence exceeds one year,<sup>17</sup> while Wisconsin authorized up to three years in prison for domestic battery at the time.<sup>18</sup> 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."<sup>19</sup>

Now things get interesting. Wisconsin strips felons of their right to hold office, vote, and serve on juries,<sup>20</sup> so at least in principle those rights may be "restored" and the state conviction no longer count as a felony for federal purposes. But persons convicted of misdemeanors in Wisconsin do not lose any civil rights,<sup>21</sup> 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.

The Second Circuit said that the statute is clear: rights cannot be "restored" if they have never been taken away.<sup>22</sup> The First Circuit agreed that this is the natural reading of the word but added that Congress could not possibly have considered the

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16. 453 F.3d 804 (7th Cir. 2006), *aff'd*, 552 U.S. 23 (2007).

17. 18 U.S.C. § 922(g)(1) (2006).

18. In the Supreme Court's opinion affirming the Seventh Circuit, the Court explained that "[u]nder Wisconsin law, misdemeanor battery is ordinarily punishable by a maximum term of nine months. See Wis. Stat. § 940.19(1) (2005); § 939.51(3). Logan was exposed to a three-year maximum term for each offense, however, because he was convicted as a 'repeater' or 'habitual' criminal." *Logan*, 552 U.S. at 29 n.2 (citations omitted).

19. 18 U.S.C. § 921(a)(20) (2006).

20. WIS. CONST. art. XIII, § 3, cl. 2; WIS. STAT. § 6.03(1)(b) (Supp. 2006); WIS. STAT. § 756.02 (2001).

21. *Logan*, 552 U.S. at 31.

22. See *McGrath v. United States*, 60 F.3d 1005, 1006–08 (2d Cir. 1995).

question at hand, because the result is weird.<sup>23</sup> Why treat the less serious state crime as the basis of a longer federal sentence? Some judges might have called the law “absurd,” but the First Circuit had none of that. It agreed 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, the First Circuit wondered. It 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.

When the question came to the Seventh Circuit in *Logan*, we disagreed with the First Circuit, 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 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].”).<sup>24</sup> 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.

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23. See *United States v. Indelicato*, 97 F.3d 627, 629–31 (1st Cir. 1996).

24. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 268–69 (1990).

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 relation, 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 situation 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 fulfill 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. And *Logan* also illustrates the judicial difficulty in understanding what kind of proposals Congress actually enacts.

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.<sup>25</sup> This Section has a definitional provision corresponding to Section 921(a)(20). That provision, Section 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.<sup>26</sup>

This provision tracks Section 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” 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 the Second Circuit’s conclusion, not the First Circuit’s.

So *Logan* posed some fascinating issues. Unfortunately, the Supreme Court did not address any of them. It affirmed my decision in an opinion stating that the statute had an obvious meaning and must be enforced as written. Perhaps this statement shows the Court’s impatience with scholarly debate; the comforting thing is that it also shows reluctance to engage in the imaginative-reconstruction exercise.

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25. 18 U.S.C. § 922(g)(9) (2006).

26. 18 U.S.C. § 921(a)(33)(B)(ii) (2006).