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Guido Calabresi *Alan Brownstein* *Michael W. McConnell*
Frank H. Easterbrook *Ira C. Lupu* *Michael B. Mukasey*

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RECENT DEVELOPMENTS

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PREFACE

The *Journal* is proud to publish several panels from this year's Federalist Society National Lawyers Convention. The Annual Rosenkranz Debate features Judges Guido Calabresi and Frank Easterbrook discussing whether the Constitution requires federal courts to interpret statutes as honest agents of the enacting congress. Professors Alan Brownstein, Ira Lupu, and Michael McConnell each present their views on religious liberties and the limits of government power. Finally, former Attorney General Michael Mukasey addresses several aspects of the Obama Administration's homeland security policy.

Drawing on the Constitution, *The Federalist*, and, in a novel move, the Official Rules of the NFL, Judge Diarmuid O'Scannlain discusses the Article III limitations on the judicial power. Arguing that a federal judge should have no more discretion than a football referee, Judge O'Scannlain applies his analogy to several cases from the Ninth Circuit. Professor John Breen expounds the metaphysical foundations of Pope Benedict's recent encyclical addressing the economic crisis, *Caritas in Veritate*. Richard Ré, an up-and-coming scholar, evaluates the possibility that a shifting democratic consensus may be able to overturn *Kennedy v. Louisiana*'s reliance on indicia of popular opinion while striking down the death penalty for child rapists. Mr. Victor Schwartz and Mr. Christopher Appel embrace the new rational pleading standard for federal civil litigation as set forth in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, arguing that it provides a much needed filter of frivolous claims in an era of complex modern civil litigation. Finally, Professor Gerard Bradley provides a thoughtful critique of *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* and its dismissal of the role of the family in criminal law.

And so concludes Volume 33. I would like to thank all the third-year students who worked on the *Journal*. Their work ethic and devotion served as an invaluable inspiration to the underclassmen. James Schuelke and Madison Kitchens compiled a wonderful selection of articles. Seth Chadwell and Sam Gedge oversaw an impressive student writing program that produced extraordinary scholarship. Deputy Managing Editors Kathy DeAngelo and Jim Schultz have performed the most tedious and grueling work on the *Journal* while demonstrating admirable grace and dedication. David Derusha and David Duncan were outstanding. I could not have asked for better Managing Editors. And finally, the Oates to my Hall, Daniel Thies—one could not find a finer gentleman and scholar.

I am honored to have served the *Journal* this year and to have provided legal academia with a forum for conservative and libertarian legal scholarship. I leave you with a quote from my fellow Texan Sam Houston: "The benefits of education and of useful knowledge, generally diffused through a community, are essential to the preservation of a free government."

LeElle B. Krompass
Editor-in-Chief

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BEING HONEST ABOUT BEING HONEST AGENTS

GUIDO CALABRESI*

Let me begin by saying that I am completely in favor of the proposition as stated: that judges should be the honest agents of the enacting legislature. In saying this, I first want to make a distinction between interpretation and construction. Construction is not the same thing as interpretation. Historically in our judicial system, judges have had the power to construe. Whether they should have such power and whether they should only use that power when it is delegated to them by the legislature are interesting and difficult questions.

I. CONSTRUCTION

Let us look at some situations where, traditionally, construction has been employed.

A. Constructing Statutes to Avoid Constitutional Questions

Judges have historically used construction to avoid constitutional questions and thus to avoid over-constitutionalizing the law. Doing this is not interpretation because it does not look primarily to the legislature. It is dishonest to call that kind of construction interpretation. And yet it has been done.

B. To Require a Second Look

Throughout the nineteenth century, statutes in derogation of the common law were supposedly read "literally." In fact this did not mean a literal reading, but rather one that made the statute consistent with the prior common law.[1] That was not interpretation. It was mangling statutes so that legislatures would not make radical changes in the law. It stopped happen-

* Senior Judge, United States Court of Appeals for the Second Circuit; Sterling Professor Emeritus of Law and Professional Lecturer in Law, Yale Law School.

1. Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908).

ing at the end of the nineteenth century because Roscoe Pound and the Left noticed that judges, who by nature are conservative, used the approach to keep things as they were, and attacked it.[2] Was this type of construction good? I do not know, but it was done.

C. To Update

Updating obsolete statutes is much more problematic. But consider an analogous approach espoused by Robert Bork. In his great work on antitrust,[3] which was influenced by Alexander Bickel, Bork acknowledged the incompatible goals, frequently ascribed to the antitrust laws, of protecting both competition and competitors.[4] Although he ultimately concluded that "[t]he Sherman Act was clearly presented and debated as a consumer welfare prescription," he did concede that in passing subsequent antitrust legislation, "Congress mentioned a variety of values besides consumer welfare and apparently never recognized or discussed the possibility of a conflict of values."[5] Perhaps foreseeing the forthcoming wave of criticism regarding his reading of legislative intent as focused on consumer welfare,[6] Bork acknowledged that the goals of antitrust policy are not "determined entirely by the intentions of Congress"[7] and proposed an "equally important . . . independent, and usually overlooked . . . factor: the responsibility of the courts for the integrity of the law and the lawmaking process."[8] Bork concluded that "the requirements of proper judicial behavior," among other things, support the case for "judicial adherence to the single goal of consumer welfare in the interpretation of antitrust laws."[9] And from that followed all of his great work on antitrust.

Was Bork's idea that consideration of "the responsibility of courts for the integrity of the law" should influence judicial

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2. *See id.* at 402–03.

3. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

4. *Id.* at 3–49, 50.

5. *Id.* at 66.

6. *See* Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 905 n.150 (2000) (noting that "[t]he statutory basis for a total welfare standard has been almost universally rejected by antitrust scholars").

7. BORK, *supra* note 3, at 72.

8. *Id.*

9. *Id.* at 89.

construction of the antitrust statutes a good one? I am not sure. But if judges are to take such considerations into account, it is worth thinking about whether, in those situations, one wants judges to acknowledge what they are doing.

Brother Easterbrook says that it is insane to give that kind of power to people who cannot be turned out of office.[10] It may be insane, but it happened at the beginning of our country, in every single state. What do I mean? Judges have the power to construe the common law. Everyone knows that. The common law is different. But where did judges get that power? The common law of England did not just come over on its own. When we declared independence, there was no common law of the United States. Every one of the states, some by legislation, some, like New York,[11] in their constitutions, enacted the common law of England and delegated to the courts the power to update it according to common law methods.[12]

In other words, the whole of the common law in the United States is statutory. It is enacted by statute with powers delegated to the courts. Courts—unelected as well as elected ones—were given the power, using the common law method, to construe the common law, to update it, to do all the things that law students in their first-term torts classes and contract classes learn that courts do. Now again, does that mean that courts can do the same as to statutes for which they have not been delegated that power? No. I am only saying that delegating that power, in some circumstances, is not insane, nor is it unconstitutional.[13]

II. INTERPRETATION

Let us shift from construction, which may or may not be allowed but which should not be excluded without thought, to interpretation.

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10. Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 915 (2010).

11. N.Y. CONST. of 1777, art. XXXV.

12. BLACK'S LAW DICTIONARY 313 (9th ed. 2009).

13. This position—that courts do not have this power unless it is delegated to them and that delegating it to them is, under some circumstances, both sane and constitutional—is the central theme of my book *A Common Law for the Age of Statutes*. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

A. Context

Interpretation, in my view, should always be backward-looking. Interpretation requires one to be an honest agent. Judges are interpreters of the enacting legislature. A judge should try to find what the legislators intended, but that is often impossible. Just saying this points out the difficulty of the task because there are any number of different things legislators said and did not say.

If it is often impossible to know the intent of the legislators, what does it mean to be an honest agent? One starts with language, but language is itself meaningless outside of context. We do not need Wittgenstein to tell us that.[14]

There are people like the critical legal theorists,[15] and people like Judge Richard Posner—who is simply a critical legal theorist of the Right[16]—who say that courts can do anything they want because language does not tell us anything. That is nonsense. Language is important; it limits courts a great deal. To say either that language does not mean anything, or that it tells us exactly what everything means, is baloney. The truth lies somewhere in between. Text means language in context.

I once convinced a judge in a tax case (she happened to be a great, great bridge player, and she also loved to play touch football) that the phrase, "you should have passed, dummy," means something rather different at the bridge table than at halftime in the Super Bowl. By that I meant that judges have to read statutes in the context in which they were enacted.

Language is helpful, but language can also be misleading because it changes in meaning. The word "substance"—as in, something is of substance—originally meant that which lay beneath—*substantia*.[17] It meant *spirit*. It came to mean *that which is important*, because spirit was important. As we became more ma-

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14. *See* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 51 (C.K. Ogden trans., Routledge & Kegan Paul Ltd. 1981) (1922).

15. *See, e.g.*, Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 187–88 (1984).

16. *See, e.g.*, Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 187 (1984) (arguing that "there is no such thing as deduction from a text" and that even seemingly clear text must always be interpreted).

17. OXFORD LATIN DICTIONARY 1851 (P.G.W. Glare ed., 1996).

terialistic, it came to mean *matter* or *that which matters*.[18] Today, "substance" means the opposite of what it originally meant. What do you do with language that changes its meaning? For this reason too we must look at text first, but also look at context.

What of legislative history? We all know that legislative history can be fraudulent. That is one of the many things that Justice Scalia has taught us.[19] But that does not mean it is useless. To what does one look if one wants to find out what a legislature really intended? I am immensely skeptical of legislative history. I am also immensely skeptical of some of the words that get thrown into the statutory text. I start with words, I look at context, and I try to see what the words were designed to mean. And this, by the way, has been the way judges and scholars have described the process from the earliest days of our legal system.

Samuel von Puffendorf gave an example that William Blackstone[20]—the single greatest influence on our Framers—picked up, and that has been cited over the centuries.[21] In Bologna, there were many brawls and duels. Bologna passed a statute that said: You shall not shed blood on the streets, punishable by hanging, drawing and quartering, or other such things. Now imagine Judge Easterbrook walks down the street of Bologna and collapses. The good Dr. Giovanni Manning comes by, and according to proper medical practice of the time, bleeds him. There is blood in the street. Meyer the Cop arrests the doctor and says, "you shall not shed blood on the streets." The courts in Bologna are said to have held such an arrest to be invalid because that was not what "shedding blood on the streets" meant. It was not the "mischief" (a word English courts in the eighteenth and nineteenth centuries commonly used when interpreting statutory text) to which the statute was addressed.[22]

What happens if the legislators that had enacted the statute had not thought about the issue before the court? It is difficult to say what they would have done had they thought about it. Sometimes one has a pretty good idea; sometimes one does not.

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18. BLACK'S LAW DICTIONARY 1565 (9th ed. 2009).

19. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).

20. 1 WILLIAM BLACKSTONE, COMMENTARIES *59–60.

21. *E.g.*, Ross v. Hartman, 139 F.2d 14, 15–16 n.10 (D.C. Cir. 1943).

22. *E.g.*, Gorris v. Scott, (1874) 9 L.R. Exch. 125, 125.

And as always, honesty is crucial. But it gets even more complicated. There are some people who say it is not just what they would have done at the time had they thought about it. Rather, it is what people who thought about things as the legislators did would have done about it had they thought about the issue in terms of today's society.[23] So, it does not really matter that Lincoln gave segregationist speeches because if one views Lincoln in the context of his society, and then asks what he meant or would mean in today's society, the answer is that he would have been an integrationist. This methodology is appealing because it may well tell us something about what a law actually was intended to do at the time it was enacted. But it is a problem because it is putting Lincoln in a Speedo, or Washington in cut-off jeans. How far can one go with that? All of these methodologies have problems.

B. Honesty

The ultimate question is whether judges are going to be honest agents when interpreting statutes. Honesty is the beginning and the end. Judges can be dishonest with language. But judges can be dishonest with any of these methodologies. Given that judges may well be dangerous and not to be trusted, what should one do? Although if I were a conservative (and I think I am), I, on the whole, would trust judges more than legislators to be conservative in the true sense of the word. Compare the conservative tradition of believing judges capable of being honest, which is Burke,[24] Bork,[25] and Bickel,[26] with the radical reformer Bentham,[27] who trusted only legislators.[28]

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23. *See* SCALIA, *supra* note 19, at 22 (arguing that judges should not interpret statutes in light of what they ought to mean today).

24. *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 25–26 (1975) (describing Burke's views).

25. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 251–69 (1990).

26. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986); BICKEL, *supra* note 24, at 25–30.

27. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 13, 14 n.1 (Clarendon Press 1907) (1789).

28. One should not be too spooked by Earl Warren. He was an aberration. When I was writing *A Common Law for the Age of Statutes*, Bob Cover—truly a wonderful lefty—said to me: You are crazy; you are giving the right wing all the power in the world by suggesting that judges, who are almost always from the right, might be able to update statutes.

Judges ought to try to do these things honestly. The alternative is to do what Judge Easterbrook argues for,[29] which amounts to tying oneself to something that has no particular meaning because one does not trust anybody. A good analogy is the use of the gold standard as a monetary policy. The gold standard has caused the worst inflations and the worst depressions in history. It does, however, have the advantage that it is mindless. Does this make it more desirable than a monetary policy that attempts to determine the money supply according to the state of the economy? Those who do not trust human beings at all prefer a mindless standard like the gold standard. They reason that, bad as it is, it is less bad than giving control of the money supply to people who do their best to be honest but may fail.

Tying oneself simply to words—which change their meaning, which do not have meaning out of context, and which ultimately have nothing to say by themselves—as necessarily being what the enacting legislature actually meant, is tying oneself to a gold standard. Such an approach has little to do with trying to determine legislative intent. It has little to do with being "honest agents." And there is an additional problem with this kind of literalism. Because words can be manipulated by judges, tying oneself to words may be like adopting a gold standard when only a few people own all the gold mines. It is giving power to judges who can say, "these words mean this," simply because they are willing to be dishonest and want a particular result. A willful judge can just as easily say "*X* means *Y*" as say what Lincoln in cut-off jeans or in a Speedo would have intended.

29. Easterbrook, *supra* note 10, at 916.

JUDGES AS HONEST AGENTS

FRANK H. EASTERBROOK*

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.[1] 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?[2] 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,[3] although he spoke as a professor and perhaps has come to see matters otherwise after joining the bench.

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* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago.

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.[4]

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*.[5] 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

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).