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# The Injustice of Dynamic Statutory Interpretation

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**The Injustice of Dynamic Statutory Interpretation,**  
by Anthony D'Amato,\* 64 U. of Cin. L. Rev. 911-935, Spring, 1996

**Abstract:** How can we possibly plan our lives on the basis of the law of tomorrow when we can't predict what that law will be? Are courts that are attracted to dynamic statutory interpretation teaching us that we can no longer know and rely on the rule of law in our daily lives because months or years later they can use policy considerations to make new law and apply that law retroactively to us? Doesn't dynamic statutory interpretation amount to unconstitutional ex post facto legislation? Hasn't justice become impossible to get from courts if judges insist on upsetting both sides' expectations of what law was when their case or controversy arose, and instead pull the rug out from under their feet with new law based on the judges' own idea of general social and governmental policy? Isn't this just a case of judges appropriating the rights of the parties, without compensation, in order to announce new social legislation? Isn't this the very definition of injustice?

**Tags:** judicial interpretation, legislative intent, statutory interpretation, retroactive powers, separation of powers, pushme-pullyou argument

[pg911]\*\* Last summer I was sorting books in the basement when I came across some notes dated 1972, a time when I was teaching Constitutional Law for a living. They were the class notes of one of my students. I remembered that I had asked a student who had been taking copious notes in class if I could copy her notes for possible future use in my teaching. As things turned out, I never did consult those notes. So now as I looked through them it was like opening a window on a forgotten past. The notes revealed that nearly every question I asked in class had the word "policy" in it. "What's the policy behind this statute? Did the court's decision advance congressional policy?" I was embarrassed. Was I actually teaching this crazy stuff back in 1972? The evidence of the student's notes said: guilty.

Since that time I have totally discarded anything resembling policy analysis. But because I discarded it piecemeal over many years, it was not until I read those notes that I realized how complete a mental revolution I had gone through.

A couple of months ago when I received the invitation and honor to deliver this year's Robert S. Marx Lecture at the University of Cincinnati College of Law, I thought it would be a good idea to sort out the reasons why my younger self got it so wrong back when I was teaching Constitutional Law. Was it because the policy approach seemed new and different, compared to other courses in the curriculum? In those days Constitutional Law was not an important course; the law school curriculum was dominated by courses in private law. The public-law courses were a discrete and insular minority. Then in the mid-70s as I turned to other subjects, public law began a long and extraordinary rise to the prominence that it enjoys today. In my more solipsistic moments I believe that the public-law folks were just waiting for me to drop out before expanding the field.

[pg912] Even as I was discarding policy analysis, the public-law scholars were busy enhancing it into a rule of decision for courts. In this Lecture I will not only try to explain why my younger self was so misguided, but I will go on to contend that the public-law theory of "dynamic statutory interpretation" is worse than misguided—it is unjust.

I want to start by offering for your consideration two arguments to support the thesis that policy should have absolutely nothing to do with judicial interpretation of statutes. These arguments can be labeled, first, the "separation of powers" argument, which derives from the Constitution of the United States, and second, the "pushme-pullyou" argument, which derives from the motion picture *Dr. Doolittle*.

## I. THE SEPARATION OF POWERS ARGUMENT

The bottom line of my separation of powers argument is the following: a judge is not a legislator. I will argue that, under the Constitution, the roles of judging and legislating are distinct. Underlying this argument is a functional difference that I will not spell out in this Lecture, but simply remind you of now. Legislators look forward and make general prescriptions, whereas judges look backward and decide specific cases. A legislator prescribes rules for deciding future imagined disputes; a judge finds the law that was in existence in the past when an actual dispute arose.

The Constitution goes to considerable lengths to separate the legislative from the judicial power. The first sentence of the body of the Constitution vests all legislative power in Congress. Article I Section 7 gives Congress power to enact legislation either with the President's consent or over the President's veto. And there is extra insurance in Article I to stop Congress from taking on any quasi-judicial powers: the clause in Section 9 prohibiting *ex post facto laws* and bills of attainder. Later the Constitution vests the judicial power in the Supreme Court and other federal courts. Article III is replete with the limiting words "cases" and "controversies"—insurance against any tendency of courts to take on quasi-legislative powers.

Yet the main way that the Framers separated the legislature from the judiciary was to provide that members of Congress have to stand for election, whereas judges are insulated from the political process. Because Congress was capable of creating a lot of mischief in making up new laws, it was important to place a check on runaway lawmaking by holding over the heads of Congresspersons the threat of being voted out of office at the next election. The Framers saw no need to make judges politically accountable because judges have no business [pg913] making new law.FN1

But despite these constitutional checks and separations, the Supreme Court in recent years has taken on a legislative role in the way it interprets statutes. Let me pick one case out of many as an example. *School Board v. Arline* FN2 decided in 1987 is, I believe, rather typical of recent Supreme Court interpretive practice. Justice Brennan's opinion for the Court's seven to two majority begins by saying that "this case presents the question whether a person afflicted with tuberculosis, a contagious disease, may be considered a 'handicapped person' within the meaning" of the Rehabilitation Act of 1973.

Briefly, the facts are as follows: Nine years before Ms. Gene Arline took a job teaching elementary school in Nassau County, Florida, she was hospitalized for tuberculosis. Her disease went into a twenty year remission. She began teaching and then, eleven years into her employment, she suffered a relapse of tuberculosis and had two additional relapses over the next two years. The school board was afraid that she would infect the children, so they suspended her with pay and then discharged her at the end of the school year.

Ms. Arline claimed that she was wrongfully discharged because she was a handicapped person within the meaning of the Rehabilitation Act. The Act protects an "otherwise qualified handicapped individual" against discrimination or job termination "solely by reason of his handicap."

The courts below as well as the Supreme Court found that Gene Arline was suffering from a handicap. But was it a handicap within the meaning of the Rehabilitation Act? Did the statute intend to keep persons on the job who have contagious and life-threatening diseases? Justice Brennan found that the "basic purpose" of the Rehabilitation Act was "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." As an example, he plucked from the legislative history a case where a cerebral palsied child was excluded from public school because his teacher claimed that his physical appearance "produced a nauseating effect" on his classmates. Then Justice Brennan said, as to Gene Arline, "Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness." He held that Gene Arline [pg914] indeed was a handicapped individual within the meaning of the Rehabilitation Act.

Now let me pause for a moment to disclose my own position on the matter of handicapped persons. I've served for many years on the board of directors of a not-for-profit Institute for Prosthetics. I like the idea of reserved parking places for handicapped persons, and I like the lightness of spirit exemplified in the recent movie that showed a large handicapped parking symbol painted on the deck of an aircraft carrier. I think that the Rehabilitation Act of 1973 was an enlightened form of legislation, helping to educate the public about living and working with handicapped persons. As long as the school child with cerebral palsy was not a physical threat to his classmates and was academically competitive, I think it is part of his classmates' education that they should see him and work with him. If that nauseates them, I feel confident that they will get over it in time and accept the child for the human being that he is. Finally, I feel very sorry for Gene Arline.

But I think there's a substantial difference between the psychological reaction of the classmates of the boy who had cerebral palsy—a reaction that can be overcome with the passage of time—and the quite proper reaction of the Nassau County school board speaking on behalf of the schoolchildren in Gene Arline's class. Ms. Arline's students were in actual danger of contracting tuberculosis. They will not overcome their fear of getting this life-threatening disease with the passage of time; rather, the risk increases with the passage of time. I do not believe that the school board was discriminating against Gene Arline because of her handicap. In fact they allowed her to continue to teach after the first two of her three relapses. I think the board was simply trying to protect the schoolchildren from being infected with tuberculosis.

I'm sure that the Supreme Court had no wish to send a carrier of a contagious disease back to the classroom. Justice Brennan went out of his way to hedge against the possibility of his opinion being construed that way. He leaned very heavily on the opening language of the Rehabilitation Act that I quoted earlier, the phrase "an otherwise qualified handicapped individual." Although he had just found that Ms. Arline was a handicapped individual within the meaning of the Act, he remanded the case to the district court to determine whether she was "otherwise qualified" to hold her teaching job. He quoted with approval an amicus brief presented by the American Medical Association arguing that an inquiry into whether a person with a contagious disease is "otherwise qualified"

to hold a job would have to include findings of how the disease is transmitted, how long the carrier is infectious, the severity of the risk, and the probability that the disease will [pg915] be transmitted.

It is hard to know what Justice Brennan had in mind, given the Court's focus on the issue whether a person handicapped by a contagious disease is "otherwise qualified" to teach elementary school. On remand, the district court found, as we would suspect, that Gene Arline was qualified to perform the essential functions of her teaching job in spite of the handicap.FN3 It was only the contagious nature of her disease that led to her job termination, and not her inability to teach.

But now comes the hard part. What should the district court do? Should it send someone with a deadly communicable disease back to the classroom? Or should it find that a person with a communicable disease is not "otherwise qualified" to teach? The trouble with the latter idea is that that is exactly what the district court found the first time around, before the case went up to the Supreme Court. When the district court first got the case, it held that although Gene Arline suffers a handicap, she is not a "handicapped person under the terms of the statute." Second, the district court said that "even assuming" that a person with a contagious disease could be deemed a handicapped person, such a person is not "otherwise qualified" to teach elementary school. So why would the Supreme Court reverse the district court and remand the case to the district court just so the district court could come up with exactly the same finding that it came up with the first time around, namely, that a person with a contagious disease is not "otherwise qualified" to teach?

The district court was faced with a logical dilemma. The only way it could escape from it in light of the Supreme Court's schizophrenic opinion was to find that, after all, Gene Arline did not have a contagious disease. And that's what the court found, after reviewing the scientific evidence.

The evidence in the case on remand was that a culture taken from Gene Arline in March 1978 tested positive with over one hundred colonies of tuberculosis. She was given extra medication, and in November of that year another culture was taken that tested positive with only one colony of tuberculosis. Subsequent tests came up negative. In addition, there was testimony that Ms. Arline lived in close proximity with her husband and two sons all through this period, and none of them contracted the disease. The district court concluded that Gene Arline "posed no threat of communicating tuberculosis to the schoolchildren she was teaching." Even when she tested positive in 1978, the court said, "the probability that she would transmit tuberculosis to [pg916] anyone was so extremely small as not to exist."

Now if I had a child in that class, I would not have had much confidence in the intellectual integrity of a court that tells me that a very low probability of my child contracting tuberculosis is precisely the same thing as no probability at all. I would say that the court was playing games with the life of my child. And I imagine that the Nassau County School Board argued the same thing to the court, because at the end of its opinion the court went out of its way to give the school board the choice of either reinstating Ms. Arline or paying her the present value of what she would earn from now to the time of her retirement, which is \$768,724.

So where does all of this leave the state of the law? I would say, in a state of total indeterminacy with respect to the question the Supreme Court asked, which was whether a person handicapped with a contagious life-threatening disease was an "otherwise qualified handicapped person"

within the meaning of the Rehabilitation Act of 1973. But the impact of the Supreme Court's decision on the world of practice is very real indeed. By chopping in half the phrase "otherwise qualified handicapped individual" and instructing the world that the first question is whether a person with a contagious life-threatening disease is a "handicapped individual," and then leaving the second half of the question to be determined by the trial courts, the Supreme Court accomplished two things. First, it significantly enlarged the scope of coverage of the Rehabilitation Act. Second, it provided people who have contagious life-threatening diseases with a new rent-seeking opportunity: to go to their employers and say that they will either stay on the job and infect everyone or accept a pay-off equivalent to the present value of all of their future earnings.

Because the Supreme Court is interested in tinkering with statutes rather than worrying about what happens in the real world as a result of its decisions, we shouldn't be surprised that the *Arline* case has rendered the law more indeterminate than it already was. I've written an article about another recent case, a defamation case, where the Supreme Court did exactly the same thing.<sup>FN4</sup> And the opinion in that case came from the opposite side of the political spectrum: it was written by Chief Justice Rehnquist. I just wanted you to know that, in taking on Justice Rehnquist *and* Justice Brennan, I regard myself as an equal opportunity critic. More seriously, I think that the Supreme Court is on its way to becoming the Supreme Legislature because most of the [pg917] nine Justices feel like legislating, irrespective of whether they are activists or passivists, liberals or conservatives.

Why do cases like *Arline* create such a mess? I suggest to you that it is because the Supreme Court has become sublimely indifferent to the fate of either the petitioner or the respondent. The Court simply does not care about the rights of the parties. It doesn't care what happens to Gene Arline. It doesn't care if the Nassau County school board has to wipe out its budget item for textbooks in order to pay \$768,724 to Gene Arline. The justices these days don't look at cases as cases but as platforms. A case is a convenient platform upon which the Court can announce new social legislation. In the *Arline* case, seven out of nine Justices liked the policy of the Rehabilitation Act of 1973 so much that they decided to expand its coverage. Their own job description—and they are the only people in this country who can write a job description without anyone else second-guessing them—is no longer the description laid out in the Constitution about resolving cases and controversies, but a new self-described job description about rewriting statutes under the pretense of resolving cases and controversies. Any practitioner who petitions the Supreme Court to review a case on certiorari knows that the Questions Presented—which must appear on the first page of the *certiorari* petition <sup>FN5</sup>—have to give the justices a hook on to an important or controversial issue of national policy. You'll get nowhere if your Question Presented asks their honors to correct an injustice to your client in the courts below, even if it's a blatant injustice. <sup>FN6</sup> You are supposed to understand and sympathize with a Supreme Court that is too busy looking for handy opportunities to amend statutes to waste its precious time restoring the rights of your client.

Maybe it's time for the Supreme Court to tell it like it is. They should throw out the usual boring titles of cases like *School Board of Nassau County v. Arline* and replace them with more informative titles like *What the Rehabilitation Act of 1973 Means to Me*.

That's my separation of powers argument, but I suspect that many of you are not convinced, and for a good reason. You're thinking that [pg918] whether or not the Supreme Court is overstepping its bounds as a court and becoming an unelected legislature, it is nevertheless serving the national

interest by furthering congressional policy. If that's what you're thinking, you have impressive company. Judge Frank Easterbrook says that courts should be "honest agents of the political branches." FN7 Judge Richard Posner says that a judge's job is to help make the legislative enterprise succeed. FN8

## II. THE PUSHME-PULLYOU ARGUMENT

So let me try to convince you by going to my second argument, the pushme-pullyou. I want to argue that there is *no such thing* as a congressional policy that courts can use as a tool for interpreting statutes. If I'm right, then back in the 1970s when I was advocating policy analysis in my classes, I frankly didn't know what I was talking about.

I begin the pushme-pullyou argument by invoking the first chapter of Richard Epstein's extraordinary book *Takings*.FN9 He sets forth a simple and effective image of what legislation does within a democratic society. He invites us to think of all the assets and values in our country as comprising a huge pie. What Congress can do with this pie is either change its size or redistribute its slices, and these are the only things Congress does. The first kind of legislation enlarges the pie. For example, financing an army protects us from foreign depredation, and financing a police force protects us from internal crime. The resulting increase in our property values exceeds what we as taxpayers have to pay for the upkeep of the army and the police, and hence the entire pie is enlarged. The second kind of legislation redistributes the pie from one group to another. When the farm lobby convinces Congress to enact price supports for farming, a piece of the pie is taken away from the group of American taxpayers and transferred to the group of American farmers. To be sure, lobbyists and politicians are skilled in recharacterizing pie redistribution as pie enlargement. And in fact some statutes can quite fairly be characterized as either type. One characterization of the Rehabilitation Act of 1973 would say that it enlarges the pie by making us a better and more caring society. The [pg919] opposite would say that the Rehabilitation Act amounts to robbing employers to pay handicapped employees.

Fortunately for present purposes, we don't have to decide whether a given statute enlarges the pie or redistributes it, because the underlying analysis I am now going to present will eventually turn out to be the same.

### A. Bills That Redistribute the Pie

Let's start with the easier type of legislation to analyze, the redistribution of the pie. Assume for the moment that the Rehabilitation Act of 1973 is a statute of this type. There are some strong lobbying groups in Washington D.C. that have an interest in this legislation. Let's say that the American Medical Association (AMA) wants the bill passed because persons with handicaps who are out of a job usually don't have enough money to pay for expensive medical treatment and care. Therefore a statute that prohibits employers from discriminating against handicapped people means that many handicapped people will continue to draw a salary, which they can utilize to pay for expensive medical care. Accordingly, the AMA enlists the help of a group of legislators who owe the AMA a favor for contributing to their election campaign. Let's further assume that a big lobbying group opposing the rehabilitation bill is the National Association of Manufacturers, representing employers.

The bill begins its slow-motion dance through various committees of Congress. At each stage and each successive draft, the group of legislators that is supporting the bill—which for reasons of brevity I'll call the AMA—tries to expand the bill's coverage. The legislative opponents of the bill—which I'll simply call the NAM—try to restrict its coverage. We can think of three different kinds of case studies that might show up in the various drafts of the bill.

The first starts with a provision that the AMA would ideally like to have—such as "all employers shall pay all medical bills of all former and present employees whether or not they are handicapped." In today's world, no such provision has a chance of getting enacted. Thus, the AMA as sponsor of the legislation begins the process of whittling down the provision. The AMA may do this by showing a draft to an opposition group to get a sense of how vehement the opposition will be; then the AMA can redraft the bill and whittle it down. Or, the AMA may simply anticipate what the hostile reaction will be and tone the provision down unilaterally. The important point about this first case study is that it represents a compromise between what the sponsor wants and what the sponsor thinks it can get. This compromise can [pg920] occur even before the bill is shown to opponents of the legislation.

A second case study starts with a provision that, after being toned down, nevertheless is met with hostile attack by the opposing legislative forces and perhaps with less hostile though still strenuous attack by various "neutral" lobbyists. The AMA and NAM exchange arguments and the provision is redrafted to the point of being studiously ambiguous. This is acceptable both to the AMA and NAM, each of whom believe they have a fifty-fifty chance that a future court will read it their way.

Finally, a third type of case study incorporates a kind of lethal gene in a provision. Here it's the NAM that proposes it as an amendment. It expands the coverage a lot—for example, by including coverage for persons with contagious diseases. The NAM hopes that the AMA will accept the amendment on the ground that it broadens the coverage of the bill, and then with this lethal gene in it the bill will die in the final vote on the floor of Congress.

Of course, in reality there are many groups other than the AMA and the NAM involved in the drafting of the bill—liberals, conservatives, neutrals, apathetics—all having some effect on the wording of these three kinds of case studies in how a bill becomes a law. And there are many variations. We have no idea of who tinkered with the Rehabilitation bill as it bobbed and weaved its way through the congressional apparatus. The legislative history doesn't tell us, because legislative history is full of self-serving declarations that are only there to enhance various negotiating positions. In general, any legislative process is characterized by a bewildering array of overlapping factions and coalitions—virtually impossible to reconstruct *ex post*. And for all that we know about the Rehabilitation Act, the NAM may have yelled and screamed not so much to defeat the bill as to raise the market value of the NAM's eventual support of the bill, a support that will later be paid off by the passage of an entirely different bill favorable to NAM interests, such as a bill giving a tax break to corporations. But in terms of the Arline litigation, we know one very important thing about the Rehabilitation Act: for whatever reason, it emerged without any mention of people with contagious diseases. There might have been a lethal gene in the bill's legislative history. The NAM group may have suggested off the record to the AMA group that the bill should be enlarged to cover persons



with contagious diseases, and the AMA may have seen through this ploy and rejected the idea. We just can't know the intricacies involved with the passage of this bill or any other bill.

In Hegelian terms, the AMA draft bill represents a thesis, the NAM's opposition is the antithesis, and the final text of the statute is [pg921] the synthesis. The dialectic process of lawmaking has produced legislation in this case—as it has in every single case of legislation from the beginning of time—that is an exact synthesis between thesis and antithesis. The text of the bill proceeds right up to the line dividing the forces of thesis and antithesis. The proponents of the bill pushed the draft to the limits of its words, and the opponents of the bill saw to it that the bill pulled away from the area beyond the limits of its words. That's why I call it pushme-pullyou. There is no room for anything "extra" in interpreting this or any statute—no room for a court to add in something like "policy," because there is no way to choose between the policy of the proponents of the bill or the policy of the opponents, or for that matter the policies of the neutrals and apathetics. Whatever these policies were, they were folded into the final draft of the bill, which neither gave the AMA all that it wanted nor the NAM all that it wanted. The final bill no more reflects the "policy" of the AMA than it reflects the "policy" of the NAM. It just reflects the actual text, no more no less, that survived the legislative process.FN10

This conclusion is especially applicable to the one case where it is most resisted, namely, where a statutory provision is ambiguous. In the typology I've given, this is the second case study—where a text is put forth because it is ambiguous.FN11 For a court to come along later and "resolve" the ambiguity by opting in favor of either the AMA or the NAM position is to make a category mistake. The only relevant intent we can legitimately attribute to Congress is an intent to enact an ambiguous text. There is no other intent. As the disappointed tourist said, "There's no 'there' there." What then should a court do when faced with the task of construing the statute? My suggestion would be that the court should not think of its job as saving the statute or making sense out of it. The court's only job, as I shall argue at the end of this Lecture, is to deliver justice to the parties. The statute, if relevant to the case at hand, must of course be read and interpreted just like any other relevant rule of law. If it is ambiguous, then its ambiguity is simply a fact of the matter that must be taken into account.FN12 [pg922]

### *B. Bills That Enlarge the Pie*

In bills like the one we have just considered—bills that redistribute the pie—it is relatively easy to find at least one lobbying group that supports the bill and a lobby that opposes it. The forces of thesis or antithesis may be harder to identify when we turn to the other type of legislation, that which purports to enlarge the pie. For example, an appropriations bill for a new kind of stealth fighter plane would undoubtedly appeal to lobbyists for the aerospace industry. But the most natural opposition lobby to oppose it would be a lobby representing Iraq, Libya, and North Korea. Yet there is no lobbying organization for these countries in Washington D.C. Even so, I want to argue that a dialectic process takes place.

In the stealth fighter kind of bill, no one is going to be opposed to the concept of enlarging the pie. A different question is on every legislator's mind, namely, how much will the enlargement cost us? Some legislators will say, "We already have enough national defense, we don't need a new program like stealth fighter planes, so let's either spend the taxpayer's money on something else or just

reduce the level of taxation." Other Congresspersons will say, "A few stealth fighters might be cost effective." Others, such as the lobbyists for the aerospace industry, may want a huge program. So, even with a single bill that purports to enlarge the pie, there will be forces that want to enlarge the bill and forces that want to reduce it—the same thesis and antithesis we saw in the example of the Rehabilitation Act. Indeed, these antithetical forces can easily wind up in the same person. Any given legislator is apt to debate internally whether the appropriations for stealth fighters should be bigger or smaller, ranging from billions to zero. She'll listen to arguments on both sides. She'll consult with her constituents. Her mind may change as she thinks about it. Thus the antithetical force vectors in the stealth fighter debate are present in conversations within legislators as well as in conversations between legislators. The resulting synthesis has exactly the same form in the stealth fighter case as it had in the Rehabilitation Act case, namely, the [pg923] final statute will be the precise resultant of the force vectors that went into it.

Let's return for a moment to statutes that redistribute the pie. You may have thought of the following objection to the argument that I was making about the Rehabilitation Act: that after all, when the legislation got the approval of both houses of Congress, it was the AMA that won and the NAM that lost. So why should a court give any weight to the policy of the losing group? Why doesn't a court simply accept the AMA policy as the official policy of the statute?

My answer invokes the stealth fighter analysis, where we have seen that a dialectic process works even in the absence of a lobby for Iraq, Libya, and North Korea. Similarly, if we took the NAM out of the Rehabilitation bill process, nevertheless the statute that finally emerged was the resultant of opposing force vectors. The Rehabilitation Act, like any other legislation, imposes a cost on some groups and a benefit on other groups. For example, even if the Rehabilitation Act is supposed to impose new costs only on employers, those costs will spread out to other parts of the economy: American commerce as a whole might be adversely affected because it could become less competitive in the global economy due to these new costs, United States tax revenues might decrease, and hence less money will be available for other governmental programs.

Thus, if a court comes along and decides either to broaden or reduce the Rehabilitation Act's coverage of handicapped individuals, that judicial action would amount to the same thing as a court coming along after the stealth fighter appropriations bill is enacted and arbitrarily adding a billion dollars to it on the ground that the extra money is needed to effectuate Congress's policy of having an effective stealth fighter plane defense system. There is no difference between expanding the coverage of the Rehabilitation Act—or of any other statute—and adding money to the stealth fighter appropriations bill—or any other appropriations bill. If the idea of a court adding more money to an appropriations bill strikes us as absurd, then we should be equally outraged when courts enlarge or reduce the coverage of statutes in the name of policy or intent or legislative effectiveness, or for any other purpose or theory.

What I've said comes down to the simple tautological truth that the statutory text that Congress enacts is the statutory text it wants. This conclusion is firmly anchored in the Constitution. Article I Section 7 says that only those texts that are approved in the exact same form by both houses of Congress can become law. In short, Congress does not enact policies, it enacts words. The mechanism of Article 1 Section 7 allows only the enactment of texts, and not motives, intentions, [pg924] purposes, policies, or add-ons of any type.FN13 If a court either expands or reduces the statute, it is

doing so by virtue of some sense that it is furthering the purposes or policies of Congress. But whatever the court finds these policies or purposes to be, they were not part of the bargain reached by all of the legislators in Congress. And, therefore, when a statute comes up in a case, my contention is that courts should not construe it in such a way as to expand it, and they should not construe it in such a way as to reduce it. I disagree with Judge Easterbrook that a court is the "honest agent" of the legislature because, as we have seen, there are opposing forces in the legislature. No agent, no matter how honest, can serve two masters who disagree with each other. Of course, an agent could be guided by a text that two masters have agreed upon. But in so doing, the agent becomes the agent of the text, and not the agent of either of the two masters.

### *C. The Jurisprudential View of "Purpose"*

The discussion about legislative purpose may have raised an issue that ought to be distinguished at this point. Reading a statute in light of its purpose has a jurisprudential history all its own. As Lon Fuller made abundantly clear, a statute is simply not intelligible unless purpose is taken into account.<sup>FN14</sup> A judge would likely do violence to the meaning of sentences if she were to read the words of a statute the way a computer would "read" those words—one at a time, according to specific definitions. A sentence means more than the words that make it up. Let me suggest that the language we use is but a fragment of the thoughts that the language captures. To get the full thought behind an utterance, we need to fill in the rest of the picture suggested by the language fragments. In order to fill in this picture, we need to know that the words we are interpreting were uttered by a human being who had some human purpose in mind in uttering it. This is something that a computer cannot know and cannot ever know.

A good negative example is a recent decision by the Supreme Court, [pg925] *United States v. Locke*.<sup>FN15</sup> That case involved a statute that set up a federal recording system designed to rid federal lands of stale mining claims. Mining claimants were required to rerecord their claim documents each year "prior to December 31." The Lockes, who had a mining claim, were told by federal employees in a Nevada recording office that they could hand in their documentation "on or before December 31st." The Lockes hand-delivered their documents on December 31. The Supreme Court held that December 31 was not "prior to December 31" and hence the Lockes's entire claim would be forfeited (if they failed to prove other factors on remand). Justice Stevens, dissenting, said that the Court's opinion "is contrary to the intent of Congress" and "unjustly creates a trap for unwary property owners." He said that "Congress actually intended to authorize an annual filing at any time prior to the close of business on December 31, that is, prior to the end of the calendar year to which the filing pertains."

A human interpreter, but not a computer, would know that there would have been no rational reason for Congress to set the deadline at December 30 and that therefore "prior to December 31" must not be taken literally; it really meant, as Justice Stevens said, "prior to the close of business on December 31." The important thing about this case for me is that a court need not look to the actual intent of Congress in using the word "prior"—and of course, if a court tried to do that, it would run smack into the pushme-pullyou obstacle. Instead, the court need only look at the text of the statute and read it with the understanding that it was passed by a rational Congress composed of human beings. Indeed, as I have argued elsewhere, to construe the statute with the word "prior" taken liter-

ally would place an irrational and perhaps insurmountable burden on Congress in using that word in redrafting the statute.FN16

I see nothing wrong with using "intent" or "purpose" in the sense of giving human intelligibility to a text. The problem arises if an interpreter takes the idea of "intent" or "purpose" in the factual sense and [pg926] tries to "find" it in the legislative history or tries to deduce it by extrapolation from some notion of Congressional policy. You need only look at the approaches of the majority and Justice Stevens's dissent in the *Locke* case to see how the factual approach cancels out. Justice Stevens, as we have seen, said that the majority's "prior to" interpretation was "contrary to the intent of Congress." If he meant this in a factual sense, that Congress probably did not intend to make the final day of filing December 30, then Justice Stevens's argument is subject to a pushme-pullyou refutation by the majority. The majority could say that the actual intent of Congress was to get rid of as many mining claims as possible! The statute that Congress enacted, accordingly, set a very clever trap for people like the Lockes, who might assume that they had until December 31 to file their documents. In short, Congress intended to wipe out as many mining claims as possible by enacting a deliberately implausible filing statute.

Now, who is to say that Congress either in fact intended to "set a trap for the unwary" or to set the filing date as the last day in the year? Under my pushme-pullyou argument, no one can possibly choose either of these alternatives definitively. There is simply no factual intent on the point. To be sure, a court could use its authoritative position in society simply to pick one of two policies—get rid of mining claims, or be fair to mining claimants—and "interpret" the statute according to the policy it has selected. But there is no logic in such a procedure; it is simply bootstrapping of the most transparent sort.

#### *D. Judge Posner's Analogy*

The image of the huge pie that I have borrowed from Professor Epstein is the opposite of the image that Judge Richard Posner urges courts to adopt when they engage in statutory construction. A lieutenant of an army platoon receives orders from headquarters. Upon proceeding into the battlefield, he encounters a situation that was not contemplated in those orders. The lieutenant is unable to get clarification from headquarters because his radio isn't working. Judge Posner says it would be a mistake for the lieutenant to freeze his platoon in position and do nothing. Rather, he must adapt to the new situation, taking into account the orders from headquarters, but not literally. American judges are "frequently in the position" of the lieutenant, says Judge Posner. "The legislature's commands are unclear and the judges cannot ask the legislature for clarification." But, Judge Posner continues, the judges are "part of a living enterprise—the enterprise of governing the United States." When the legislature's orders are unclear, judges have the responsibility for "helping to make the enterprise [pg927] succeed."FN17

The problem that I have with Judge Posner's analogy is that in a military situation you don't care about the enemy's welfare. You don't care about the enemy's arguments, and you're not trying to get the enemy's votes. The enemy is a true externality. War is not a matter of dividing up a pie, it's a matter of beating the enemy. Domestic legislation is different. We have Professor Epstein's pie. Congress either changes the size of the pie or redistributes it. One person's externality is another's internality; the NAM's loss is the AMA's gain; the more the stealth fighter costs, the more

the public has to pay for it. Within the nation it is not a us-them kind of situation like war; it's simply us-us. We're all blackbirds baked in the same pie. So when Judge Posner says that a judge's job, like the lieutenant's, is to help make the enterprise succeed, we should ask, "Whose enterprise—the AMA's or the NAM's?" Judges shouldn't be in the business of favoring one interest group over another. Judges aren't like lieutenants leading a platoon against the enemy. Judges are supposed to be above the fray, evaluating the rights and interests of the parties to the case and resolving those rights and interests fairly in light of the relevant statutes, precedents, and other sources of law. Judges should be concerned about the interests of parties and not about the interests of Congresspersons. In deciding a case where a statute is relevant, the courts should not try to change the statute, transform it, amend it, adapt the statute to fit one side's notion of policy, finish Congress's job, or make the enterprise work. Courts simply should not do very much with statutes. To borrow the title of the movie featuring the pushme-pullyou, courts should do little with statutes.

### *E. Wrapping up the Arline Case*

How would my recommendation—to do little with the Rehabilitation Act—have applied in court in the Arline case? The evidence was that Ms. Arline was fired because she has a contagious disease. The school board argued that a teacher who constitutes a direct threat to the health of schoolchildren is not qualified to continue teaching. Once a court has satisfied itself that these are indeed the facts of the matter, it should dismiss Ms. Arline's complaint. Her invocation on the Rehabilitation Act cannot help her, because the fact that she is a carrier of a contagious disease means that she does not meet the Act's threshold requirement of an "otherwise qualified handicapped individual." [pg928] Because she is not qualified, the question whether or not she has a handicap is irrelevant. FN18

What the court must *avoid* doing is reaching the question of whether Ms. Arline is "handicapped." However, that is the question the Supreme Court desired to reach—a desire stemming from deep legislative impulses on the part of the Justices. Because the question of handicap is irrelevant to the *Arline* case, a problem was presented to the Justices who wanted to use the case as a platform to give new meaning to the key term "handicapped individual" under the Rehabilitation Act. They solved the problem by making it appear that a determination of whether a person with a contagious disease was a "handicapped person" under the Act was necessary in deciding the case. Although logically its gloss on that key term was pure dicta, the Court had to make it seem like part of the process in arriving at a judicial decision. Otherwise, a critic may have the audacity to say that the Emperor has no clothes, that the Supreme Court is simply usurping the prerogatives of Congress. But even if there were no critics, the Supreme Court cannot avoid setting an example for lower courts of how to construe statutes. It is an unfortunate example, one that is apt to create increasing mischief and confusion

## I. DYNAMIC STATUTORY INTERPRETATION

### *A. The Historical Tug-of-War Between Legislatures and Courts*

Now if you will, let's step back for a moment and put all of this in a historical context. Throughout legal history there has been a tug-of-war between legislatures and courts. The first stage went from the twelfth century to the eighteenth. The courts were firmly in command of the law, and

Parliament was just a brash upstart that intruded into the law with its statutes. Although the courts accepted the validity and [pg929] legitimacy of statutory law, they construed statutes strictly if they found that the statutes derogated from the common law. Because most statutes derogate from the common law—otherwise, why go to the trouble of enacting them?—the result was that the courts gave statutes a hard time.

The second stage is the nineteenth century positivist revolution engineered by Jeremy Bentham and his disciple John Austin. Bentham succeeded in selling the concept of legislative supremacy. Now the only real law was the command of the sovereign in Parliament. Courts were relegated to the minor role of applying those commands.

The third stage went from the middle of the nineteenth century to the middle of the twentieth. Here the courts brought the inflated Benthamite statutes down to size and accorded them appropriate respect—not too much and not too little.

The fourth stage started a few decades ago, maybe just when I dropped out of public law. This new public-law stage takes us back to the twelfth century with a vengeance. The public-law scholars are telling us that courts should not only construe statutes strictly if they derogate from current social policy, but that courts should even disregard statutory language that conflicts with current social policy. The Supreme Court hasn't yet arrived at this point, but they're getting closer all of the time, encouraged by their apologists—the public-law scholars. When they do, the title *School Board of Nassau County v. Arline* should be replaced by *A New Rehabilitation Act for Today's World*.

### *B. Professor Eskridge's Approach*

Let's look more closely at this public-law approach to statutes. Fortunately you don't have to read hundreds of law review articles to discover what public-law scholars have been saying about statutory construction, because it's all revealed and summarized in a truly remarkable book published just two years ago entitled *Dynamic Statutory Interpretation* by William Eskridge.FN19 Professor Eskridge begins by taking us through more theories of statutory interpretation than we ever wanted to know, but he does it so well that we are fascinated by hermeneutics, liberal theories, normative theories, legal process theories, law and economics, feminist jurisprudence, public choice, coherence theories, canons of statutory construction, republicanism, pragmatism, and post-modernism. But somehow the more theories you get the less they seem to amount to. And as far as I'm concerned, they all run [pg930] for cover when confronted by the pushme-pullyou.

Curiously enough, with one exception, Professor Eskridge doesn't like these theories either. The one he likes is the one that is in the title of his book, *dynamic statutory interpretation*.FN20 What is "dynamic" statutory interpretation as opposed to, say, "static" statutory interpretation. Well, if you interpret the Rehabilitation Act of 1973 according to the intent of the 1973 Congress that enacted it, you're engaging in static statutory interpretation. But why should we care about what Congress thought back in 1973? That's bringing back the dead hand of the past. Their statutes may have addressed their problems; today we have different problems. So we should engage in dynamic statutory interpretation. We should interpret the Rehabilitation Act of 1973 according to the policies of 1996.

I want to concede right away that my pushme-pullyou argument does not apply to this public-law theory of dynamic statutory interpretation (though the separation-of-powers argument does apply). Pushme-pullyou only applies to texts that have gone through the legislative process and are enacted into statutes. But when you choose a policy, you don't have to negotiate with anyone over your choice. There are as many policies floating around to choose from as there are magazines in the newsstand. They can all coexist without any need to engage in a dialectic process with each other.

How does a court interpret the Rehabilitation Act according to the policy of today? First it has to decide what today's policy is. Court A might decide that today's policy is to have a government that cares more about the people. In that case, Court A should enlarge the coverage of the Rehabilitation Act by expanding the definition of "handicapped individual." However, Court B might decide that today's policy is to downsize the government and get it out of the social welfare business. That court should then reduce the coverage of the Rehabilitation Act by contracting the definition of "handicapped individual."

How can we tell whether Court A or Court B is right? The public law scholars don't seem to have addressed this question directly, but two answers may be inferred from their writings, and a third one is conceded by Professor Eskridge. First, it is not for us, the public, to know the true nature of today's policies. That is something for courts to decide, because courts have specialized knowledge about such things. As my dear colleague Michael Perry puts it, the Supreme Court has a [pg931] "prophetic function" in the United States.FN21 Second, if we really disagree with a court's view of today's policy, we can write a law review article explaining our own view of policy. Law journals, after all, are proliferating so rapidly that they need lots of new articles. And what is easier, or more fun, than writing an article about policy? It's a golden opportunity to legislate for the public welfare. No need to do laborious, doctrinal research. Third, there are several places in his book where Professor Eskridge candidly admits that he likes the way the Supreme Court is interpreting statutes because he likes the results they are reaching. If the Court's on a roll, you go with the flow. But what will happen when the Court starts to produce a series of policy decisions that strike you as disastrous? I suppose the public-law scholar might reply that if that calamity occurs, he'll drop statutory construction and teach something else, like International Law.

What reasons do the public-law scholars give for advocating the application of today's policies to yesterday's statutes? Professor Eskridge tells us that law is an organic unity. The world today is different from the world of yesterday, and so are its laws. It doesn't make sense to wonder what combinations in restraint of trade meant to the legislatures that passed the Sherman and Clayton acts when we can ignore all of that and look instead to the latest economic theories of oligopolistic behavior. We don't care what Congress had in mind in 1973 when it passed the Rehabilitation Act, because those legislators are nearly all gone, the issues of that day have been replaced by new issues, nearly all of the legislation "surrounding" the Rehabilitation Act of 1973 has changed, the legislative climate is different, there are new groups clamoring to have their interests recognized in today's increasingly pluralistic culture, and so on. To quote Professor Eskridge, "The process by which interpreters struggle with making the statute work in new factual and even legal settings permits statutes to grow in a constructive way."FN22 I suppose that what we have to do, as President Clinton might put it, is grow the Rehabilitation Act.

Next question, Professor Eskridge: What happens if a judge finds that his favorite policy clashes with the text of the statute? If the judge feels that the policy is important enough, can he override the statute? Again we have to interpret his book for the answer, but I'll let you make the interpretation—I'll just quote the relevant portions. First, he [pg932] enlists hermeneutics in support of his own theory of dynamic statutory interpretation, and then explains what hermeneutics does: it "posits that statutory meaning is constructed, not discovered, by the interpreter."FN23 Second, Professor Eskridge justifies dynamic statutory interpretation "as a means of adapting statutes to new circumstances and responding to new political preferences . . . even when the interpretation goes against as well as beyond original legislative expectations."FN24

My reaction is that this is another instance where titles should be changed. Instead of *Dynamic Statutory Interpretation* the book should be called *Dynamic Judicial Legislation*. For although we can all agree that when you're interpreting a text you have a great deal of latitude, I don't think that the concept of interpretation is so broad that it includes disregarding what you read. If courts can disregard statutory texts, in what possible sense are they interpreting those texts?FN25

The day may soon come when the Supreme Court decides that the public-law professors are right—that the Court should not waste its precious time figuring out what Congress wanted the statute to mean when the Court can simply interpret the statute loosely in light of the policies of the day.

### C. The "Justice Trial" at Nuremberg

At the risk of sounding heavy-handed, I would like to remind you of one of the Nuremberg trials after the Second World War where German judges were prosecuted and convicted for interpreting statutes according to governmental policy. I do not intend to imply that American courts are doing anything even remotely partaking of the evils of the Nazi period. But I do want to point out that the United States believed it was taking the moral high ground in prosecuting German judges for engaging in a practice that I believe can accurately be described as "dynamic statutory interpretation."

The case is the one depicted in *Judgment at Nuremberg*, starring Spencer Tracy, Burt Lancaster, Richard Widmark, Judy Garland, and Maximilian Schell, and directed by Stanley Kramer. I hope that many of you have seen this exceptional motion picture. The judgment at Nuremberg to which the film refers was not the trial of the leading Nazi war criminals—that trial had already taken place. The trial depicted in the film was conducted by Branch III of the International Military [pg933] Tribunal in 1949. Here the tribunal was getting down to prosecuting less prominent officials in the Third Reich. Sixteen judges and judicial officials were among those indicted, and one of them was Oswald Rothaug, whose name was changed in the movie and whose role was brilliantly played by Burt Lancaster. As dramatic as the movie is, I think that lawyers can find a higher form of quiet drama in reading the case.FN26

The most important question to ask—which was not asked in the movie—was why the prosecutors at Nuremberg picked out these sixteen judges and judicial officials for indictment out of the many thousands of judges and judicial officials in the Third Reich. Many German judges had occasion to apply grossly immoral Nazi legislation to the cases that came before them. Did not all of those judges act in a morally reprehensible way in applying that law instead of resigning from the



bench? Whether they did or not, the Anglo-American common-law tradition regards a judge as a neutral applier of the law and does not hold the judge responsible for the content of the law. The reason that sixteen judges and judicial officials were singled out for prosecution was that they were allegedly over-zealous in interpreting the law in accordance with the policies of the Nazi regime.

Judge Rothaug was exceptionally zealous in his handling of a notorious case. The defendant Lehmann Katzenberger, a Jewish landlord who was sixty years old, was indicted for the crime of racial pollution. Testimony established that Irene Seiler, a German woman twenty-two years old, rented a flat in the defendant's building. Eyewitnesses testified that Seiler and Katzenberger kissed each other now and then, and he admitted that he patted and caressed her thighs over her clothes. Irene Seiler told the examining judge before the trial that neither she nor the defendant had any erotic emotions in exchanging these caresses. Judge Rothaug "applied" the following statutes to these facts:

*Law for the Protection of German Blood and Honor:*

§ 2. Sexual intercourse (except in marriage) between Jews and German nationals of German or German-related blood is forbidden.

*Decree Against Public Enemies:*

§ 4. Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to 15 years, or for life, or is punishable by death if the sound common sense of the people requires it [pg934] on account of the crime being particularly despicable.FN27

Judge Rothaug found as a matter of law that Irene Seiler's statements were incompatible with all practical experience and made with the sole purpose of saving the defendant from his punishment. He decided that Irene Seiler had committed perjury, and she was sentenced to two years of hard labor.

As to defendant Katzenberger, Rothaug wrote: "Even if the Jew had only done these acts of petting in lieu of actual intercourse, it would have been sufficient to charge him with racial pollution in the full sense of the law." In addition, Judge Rothaug found that racial pollution was committed by the defendant through exploiting war conditions and the blackout. He sentenced Lehmann Katzenberger to death.

Judge Rothaug's decision was greeted with wild enthusiasm by the public. The Nuremberg newspaper for April, 1942, headlined its story "Death to the Race Defiler." It was clear that Judge Rothaug's decision served as an exemplar to other German judges who might have been too conservative in requiring proof of actual sexual intercourse before convicting a defendant.

The Nuremberg Tribunal found that, "the evidence establishes beyond a reasonable doubt that Katzenberger was condemned and executed because he was a Jew . . . His execution was in conformity with the policy of the Nazi State of persecution, torture, and extermination of [this race]." FN28 The Tribunal convicted Rothaug and sentenced him to life imprisonment.

It is clear that Rothaug read the above-quoted statutes in light of Nazi government policy as he understood it. The popularity of his decision attests to its conformity to the policy of the day. Do we

want to encourage our own courts to engage in a similar form of dynamic statutory interpretation on the ground that our policies are substantively a lot better than the Nazi policies?

#### *D. The Injustice of Dynamic Statutory Interpretation*

What's really wrong with using cases as a platform for straightening out statutes and bringing them into line with current policy? If the policies are evil, we have the aforementioned Nuremberg problem. But most policies are good; after all, they're our policies and we live in a democracy. So, I'll rephrase the question: what's wrong with deciding cases according to today's perfectly good policies? [pg935]

What's wrong is that it is blatantly unjust. Suppose you get into a dispute with somebody and you see a lawyer. She tells you that there's a statute that's relevant to your case. You ask what the statute provides. "We can't be sure," she says, "because it depends on what the government's policy will be by the time your case gets to court. Even if I make a good guess as to what the government's policy is today, it could change by the time a judge looks at this case. I can't guess what a judge is going to say about policy six months or a year or two years from now. It will depend on which judge gets the case, what his view of the policy is, and whether he believes in the policy strongly enough to twist or even disregard the statute in order to fit the policy."

In other words, we can't know what our rights are today, because if we have to go to court to safeguard what we think our rights are, the court may change today's law in light of the policies that are in place at the time the judge rules on our case.

How can we possibly plan our lives on the basis of the law of tomorrow when we can't predict what that law will be? Are courts that are attracted to dynamic statutory interpretation teaching us that we can no longer know and rely on the rule of law in our daily lives because months or years later they can use policy considerations to make new law and apply that law retroactively to us? Doesn't dynamic statutory interpretation amount to unconstitutional ex post facto legislation? Hasn't justice become impossible to get from courts if judges insist on upsetting both sides' expectations of what law was when their case or controversy arose, and instead pull the rug out from under their feet with new law based on the judges' own idea of general social and governmental policy? Isn't this just a case of judges appropriating the rights of the parties, without compensation, in order to announce new social legislation? Isn't this the very definition of injustice?

It all seems to be a case of public-law scholars becoming so enamored of the idea of legislating without accountability for the good of society, that they see nothing wrong with turning cases into platforms. Or if you want to take everything I've said in this Lecture and boil it down to one short sentence, it's a case of public law forgetting about private law.

#### **FOOTNOTES**

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\*\*Numbers in the format "pg911", etc. refer to the pagination of the original article.

FN1 Legal realists will of course say that judges make new law in every case, but a more careful look at legal realism reveals that there are significant constraints upon judicial lawmaking. *See, e.g., Realism*, in ANALYTIC JURISPRUDENCE ANTHOLOGY 181-218 (A. D'Amato ed., 1996).

FN2 480 U.S. 273 (1987). I omit from this Lecture the complex issue of judicial deference to the interpretation of statutes by administrative agencies, aspects of which came up in the *Arline* case.

FN3 *Arline v. School Bd.*, 692 F. Supp. 1286 (M.D. Fla. 1988).

FN4 Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 207 (1990).

FN5 Supreme Court Practice Rule 14 states,

The petition for a writ of *certiorari* shall contain . . . the questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on that page. SUP. CT. R. 14.

FN6 For an earlier polemic charging the Supreme Court with having turned from judging to legislating, *see* Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy With One Bold Thought*, 85 NW. U. L. REV. 113, 117-18 (1990).

FN7 Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 60 (1984).

FN8 RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 270 (1990).

FN9 RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). The same division of statutes into pie-slicing and pie-enlarging types was made earlier by Judge Easterbrook. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540-41 (1983). This concept was prefigured in Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEG. STUD. 49, 74-79 (1979).

FN10 As readers familiar with statutory interpretation will know, my general position is not new. I have tried to present forcefully an account of the legislative process, with new observations and illustrations, but I make no claim of overall originality. *See, e.g.,* Easterbrook, *supra* note 9. My position is far more uncompromising than Judge Easterbrook's.

FN11 Purposeful ambiguity may be more familiar to international lawyers than to domestic lawyers. Treaties are nearly always textbook examples of provisions that were adopted because both sides were able to agree only on an ambiguous text.

FN12 I have argued elsewhere that law is not a value; it is a fact. As a fact, it plays a role in the decision of cases like any other material fact. A judge cannot ignore the law any more than the judge can ignore any other material fact. But it is not the judge's job to give effect to the law the way an agent might carry out the wishes of a master, because the law has no intrinsic worth in the sense of something that ought to be carried out—any more than a hill or a river has an intrinsic purpose or teleology. For a full statement of this position, see Anthony D'Amato, *On the Connection Between Law and Justice*, 26 U.C. DAVIS L. REV. 527 (1993), reprinted in part in PHILOSOPHY OF LAW 19-30 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).

An ambiguous statute is like a stream that is arguably a river, or a hill that is arguably a mountain; a judge need not "resolve" the ambiguity. Instead, the party asserting the benefit of the statute simply has a more difficult burden of persuasion if the statute is ambiguous than if the statute were relatively clear in the context of the case. A court must not lose sight of the fact that its job is to deliver justice to the parties, not to make sense out of statutes.

FN13 What if Congress provides a preamble to the statute, stating what its policy is? To make the question even harder, what if Congress says in the preamble that the courts should use the policies stated in the preamble to construe the statute? My analysis does not change; the preamble itself went through the legislative process, it represents a fight between proponents and opponents; and hence it should be construed just like anything else in the statute. The limits of the preambular words, in other words, should not themselves be extended by any notions of policy.

FN14 For a concise statement, see *Lon L. Fuller, The Morality of Law* 145-51 (2d ed. 1969).

FN15 471 U.S. 84 (1985).

FN16 My argument is as follows: Taking the court's meaning of "prior to," how could Congress enact a statute using that term and still mean December 31? The revised statute would have to read, "prior to January 1 of the following year." This, under the Supreme Court's interpretation of "prior to," would allow a claimant to file by December 31. But this wording would create an entirely new (and absurd) ambiguity. Would the term "the following year" mean the year beginning with the next day after December 31, or would it mean the year beginning the next day plus one year after December 31? The absurdity of this new ambiguity argues powerfully against the Supreme Court's literal interpretation of the term "prior to." For a full statement of this argument, see ANALYTIC JURISPRUDENCE ANTHOLOGY, *supra* note 1, at 233-34.

FN17 POSNER, *supra* note 8, at 269-70.

FN18 Another way to see the irrelevance is to consider the hypothetical case of Ms. Baker, a carrier of a deadly contagious disease, who is nevertheless personally immune from it. Ms. Baker has no physical or medical impairment at all; she is not handicapped. Yet Ms. Baker is not "qualified" to teach schoolchildren because she constitutes a direct threat to their health. The question of "handicap" does not arise in Ms. Baker's case any more than it should arise in Ms. Arline's case. For a superb discussion, not all of which I agree with, see Gary Lawson, *AIDS, Astrology and Arline: Towards a Causal Interpretation of Section 504*, 17 HOFSTRA L. REV. 237, 245 (1989). Because the Rehabilitation Act is "public interest" legislation, Judge Easterbrook leans in favor of allowing courts to extend their coverage (the opposite of my approach). See Easterbrook, *supra* note 9, at

541-44. Judge Easterbrook implicitly seems to accept legislative-intent determination of judicial statutory construction—a position that appears to contradict his starting-point (that courts cannot infer an intent from analyzing the processes that went into the creation of a statute).

FN19 WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

FN20 However, his admiration for the technique seems to decrease the farther back in time his illustrations go. See, for example, his criticism of *Boutilier V. Ins*, 387 U.S. 118 (1967), and *In re Debs*, 158 U.S. 564 (1895), in ESKRIDGE, *supra* note 19, at 52, 86-87.

FN21 MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 162 (1982). I hasten to add that there is absolutely no truth to the rumor that an earlier draft of Professor Perry's book contained a sentence urging the relocation of the Supreme Court building from Washington D.C. to the Vatican.

FN22 ESKRIDGE, *supra* note 19, at 65.

FN23 *Id.* at 62.

FN24 *Id.* at 108.

FN25 Professor Fuller might have answered: In a Pickwickian sense—the sense that a void contract is just another form of contract.

FN26 Substantial excerpts from the trial transcript and the tribunal's opinion can be found in *JUSTICE AND THE LEGAL SYSTEM* 311-28 (Anthony D'Amato & Arthur Jacobson eds., 1992).

FN27 *Id.* at 313.

FN28 *Id.* at 327.