

UC Berkeley

Law and Economics Workshop

Title

Public Choice and Legal Interpretation

Permalink

<https://escholarship.org/uc/item/0d74j0pw>

Author

Easterbrook, Honorable Frank H.

Publication Date

2009-04-20

Public Choice and Legal Interpretation

Frank H. Easterbrook*

“It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.” Those famous words appear in Adam Smith’s *Wealth of Nations*. They reflect the hard-won knowledge that, in large and complex societies, self-interest prevails over altruism. In small groups, such as the family and some voluntary associations such as clubs and churches, altruism plays a greater role, although Gary Becker thinks that much of the family, too, must be understood in Smith’s terms. But in large groups organization by self-interest prevails. This means the invisible hand of competition, which in the end aligns private and public interests.

Law, too, is a product, but the nature of the market differs. It is not competitive. Governments resist competitive displacement; and the suppression of private competition is the principal function of government. Often we think well of this; competition among thieves to maximize booty is not beneficial. But competition among producers of steel is; yet the government curtails this too, and it alters the terms of what remains. Again the alteration can be beneficial. Air is an input into production, so it should be priced correctly. This means regulation of pollution. But once the process begins, self-interested people move in. It is no surprise that our methods of controlling pollution produce advantages for producers of high-sulfur coal and high-tech gadgets, rather than low-sulfur coal and no gadgets—for the producers of high-sulfur coal and gadgets have many more votes, and the beneficiaries of ways to curtail emissions are scattered and have low stakes per person.

My goal in this talk is to discuss some of the forces that produce laws, and how these affect our understanding of laws’ meaning—that is, the questions of interpretation so dear to the classroom, the legal practice, and the judiciary. The invisible hand of competition requires two ingredients. The first is choice. You can buy a Ford car and I a Volkswagen; my purchase does not restrict yours; the possibility of different choices means that producers must compete for our business by better products and lower prices. Second, payment for the choice. If I make a mistake in my purchases, the loss falls on me. So I learn—and people can compete to educate me. Both elements are often missing in legislation, which not only prescribes one set of rules for all but also uncouples the outcome from personal cost. Suppose the United States sets a tariff or quota on imported sugar, elevating the domestic price to four times the world price. Everyone pays; there is no individual shopping; and the price is the same throughout the nation. Competition in political markets must take a different form.

* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago. This talk was presented as a Berkeley Distinguished Lecture on Law and Economics on April 13, 2009, and is © 2009 by Frank H. Easterbrook. The talk incorporates portions of published articles being revised and extended for a book tentatively entitled “Legal Interpretation.” Most citations have been omitted from this version. It should not be quoted or cited without the author’s permission.

There is an old tradition, which many of you encountered in your college political science classes, that depicts government as benevolent but private parties as the Mafia. After a good law is passed, the interest groups muscle in. They “capture” the agencies.

George Stigler asked a simple question about this understanding: how can everyone be so stupid? If special interests routinely capture agencies, why doesn't everyone know that and build in safeguards? His answer was that safeguards are unnecessary *because there is no capture!* And there is no capture because the laws are designed to serve interest groups from the start. You don't need to capture what you already own! Others, including Richard Posner, Sam Peltzman, and Gary Becker, have elaborated on the approach, and journals such as *The Journal of Law & Economics* and *The Journal of Law, Economics & Organization* publish the data. Over and over scholars find that some law or regulation makes an interest group better off at the expense of the public. The public loses more than the group wins, the difference being the allocative efficiency loss of displacing competitive markets.

This happens even when there are powerful public-interest theories of legislation, as with pollution control. I have mentioned the high-sulfur coal follies, which are also associated with the decline of nuclear power (coal replaces it). The public pays higher prices *and* gets sicker; sulfur dioxide is terrible for the lungs. Coal kills far more people than even one Chernobyl a year would do. I have mentioned agriculture. Sugar is not alone. The government tries to reduce the use of tobacco—and it also subsidizes that drug's production. The list goes on and on. It is not hard to find examples; instead, it is hard to find exceptions.

Does that not just pose Stigler's question all over again? How can everyone be so stupid? If the hijacking of the legislature is so common, why don't the people rise up? They lose more than the special interests win. There must be gains from trade in repealing the bad laws and enacting ones that serve the public interest. But this turns out to be very hard. Most voters have little at stake in any law. Worse, there is no real chance that anyone's vote will affect the outcome of an election. So voters are rationally ignorant. They do not learn what laws do, concentrating instead on the latest twists of the Colonial-Cylon conflict in *Battlestar Galactica*, and the shenanigans of Terrell Owens. Interest groups have much more to gain per person than voters at large have to lose. So they organize; and organized support for a law overcomes diffuse and ignorant opposition, because the supporters can do more to aid politicians than the opposition can do to defeat them.

When asking whether a person or group exercises political influence disproportionate to its numbers, the first inquiry is: how does this group solve the problem of free riding? People who *could* influence legislators, if they tried, need a good reason to try. If other persons similarly situated will do the job, any particular member of the group can sit on the sidelines, reaping the benefits without incurring the costs. Overcoming free riding is easier when the group is small, cohesive, able to provide large benefits to each member and to exclude non-members from sharing in these benefits, and able to spread the costs widely

so that they do not stir up opposition. Your group prevails if its free riding problem is less serious than the problem afflicting your rivals.

In many ways the *most* powerful groups are those that the conventional wisdom treats as powerless: for example, minorities that have limited agendas, and from which dropping out is not an option, or dairy farmers who are few in number and whose upbringing and way of life make dropping out of the group very costly. Agriculture grows in power as its numbers shrink. In societies where farmers are the majority, farming is heavily taxed; how else can the government raise revenue? In industrial societies, where farmers are 2% of the population, farming is heavily subsidized—for the interest group is cohesive and the cost widely spread.

This analysis has some surprising implications. Conventional wisdom treats corporations as powerful interests. Yet corporations fare poorly in handling free riding. Corporations do not vote and are not allowed to make political contributions. Thus corporate influence depends on firms' ability to engage the interests of investors and other stakeholders. Yet large corporations have widely traded investments. Liquid securities markets make buying and selling these investments easy. Dropout at the investor level is almost costless. Portfolio theory has taught investors, and their surrogates at pension and mutual funds, that safety lies in diversification. A diversified investor cares about the success of the economy as a whole and is indifferent to the fortunes of any corporation. Rational ignorance prevails. Most investments today are held in diversified portfolios, and indirectly (by insurance or pension trusts or university endowments) rather than by natural persons. So real people, who alone have the power to vote, do not much care what happens to particular firms.

To speak of "corporations" is to speak of the economy as a whole, and therefore to speak of a disorganized and ineffectual group—the target of small, concentrated, and therefore powerful adversaries. Businesses are at each other's throats (this is what competition in both product and political markets is about) and cannot collaborate to exploit the rest of us—if "rest of us" is coherent, given the wide distribution of investments. Corporations that want to emit pollution must fight off corporations that manufacture pollution-control equipment. One hundred years ago holdings were more concentrated; the Morgans and the Rockefellers could mobilize political power. Their successors, the Vanguard Group of Mutual Funds and the arbitrage department of Goldman Sachs & Co., are politically neuter.

Only small, closely held corporations are likely to be politically effective: investors in these firms are not diversified, and dropout is costly. No surprise, then, that the small business lobby is influential—that small businesses regularly win exemptions from laws imposing costs on larger firms.

If you doubt this, ask yourself: why is there a corporate income tax? Not because corporations are wealthy; corporations are just place-holders, collective names for aggregates of investments. The corporate tax is attractive to politicians because it is invisible. No natural person pays the bill. Investors are so scattered and diversified that they cannot resist it, cannot even tell who pays it. As a matter

of economic theory the incidence of corporate taxation is hard to pin down. Everyone believes that someone else pays it, and so almost everyone supports it, although it is economically inferior to a unified tax system. So, too, voters believe that “someone else” pays for reductions in emissions, safer products, and the like. No concentrated interest group opposes the demand for regulation, which appears (to those demanding it) to have few costs. Corporations do not hold political power in America: they are too large, and their investors too many.

Let me ask once again: How can everyone be so stupid? This time, the “everyone” in question is the political class. Voters may be diffuse, but elected officials are concentrated. They can inform voters and collect support. If bailouts of auto producers in Detroit hurt citizens of California, we can expect Senators Feinstein and Boxer to tell us, and to protect us. Or can we? This is an empirical question. What *are* the incentives facing elected officials?

Let me begin indirectly, by disabusing you of a popular misconception about the Stigler-Becker view of legislation. The misconception is that legislators care only about reelection, which they assure by selling out to the highest bidder. This is a misleading statement about politicians, about interest groups, and about voters, all at once.

Politicians care about the merits of laws, care a great deal, care deeply about their constituents. To see why, think for a minute like a member of the financial futures lobby would think. You have to decide who to support for a district in Chicago, where the Board of Trade is located. Do you hold an auction? Hardly! It is unwise for any group to hire a cynic, who may sell out to a higher bidder later. You don’t want to rent politicians by the hour—PACs don’t, and neither do voters. All look for True Believers, who are low maintenance investments (in every sense of that word). No farm state would vote for someone who on principle opposed price supports, supporting them only when his palm was crossed! That would be folly. Thus it is that internally—as politicians, groups, and voters see their own state of minds—*everyone* thinks that only the public interest matters. States of minds are aligned by an invisible hand.

Suppose you compile a lot of data about each electoral district—the portion of the economy devoted to agriculture and steel; the average levels of wages, and so on. Then look at the voting record of the elected representatives. What do you find? You assuredly do *not* find that members of the House in industrial districts take large payments from the auto makers’ PACs and vote to cut steel tariffs. You find instead voting records strongly correlated with the district’s real interests. Even small deviations substantially reduce the chance of reelection.

Perhaps the best question with which to test the thesis that politicians serve their constituents’ interests because they *want* to (rather than because they *have* to) is to ask: what happens in final terms? Suppose a member of Congress announces that he or she is leaving politics at the end of a political career. Here, surely, is the playground of special interests and personal preference. It is a standard Last Period Problem. But several studies have found that it doesn’t happen. Departing legislators vote a little less often, so they are pursuing leisure. But when they vote, their records are identical to their prior records, and in the interest of

constituents. Once again, this shows that voters manage to hire representatives who serve their interests.

Wait. Does this not at last refute the interest-group view? No, it does not; indeed, it fortifies it. Here's why. The representatives are treating their constituents as interest groups—agricultural representatives favor price supports that help farmers at the expense of consumers; Senators from Ohio and Pennsylvania always support tariffs and quotas to keep foreign steel out of the United States. What then do the interest groups do? They concentrate their efforts and support on representatives whose constituents don't care. That is, the groups find indifferent voters—who are plentiful, since the whole idea is to impose the costs of legislation on the scattered many. Groups concentrate their support in these districts, where representatives have little to lose from supporting their agendas.

What can groups offer in return? Why, they offer support for projects on which the constituents *do* care. So an agricultural representative can be induced to support quotas on foreign steel—even though that raises, by a little, the cost of corn cribs—because the groups offer the support of their core representatives on agricultural issues. This logrolling is rarely explicit, but it is nonetheless real. Each representative serves his own constituents by supporting legislation on which they lose just a little; and because the data tell us that voters are pretty sophisticated, they *want* their representatives to do this. Constituents *demand* that elected officials do so. The phenomenon ensures that concentrated interest groups prevail.

Of course, everyone would benefit if the process were abandoned. Every once in a while we see such a proposal. The flat tax movement is a good example. Congress has loaded the Internal Revenue Code with special interest breaks. These breaks drive up the average level of tax for the rest of us. Would it not be better to cut out the favors and reduce all rates? In principle almost everyone supports that outcome.

Everyone supports, even more strongly, eliminating all of the breaks *except the one he gains by*. For then he gets all of the advantages of a lower general rate, plus a further reduction. The difficulty is that, when everyone thinks that way, it is almost impossible to change the Code. For if I know that my neighbor will strive to keep his own special privileges, I must do likewise, for self-protection. Thus when, in 1985 and 1986, Congress set out to “simplify” the Code, it actually got longer. It may be that the only way to break down this process is to make the main rate *so* low that it does not pay to lobby for a break. Illinois has a flat tax, at 3%; deductions from this tax are worth little, because the rate is low, and therefore there are few deductions. But no one supposes that the rate for a national tax could be less than 18%, high enough to set this process in motion.

I have been describing all of this to you as if it were a discovery of the last 50 years. But it is not. It has been with us from the start—and the Constitution itself was designed to mitigate it. James Madison, our principal designer, recognized what scholars did not see clearly until the 1950s: that the *amount* of interest-group legislation depends critically on the design of political institutions. It is

interesting to take a look at what Madison and his contemporaries called “faction,” at how they proposed to rein it in, and at why the effort failed.

Faction, according to Madison’s *Federalist No. 10*, is “a number of citizens ... who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” Self-interested voting is a scourge of all republics, breeding contention, oppression, local favoritism, beggar-thy-neighbor policies. It has brought down efforts at democracy around the globe, and throughout history. It must be conquered—yet, Madison thought, it cannot and must not be conquered.

Faction cannot be conquered because in large bodies self-love prevails over altruism and civic virtue. Faction also is beneficial, and therefore must be tolerated. This may be harder to see, but consider: the source of faction is the division of labor. Landholders, farmers, merchants, academics, and so on all stake out claims. To have prosperity we need separation of function. Religion and other ingredients of moral life also ensure faction. Differences are to be treasured, are a hallmark of freedom, are an *objective* of our government. Yet they *are* faction.

We do not want to extinguish the differences we cherish, and if we wanted to do so we could not without eliminating the role of the governed—without the tyranny this republic was established to avoid. Madison and his colleagues in the Convention sought to ameliorate rather than eliminate faction in two principal ways: indirect democracy and fragmentation of the electoral base.

Direct democracy will fall victim to faction, Madison thought, for it encourages everyone to vote his own preferences. Government by elected representatives, whose self-interest is not at stake for the vast majority of votes, and which at any event is not identical to the interest of the constituents, may solve the problem. Mediating among many factions, the representative answers to none.

Elections from different states with different factions dilute the power of faction. Merchants may dominate in Pennsylvania and tobacco growers in North Carolina; neither dominates the larger republic. “Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.” Diversity that is a source of faction locally thus becomes the security in a larger jurisdiction. Fragmentation is to be pursued in a thoroughgoing manner. Different states establishing different qualifications for voting; different districts to represent (portions of states for representatives, whole states for senators, the entire nation for the President); different electors (the people for representatives, state legislatures for senators, the electoral college for the President); different tenures (from two years for representatives to life for judges).

The plan of the Constitution thus lies in the design of political institutions, which can bend self-interest to the public good. Adam Smith believed that competition

in markets would bend self-interest to the public good. Madison's diagnosis and prescription are the same. Smith lauded competition among producers of private goods and services; Madison sought to promote competition among suppliers of public services.

Yet Madison's *predictions* about the relation between the national government and faction have not come true. Private-interest legislation is more common today than in 1787, and more common at the national level than among the states. Why?

1. Both room for representatives to put virtue ahead of constituents' interests and the belief that groups cannot coalesce at the national level depend on slow communication and costly transportation. These impede coordination and monitoring; by the time groups learn of legislative proposals, it may be too late. Times have changed; now factions monitor their representatives over the Internet in real time. Congress has evolved a structure that reduces members' leeway. Members serve on committees, which as gatekeepers to the floor and the principal drafting institutions. Interest groups can monitor the behavior of a few committee members much more closely than they can track all members of Congress. The Administrative Procedure Act, hailed by many on "good government" grounds because it exposes agency action to public view and invites input, is anti-Madisonian. Extended rulemaking procedures and numerous oversight hearings augment the relative power of faction.

2. Cheap transportation and communication mean a larger market. This cuts the power of states (exit is easier) but increases the division of labor. More specialization enhances productivity but also produces more, and more powerful, interest groups. Recall that faction *means* a group with a special interest, something they share but the general public does not. Greater specialization in production means more factions, and each faction will be more cohesive.

3. The gravest obstacle to faction is free riding, as I have stressed. Madison was concerned about, and designed the government to avoid, capture by majority factions. Madison was right in appreciating that the structure of this society would produce interests and sects in profusion, but he did not appreciate how easy it would become to organize these groups from coast to coast.

4. Although as Madison observed the national government is harder to capture—there are more contending interests, many with powerful reasons to resist factions' demands—there is also a greater gain in sight. No state could effectively regulate the price of labor or the cost of automobiles. People and plants can move too easily, and the Constitution denies states the power to erect tariffs at their borders with other states. Because it is much more costly to emigrate from the United States than to move to another state, the national government has much more potential power, creating a reason for factions to concentrate their efforts there.

Factions strive mightily to suppress the power of exit. National legislation is ideal for this purpose. So there is no reason to conclude that the federal government is

less vulnerable to faction once the factors that created agency space in which virtuous legislators could operate have fallen. The national government will enact fewer private-interest laws than the aggregate of state and local governments—but the costs of each will be greater.

5. The value of factious legislation at the national level has risen with the government's command of resources. The Sixteenth Amendment, authorizing an income tax without apportionment among the states, gives the national government control of whatever portion of the economy it wishes to exercise. This makes it the prime target for faction. Simultaneously, the Seventeenth Amendment cut down the constraints by removing state legislatures from any role in the selection of senators.



What can we learn from these developments? What significance do they hold for the work of lawyers? Madison set out to design a governmental structure that would harness faction to public ends. Two centuries of experience yield many implications for those who share Madison's vision of a republic in which the choice of institutions can reduce the influence of faction.

1. Altogether too much contemporary discussion about the allocation of governmental functions is cast in terms of claims about what the Constitution commands or permits. Perhaps it is inevitable that lawyers and professors of law would turn to the most fundamental law when looking for answers to the most fundamental questions. But the price of establishing an *enduring* Constitution is a high level of generality. The Constitution has little to offer about rules of interpretation for use by the Judicial Branch. The question is not what the founding generation thought, but how the living think, about interpretation. Debating the constitutional boundaries of the political branches is an interesting intellectual exercise, and an important one for questions of legitimacy under the existing Constitution. But if we wish to know how governance proceeds, we must concern ourselves with the functional questions.

2. An unproductive rhetorical to-and-fro about administrative agencies should not detain us. On the one hand are those who say that agencies bring us expert administration, specialists free from political sway to enforce the law correctly and make expert discretionary judgments. This is the public argument for agencies, and it appears in judicial opinions incessantly. On the other hand are those advancing the claim that a unitary executive will promote energy in public administration, that government without a single coordinating hand is internally divided, weak, even incoherent, and of course irresponsible (because there is no one to take the blame).

This debate is beside the point. The choice is not expertise versus vigor and coordination. These are ideals, claims based on virtue in government. Proposals based on these ideals—to appoint better people, to produce more openness, and so on—miss the point that *ideals* of virtuous administration direct attention away from how government operates in practice.

We must discard claims based on “expertise” and “vigor” so that we may see the real effect of “independence.” The most important feature of the “independent” agency is not the tenure of its members but their isolation from the executive branch. A President may resist claims by factions in the way Madison envisioned: by adding other items on the agenda. Agencies devoted to single industries lack *threats*; they cannot promise to veto Bill X if Congress takes step Y. The absence of logrolling means that committees in Congress have extra influence—more to the point, that power has been transferred from the President (with a national constituency) to the committee chairmen, who serve longer and are on average farther from the national median view of politics. (Chairmen are tied to the very interest groups that set this process in motion; that is an effect of both the division of the country into districts and the seniority system, which ensures that those who represent relatively unified and stable districts will achieve disproportionate power.)

If you doubt this, consider the case of antitrust enforcement, a natural experiment because carried out by both an agency (the Federal Trade Commission) and a unit of the executive branch (the Antitrust Division of the Department of Justice). Antitrust law is supposed to ensure that consumers receive the benefits of competition. But it may be used to suppress competition: a prosecutor may initiate actions against firms that are competing too strongly, to the detriment of producers. Producers are concentrated relative to consumers and so can overcome the free riding problem that obstructs collective action more readily than consumers. Thus producers have considerable influence over many localities, but representatives elected from the entire nation (principally the President) are more inclined to favor consumers. Because the seniority system in Congress gives the representatives of a few localities more influence over the FTC than the Antitrust Division, we should expect the FTC to do more to protect producers and the Antitrust Division to do more to protect consumers.

This is what a series of careful empirical studies has found. When the FTC challenges a merger, the stock prices of firms in the industry rise, which one would expect if the challenge is designed to aid producers; when the Antitrust Division challenges a merger, the stock price falls, what one would expect if the action is designed to assist consumers. The judiciary, with its wider constituency, has been in recent years on the side of consumers, being deeply suspicious of suits filed by producers against their rivals. But despite changes in Administrations and dramatic philosophical differences among Presidents, the FTC has been responsive to producers’ interests—particularly if the producer has a plant in the district of a member of the legislative committee that superintends the FTC’s budget.

It can be no surprise, therefore, that the legislature has found ways to wean even line agencies of the executive branch away from the President through private rights of initiation, intervention, and participation. The APA, the FOIA, the Government in the Sunshine Act, and the extensive provisions for judicial review, all ensure that factions have many points of access and influence. They monitor intensively; insulation from factions’ influence has become an *objection* to the behavior of all public officials. Failing to wait for group monitoring and input is seen as a reason to set aside the agency’s decision. From an economic

perspective, it can be no surprise that those members of Congress with the most seniority vigorously resist presidential efforts to coordinate executive action through the Office of Management and Budget. Anything that increases the role of a broader national constituency in rulemaking, and that removes important aspects of decisions from “the sunshine” (that is, from monitoring by factions), reduces the support these legislators can garner.

None of this is to deny that we ought to be suspicious of what public officials do behind closed doors. Recall one of Madison’s most famous lines: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.” Adam Smith had equal suspicion about producers sitting down together. Mistrust of officials leads many public spirited persons to prescribe closer monitoring. Yet it should by now be apparent that closer monitoring comes at high cost. By “auxiliary precautions” Madison had in mind the division of governmental powers rather than anything like the APA—and both Madison and Smith would have been appalled by the idea of “negotiated rulemaking,” which practically hands the instruments of public power to an industry cartel.

3. How should regulatory authority be divided between state and national governments? Once again much of the legal literature lavishes attention on formal questions about the legal entitlements of states under the Constitution. Other scholars inquire whether government “close to the people” is superior. We should ask instead: what facilitates competition among jurisdictions?

Competition depends on choice: consumers can turn to other vendors, producers can turn to new sources of supply or build new plants in different places. Choice depends on movement. Inputs into production move, finished goods move, capital and labor move. The role of private ownership in this process is widely understood. Less recognized, but no less vital, is the ability of laws themselves to move—or, what is the same thing, of money, goods, and people to move to the laws. A corporation dissatisfied with one state’s law can reincorporate in another, effectively choosing the rules of law that govern its operations. Under the McCarran-Ferguson Act, insurance companies can move to favorable laws, and persons who want insurance may shop for the combination of price and regulatory benefits they prefer. When governments become sufficiently plentiful, and when the scope of laws matches the domain of their costs and benefits (that is, when costs and benefits are all felt within the jurisdiction enacting the laws), competitive forces should be as effective with governments as they are with private markets.

Granted there are not enough governmental units, the populations of jurisdictions are not sufficiently homogenous, and externalities are common, so the competitive ideal cannot be achieved. A market economy, too, does not look like Adam Smith’s atomistic competition. The question is not whether we can achieve perfect competition but how to use the power of competition to deal with the costs of monopoly in government, just as markets in goods deal with the

costs of private monopoly. The ratio of rhetoric to data is high when lawyers and professors and legislators talk about law. Instead of relying on a rhetorical equilibrium, we can employ the forces of competition.

If the level of government should be matched to the consequences of legal choices—large enough to prevent significant effects from escaping to impose costs on outsiders, and small enough to keep rules under competitive pressure from within or without—then we should be searching for trans-border consequences. Not just any consequences; there are always some, but using small effects to justify national regulation enhances the power of interest groups (by stifling jurisdictional competition) without affording a prospect of significant benefits.

Pollution control and defense are natural candidates national regulation from this perspective. Surprisingly, so are some property taxes. (Alaska has market power in oil and will therefore levy severance taxes that fall on persons out of state who buy the energy.) Regulation of production presumptively is local, to facilitate movement of both assets and goods, unless a state happens to have market power in some resource that is hard to move. Regulation of the market in finished goods, or of ownership of resources, as opposed to the process of production itself, presents multi-state issues. Thus antitrust policy should be national and not local.

The distinction between production and trading may be elusive. It is the possibility of movement that places pressure on state and local regulation. If capital, goods, and people can move freely, interest groups seeking state and local regulation cannot achieve much; they will simply drive people and production elsewhere. Ability to regulate the process of movement, by contrast, creates the situation in which faction can succeed.

Consider a merger of two firms with plants scattered throughout the nation. Particular states may attempt to hold the merger hostage while insisting, as a condition of approval, that the firms allocate the benefits of the transaction to those states—perhaps by promising to increase employment there. Sometimes transactions that create aggregate benefits for the nation impose local costs (plant closings being the prime contemporary example). Whenever the benefits of a transaction come from activities in many states, it is possible for particular states to take hostages, and in the process perhaps to disrupt the creation of the benefits. This is the mirror image of pollution: in one case harms created locally flow out of states; in the other benefits created nationally are inviting targets for local capture; in both cases the optimal jurisdictional size transcends state borders.

4. The economic understanding of legislation holds other implications for our understanding of the laws. I mention only one: that judges cannot interpret laws to serve the public interest. Shocking? Certainly to the legal process tradition exemplified by the work of Henry Hart and Albert Sachs. But when civil virtue fails to carry the day, statutes reflect the outcome of a bargaining process among factions (and their representatives). They are compromises, and compromises lack “spirit.”

My point has two components. First is the interest-group theme on which I have been hammering away. Second is a corollary so far unmentioned: legislatures decide by voting. Condorcet showed long ago that sometimes majority voting cannot produce a victor, because people may hold intransitive preferences. When there are three or more possible choices, it will often be true that a coalition of those who support two can defeat the third; the loser then makes a better offer to half of the “winning” coalition, and the cycle repeats; this can continue with no winner. In the language of game theory, the legislative game often has an empty core. In the 1950s Duncan Black and Kenneth Arrow independently formalized Condorcet’s insight and demonstrated that it is impossible to have stable, consistent outcomes from voting systems that meet even the most minimal requirements (such as everyone’s vote counting the same, and no bribes).

Well, legislatures manage to produce reasonably stable bodies of law. But they have done this by violating Arrow’s conditions. In Congress, some votes *do* count for more than others. The Speaker of the House and Committee Chairs are dictators within their domains. With dictatorship comes path dependence. He who controls the agenda can manipulate the order of decisions so that the outcome is to his liking, even if a majority in a free vote would do things differently. This can create stable laws, but at the expense of a gap between the law and what the majority of the legislature favors. And then there are bribes. Not in cash, but via logrolling. It is no accident that Congress almost every year produces an Omnibus Budget Reconciliation Act, roughly 1,000 pages of provisions with a little something for everyone. These laws demonstrate the power of both interest groups and Arrow’s theory of public choice. And they mean that statutes lack spirit.

This is so even when a law covers but a single topic. Let me give you an example. *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987), dealt with a statute, the Pregnancy Discrimination Act, saying that pregnant women must “be treated the same for all employment-related purposes” as employees not so affected. The question was whether employers who favor women over men, giving women alone leaves of absence, comply with this rule.

The PDA was a reaction to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that pregnancy discrimination is not sex discrimination. The PDA overturns *Gilbert*. Does it do more—does it give new rights to men who want to stay home with babies? The Court approached *Guerra* by putting a hypothetical question to the drafters of the law: “Would you object if women got a little more than men?” They answered “no” for the silent drafters. I could of course pose a different question: Does “‘treated the same as’ mean equality?” Lots of options fall in between.

Is there any way to choose, on public-interest grounds—that is, if we assume that everyone has only civic virtue at heart? It turns out that the answer is no. Some legislators favor formal equality on moral or prudential grounds; others want to minimize the role of law versus private choice (or role of feds vis-à-vis states), still others think law should do no more than protect victims of past discrimination while leaving men to fend for themselves; still others would say

that there is no discrimination either way if we view the family unit as the object of the law's solicitude.

Who gets the Court's hypothetical question? The sponsors? The median voters? Former wrong, but latter silent! You will have to reconstruct the speaker in either case. If you reconstruct a person exactly like you (perhaps on theory that everyone is reasonable, and you are a model of reasonableness), then the process of hypothetical querying is worthless. Might as well ask yourself what is wise and be done with the pretense. If you imbue the reconstructed speakers with different attributes, however, you get out only what you put in—and again the process is worthless. There just wasn't anything *there*.

Perhaps coming at this from another angle would help make the point. Every law has to solve multiple problems at once. Consider a *really* simple law: one that provides only a rule of decision and an enforcement budget.

Suppose 55% of Congress preferred rule "treat women at least as well as men" (so the man loses *Guerra*) but 20% of these wanted cheap enforcement. To get a larger enforcement budget the majority stops with strict equality (preferable to the status quo). Any interpretation that looks to the sponsors' preferences will misconstrue the law. If court later "interprets" the equality rule as allowing a preference, Congress can't overrule it (the 55% blocks); but knowing of this construction would have ensured weak enforcement. Ex ante, such an approach would have killed the deal altogether.

Instead of putting this as Q of disturbing a package, ask whether a two-dimensional deal has *any* meaning when the court comes to interpret a single dimension. Suppose the legislature could agree on (a) preference for women with low funding, or (b) formal neutrality with high funding. If sponsors refuse to budge from preference with high funding, they get no law. And if you put either preference or high funding individually, both would pass—but because some of the preference types want low funding, you can't aggregate these. Now if you present the preference issue to a court you get a misleading answer—even trying to address it alone warps the answer, or imputes one where there is none!

All in all, there just isn't anything *there* except for the text. A statute lacks an underlying spirit—not because the intent of the drafters it is hard to discover, but because a collective body doesn't have a brain. It just votes. Compromises lack purposes. And *that* has powerful effects for interpretation.

For many judges, including me, the solution is to look only at the statute's text—to disregard legislative history and certainly never to impute a "purpose" to the legislative bargain, as the Legal Process school would do. Even if we knew the objective, deciding how far to go in that direction is a legislative rather than a judicial task. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S.

522, 525–26 (1987) (emphasis in original). The opinion from which I have quoted was unanimous.

That approach has come to be called textualism—and it has the collateral benefit that it can be implemented by generalist judges. A specialist might be able to do better by a nuanced approach, but for a judge who does 1% tax, 1% antitrust, and so on, the simple approach is best. The common belief that judges are philosophers who have ample time to study the laws and to understand the effects of their decisions is fantasy. Judges are as prone as other busy people to the law of unintended consequences.

Other judges respond to public choice, and the collapse of the legal-process model, by asking not what the legislature *did* but what it would have done had the question been put directly. This approach, pioneered by Aristotle, often is called imaginative reconstruction. Its modern proponents include Learned Hand, Henry Friendly, and Richard Posner on the bench, and William Eskridge and Einer Elhauge in the legal academy. The judges tend to ask what the *enacting* Congress would have done with the issue, while the professors tend to ask what the *current* Congress would do. This difference can be important, but for today I treat all stripes of imaginative reconstruction as similar.

I'm going to discuss imaginative reconstruction through an example: *Logan v. United States*, 453 F.3d 808 (7th Cir. 2006), affirmed, 128 S. Ct. 475 (2007).

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

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

This question came up in three circuits. The second circuit, per Judge Leval, said that the statute is clear: rights can't be "restored" if they have never been taken away. The first circuit, per Chief Judge Boudin, agreed that this is the natural reading of the word but added that Congress could not possibly have considered the question at hand. Why treat the less serious state crime as the basis of a longer federal sentence? Some judges might have called the law "absurd," but Judge Boudin had none of that. He agrees with the textualist position that the

absurdity doctrine should be limited to linguistic problems; otherwise the judiciary can assume too much power by waving its hand and declaring “absurdity” whenever the law produces an unpleasant result.

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

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

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

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

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

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

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

My point is simple: an understanding of agency appropriate to one-on-one transactions is not appropriate to the business of writing and implementing statutes. To the extent it is a useful analogy, it shows why the laws’ addressees—private persons or the executive branch—should have discretion in interpretation. It may show, for example, why courts defer to administrative agencies’ interpretation of the law, and why public officials have immunity from liability in damages. So used, however, this analogy *diminishes* the role of the courts in governance.

There’s one final problem with imaginative reconstruction: attempts to replicate something that never happened in Congress are impossible. That’s the main lesson of the first part of my talk. A proposal to add a subsection about state-law misdemeanors may be met with an amendment about abortion, or about building a new post office in some legislator’s district, and may fail because there isn’t time on the floor. Confident predictions about what Congress “would have done” are very likely to reflect the judge’s druthers rather than the actual legislative process. And efforts to interpret one subsection of a complex law, divorced from the others, are folly: I hope that’s the lesson you took from *Guerra*.

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

such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” This tracks §921(a)(20) in treating expungement, pardon, or restoration of civil rights as canceling all effect of the conviction—but it shows that the “restoration of civil rights” clause is inapplicable to one whose civil rights were never taken away. For such persons, expungement and pardon are the only ways to regain the right to possess firearms. In other words, when Congress addressed this subject directly, it supported Judge Leval’s conclusion, not Judge Boudin’s.

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

If judges cannot serve the public interest by finding and implementing a legislative intent, what is appropriate? Beady eyed readings designed to pull the teeth from political deals? Readings designed to fortify any public-interest elements in the legislative packages? A public interest counterweight in which canons of construction add a little to the lot of the less fortunate members of society?—but only a little, not only because judges lack the mandate to follow their own preferences but also because if they add a lot Congress will notice and start subtracting to counteract the judicial thumb on the scale. Each poses substantial questions for implementation and legitimacy. But these are the questions we must today be asking, questions lurking since 1787 and thrust into prominence by the insistent logic of public choice as the Constitution’s own mechanisms of faction control continue to lose their effectiveness.