THE FAILED PROMISE OF REGULATORY VARIABLES

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The dialogue among scholars of law and linguistics manifests the schism between those (predominantly legal scholars) willing to embrace a dynamic theory of statutory interpretation and those unwilling to bend the text quite so far, at least without abandoning the pretense that some form of (predominantly linguists) interpretation is at work. To bridge that gap, several participants in the recent conference proposed the idea of a regulatory variable to explain why the legal interpretation of certain words or even phrases in a statute may change substantially over time. Thus, in Professor Hart's famous hypothetical of the prohibition on "all vehicles in the park," the term "vehicle" can be seen as a regulatory variable. Courts therefore may justifiably construe "vehicle" variably depending upon the circumstances. An ambulance entering the park at the request of an injured patron is not a vehicle, despite the fact that ambulance falls comfortably within the term's ordinary understanding but an ambulance joy riding through the park would fall within the statutory prohibition. The idea of a regulatory variable is alluring, for statutory language as a whole can bind judges within a range of narrow interpretive alternatives—an apartment building is not a "park" no matter that playground equipment is in its courtyard—even if the meaning of certain words or phrases, such as vehicle, must of necessity be altered with new conditions unforeseen by the legislature.

But the concept of a regulatory variable is misleading. All statutory language is susceptible to numerous interpretations that would be impossible to predict in advance. And myriad changes in financial or social situations may make legislative directives difficult to apply in future generations. Banking restrictions make little sense in a world of ATM's, and discovery rules need to be adapted to an era of e-mail. As several conferees noted, it is not just the term vehicle that may become a regulatory variable, but all terms in the statute. Is the airspace above the parkground part of the park? Does "in" include a vehicle on the sidewalk

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encircling the *park*? And, if statutes as a whole are immanent regulatory variables,[1] the concept loses all substance.

Nonetheless, the idea of a regulatory variable is helpful in reframing the debate over the propriety of dynamic or activist statutory interpretation. Because interpretation inevitably includes some choice or variables—whether interpretation is based upon a textualist, intentionalist, or legal process approach—it entails delegation of authority to the interpreter. Choice exists even in ascertaining what linguists refer to as *conventional meaning*: which sources are relevant in determining submeaning; what type of empirical evidence is probative; and whose conventions are more important, those of Congress, judges, or the citizenry as a whole?

A key question to address is therefore the allocation of interpretive authority among institutions. Are judges free to choose the methodology for determining the meaning of statutory language? Should judges engage in dynamic interpretation if that role is explicitly or implicitly prescribed by Congress? Even if there is no explicit or implicit delegation, can courts nonetheless be activist in furthering other social or political values?

In administrative law, the question of the allocation of interpretive authority has long been paramount. Under the *Chevron* doctrine,[2] courts (at least doctrinally) will defer to all reasonable agency interpretations of ambiguous statutory language. The underlying justification is that Congress, even when not expressly saying so, intends to delegate such interstitial interpretive authority to the agency charged with administering the statute. Thus, in *Chevron*, the Court concluded that, if Congress uses ambiguous terms such as "stationary source" in a pollution abatement statute, the primary responsibility for construing that term should rest with the agency (the EPA) administering the statute.[3] The presumption of intentional delegation serves as an easily administrable bright-line rule. Congress can always overcome the presumption by expressing a contrary intent.

Although the Supreme Court never demonstrated an empirical basis for the presumption, it provided an ideological justification. Justice Stevens

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1. Professors Eskridge and Levi now term the concept *regulatory variablility*. *See* William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103 (1995). The idea of regulatory variability may perceptively describe what judges do, but it fails either to explain how judges determine the meaning of language or to justify their departures from conventional meanings to serve other goals.

2. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

3. Such delegations are dynamic in authorizing those agencies to alter interpretations with changing conditions and political winds. *See* T. Alexander Aleinikoff, *Updating Statutory Interpretations*, 87 MICH. L. REV. 20, 42-46 (1988).

explained:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.[4]

In Justice Stevens' view, interpretation becomes a political act, whether by congressional staff, judges, or administrative agencies.

In contexts in which a congressional intent to delegate interpretive authority to agencies is manifest, *Chevron* is not controversial. Congress should be able to delegate interpretive authority to agencies just as it does other policymaking tasks. Agencies exercise no more authority in ascertaining the meaning of ambiguous provisions than they do in fleshing out which broadcast licenses are in the "public interest,"[5] or which defense bases have become obsolete.[6]

Chevron remains problematic, however, when there is little reason to believe that Congress would have intended the agency to exercise interpretive authority. Indeed, courts themselves have ignored *Chevron* in a substantial number of cases.[7] Many factors influence whether judges defer to agency's interpretation of statutes, such as whether the agency's interpretation raises a constitutional issue,[8] whether the agency's interpretation is retroactive,[9] whether it expands the agency's own jurisdiction,[10]

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4. 467 U.S. at 865. Under *Chevron*, courts first ascertain—without any deference to the agency—whether the contested statutory language is clear. If the language is ambiguous, then the courts will defer to any reasonable construction by the agency.

5. Communication Act of 1934, 47 U.S.C. §§ 303, 307-08 (1988).

6. *See* Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687. The nondelegation doctrine is no longer aggressively enforced. *See generally* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993) (excoriating broad delegations of policymaking authority to unaccountable agencies).

7. *See generally* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992).

8. *See, e.g.*, Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Councils, 485 U.S. 568 (1988). In addition, courts perhaps have ignored *Chevron* when, for political reasons, they cannot abide by the agency's interpretation.

9. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

10. *But see* Dole v. United Steelworkers of America, 494 U.S. 26 (1990).

or whether the agency has principal authority for administering the statute.[11] For instance, when the Department of Agriculture is interpreting the language in a regulatory permit, *Chevron* deference makes little sense.[12] And *Chevron* may also make little sense when a prosecutor is interpreting a statute he or she is enforcing.[13] In other words, when Congress' intent to delegate is plain or at least reasonably inferred from the statutory scheme, the deference rule is followed, but if there are reasons to suspect that Congress would not have (or should not have) delegated such interpretive authority to agencies, then courts are more reluctant to rigorously apply the *Chevron* analysis. Courts, in other words, do not permit agencies to treat all ambiguous phrases as regulatory variables.

The courts' ambivalence about *Chevron* illustrates the difficulty of categorically allocating interpretive authority between courts and legislatures in all statutory interpretation cases. The allocation of interpretive responsibility within our legal system may hinge both on congressional intent as well as on external values bearing on the propriety of judicial activist interpretation. Characterizing particular statutory language as a regulatory variable dodges the thorny issues. Who, after all, must decide whether a regulatory variable exists? Rather, as in the administrative law context, we should focus more explicitly on the reasons why particular institutions should exert greater or lesser authority in interpreting statutory language, whether because of one institution's comparatively greater expertise, because of the passage of time, or because of background norms in our society.

Some judicial discretion is inevitable. At least in the absence of congressional direction, courts must determine the methodology for interpreting statutory language. Courts must then employ that methodology to understand statutory language and then apply that language to the controversies that arise.

Congress can limit judicial discretion—at least to a large extent[14]—by

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11. *See, e.g.*, Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).

12. *See* Meadow Green-Wildcat Corp. v. Hathaway, 936 F.2d 601 (1st Cir. 1991).

13. The Supreme Court implicitly rejected the applicability of *Chevron* to interpretation of criminal statutes in recent cases such as United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994), and Staples v. United States, 114 S. Ct. 1793 (1994). *See also* Crandon v. United States, 494 U.S. 152, 177-83 (1990) (Scalia, J., concurring) (suggesting inapplicability of *Chevron*).

14. Congress cannot, however, through use of presumptions or canons, direct an impermissible result. *Cf.* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (invalidating statute, which by mandating presumption of disloyalty for all those receiving presidential pardons, infringed on President's pardon power).

instructing courts how to interpret its commands. Congress can indicate which presumptions to use in interpreting statutory language and presumably even what type of interpretive theory to apply. Congress has in fact passed a Dictionary Act[15] to provide a "few general rules for the construction of statutes,"[16] and courts have relied on the Act to resolve interpretive issues.[17] Despite the congressional direction, however, some discretion remains, for Congress cannot anticipate all the interpretive quandaries that will arise.

Even when the statutory language is relatively clear, however, judges may at times trump a conventional understanding in pursuit of some external political or social goal. Such activism is most defensible when Congress implicitly delegates that authority to courts. As with delegations to administrative agencies, Congress often uses indeterminate language, inviting courts to apply a statute's wording in a flexible, common-law like manner. Courts could not do otherwise with statutory language forbidding "restraints of trade" in the Sherman Antitrust Act,[18] "discrimination" under Title VII,[19] protecting "personal privacy" under the Freedom of Information Act,[20] or requiring "reasonable accommodations" under the Age Discrimination in Employment Act.[21] Congress in such statutes may be viewed as delegating authority to the courts to develop legislative principles through the common law.[22] Indeed, courts on occasion have asked whether excessive delegation is consistent with Congress' lawmaking function.[23]

Even when the delegation is not explicit, or the statutory language so open-ended, Congress might be thought to have implicitly delegated considerable interpretive authority to the courts for a variety of reasons. Because of inevitable errors in drafting and unforeseen applications, Congress might delegate a broad interpretive role to courts simply as a matter of efficiency. Congress is willing to abide by the occasional judicial

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15. 1 U.S.C. § 1, et seq (1988).

16. CONG. GLOBE, 41st Cong., 3d Sess. 1474 (1871) (remarks of Rep. Poland). In the Act, Congress has defined such commonly used terms as "person" and warned that statutes applying to singular entities should apply to plural entities as well.

17. *See, e.g.*, Rowland v. California Dep't of Corrections, 113 S. Ct. 716 (1993); Ngiraingas v. Sanchez, 495 U.S. 182 (1990).

18. 15 U.S.C. § 1 (1988).

19. 42 U.S.C. § 2000e-2(a) (1988).

20. 5 U.S.C. § 552(b)(6) (1988).

21. 42 U.S.C. § 12113 (1988).

22. Harold J. Krent, *Delegation and its Discontents*, 94 COLUM. L. REV. 710, 728-30 (1994).

23. *Id.* at 741 n.32.

error, knowing that it can always correct a distasteful interpretation after the fact. For instance, the Supreme Court in recent terms has arguably altered statutory language in concluding that the term "knowingly" in a criminal prohibition modifies not only the verb following it, but also all subsequent verbs in the same clause.[24] The Court's interpretation may violate the linguistically preferred reading of the statute,[25] yet Congress can always amend the statute and otherwise is spared the necessity of revisiting the issue. In such cases, courts act on behalf of Congress, attempting to answer questions roughly as would have the enacting legislature.[26]

But courts may also interpret statutes more creatively, even when such activism does not respond to delegated authority from Congress. As with departures from the *Chevron* doctrine, courts may embark upon more activist interpretation when there is less reason to defer to a coordinate branch of government. Majoritarian rule is not the exclusive norm in our constitutional system. For instance, when Congress' legislation trenches upon constitutional values, it may be reasonable to allocate more dynamic interpretive responsibility to the courts in keeping with their traditional role in defining and preserving constitutional interests.[27] Similarly, courts may justifiably exercise greater interpretive discretion if a legislative process defect exists.[28] Just as judicial review itself comports with the checks and balances within our system, so may dynamic interpretation.

The regulatory variable concept attempts to do the impossible by preserving interpretive flexibility within a legis-centric theory of statutory construction. Resolution of the tension between legislative primacy and creative interpretation by judges should turn instead on contextual judgments concerning the allocation of interpretive responsibility within our system of separated powers. No problem arises if Congress intends to

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24. *X-Citement Video, Inc.*, 115 S. Ct. at 467-69.

25. *Cf.* Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1570-77 (1994).

26. The Court has performed an analogous function under the dormant commerce clause, responding on Congress' behalf to perceived state incursions into interstate commerce.

27. Judicial activism is particularly apt if the constitutional norm is underenforced, as with the nondelegation doctrine or the Tenth Amendment. *See generally* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 160-192 (1990); John C. Nagle, *Clear Statement Rules*, 1995 WIS. L. REV. (forthcoming).

In contrast, some canons of statutory interpretation, unlike the canon of avoiding constitutional questions when an alternative reading is fairly possible, merely attempt to further legislative will. For example, consider the canon *expressio unius est exclusio alterius*. *See* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993).

28. *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (holding that Congress had not conferred upon Civil Service Commission the power to exclude resident aliens from working for the government).

delegate such subsidiary lawmaking powers to the courts, and many would agree that courts should similarly be activist in safeguarding constitutional and possibly other interests. Because interpretation inevitably is a political act, we should focus not on ways to conceal the shared power between legislatures and courts, but on ways to rationalize and delimit the courts' exercise of subsidiary lawmaking authority through interpretation.