CHAPTER 1

The Goal of Statutory Interpretation

The goal of statutory interpretation should be central to understanding its theory and practice. Unfortunately, there is no consensus about the proper goal of this interpretive enterprise, either politically or legally. Fortunately, consensus is unnecessary for purposes of this book. However, it remains important to understand the goal of statutory interpretation in order to evaluate the different theories set forth in the book. Practices and consequences cannot be appreciated in the abstract, especially given the concern about unconstrained willful ideological discretion of the judiciary. Consequently, this chapter sets forth, relatively briefly, the theories about the appropriate purpose of judicial interpretation of statutes.

The judicial power, including that of statutory interpretation, derives from the Constitution. The Constitution, however, does not provide much guidance on the relevant question. It simply "leaves statutory interpretation to be resolved by the 'judicial power' without specifying how that interpretation should be conducted."[1] No provision "sets out explicit instructions to

judges about the limits of interpretive flexibility."[2] The Constitution leaves us with only the broad principle that statutory interpretation should be a "judicial" exercise, which leaves considerable discretion about the proper nature of judging the application of statutes in individual cases. Various leading scholars have claimed that their proposed interpretive method is constitutionally inspired, or even required, but they have reached this same conclusion in support of different approaches. While some substantive interpretive canons, discussed in Chapter 4, have an apparent constitutional provenance, there is no accepted general thesis of constitutionally directed statutory interpretation.

Historically, the dispute over the goal of statutory interpretation has largely been drawn between those who believe that judges should hew closely to their assessment of what the legislature intended, based upon all available evidence of that intent, and those who think that the purpose is simply to give effect to the statutory language adopted by the legislature and eschew consideration of extrinsic evidence about the legislature's intent. This dispute is closely bound up with the interpretive theories of each school, and it will be explicated further in succeeding chapters. Those who believe that the purpose of the process is to discern intent commonly argue for consideration of legislative history, while those who would limit interpretation to language are of the textualist school. A third purpose has also emerged, which contends that interpretation should be guided by a concern for the best policy consequences under the circumstances. This is generally considered the pragmatic approach to interpretation, which uses its own discretionary standards.

The debate over the proper purpose of statutory interpretation has lasted for many decades. The Supreme Court has cycled among different purposes at different times. While one approach or another has gained ascendancy for a time, it has eventually lost this position. None of the theories have knocked out competing theories. For most of our history, the different theories have coexisted. This book does not purport to resolve the proper theoretical basis for statutory interpretation, but it is important to understand these theories, as their application is examined and evaluated.

This introductory chapter first sets forth the overall theoretical construct for statutory interpretation disputes. The interpretive role of courts should be seen, I contend, as an exercise of power delegated by the legislature. The

courts should view themselves as agents who do the bidding of Congress in their interpretations of congressional statutes. Next, I review the major interpretive theories and how they may fit within this delegation scheme. Finally, I summarize the overriding issue of faithless judicial ideological decision making, which pervades the debate over interpretive methods and is discussed throughout the book.

Statutory Interpretation as Delegated Power

Before examining the competing purposes for statutory interpretation, it is important to address its context. Congress passes statutes but does not apply them to individual cases; the judiciary is in charge of that task in our constitutional model. In statutory interpretation cases, judges are applying the legislation passed by Congress. Consequently, judges are often viewed as fiduciaries, or agents, of the legislature. Thus, "[m]ost academic theories of statutory interpretation, and perhaps all judicial ones, see judges as agents of Congress."[3] This is the theory of legislative supremacy in the statutory sphere.

Legally, judges are not true delegatees but have their own independent constitutional interpretive authority that is not derivative of the legislature. The Constitution invests the judicial power in the judiciary, and this serves as its authority to interpret statutes when deciding cases. However, this declaration begs the question of what the "judicial power" means. The judicial power is not that of arbitrary decision making nor that of legislating. The delegation theory suggests that viewing themselves as legislative agents when interpreting statutes is the proper understanding of how judicial power should be exercised.

In this schema, the legislature is the principal and the courts are its agent, analogous to private agency relationships. A corporation, for example, relies on individual officers and employees to carry out its business. The law recognizes the corporation as a principal and the officers as its agents, who are delegated authority to advance the interests of the corporate principal. Because the corporation and its directors are unable themselves to make every day-to-day managerial decision to carry out their broad business policies, they provide this authority to others through delegation. This delegation

may provide more or less discretion to an agent. The agent may have broad authority to take action, as in the case of a legal power of attorney, or quite limited authority to take only a given action or actions below a certain monetary threshold. Moreover, there is some residuum of authority that cannot be delegated to officers but must be reserved for the board of directors, under corporate law.

Analogously, the legislature is like a board of directors that sets national policy but delegates its implementation. The executive branch is somewhat like the officers of the corporation, in its actions applying the law. The federal judiciary has a separate constitutional authority, but its ability to exercise that authority is often governed by the legislature, which has some jurisdictional control and, more significantly, adopts the laws that the judiciary is to interpret. The legislature lacks the resources to control the case-by-case interpretation and application of those laws, and this is the judicial power delegated to the judiciary by statutes.

William Eskridge has argued that legislation by its very nature "delegates policy-making authority to agencies and courts."[4] A major article by Matthew Stephenson examines the delegation issue in an elaborate form.[5] He reviews the evidence of delegation and specifically analyzes why legislatures delegate some questions to courts but others to agencies of the executive branch and notes that courts exhibit more stability over time and more ideological heterogeneity across issues. Of course, courts have the authority to review agency actions, so any delegation to agencies ultimately transfers some authority to the courts. Indeed, Congress uses courts to monitor and control abuses of its delegation to agencies though legislation such as the Administrative Procedures Act.

The delegation context has been extensively explored in the context of administrative agencies. One major theoretical construct is based on the assumption that constituents care less about the details of policy than about their effectiveness.[6] Legislators will delegate more authority to bureaucrats, on this theory, when they believe that bureaucratic expertise will yield better policy outcomes. Congress "often lacks the knowledge it needs to obtain desired policy outcomes."[7] Because Congress has such a broad agenda and legislative action is so costly, it is difficult for the legislature to monitor and modify its statutes in light of their practical effect in particular applications. Agencies, though, have a better ability to perform this ongoing function.

Although ideologically the agency will not align perfectly with the legislature, the common interest in successful policy outcomes may overcome any such differences.[8]

Epstein and O'Halloran's classic work on such agency delegation notes that a reason "that bureaucracies are created in the first place is to implement policies in areas where Congress has neither the time nor the expertise to micromanage policy decisions."[9] They hypothesize that legislators will delegate more where a policy area is complex and informationally intensive. Epstein and O'Halloran then constructed a quantitative index for the extent of statutory delegation to federal agencies. They analyzed the extent of degrees of discretion in different statutes over time and found that the magnitude of discretionary delegation to agencies varied slightly with the executive branch's political alignment and that greater delegation existed in complex areas.

As Stephenson notes, the decision to delegate to courts parallels that of agency delegation, though his theory is not complete. Some have theorized that delegation to courts is riskier for Congress than delegation to agencies, because judicial independence gives the legislature less control over judicial decisions. In some ways, delegation to courts may be less risky, though, because the judiciary contains many different judges with many different ideological preferences, in contrast to an executive branch largely under the control of a single president. Moreover, judicial decisions are made on a case-by-case basis rather than a top-down determination by a national agency in the form of a rule. The advantages of this process are discussed in Chapter 5. In any event, this book is not about the delegation choice of agencies versus courts. It is about the legislative decision to delegate decision-making discretion to courts by using more ambiguous statutory language or leaving gaps in the statute to be filled by judicial application. The next section describes the distinct types of legislative delegation.

Types of Delegation

The legislative delegation to courts takes two distinct forms. The first might be called "background delegation." No matter how precisely Congress may attempt to draft, it is humanly impossible to foresee every future circumstance.

H. L. A. Hart suggested that hard cases arose from the legislature's "inability to anticipate" future circumstances.[10] Judge Posner has noted that the realities of the legislative process make it unrealistic for Congress to consider "fully the potential application of their words to novel settings."[11] James Madison himself wrote that "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal."[12] Some cases will arise that fall through the cracks, or interstices, of the statutory language. Statutes remain on the books indefinitely while society changes around them. They will constantly be applied to new circumstances which may not even have existed at the time of their passage. With these new circumstances not being clearly governed by the statutory language, the court must nevertheless somehow interpret the language to rule on the case. The delegation construct means that the court should do so with an eye to what the legislature might have intended for the case, had it known of those circumstances.

The second form might be called "direct delegation." This involves the legislature affirmatively delegating decision-making authority to the courts. In this case, the legislature purposely leaves issues unresolved in the statutory language, issues that must be settled by courts applying that language to particular disputes. Such direct delegation may arise for a variety of reasons. It may be that Congress could not reach agreement on precise language and, rather than abandon the legislation in toto, chose to leave the statutory lacuna.[13] The Supreme Court recently concluded that in passing the 1991 Civil Rights Act, the members of Congress simply "agreed to disagree about whether and to what extent the Act applies to preenactment conduct."[14] Hence, they left the issue unresolved for the courts to settle. Alternatively, it may be that Congress thought that government policy reflected in statute could be better made by the case-by-case development of law than by setting a "one size fits all" uniform national statutory rule. Cynics might suggest that such broad direct delegation reflects "lack of will: Congress may recognize a potentially divisive issue but decide to finesse the issue with ambiguous or incomplete language."[15] Some consider this an inappropriate form of delegation, an attempt to escape accountability for legislative determinations. In this event, greater interpretive discretion suits the ends of Congress. Yet another reason might be the enlistment of court power in monitoring the actions of the executive branch.

An obvious example of such direct delegation is found in the 1980 adoption of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the federal Superfund statute. This law, of great economic and environmental importance, was hastily adopted by Congress and contained many unresolved gaps in application. One plain example of delegation was the question of the joint and several liabilities of CERCLA defendants. The original bill provided for such liability, but the provision was deleted from the final bill. The deletion was not accompanied by an alternative standard, though, and Congress openly left the resolution of the liability apportionment question to the courts that would apply the law. Another gap in CERCLA involved the standards for causation that would govern liability under the statute, which the Congress did not directly define. The same was true of many important contested issues such as the liability of parent and successor corporations under the act. Indeed, CERCLA's legislative history indicates that Congress intended to have some issues about the scope of liability determined under common law principles, the application of which was explicitly endorsed in the legislative history of the Superfund Amendments and Reauthorization Act (SARA), which amended CERCLA. CERCLA provides an example of substantial direct delegation of decision-making authority to courts.

This process of legislative delegation to the courts was closely studied in the context of federal labor law.[16] This study analyzes direct delegation and how "legislators sometimes deliberately include ambiguous language in statutes that allows judges to make policy choices as they resolve interpretive controversies about the meaning of the ambiguous language."[17] Examination of labor laws, such as the Wagner Act, Clayton Act, and Erdman Act, revealed that legislators carefully avoided creating precise rules but delegated many controversial decisions to the courts, even though Congress foresaw those controversies. Not entirely pleased with the courts' resolution of those issues, the legislature later adopted clearer linguistic requirements in the Norris-La Guardia Act to limit the courts' choices. The history demonstrated how the legislature titrated judicial discretion based on the circumstances of the legislation it addressed.

A more recent study of the Private Securities Litigation Reform Act also illustrated direct delegation.[18] In attempting to tighten judicial standards for securities fraud actions, Congress focused on requirements for plaintiffs

pleading the *scienter* standard for liability. Congress resolved that plaintiffs be forced to plead facts demonstrating a "strong inference" of *scienter* but said little about precisely what this meant. The study of the act's passage demonstrated that the record was replete with contradictory positions on the meaning of the standard and ultimately ducked the issue, leaving it to the courts to flesh out the statutory standard with meaning.

The statute books are replete with examples of broad delegation to agencies and courts. Consider the authority of the Federal Communications Commission to grant licenses in the "public convenience, interest, or necessity" without elaboration on the interpretation of those very broad words. The legislature sometimes uses simply the "public interest" as its governing rule. Professor Richard Pierce estimates that nearly all the congressional delegations to agencies are statutes with broad goals and broadly delegated discretion.[19]

While most of the public controversy is about direct delegation, background delegation may be the even more significant issue. The courts decide thousands of statutory cases every year, and many more are settled in anticipation of court action. Innumerable circumstances involve statutory application in the shadow of the law that never results in a case filing. When the statute is clear, there is little reason to litigate, expending attorneys' fees in pursuit of a foregone conclusion. It is precisely the disputes where the law is unclear that result in litigation. Each dispute that produces a legal case involves unique facts and, with hundreds of millions of Americans, a wide range of factual settings will arise. Moreover, those factual settings will inevitably change over time as society changes. This inevitably means that even the most precisely crafted statute cannot anticipate and linguistically resolve all the disputes that arise under the act.

A crucial question for the judiciary regards *what* is being delegated. By their nature, courts adjudicate disputes and in the process must apply statutes. To apply a statute, a court must interpret its meaning in the context of a particular case or controversy. While this interpretation of statutory language may be simple, that is not typically the case. Sometimes the statutory language simply does not resolve the dispute. Just as with private delegation, the courts have certain authority to interpret, authority which might be exceeded by an erroneous interpretation. A court may exceed its authority by creating statutory provisions not included in the act's language or misuse its authority

through self-dealing, such as giving a meaning to a law contrary to that of the legislature, because it is preferred by the ruling judge.

The legitimate nature of this delegation and consequent judicial application is hotly debated. Some dispute the magnitude of the role of courts in statutory interpretation and contend that the legislature has illegitimately delegated legislative power to the judiciary when it engages in direct delegation. This argument typically reduces to a semantic debate over the meaning of "legislative" and "interpretation," however. Everyone agrees that courts can interpret but not write legislation. At its most extreme level, the delegation theory seems objectionable—Congress could not simply pass a bill that did no more than direct the courts to criminalize objectionable behavior. But Congress has not, and presumably would not, choose to delegate such untrammeled authority to the separate branch of the judiciary. The dispute is over the scope of the meaning of interpretation as opposed to legislation, and I join this debate in greater detail in subsequent chapters.

It is in this context of delegation that disputes over statutory interpretation must be analyzed, but delegation does not resolve the dispute. When Congress delegates, it may intend that courts use evidence of its underlying legislative intent in application or it may have preferred that courts used the principles of textualism and the long-established canons of interpretation. Alternatively, the legislature may have contemplated a broader delegation for courts to use pragmatic policy concerns in their interpretation, akin to the common law, which is judge-made. Congress has made no formal declaration of the proper interpretive method, though. This absence may well reflect a delegation of the proper interpretive method to the judiciary as well or reveal a pluralist preference, that judges use the method best suited to the circumstances of the cases that they decide. Congress is perfectly capable of giving interpretive instruction for particular statutes or more generally but does not do so, preferring to delegate the interpretive question to the judiciary. This leaves open the question of what method judges *should* use in their case-by-case statutory interpretations. A grant of interpretive discretion to the courts does not mean that it is unbounded or cannot be improperly exercised by deciding courts.

Legislative Intent

Those devoted to legislative intent believe that the judges should be the faithful fiduciaries of the enacting legislature and adhere to what that legislature "meant." They believe that judges should adjudicate cases and reach the outcomes that the legislature would have chosen, had it foreseen the specific facts of the case before the court. In the early days of our republic, Chief Justice Marshall embraced this theory, announcing that it is "the duty of the court to effect the intention of the legislature."[20] At that time, though, statutes were relatively few and did not make up the bulk of the Court's docket. The question of the purpose behind statutory interpretation has evolved considerably since that time. However, for the first two centuries of our nation's jurisprudence, the intentionalist goal of statutory interpretation generally ruled.[21]

Some have referred to this intentionalist approach to interpretation as "imaginative reconstruction."[22] It attempts to reconstruct what an earlier legislature would have thought of the facts presented in the contemporary adjudication. The renowned circuit court judge Learned Hand, explained the process as telling a judge to "try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[23] Legislative history and intentionalism has been cited as a tool for addressing background delegation as a measure of discerning "what the words can be made to bear, in making sense in light of the unforeseen."[24] The General Accounting Office (GAO), itself a branch of Congress, has declared that the "goal of statutory construction is simply stated: to determine and give effect to the intent of the enacting legislature."[25]

The foundational criticism of focusing on legislative intent is the claim that no such intent even exists, sometimes called the "social choice" critique. The GAO has itself conceded that the concept of legislative intent "is in many cases a fiction."[26] It goes on to note that tools for statutory interpretation in pursuit of such intent serve "the essential purpose of providing a common basis for problem-solving."[27] The GAO suggests that in the absence of a perfect approach for statutory construction, the accepted methods of seeking intent work in practice. This argument is explored further in Chapter 2.

Another basis for criticizing legislative intent as the polestar of statutory interpretation is its indeterminacy. Critics question the ability of courts to

identify and implement a legislative intent, assuming that it exists. William Eskridge suggests that the actual intent of the legislature is "unknowable."[28] Of course, "knowability" is not a binary concept. One can approach an understanding of legislative intent with greater or lesser reliability. One oft-expressed concern is that parties may manipulate the apparent legislative intent to favor positions not chosen by Congress, and it is essential that courts be able to discern such action.

It might superficially seem that the legislative intent approach is most faithful to delegation because it envisions the courts as the agent of the legislature. This is not necessarily the case. No one has demonstrated that the legislature *wants* the courts to rely on legislative intent. The delegating legislature might well prefer that the courts limit their consideration to the text of the statute or expand their consideration to the policy consequences of their decisions. A principal, in its own self-interest, may wish to constrain or free an agent's discretion, and it merely begs the question to presume that the principal wants the agent to follow its own view of the principal's intent, rather than using some other standard. Conceivably, the legislature might clear up this problem by adopting a statute that directs the courts' interpretive discretion. Some have proposed just this answer, but Congress has adopted no such statute and there are some questions about the constitutionality of its doing so.

"Rule of Law" Statutory Text

The primary opponents of focus on legislative intent argue for the "rule of law," by which they mean the text of the statute itself. The "words of the statute, and not the intent of the drafters, are the 'law.' "[29] Some adherents to this view reject "the faithful agent model and instead adopt a model of courts as autonomous interpreters who seek answers to questions of statutory meaning through application of the ordinary reader perspective, supplemented by various judge-made rules of interpretation."[30] Others, though, argue that textualist interpretation is the best means of being a faithful agent of Congress. Professor Manning calls the approach a superior "basis for implementing legislative supremacy."[31]

A foundation of the "rule of law" statutory language approach is constitutional. John Manning argues that the "semantic integrity" of a statute must

take precedence over giving it "coherence."[32] This, he argues is implicit in legislative supremacy and the constitutional procedures for legislating. Textualists have also raised other reasons why their interpretive theory is constitutionally compelled under the rule of law, and I will address these in Chapter 2.

However, the exclusive focus on statutory language proves both too much and too little. It proves too little in the sense that no one disagrees that text should be of central importance when interpreting statutes. In this sense, it proves only the obvious. It proves too much in the sense that it may not help resolve the truly difficult interpretive issues. These are cases in which the statutory text provides no obvious answer, as evident from the examples of statutory delegation discussed above. While textualists have various techniques for extracting meaning from ambiguous words, the theory that the rule of law commands those techniques, as opposed to others, is not obvious. Textualists typically do not claim that their methodology is perfect but only that it is comparably preferable, but this too requires proof.

Declaring that giving effect to the "rule of law" should be the primary purpose of statutory interpretation is not meaningless. There are cases where an interpreting court has seemingly disregarded apparently clear text in favor of a contrary intentionalist approach, but these cases are few. The focus on statutory language has importance in these cases but does not address the great bulk of statutory interpretation questions. While a purely theoretical case has been made for the statutory text purpose, its main justification is a more consequentialist one involving the constraint of the judiciary, discussed below and throughout this book.

The "rule of law" statutory language purpose might seem inconsistent with the delegation context, in its disregard of the principal's underlying intent (though there remains the possibility that this *was* the interpretive intent of the legislature). But for devotees this is unproblematic in any event. Our principal, the legislature, is not all powerful in the American system and is bound by the Constitution. Consequently, it is not free to delegate any interpretive standard that it might choose. The bicameralism/presentment argument contends that the legislature may delegate no interpretive rule other than the "rule of law" one. The true principal, in this vision, is the Constitution itself. In addition, a rational legislative principal might prefer this standard for delegation to the judiciary, believing that it best fulfills its purposes.

Reliance on text, rather than searching for intent, might be a surer guide to that intent.

Pragmatic Policy

A third purpose for statutory interpretation is the pragmatic or "best policy" standard, which has been analogized to practical reason. The approach is said to rely on a "less structured problem-solving process involving common sense, respect for precedent, and a sense for society's needs.[33] This approach views the judiciary as a partner with the legislature in the nation's governance, capable of making independent determinations of sound outcomes or even correcting the flaws of the legislative process. Pragmatism may come in varying strengths, from assuming the power to declare old laws null and void to claiming a more modest power to adapt legal language to the circumstances of cases in a way that makes the most sense to the judiciary.

Justice Holmes, often regarded as a pragmatist, famously rejected the stronger interpretive tenets of pragmatism, declaring, "if my fellow citizens want to go to Hell I will help them."[34] For the modern pragmatist, this conclusion is not self-evident. Perhaps judges should play a role in protecting the citizenry from going to hell. Pragmatism is generally informed by statutory text or legislative history. Pragmatism does not ignore the text or statutory background, an ignoring that might itself be unpragmatic, but adds an additional consideration. Many pragmatists place great importance on statutory text, especially insofar as it may direct the compliance decisions of the private parties who appear in court. However, neither text nor evidence of legislative intent is considered a dispositive source of information. A pragmatist will look further, to the societal consequences of different interpretations, before choosing one. This is something like the approach of the common law, where courts ask the question: "What is the best legal policy choice?"[35] Courts do not openly ask this question in connection with statutory interpretation, but pragmatists suggest that perhaps they should do so more often. In this view, the courts are inevitably "supplemental lawmakers" as they apply and flesh out statutory language, and pragmatism simply recognizes this reality.[36]