

Ambiguous Statutes

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INTRODUCTION: AMBIGUITY IN THE APPLICATION OF TITLE VII

Imagine that a law school hired four new assistant professors, two from private practice and two from public interest positions. All four had numerous, remunerative, private sector offers of employment. The dean was eager to secure the services of all four, but the recruitment process was conducted with some budget constraints. The dean offered each a position with compensation equal to 10 percent more than earned in the candidate's previous job, and all accepted. The two who arrive from private practice are men, and the others are women. The men are paid twice as much as the women. Do the women have a winning lawsuit?

The Equal Pay Act of 1963 says:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.¹

The law school's dean might argue that the wage differential is not founded on the "basis of sex," as specified in the first part of the statute's sentence, but instead on the basis of prior employment or compensation history. This is essentially the argument that has prevailed in the Seventh Circuit, which has several times held that "prior

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I benefited greatly from conversations with Zak Rosenfield, Rosalind Dixon, and Julie Roin.

¹ Equal Pay Act of 1963, Pub L No 88-38, 77 Stat 56, 56-57, codified at 29 USC § 206(d)(1).

wages are a ‘factor other than sex.’”² It is the position advanced by Judge Frank Easterbrook in *Wernsing v Department of Human Services*³ (of Illinois), who points out that § 206(d)(1)(iv) of the Equal Pay Act emphasizes the point “by exempting any pay ‘differential based on any other factor other than sex.’”⁴ *Wernsing* is the only Easterbrook decision involving statutory interpretation that I have found to be disappointing. Frank Easterbrook is probably the best and most thoughtful judge our nation has ever produced when it comes to matters of statutory interpretation. He makes most cases involving statutory interpretation seem remarkably easy, in part because he has an easily applied theoretical framework at his disposal, and it is therefore worthwhile to examine the cause of any difficulties he encounters. I continue, therefore, to examine *Wernsing*, and then to set it within the larger question of when and how judges ought to interpret statutes.

What if our hypothetical law school paid according to height or years of postgraduate study, and this produced a pattern in which the average man earned more than the average woman, or even every man more than every woman in that workplace? Some appellate courts have held that wages in a former job, and presumably other determinants of wages that might be highly correlated with sex, are a “factor other than sex” only if the employer has an acceptable business reason for its compensation pattern.⁵ Years of postgraduate study

² *Wernsing v Department of Human Services*, 427 F3d 466, 468 (7th Cir 2005). See generally *Dey v Colt Construction & Development Co*, 28 F3d 1446 (7th Cir 1994); *Riordan v Kempiners*, 831 F2d 690 (7th Cir 1987); *Covington v Southern Illinois University*, 816 F2d 317 (7th Cir 1987). The *Wernsing* court also sketches the views of several other circuit courts. 427 F3d at 468 (noting that the Second, Sixth, Ninth, and Eleventh Circuits have held that prior wages are not a “factor other than sex” if the employer lacks an “acceptable business reason” to use them to set pay).

³ 427 F3d 466 (7th Cir 2005).

⁴ *Id* at 468. For defendants, the best interpretation of exception (iv) is that it intentionally provides a catch-all that includes the other three exceptions, so that “any other factor other than sex,” rather than containing a superfluous and ungrammatical first “other,” means “Reader: these three exceptions are factors other than sex, and now we add a catch-all in (iv) to include any other such factor that is also other than sex.” If so, the phrase would be clearer if it said “any other factor that is also a factor other than sex.” A more conventional means of conveying that message would have been to begin with the catch-all, and then say “including seniority, merit, and quantity of production.”

Wernsing is unconcerned, as I will be, with a disparate impact or other claim arising under another statute. We might think of the four exceptions, or employer defenses, in the Equal Pay Act, as imported into Title VII, without resolving the question of what can be a “factor other than sex.” See *City of Los Angeles Department of Water and Power v Manhart*, 435 US 702, 710 & n 20 (1978) (suggesting that a factor cannot be a “factor other than sex” for Equal Pay Act purposes if it would violate Title VII’s disparate treatment standard); *County of Washington v Gunther*, 452 US 161, 176 (1981).

⁵ See, for example, *Aldrich v Randolph Central School District*, 963 F2d 520, 525 (2d Cir 1992). At times even the Seventh Circuit has left itself room to tighten the “factor other than sex” escape by suggesting that it must be bona fide and that there might be room to ask whether

might in this way be found to be a reasonable underpinning for law faculty compensation, while height seems like a certain loser. We might wonder whether the employer deployed height in order to discriminate on the basis of sex, though it might be hard to see why a profit-seeking employer or student-seeking law school would do so. Some legislators or judges might require a plaintiff to prove that the employer intentionally discriminated. A subtle and careful employer will likely prevail if intentional discrimination is an essential element of the case. But height seems so unlikely a proxy for future performance or competitive offers that a plaintiff who cannot find evidence of intentional discrimination will likely argue that it is too far-fetched to impute or believe that there is any good reason for an employer of law professors to pay in proportion to height.

Years of postgraduate study presents a harder case, and prior wages harder still. An employer might have some confidence in its own evaluation of job applicants, but reason that it must pay an attractive candidate at least as much as that person earned in his or her previous position. The employer might also have faith in markets, which is to say in prevailing prices, and reason that new employees cannot be worth more than twice what they have recently earned in the marketplace. Just as a retailer might use a convention like fixed markups across products, so too an employer might “mark up” the last known wages of new employees.

In short, a female employee who finds she is paid less than male coworkers hired at the same time, and even in response to the very same job description, would expect to prevail under the Equal Pay Act if her employer has used height to set compensation, but her confidence would decline if the employer based its compensation decisions on years of postgraduate study. Her case would seem hopeless, in the Seventh Circuit at least, if wages are based on prior wages. Judge Easterbrook insists that the statute does not authorize courts to set their own standards of acceptable business practices, for “Congress has not authorized federal judges to serve as personnel managers for America’s employers,” but asks instead whether the employer has a reason other than sex—not whether it has a “good” reason.⁶ Other circuits may hint or claim that there is some congressional *intent* as to what is a factor other than sex,⁷ but seasoned Easterbrook readers

it has a discriminatory effect. See *Dey*, 28 F3d at 1462 (Rovner) (Easterbrook not on the panel). *Wernsing* does not proceed on these paths.

⁶ *Wernsing*, 427 F3d at 468.

⁷ See, for example, *Glenn v General Motors Corp*, 841 F2d 1567, 1571 (11th Cir 1988) (criticizing the Seventh Circuit for “ignor[ing] congressional intent as to what is a ‘factor other than sex’”).

know that those are fighting words. For Easterbrook (and, I ought to confess, for me as well), Congress makes legal rules through statutes, and in most cases we have no reason to think we can discern in them some majoritarian intent.⁸ Congress has many members, and they are unlikely to think alike. “Congress is a they, not an it,” as the useful expression goes.⁹ Legislation represents some aggregation of *their* views and thoughts. Typically, we cannot even identify a legislature’s median voter, whose intent might sometimes be more defensibly deployed in order to interpret ambiguous statutes.¹⁰

But one need not resort to the fiction of legislative intent in order to see that the statute can be read in a manner friendlier to plaintiffs. It is true that it asks whether the employer discriminates “on the basis of sex.” But why emphasize this phrase rather than the next, which says “by paying [one sex] wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex” for equal work.¹¹ If the reader emphasizes this second phrase, the statute essentially codifies a strict policy of equal pay within one job type, and perhaps also a policy of comparable worth with courts put to the task of assessing workplaces and comparing jobs in order to determine whether the sexes were comparably paid. How does an employer violate the statute and discriminate “on the basis of sex”?—by paying unequal wages, as described in that second phrase. This reader is thus interested only in evidence of disparate wages (for the same work). By contrast, Easterbrook reads the sentence with an emphasis on the first phrase. What is forbidden?—discrimination on the basis of *sex*, as opposed to discrimination on the basis of height or prior wages. But Easterbrook’s preferred reading eviscerates or trivializes exceptions (i), (ii), and (iii). If a differential based on anything other than sex is permitted under (iv), then of course one based on seniority, merit, or production is permitted. For these prior exceptions (and for the word “or” before (iv)) to have content, the word “factor” in (iv) should mean something like a reasonable factor. The statute is simply ambiguous, for it admits more than a single interpretation.¹² One interpretation has a plain

⁸ See Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv J L & Pub Pol 59, 63–65 (1988) (“[T]he original intent approach to legislation ignores the fact that laws are born of compromise. Different designs pull in different directions. To use an algebraic metaphor, law is like a vector. It has length as well as direction. We must find both, or we know nothing of value.”).

⁹ Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 Intl Rev L & Econ 239, 239, 254 (1992).

¹⁰ See Easterbrook, 11 Harv J L & Pub Pol at 63 (cited in note 8).

¹¹ 29 USC § 206(d)(1).

¹² The confusion seems to arise out of the drafter’s attempt to enact something less than a comparable worth policy. That policy would have judges comparing the wages of a nurse to those

phrase going for it, but that same understanding makes the other phrases pointless—and might well render the entire statute meaningless. Under Easterbrook’s reading, only an employer who really tried to violate the statute, and announced as much, would do so. I am not sure there is good reason to prefer one reading of the plain words over the other. Nor is it obvious which interpretation to favor if one is willing to think about congressional intent. Easterbrook’s version is imperfect because it is unlikely that even one member of Congress would vote for a statute that barred only those employers foolish enough to state that no other “factor” brought about the pay differential. But the other interpretation is also an unattractive reading because one would think that some member would have dramatized the novelty and reach of a new comparable worth law if he or she thought one was being enacted.

I. GAP-FILLING AND AMBIGUITIES

Let us then think of *Wernsing* as presenting an ambiguous statute. I return in due course to Judge Easterbrook’s inclination in the case, but turn now to the general problem of ambiguous statutes. I suggest that the source or nature of the ambiguity is important. Ambiguity can be intentional or unintentional; it can derive from misunderstandings about language, from simple mistakes, from a failure to plan ahead, or from the impossibility of seeing very far ahead. I develop some ideas about interpretation and the sources of ambiguity with illustrative cases decided by this master of statutory interpretation.

For some judges, ambiguity is simply the opening bell. With encouragement from many academic commentators, they take ambiguous code as an opportunity to make good law as they see it, to offset interest group effects, or to protect fragile minorities.¹³ We can think of this as the activist approach; gaps, ambiguities, and delegations of authority are all taken as opportunities to make the world a better place. The skeptical, democratic, and nonactivist reaction is of course to worry that judges will make mistakes, usurp the legislative role, or even

paid to an engineer. But of course *Wernsing* is about identical jobs, not different jobs. The statute seems written for someone looking to compare different wages for different jobs, but it is being applied to a case where there is a wage differential for the same job—but perhaps a differential based on something other than sex.

¹³ Starting points in this small industry of academic literature on the topic include Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum L Rev 223, 250–56, 266–68 (1986) (arguing that judges should stick to the statutory language, rather than decide based on a presumed bargain between interest groups and the legislature), and William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va L Rev 275, 323–25 (1988) (reasoning that courts should construe statutes in light of the size and power of interested groups).

advance their own political agendas. Inasmuch as the focus here is on ambiguous statutes, it is useful to separate out, if at all possible, two kinds of cases that involve something more than mere ambiguities. I do not advance these categories as natural or as necessary, but rather I borrow them from Easterbrook's own, well-known academic work, in order that we might better understand his treatment of ambiguous statutes. There are, first, instances where the legislature has asked judges to proceed in the manner of the common law. Easterbrook's favorite example is the Sherman Act, which we might think of as stating a standard rather than a rule, and then delegating to judges the task of deciding what it means "to monopolize," or to contract in "restraint on trade."¹⁴ It may be that such a statute is a product, or compromise, arising out a battle of interest groups, but then Easterbrook is committed to enforcing such legislative bargains.¹⁵ It may also be that such delegations to the judiciary were more common before the rise of modern administrative agencies. *Wernsing* bears no signs of being such a case.

At the other, more interesting end of the interpretation spectrum are cases where the legislature has intentionally left a "gap," to use the accepted term. In these cases, Judge Easterbrook, famously, believes that judges ought to be disinclined to take on the task of gap-filling. It is presumably impossible to ascertain the legislature's intent with respect to this unfilled space, and attempts by judges to fill gaps will often reflect a given judge's own values and politics. The matter ought to be resolved by the legislature, or ought to be regarded as already resolved by the language of the statute, even if a reasonable person would think that members of the enacting Congress did not anticipate the case at hand. Easterbrook allows that, where there are gaps, there may be some role for judges not only because they can insist on sticking to the statutory language,¹⁶ but also because the litigants are free to look outside the statute's domain to other tools of law that might ap-

¹⁴ Easterbrook himself offers the Sherman Act as the classic example of such delegation. See Frank H. Easterbrook, *Statutes' Domains*, 50 U Chi L Rev 533, 544 (1983).

¹⁵ See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv J L & Pub Pol 61, 63-64 (1994) (suggesting that enforcing interest-group bargains in the form of statutes may in the long run lead to legislative accountability). In any event, Easterbrook does not shy away from common law judging, even if it arises from apparent statutory delegations, though it should be noted that common law judging may itself bring out different degrees of activism, or of commitment to precedents, across the judiciary.

¹⁶ See, for example, *United States v Mitra*, 405 F3d 492, 494-95 (7th Cir 2005) (applying a statute written to criminalize hacking into a "protected computer" to a defendant who interfered with a radio system). Easterbrook notes that "[a]s more devices come to have built-in intelligence, the effective scope of the statute grows. This might prompt Congress to amend the statute but does not authorize the judiciary to give the existing version less coverage than its language portends." Id.

ply to their dispute.¹⁷ I have some difficulty distinguishing gaps from ambiguities, but that difficulty should not be the centerpiece here.¹⁸ It is sufficient to say that *Wernsing's* ambiguity is surely something smaller than (what is meant by) a gap, and thus something that a

¹⁷ Easterbrook, 50 U Chi L Rev at 544 (cited in note 14) (“[U]nless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process. . . . [In other cases the] statute would become irrelevant.”). Easterbrook goes on to advance several arguments against judges filling “gaps” left by the legislature. See *id.* at 547–49.

At the risk of misrepresenting Easterbrook’s views, it may be useful to imagine particular gaps and how they might be filled or avoided. Consider legislation that said that a defendant should be interrogated more harshly when suspected of terrorism. Here, there is a sizeable gap because “more harshly” is terribly vague and leaves much room for post-legislative lawmaking. The task would be easier if “more harshly” had a well accepted meaning in penal statutes. It is hard to imagine judges’ filling this gap without resorting to their own sentiments, and that is not something a nonactivist, or even moderately activist judge, would wish to do. We might expect the nonactivist strategy to cause cases arising under this hypothetical statute to be remanded or swept away with the claim that the legislative language was hortatory, in the manner of a resolution, and not capable of execution. Imagine next a statute declaring “inasmuch as safety is of paramount importance, there is hereby imposed a civil fine of \$100, multiplied by the number of manufactured and shipped units of that kind and awarded to a private citizen who is injured by and brings an unsafe ladder to the attention of the Safety Commission; an unsafe ladder includes, but is not limited to, one that fails to hold a 600 pound weight.” The statute has some specific instructions, but it leaves open the question of those other safety features. A plaintiff might insist that the rungs on a ladder were spaced too far apart. Easterbrook would try hard not to fill the gap himself—and this seems more of a gap than an ambiguity. He might remand or resort to the default rule provided by common law negligence jurisprudence, but he would insist that the express language about the importance of safety helps not a bit with “intent” because the statute also reflects an awareness of costs. The question is how to balance safety with costs, and that is not something provided except with respect to carrying capacity. It is also possible that he would refuse to fill the gap, but in that case a plaintiff would be left with other law, including the common law, and would presumably try to show negligent design as a means of collecting the fines.

¹⁸ The difficulty derives in part from the fact that some ambiguities are intentional. A legislature can see that technology will change or that some of the expressions it uses are capable of multiple translations, and so when there is anticipated or intentional ambiguity there is in a sense a gap for courts to fill. But it also derives from the fact that it is not just broad standards but even everyday rules that beget gaps. A standard is necessarily a delegation to courts or agencies to interpret, but so is a rule because even clear rules have standard-like features, unless they come with many pages of associated subrules. A speed limit is not a license to drive through a pedestrian who has wandered on to the road, and it does not allow weaving or driving in reverse at the stated speed. The tradeoff between, or reality of, standards and rules is the stuff of every principal-agent relationship. When Congress uses confusing grammar, or an expression like “substantially all,” or when it provides that a bank can sell insurance if it is located in a small town—but does not specify to whom the insurance might be sold, *NBD Bank v Bennett*, 67 F3d 629, 633 (7th Cir 1995) (allowing a bank to sell insurance with Judge Easterbrook declining to look beyond plain statutory language)—it is essentially asking some agent, often unidentified, to do the work. Ambiguities or uncertainties about statutes may not be very different from legislated standards or from virtually explicit delegations; all require interpretation by agents. Easterbrook is not alone in thinking that self-delegation—to a congressional committee or to the remarks of one or two members—is not something to be imputed lightly. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 684–89 (1997) (discussing the textualist critique of the use of legislative history). But of course the irony is that we are left with judges (and sometimes with administrative agencies) as the interpreting agents.

judge, or other useful agent, must resolve. With these two subsets—common law delegations and gaps—removed, one because even a nonactivist judge will proceed with relish and the other creating space where he dare not tread, we are prepared for ambiguous statutes.

II. SOURCES OF AMBIGUITY

In *Continental Can v Chicago Truck Drivers*,¹⁹ the governing statute afforded Continental Can, when it closed a trucking business, a means of escaping the obligation to pay a share of an underfunded pension plan if “substantially all” of the pension fund’s assets derived from “employers primarily engaged in the long and short haul trucking industry.”²⁰ In fact, about 62 percent of the relevant fund’s assets were attributable to such employers, and so Continental Can would win only if “substantially all” meant something less than that. The company argued that the statutory phrase referred to a simple majority of the assets, but Easterbrook, citing the member of Congress who was the bill’s floor manager, noted that the phrase appeared in a number of tax laws, where the Internal Revenue Service had always interpreted the phrase to mean at least 85 percent.²¹ Here Judge Easterbrook concedes ambiguity, but claims no gap, and adds the nice explanation that the ambiguity may be traced to the proclivity of members of Congress for saying different things to different interest groups.²² But what is a judge to do with such raw ambiguity? The judge might like to return the statute to its sender, but we do not sanction such a remedy. Moreover, it is not the sitting, contemporary Congress that matters, but the enacting one, and that body is no longer available. Plainly, a faithful agent must undertake the task.

It is one thing to say that “Congress is a they, not an it,” because a group that acts is unlikely to have a single intention (for normally voters in a group have disparate motivations), but quite another to say that words agreed upon by a group have *no* meanings. Language is little more than shared meanings, and it is surely legitimate to assign meanings to statutes based on the shared understandings of those who enacted the statute, or perhaps those whom the statute was “intended” to govern. We might even refer to those understandings as intentions. If “substantially all” were always interpreted to mean 85 percent, the early interpretations of it were the product of explicit delegation to an agency, say, and members of Congress knew the phrase had acquired

¹⁹ 916 F2d 1154 (7th Cir 1990).

²⁰ *Id.* at 1155.

²¹ *Id.* at 1158.

²² *Id.* at 1155–56.

that meaning, then the case would be easy. If, as happened with the statute at issue in *Continental Can*, one senator tried to advance a different meaning that 50.1 percent amounts to “substantially all,” the situation would be ripe for a lesson on intent and ambiguity. Judge Easterbrook is not shy about teaching it:

The text of the statute, and not the private intent of the legislators, is the law. . . . It is easy to announce intents and hard to enact laws. . . . So the text is law and legislative intent a clue to the meaning of the text, rather than the text being a clue to legislative intent.

...

If everyone accepts a new meaning for a word, then the language has changed [and every instance cited pegs “substantially all” at 85 percent or more]; if one speaker chooses a private meaning [of 50.1 percent], we have babble rather than communication.²³

Imagine, however, that “substantially all” does not in fact always mean 85 percent in the world of pensions, taxes, or in other federal regulations, but rather that sometimes the Internal Revenue Service, other agencies, and the courts attach 90 percent or 70 percent or even 50 percent meanings to that phrase.²⁴ I think that a modest or nonactivist judge would then say that in the quest to attach meaning to statutory language, we are better off choosing the understanding usually associated with that language at the time the statute was enacted than having judges decide based on what they think best, what they think most members of Congress (or members in the majority) intended, or what they read in prior or subsequent legislative histories inserted by individual members of Congress.

There is something of a logical problem with statutes that convey ambiguities rather than plain meanings. Judge Easterbrook (and aca-

²³ *Continental Can*, 916 F2d at 1157–58. The judge goes on to make short shrift of an argument that the statute must have bite, and that an 85 percent interpretation happens to yield very little of that because most firms in the industry do not meet the 85 percent standard. The argument is that Congress legislated a plan, not an outcome. If it is disappointed with the results it may change the law. Id at 1159–60.

²⁴ As it turns out, this is the case. Even in the narrow area of corporate acquisitions, where tax-free reorganization status may depend on the acquisition of “substantially all of the properties of another corporation,” under IRC 368(a)(1)(C), there is some disagreement as to the meaning of the term, though 90 percent and 70 percent are important focal points. See Robert H. Wellen, *New Guidance Is Needed for the “Substantially All” Rule as Applied to Acquisitions*, 79 J Tax 280, 280 (1993). If we are free to look beyond tax law, it is especially easy to see that “substantially all” may even mean 50 percent. See *Antilles Cement Corp v Acevedo Vila*, 408 F3d 41, 49 (1st Cir 2005) (interpreting a law requiring “substantially all” US-made inputs defined by federal regulations to mean 50 percent).

democratic commentators) may be right about the way to think about claims of legislative intent, but what if most other judges do not see it that way, and then (a large majority of) members of Congress also attach a meaning to their own ambiguous statutes or to the concept of their own intent? If “substantially all” had five different meanings, and these meanings were originally created by authorized interpreters, after which Congress continued to enact statutes with the very same phrase, we might be forced to say that the accepted meaning of that language was the same as language that said “the meaning of ‘substantially all’ in this statute shall be determined by regulations promulgated by the Secretary of the Treasury or by the common law process.” Similarly, if *Wernsing* is hopelessly ambiguous, depending on whether one emphasizes the first or second phrase of the key sentence of the cited provision of the Equal Pay Act, then a reasonable case can be made that our most able judges could regard themselves as thrust into the position of lawmakers, or at least energetic interpreters, because the language enacted by Congress virtually commands that some agent act as interpreter.

In thinking about the role courts might play with respect to these ambiguities, avoidable or not, we might ask whether the source of the ambiguity matters. Why do legislatures not clarify and specify as much as possible, especially where the “intent” seems to be to enact a rule rather than a standard? In public choice terms, a legislature that sought to get maximum credit or other benefit for its work would want to provide more specificity rather than more delegation of authority. Can interest groups really be often fooled by inconsistent claims? Let us again set aside the important case where a legislature resorts to the common law process because that delegation to the judiciary is itself the legislative decision or interest-group compromise. But why, for example, would a legislature say that a benefit is available to some firm if “substantially all” its workers do something, when members must know that the expression is ambiguous?

We have already seen that ambiguity might allow legislators to make different claims to different constituents or supporters, but we are left with the question of what courts ought to do with such intentionally ambiguous statutes. A might tell group X one thing and group Y another, or perhaps A might tell XY one thing, while B might tell V another, even though A and B both voted for the legislation in question. I would think that constituents would learn to despise and distrust ambiguity, but perhaps this strategy is especially valuable if the statute is passed before an election, and the ambiguities are not tallied until later. A says that “substantially all” means 50 percent, and this makes Continental Can happy (assuming a firm is an “it,” not a “they,” for this purpose), while B, or even A and B, claim to other con-

stituents that they have taken steps to ensure that pension funds would not be underfunded. An idealist might say that if this is the reason for ambiguity, then courts should not facilitate the charade. I suppose courts could try to draw attention to the ambiguity in order to embarrass the enacting legislators. In any event, under this view, there is no correct interpretation, and courts might as well flip coins, unless the democracy-friendly plan is for legislatures to please their friends in the short run, and then blame courts later for “misinterpretations.” If so, one possibility is for judges to act as they are acculturated to do in common law matters, trying simply to improve the world (with an eye on precedent, perhaps as a means of controlling activism) rather than divine legislative intent. The rare judge who was determined to be minimally activist, and only when necessary, might follow other circuits more than usual or might remand, all in the interest of not projecting one’s own preferences. The activist would plainly jump into action in *Wernsing*, taking it as an opportunity to decide whether comparable worth is good policy. In *Continental Can*, it is more difficult to be an energetic agent, and certainly a moderately activist one, because the case is about complicated legislative deals in which some interest groups are subsidized at the expense of others. It is hard to see how a court (or other agent) could be expected to do this, unless the default is that lower subsidies are always better than higher or more subsidies.

Ambiguity might also arise because of changing times. Statutes need to be updated, and legislators are surely farsighted enough to know that. In one bankruptcy case, *In re Erickson*,²⁵ a Wisconsin statute, last visited by the legislature in 1935, allowed the debtor to exempt some property from civil judgments.²⁶ The list of such property included eight cows, one mower, one hay loader, one year’s feed for the livestock, and fifteen or so other types of property, some with capped values. The debtor in the 1980s had a baler and a haybine that were, essentially, much improved, multipurpose versions of their single-function predecessors on the statute’s outdated list. Judge Easterbrook reasoned sensibly that just as a “chair” in an old statute would now include an easy chair but not a Chippendale chair, too valuable to sit on, so too one must look at the function of the items in the original Wisconsin statute.²⁷

In *Erickson*, unlike *Continental Can*, the ambiguity is unintentional, unless we think the enacting legislature must have known that

²⁵ 815 F2d 1090 (7th Cir 1987).

²⁶ *Id* at 1091.

²⁷ *Id* at 1092, 1094 (“The role of an exemption in the statutory structure . . . is the centerpiece in identifying the meaning of the language.”).

“its” list would eventually be outdated, so that the very creation of such a list intentionally delegates, or leaves real gaps.²⁸ But assuming that the built-in obsolescence is best characterized as unintentional and as a source of ambiguity, rather than a yawning gap, it is still the case that the legislature’s list almost necessarily creates work for an agent. The agent can be extremely activist, declaring the statute obsolete and making the best law for the presumed subject matter; moderately activist, beginning with the purpose of exemptions or the purpose of the statute as a whole; or minimally activist, assessing the purpose of the particular exemptions noted in the language of the statute. Note that each of these approaches necessarily calls for some inquiry into legislative purpose, or statutory “function,” unless the agent is to value principle (and foolishness) over common sense. The legislature is still a “they, not an it” when it comes to this purpose, and yet the agent is in the position of discerning a single purpose. The point, again, is that legislative intent may be a fiction to be avoided, but if one is to be a useful agent in the legal system, one is virtually compelled to join in the fiction from time to time.

This is perhaps the point at which to emphasize that if a group is of several minds, no method of aggregation can be guaranteed to fulfill some basic requirements, where one of these is coherence, or transitivity. But it is important to see that if we are lucky, and perhaps just when it is necessary for an agent to update an old list, or otherwise resolve an ambiguity, the intentions of most members of the enacting legislature might actually be discernible, of a piece, or at least capable of coherent aggregation.²⁹ There are no guarantees. It is possible that some of the Wisconsin legislators in 1935 thought they were helping small farms to survive, while others thought they were helping the manufacturers of mowers, and still others intended to help rural interests over banks.³⁰ If so, one might hesitate before updating the list be-

²⁸ I follow the Easterbrookian framework here. See note 17.

²⁹ I am not associating myself with the belief or wish that cycling is so rare that aggregating legislators’ intentions is something we can normally do. Compare Daniel A. Farber and Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va L Rev 423, 429–37 (1988) (arguing that cycling is rare in legislative bodies, and positing that this might be due to “uni-peaked preferences in small legislative bodies,” legislative rules that create path dependency, or a tendency to favor “balanced compromise outcomes”) with Saul Levmore, *Public Choice Defended*, 72 U Chi L Rev 777, 789–93 (2005) (arguing that cycling can be common and is often unseen because it is pushed back in the legislative process).

³⁰ I suspect that most readers will think that the first purpose is what a supermajority of legislators had in their minds. In that case, it seems especially safe to proceed as Easterbrook did. But the lesson of the case is then that while it can be dangerous to impute a single, aggregated legislative intent, it is sometimes less dangerous, or even reasonable, to do so. In any event, if in *Erickson* the intent is safely discerned, then it is a very different case from *Wernsing*, where the best guess is probably that the ambiguity was intentional, as discussed in the text.

cause there is no single legislative purpose, and it is quite plausible that a majority of the enacting legislature would have opposed the interpretation constructed by the activist judge. But inasmuch as it is impossible to abide by the plain meaning attached to “mower” fifty years earlier, the modern judge must do something. Unsurprisingly, Easterbrook tries to be minimally activist, and he looks to the function of “mower” rather than the function of the statute as a whole; he certainly has no interest in declaring the statute altogether outdated in order to redesign a list from scratch—or even in revisiting the question of whether exemptions are wise. In short, updating begets some inquiry into function, or intent, despite the dangers of imagining that there is such a thing as legislative agreement on anything but the words as enacted. The strategy is, however, a bit different from that found in cases where ambiguity is a strategy meant to avoid matters the resolution of which might dissatisfy particular constituents.

There are obviously many other causes of ambiguous statutes. One of Judge Easterbrook’s most important contributions in a distinguished judicial career has been to focus attention on the danger (though, as I have already insisted, not quite the impossibility) of claiming to discern legislative intent. If his job is to convince not only the choir but also some other judges, then I think his best chance for success is where “intent” is said to inform a broad statutory goal. Thus, in *Contract Courier Services v Research & Special Programs Administration*,³¹ the US Department of Transportation argued that the ambiguous word “knowingly” should be interpreted to include “should have known” so that a statute would impose strict liability on a party that had improperly stored cartons containing radioactive material.³² The department argued that the law in question was a remedial statute, and therefore ought to be construed liberally. Judge Easterbrook found the maxim

useless not only because it invites the equal and opposite riposte that penal statutes are to be strictly construed but also because it does not answer the question “how far?” Statutes do more than point in a direction, such as “more safety.” They achieve a particular amount of that objective, at a particular cost in other interests.³³

In this regard, Easterbrook has been influential, as many decisions now find that legislative intent (which they might assume exists) is not furthered by assuming that whatever advances the statute’s primary

³¹ 924 F2d 112 (7th Cir 1991).

³² *Id* at 113.

³³ *Id* at 115.

objective must be the “intent” or content of a law.³⁴ Even if a court thinks that it can discern the aggregated intent or purpose of a great majority of legislators, their agreed-upon strategy might simply be to balance a goal with the costs of advancing toward that goal.³⁵ And even if the group agrees on the precise balance, it does not help courts in interpreting some ambiguity in the enacted statute to know that the purpose was to balance. If, as seems more likely, the legislators do not entirely agree on the precise balancing of advancing toward a goal and controlling costs (including the negative effects on other desired outcomes), then we might wish we could identify the median voter in the legislative body, and then discern that legislator’s own calculation of costs and benefits. Of course, none of this can be done well; committee reports do not help identify or unpeel this median legislator.

There remains the question of judging such cases, where a faithful resolution of ambiguity requires knowledge of how goals and costs were balanced—and where a judge cannot possibly know the intended balance. My sense is that in these cases, the least active branch, or perhaps it is just Judge Easterbrook, does its best to avoid activism. The judge remands, looks to state courts, declares ties, and does whatever it takes to wish away the task of resolving ambiguity and imposing one’s own preferences.³⁶ It is hard not to respect the modesty inherent

³⁴ The flag was raised at the highest level in *Rodriguez v United States*, 480 US 522, 526 (1987) (“Deciding what competing values will . . . be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent [] to assume that *whatever* furthers the statute’s primary objective must be the law.”), and I do not mean to imply that Easterbrook gets all the credit. But his academic writing and constant advancement of this cause in his decisions have influenced a new generation of clerks, lawyers, and even judges. Easterbrook politely cites *Rodriguez*, but we might better cite *Statutes’ Domains*:

Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved. . . . What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.

This concern for balance is not confined to interest group (pie-slicing) legislation Balance is as important in public interest (pie-enlarging) legislation, for the structure of the statute will determine how the public interest is to be achieved. . . . Legislators seeking only to further the public interest may conclude that the provision of public rules should reach so far and no farther, whether because of deliberate compromise, because of respect for private orderings, or because of uncertainty coupled with concern that to regulate in the face of the unknown is to risk loss for little gain. No matter how good the end in view, achievement of the end will have some cost, and at some point the cost will begin to exceed the benefits.

Easterbrook, 50 U Chi L Rev at 540–41 (cited in note 14).

³⁵ As discussed in the hypothetical example offered in note 17.

³⁶ See, for example, *Contract Courier Services*, 924 F2d at 116 (remanding to the district court for it to remand to the Department of Transportation so that the department could address the question of whether the persons who placed the radioactive cartons were Contract Couri-

in this approach. At the same time, when a decision is in the hands of Frank Easterbrook, it is easy to get carried away and to imagine that he must be representative of a large cadre of extraordinarily able judges. With such agents on our federal payroll, it is natural to wish that they allowed themselves to be lawmakers-in-waiting when the constitutionally authorized lawmakers have generated ambiguous products.

III. THE ERA OF EASTERBROOK

I return to *Wernsing*, where Judge Easterbrook found clarity but where others would likely see ambiguity or reach a different conclusion. I have suggested that if the ambiguity is willful, then a starting point might be to ascertain the reason for the particular ambiguity. In some cases it would be useful to know the legislative intent, if by any chance there was a coherent, majoritarian mindset. It is perhaps good news that even our most careful judge does, on occasion, as in *Erickson*, imagine that a single legislative intent was behind a statute. It is impossible to guarantee a coherent aggregation of the preferences of many people, but it is not impossible that such an aggregation does exist in a particular case. Even so, there is the argument that judges, who will have the opportunity to project their own preferences, should not be in the position of deciding whether the intent of a collective is discernible. Judicial activism also runs the danger that attempts to aggregate will go awry, with the observer misconstruing the real majoritarian intent, even if it exists. In this regard, the problem of ambiguous statutes is very much like the problem of interpreting judicial pluralities, where the agent might well misconstrue the reasoning of the “enacting” majority.³⁷ At best, then, our judges might be good at identifying these

er's employees); *Covalt v Carey Canada Inc*, 860 F2d 1434, 1440–41 (7th Cir 1988) (certifying a question of Indiana law to the Supreme Court of Indiana); *Erickson*, 815 F2d at 1094–95:

To the extent there is doubt—and there is still substantial doubt, for the age of this statute prevents “literal” application to today's farm equipment . . . —we accept the decision of the bankruptcy and district judges. The views here of judges skilled in the law of the state in which they sit are entitled to respect. . . . The law has need of tie-breakers, and if this case be a tie (it comes close), the nod goes to the district court's construction. This statute needs legislative attention; we cannot provide more than emergency care, and it is wise to avoid switching treatments so quickly.

³⁷ See Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 *Theoretical Inq L* 87, 94–106 (2002). In a manner analogous to the analysis undertaken here, we find that some courts, in some eras, refused to construe the supposed majority reasoning behind split opinions (much like Easterbrook prefers not to fill gaps left by the legislature), but that the more popular current practice is to abide by a rule of finding precedent (by looking for the narrowest ground common to the plurality and concurring opinions). A modest danger is that there is no majority reasoning to be found (a result that is close to the claim advanced by Easterbrook when he says that a group is a “they,” not an “it”), and a greater danger is that a later court will positively misconstrue the real majority view. *Id* at 101–06.

instances where Congress is a “they,” to be sure, but where “it” is reasonably single-peaked, or single-minded. Activists might also claim that whenever ambiguities are intentional, the enacting legislature has delegated, so that there is no danger of misconstruing legislative intent.

In any event, the ambiguity in *Wernsing* does not derive either from uncertain language (as in “substantially all”) or from obsolescence (as in *Erickson*’s old list of exemptions). The source of the ambiguity is most likely one of simple mistake. Perhaps in the rush to a drafting deadline, two phrases were inserted, and we have no way of knowing what a group of legislators would have done had the inconsistency between the phrases been brought to light. With some other judge, it might be tempting to say that this mistake, and the resulting ambiguity, triggered judicial activism in a politically charged case. The judge writing the case might have avoided waving the activist flag by insisting that the language was unambiguous. I suspect that such a judge, if faced with the hypothetical case offered at the start of this Essay, would allow the plaintiff to prevail, and might in that instance say that the second phrase, or perhaps the listing of several exceptions, made the statute unambiguous.

But we know that when Judge Easterbrook confronts statutory ambiguity, he remains as nonactivist as possible. In *Wernsing*, there was no state court, expert, or agency to which to turn. The nonactivist thing to do was to affirm what the lower court had done, and so he did. I like to think that if Judge Easterbrook had seen the statute as internally conflicted, and sufficiently so to regard it as an instance of legislative delegation in the manner of the common law, we would have been treated to a fuller discussion of the dangers of comparable worth policy. But one cost of judicial modesty is that we are unable to enjoy such discussions.

Judge Easterbrook’s approach is plainly coherent, even if it requires occasional guess-work regarding legislative minds. It may well be the best approach to ambiguous statutes, and it is certainly the one most thought through and most cognizant of the aggregation problem. Still, it is tempting to wonder what will become of it, which is to say, of Judge Easterbrook’s legacy. If many more judges had followed suit, the approach would have much more to recommend it because there might then be the feedback effect on Congress that the approach contemplates. But even after twenty-five years of Judge Easterbrook, we have no reason to think that members of Congress draft more carefully or resolve more disputes among themselves because there are judges on the bench who will hold them to their bargains and language. I think it more likely that in the distant future the Easterbrook approach will seem precious. Some of us like to insist on statutes as written because the approach avoids the problem of misconstruing

legislative minds. But to most people, repeated evidence that statutes running many hundreds of pages are never read or understood by those who voted for them might make the approach seem pedantic.³⁸ Why indeed do we pay so much attention to statutory language when our elected officials do no such thing? For one generation, it is because unbridled judicial activism is even worse. But this answer might not satisfy the next generation of lawyers and citizens. And one place to begin rethinking the dynamic process among voters, legislators, agencies, and judges is with ambiguous statutes.

³⁸ See, for example, Peter J. Smith, *New Legal Fictions*, 95 *Georgetown L J* 1435, 1462–63 (2007) (arguing that one of the “new legal fictions” relied upon by textualists is the notion that legislators read and understand the bills they vote on, a belief they themselves concede is foundationless).