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Department of Agricultural and Consumer Economics, University of Illinois Urbana-Champaign

Changing the Rules, Part 2: Ambiguity's Alchemy

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August 29, 2019

***farmdoc daily* (9): 161**

Gardner Policy Series

Recommended citation format: Coppess, J. "Changing the Rules, Part 2: Ambiguity's Alchemy." *farmdoc daily* (9): 161, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, August 29, 2019.

Permalink: https://farmdocdaily.illinois.edu/2019/08/changing-the-rules-ambiguitys-alchemy.html

The Supreme Court considers ambiguity in the statute to indicate that Congress delegated relatively broad interpretive authority to the agency; the resulting interpretation is to be given deference by the courts (*farmdoc daily*, August 22, 2019). If ambiguity opens the door for an agency to insert its (reasonable) interpretation and receive deference then what constitutes ambiguity is a key question. This article delves further into the question of an agency's authority and ability to change the rules, revising regulations without new Congressional authority.

Discussion

Under the Chevron Doctrine, the court's role is to evaluate the agency's interpretation of the statute for reasonableness, comparing the agency interpretation with the court's own interpretation to ensure that the agency has followed Congressional directives (*Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)). As such, courts remain the final authority on statutory interpretation, retaining the power to reject any agency interpretations that are "inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement" (*Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)). Interpreting the statute is necessary to determine if it is, in fact, ambiguous and thus a delegation to the agency. What constitutes ambiguity is, ironically, not at all simple, clear, or straightforward.

(1) Reality and Statutory Text

Language is always imprecise; words imperfect to some degree. The imprecision of words for the complex objects of legislation and the imperfections inherent in expressing ideas and policies were realities incorporated into the Constitutional design of our federal government. James Madison wrote that "no language is so copious as to supply words and phrases for every complex idea . . . the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered" and that "this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined" (*The Federalist* No. 37). It is simply reality that Congress cannot contemplate every particular problem or variation of problem in advance when it legislates (*Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944)). Modern legislation deals "with complex economic and social problems" and the "legislative

process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation" (*American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Importantly, ambiguity in statute is not the same as "being inartful or deficient" because Congress is not able to "anticipate all circumstances in which a general policy must be given specific effect" (*United States v. Haggar Apparel Co*., 526 U.S. 380, 392 (1999)). Imprecision of legislative text is both elemental and fundamental; inherent in the use of words, it is essential for being able to legislate.

Additionally, Congress always delegates some degree of discretion and authority to an agency to interpret the statute when it is implemented and executed. The Court has consistently recognized that the "power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress" (*Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). The Constitutional power to legislate—to create and enact law—will necessarily include or imply a certain degree of "delegation of authority under it to effect its purposes" (*Lichter v. United States*, 334 U.S. 742, 778-79 (1948)). The vast field of legislative action requires "vesting discretion" in the executive branch to "make public regulations interpreting a statute and directing the details of its execution" (*J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406-07 (1928)). The question at the heart of the matter, therefore, is what Congress has delegated to the executive; the contours and limits of discretion provided, the details, "gap" or "space" to be filled by the agency (*United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001); *Yakus v. United States*, 321 U.S. 414, 425-26 (1944)). For these reasons statutory phrases are often lacking in clarity and precision. Surveying the decisions of the Supreme Court can present a general understanding of ambiguity but one that can seem, itself, rather ambiguous.

(2) Understanding the Concept of Ambiguity

Ambiguity can mean statutory provisions "where a word is capable of many meanings" (*Jarecki v. G. D. Searle & Co*., 367 U.S. 303, 307 (1961)). Consider that statutory terms may present "conflicting constructions" each of which "is plausible but each has its difficulty" (*Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 411 (1993)). Such terms are "not self-explanatory, and reasonable men could easily differ as to their construction" (*Immigration & Naturalization Service v. Jong Ha Wang*, 450 U.S. 139, 144 (1981)). These cases appear to fit the concept of ambiguity where such terms can be taken as Congress delegating discretion to the agency to "choose between conflicting reasonable interpretations" (*Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996)). The Court's perspective is that Congress "must have appreciated that the meaning of the statutory term was not self-evident, or it would not have given the Secretary the power to prescribe standards" (*Batterton v. Francis*, 432 U.S. 416, 428 (1977)). Conflicting reasonable interpretations are not the whole of ambiguity, however.

Seemingly the least ambiguous are those terms of art used by Congress in a technical, specialized or particular manner (*United States v. American Trucking Ass'ns*, 310 U.S. 534, 545 (1940); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 5-6 (1932)). Here are words in which Congress has explicitly defined the term(s) at issue (*Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007)). Understandably, such legislative terms should indicate that "Congress has spoken in the plainest of words, making it abundantly clear" the decision it reached and the limits of discretion; in short, where "the balance has been struck" (*Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)). Even here, however, "statutory language cannot be construed in a vacuum" because "the words of a statute must be read in their context, and with a view to their place in the overall statutory scheme" (*Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). Legislative text is not to be read in isolation because the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context" (*FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132-33 (2000); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)). By doing so, the "text and reasonable inferences from it give a clear answer" (*Brown v. Gardner*, 513 U.S. 115, 118-120 (1994)).

Regardless of the degree of precision or ambiguity, a "word is known by the company it keeps" and that it "gathers meaning from the words around it" (*Jarecki*, 367 U.S., at 307). Thus, "the cardinal rule that a statute is to be read as a whole since the meaning of statutory language, plain or not, depends on context" (*King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). It may even be that "a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute" (*Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983)). In this way, the concept of

ambiguity comes full circle; ultimately, "[a]mbiguity is a creature not of definitional possibilities but of statutory context" (*Brown v. Gardner*, 513 U.S. 115, 118-120 (1994)).

Accordingly, questions about the meaning of text or phrases in a statute "must be answered primarily from the history, terms and purposes of the legislation" and the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained" (*NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944)). A statutory phrase "takes color from its surroundings and frequently is carefully defined by the statute where it appears" (*United States v. American Trucking Ass'ns*, 310 U.S. 534, 545 (1940)). Interpretation requires considering "the context of the particular use of the term and the object to be accomplished by the enactment under consideration" (*South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)). This raises questions about the inclusion of ambiguity in the Chevron Doctrine and its use by agencies and courts alike.

(3) A Matter of Separating Powers

Any attempt at an answer should return to the core matter of separated powers, the discussion initiated in Part 1 of this series with Justice Jackson's explanation of the limits of executive power (*farmdoc daily*, August 22, 2019; Y*oungstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring)). Ambiguity in the Chevron Doctrine should not be limited to the statutory words, their precision or lack thereof, but rather understood as shorthand for measuring the delegation of discretion by Congress. In that view, ambiguity is the court attempting to delineate the amount of discretion provided the agency and the contours of the limits on what the agency can permissibly do under that discretion without further action by Congress.

For this purpose, courts are looking for statutory terms that are "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the [agency] . . . has conformed" to that which has been authorized (*Yakus v. United States*, 321 U.S. 414, 425-26 (1944)). This is not about precision of the definition or meaning of the terms in and of themselves, but about sufficiency in the guidance as to the discretion authorized to the Executive. "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors" (*Touby v. United States*, 500 U.S. 160, 165 (1991)).

Ambiguity and discretion can risk overreach if an agency stretches the limits of its discretion, taking too much from legislative power as it interprets or reinterprets statutory words. For example, statutory words "are not indefinitely elastic, content-free forms to be shaped in whatever manner" the agency prefers or thinks best (*American Ship Building Co. v. NLRB*, 380 U.S. 300, 310 (1965)). Along this line, conservative legal thought has been shaping a trend towards limiting agency discretion and interpretation (*MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225 (1994); *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1660 (2017)). It is built on a strong "measure of skepticism" for any statutory interpretation viewed as an "enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization" that comes about when the "agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy" (*Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). The stated objective is to cut back executive latitude seen as having expanded by "rewriting unambiguous statutory terms" to achieve "bureaucratic policy goals" (*Id.*, at 325-26). In this view, agency discretion exists only in the "interstices created by statutory silence or ambiguity" and is permissible solely "to resolve some questions left open by Congress that arise during the law's administration" but not "revise clear statutory terms that turn out not to work in practice" (*Id.*, at 326-27).

If ambiguity is better understood as a measuring tool rather than a definitional one, this trend raises its own questions about the separation of powers; specifically, the limits on the Article III judicial power. Courts are subject to limits on their power and risk a precarious position if they become entangled in the political branches struggle for power to shape policy. Courts are not to weigh in on "the wisdom or unwisdom of a particular course consciously selected by the Congress" and they "do not sit as a committee of review, nor are we vested with the power of veto" (*TVA v. Hill*, 437 U.S., at 194-95). The court's role is limited to determining the "meaning of an enactment" and "its constitutionality" after which the "judicial process comes to an end" (*Id.*). Drawing lines in this power struggle is exceedingly difficult but has consequences beyond the theoretical. For one, imprecision is the reality of legislating and for courts to come down too severely risks crossing the point "beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules" (*American Power & Light Co. v. SEC*, 329

U.S. 90, 105 (1946)). The result limits not only executive power but also legislative power while aggrandizing power in the judiciary.

The bottom line objective is to determine whether the agency is faithfully executing the law enacted by Congress; a balance between preventing agencies from taking words and discretion too far without the court restricting the making of policy or its evolution and adaptation. It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority" (*Id*. *American Power & Light Co. v. SEC*, 329 U.S., at 105). Ambiguity is not a concern so long as a court can determine whether the agency's "practice is consistent with the agency's statutory authority," has a "reasonable basis" in the law enacted by Congress, and is not "inconsistent with the statutory mandate" (*SEC v. Sloan*, 436 U.S. 103, 118 (1978)). Deference becomes the rule where a "specific application of a broad statutory term in a proceeding in which the agency administering the statute" because "the reviewing court's function is limited" (*Hearst Publications*, 322 U.S., at 131). If needed, individual parties can always protect their rights "by access to the courts to test the application of the policy in the light of these legislative declarations" rather than requiring a certain level of definitional precision by the legislative branch (*Id*.).

Concluding Thoughts

There is risk in ambiguity's alchemy; the transmutation of legislative power when either the executive or judicial powers take advantage of the imperfect nature of words and language to overcome the Constitutional separation. The issue serves as a reminder that in law—whether statutory, regulatory or the opinions of judges—words possess the ability to impact rights and responsibilities. Great power then for those with the ability to define or shape the meaning of the words used and why it was vested foremost in the branch most accountable to the citizens governed by the words. James Madison called the separation of powers designed in the constitution mere "parchment barriers" for the difficult realities of power (*The Federalist* No. 48). Power is neither one-dimensional nor uni-directional. Congress can exceed its limits, but so too can courts and agencies; definitional ambiguity a method for expansion, encroachment and aggrandizement. Conceptually, ambiguity is better viewed as shorthand for measuring the delegation by Congress, the discretion authorized and whether the agency has remained within it. The reasonableness of the interpretation by an agency or court should be the key, not the level of terminological or definitional precision. To that end, a critical tool is the Administrative Procedures Act which Congress enacted to, among other things, help ensure that "administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations" (*Morton v. Ruiz*, at 232).

Reference

Coppess, J. "Changing the Rules: Reviewing Agency Authority to Rewrite Regulations, Part 1." *farmdoc daily* (9):156, Department of Agricultural and Consumer Economics, University of Illinois at Urbana-Champaign, August 22, 2019.