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Reply to Judge Easterbrook: Judicial Discretion and Statutory Interpretation

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JUDICIAL DISCRETION AND STATUTORY INTERPRETATION

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Judicial discretion is inherent in statutory interpretation. The legislature cannot craft statutes to govern every (in)action.[1] Thus, for example, a legislature may prohibit, without exception, the willful killing of another, entrusting the judiciary with discretion to identify exceptions, like self-defense, that existed at common law at the time of the statute's enactment.[2] Moreover, when a statute is enacted, the legislature knows that its chosen language may bear more than one interpretation,[3] entrusting the judiciary with discretion to identify the correct meaning of that inevitably ambiguous language. For these and other reasons, judges must exercise discretion when interpreting statutes. Of course, certain exercises of judicial discretion may be necessary or appropriate, whereas other types of judicial discretion may be unnecessary or inappropriate.[4] Once again, Judge Easterbrook offers insight into the realm of statutory interpretation.[5] In light of those insights, in light

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1. Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 88 (1984) [hereinafter Easterbrook, *Legal Interpretation*].

2. *See* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

3. *See generally* Muscarello v. United States, 524 U.S. 125 (1998) (interpreting the phrase "carries a firearm"); *id.* at 144 n.6 (Ginsburg, J., dissenting) ("And in the television series 'M*A*S*H,' Hawkeye Pierce (played by Alan Alda) presciently proclaims: 'I will not carry a gun. . . . I'll carry your books, I'll carry a torch, I'll carry a tune, I'll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I'll even "hari-kari" if you show me how, but I will not carry a gun!'").

4. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 6-7 (2004) (comparing judicial discretion in the areas of antitrust and admiralty (large) with the area of tax (none)) [hereinafter Easterbrook, *Judicial Discretion*].

5. Judge Easterbrook's scholarly contributions regarding statutory interpretation are numerous. *See, e.g.*, Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913 (1999); Easterbrook, *Legal Interpretation*, *supra* note 1; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). Professor Eskridge suggests that Judge Easterbrook was an early proponent of a new school of thought regarding statutory interpretation. *See* William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621, 646-50 (1990). Per Eskridge, "[w]hat is 'new' about the new textualism is its intellectual inspiration: public choice theory, strict separation of powers, and ideological conservatism." *Id.* at 623 n.11.

of certain constraints associated with the format of the Henry Lecture, and because "examples work more forcibly on the mind than precepts,"[6] I thought it best to limit the scope of my reply to a recent decision of the U.S. Supreme Court, *FDA v. Brown & Williamson Tobacco Corp.*[7] The opinion both exemplifies the strengths of interpreting statutes at lower levels of generality and invites a few questions. In light of the presence of rent-seeking interest groups, should a court interpret an ambiguous statute to fulfill a larger purpose rather than line the purse of any such rent-seeker? And if a court employs such an interpretative technique, has unnecessary or inappropriate judicial discretion simply been transported from one arena to another?[8]

In 1996, under the direction of President William J. Clinton, the Food and Drug Administration (FDA) sought to regulate tobacco products to curb the usage of such products by children.[9] The agency's assertion of authority to regulate tobacco was a reversal of its stated position for the preceding decades.[10] Of course, most would concede that the agency sought to achieve an admirable goal, but admiration alone does not confer the authority to regulate.[11] Such authority must come from Congress.[12] Tobacco companies challenged the FDA's authority to regulate tobacco products, and in a 5-4 decision, the Court concluded that Congress had *not* delegated to the FDA the authority to regulate such products.[13]

As to levels of generality, both the majority and dissenting opinions referenced the purpose of the statute.[14] When the majority referenced the

6. Henry Fielding, *Joseph Andrews*, *in* JOSEPH ANDREWS AND SHAMELA 47, 57 (Arthur Humphreys ed., 1991).

7. 529 U.S. 120 (2000).

8. *See supra* note 43 and accompanying text.

9. 61 Fed. Reg. 44615-18 (Aug. 28, 1996).

10. *Brown & Williamson*, 529 U.S. at 137, 144-46.

11. *Id.* at 161 ("[N]o matter how important . . . the issue, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.") (internal quotes and citation omitted); United States v. Article of Drug . . . Bacto-Unidisk . . ., 394 U.S. 784, 800 (1969) ("'In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'") (quoting 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951)). *See generally* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

12. *Brown & Williamson*, 529 U.S. at 161; La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

13. *Brown & Williamson*, 529 U.S. at 160-61.

14. *Id.* at 133 ("[O]ne of the Act's core objectives is to ensure that any product regulated by the FDA is 'safe' and 'effective' for its intended use."); *id.* at 162 (Breyer, J., dissenting) ("[T]he statute's basic purpose — the protection of public health — supports the inclusion of

purpose of the statute, however, it referenced the text of the statute. Congress passed the statute, and in so doing, it provided rules by which the agency was to operate. In addressing the purpose of the Federal Food, Drug, and Cosmetics Act (FDCA)[15], the Court discussed these rules, including those governing the pre-market approval for new drugs and the procedures for the withdrawal from the market of unsafe drugs for which approval was previously granted and for the determination that a drug is safe.[16] The majority's reference to purpose operates at a low level of generality because it is tied to statutory text and to those rules.[17] At this lower level of generality, judicial discretion is cabined; accordingly, less opportunity existed for the majority to inject personal preferences into its interpretation.[18]

Familiar arguments suggest that there should be appropriate limits on judicial discretion, so only three are presented here. First, the Framers entrusted Congress with the role of assessing the people's needs and preferences and drafting legislation to fulfill those needs and preferences.[19] Relative to Congress, the judiciary is institutionally incompetent to assess and fulfill those needs and preferences for which legislation was enacted,[20] and thus should not pick up the interpretive gauntlet when challenged.

Second, members of a collective body may not act with a single purpose.[21]

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cigarettes within its scope.").

15. 21 U.S.C. §§ 301-399 (2000) (amended 2004).

16. *Brown & Williamson*, 529 U.S. at 133-43.

17. Here, Judge Easterbrook offers insight. Easterbrook, *Judicial Discretion*, *supra* note 4, at 10 ("When I say that a law is being interpreted at a low level of generality, I mean that it is taken as a code of things to *do* rather than a set of objectives to *achieve*."). The issue may be viewed as a familiar one — rules versus standards. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 590-95 (5th ed. 1998); *Easterbrook, Judicial Discretion*, *supra* note 4, at 10 ("motorists must not exceed 65 miles an hour" versus "motorists must use reasonable care under the circumstances").

18. Easterbrook, *Judicial Discretion*, *supra* note 4, at 11 ("Some judges . . . favor formal equality on moral or prudential grounds; others want to minimize the role of law . . . . So how should a tenured judge proceed?").

19. U.S. CONST. art. I, § 7.

20. Alex Kozinski, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1878 (1999) ("[R]elief must come from the organs of government best equipped to judge what the community wants.").

21. Landsgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) ("Statutes are seldom crafted to pursue a single goal . . . ."); Fuller, *supra* note 2, at 628-29 ("Assuming that we must interpret a statute in the light of its purpose, what are we to do when it has many purposes or when its purposes are disputed?"); Cass Sunstein, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1883, 1887 (1999) ("[T]he purpose of any statute can be defined in many different ways and at many levels of generality; and . . . it [may be] unclear which characterization to choose.").

Though a bill must be supported by majorities in the House and Senate,[22] the reasons that individual members support a bill may not coincide. The purpose of a statute, as articulated by one member of Congress, may not command the necessary support for enactment. Thus, to ensure enactment, different purposes, each supported by individual members of Congress, may be bundled.[23] Of course, the *language* of a bill must command the necessary support for enactment, but the language itself may support various purposes. Consequently, the selection of a single purpose — and particularly one at a high level of generality — permits the injection of judicial preference into the analysis.[24] The search for a single purpose may be futile and may be an inquiry so malleable that the judiciary ceases to interpret the law and instead creates it.

Third (though related to the second), questions of purpose invite framing issues. The manner in which a question is framed impacts the answer.[25] Each party invariably will frame an issue in hopes of influencing a court to reach an interpretive conclusion that favors that party. The framing contest will not be limited to the principal issue, but may also touch upon the purpose of the statute. Disputes as to the purpose of the statute, however, may further the principal inquiry with which the court struggles little, if at all. If a court gives credence to arguments relating to the purpose of the statute, the court signals to future litigants that such arguments may persuade, perhaps providing signals that should not be sent.[26]

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22. U.S. CONST. art. I, § 7 (with presidential approval, super-majority without presidential approval).

23. Stewart v. Abend, 495 U.S. 207, 225 (1990) ("The process of compromise . . . undermines any . . . attempt to draw an overarching policy . . . ."); Easterbrook, *Judicial Discretion*, *supra* note 4, at 12.

24. Fuller, *supra* note 2, at 633 ("'[P]urpose' can be employed to justify the result the court considers proper.").

25. Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEG. STUD. 237, 247 (2000). *See generally* Easterbrook, *Judicial Discretion*, *supra* note 4, at 11.

26. *See generally* Mark Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1187-88 (1998) ("If judges make a habit of searching the legislative record, lawyers must do so as well . . . . [T]he game hardly seems worth the candle."); *id.* at 1155 ("Creating and employing legislative history is expensive, after all, and it simply would not be 'worthwhile to incur . . . transaction costs in the hope of a more accurate interpretation of the statute.'") (alteration in original) (quoting Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667, 683 (1991)). Others may disagree. *See* Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 129 (1995) (listing distinguished proponents of purposivism, including Roscoe Pound, Learned Hand, Max Radin, Jerome Frank, and Felix Frankfurter).

When referencing the purpose of the FDCA, the *Brown & Williamson* dissent operates at a higher level of generality relative to the majority because it speaks of goals and aspirations. The dissent notes that the purpose of the FDCA is the protection of public health.[27] Unlike the majority, however, the dissent does not discuss the statutory provisions or rules by which that goal is to be achieved.[28] The pursuit of lofty goals — high-level purposes — invites judicial discretion, instead of confining it, because greater opportunity exists for the court to inject its personal preferences into its interpretation. Such judicial discretion may be problematic for a number of reasons, including those set forth above.[29]

Based on its operation at a lower level of generality, there is reason to commend the opinion of the Court. Nonetheless, the case invites questions regarding who should be obligated to overcome the legislative status quo.

Certainly, as suggested by the dissent, the contemplated rules promulgated by the FDA were public regarding. The benefits flowing from the contemplated rules would have been diffuse, and the costs would have been concentrated.[30] If the Court had accepted the FDA's assertion of authority to promulgate regulations regarding tobacco products, many would have benefitted. As a general matter, most would prefer that children not smoke. Moreover, financial benefits may have flowed from a reduction in the number of people that will be smoking cigarettes in the future. For example, health insurance premiums may have been reduced. Of course, the benefits enjoyed by any individual may have been tiny, but the aggregate benefits may have been large. While the benefits may have been diffuse, the costs may have been concentrated, and a significant portion of those costs may have been borne by the tobacco companies.[31]

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27. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 162 (2000) (Breyer, J., dissenting).

28. Elsewhere, the dissenters employ rigorous analysis of the FDCA and other statutes touching on related matters.

29. *See* William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 335 (1990) ("Judicial attempts to fancy up . . . deals with public-regarding rhetoric either are naive or simply substitute the judge's conception of public policy for that of the legislature."); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989).

30. *See* Appendix A.

31. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-16 (1984) [hereinafter Easterbrook, *Harvard Foreword*] ("Laws that benefit the people in common are hard to enact because no one can obtain very much of the benefit of lobbying for or preserving such laws. Smaller, more cohesive groups are more effective lobbyists. . . . The tobacco lobby is not large, but it is effective in obtaining subsidies."). One might expect that a lobby that is effective in obtaining subsidies

In effect, the majority invalidated the FDA's regulations. Thus, the status quo is no regulation. This may have been the deal struck by legislators — a refusal to confer authority on the agency to regulate tobacco products — and that deal should be enforced.[32] For there to be regulation, the beneficiaries of the regulation must overcome the status quo by prompting Congress to act.[33] They must overcome collective action problems;[34] they must overcome the lobbying efforts of the tobacco companies, which have been willing to spend millions in the past.[35] Moreover, they must overcome their own and Congress's preference to address other matters, such as homeland security.[36] This may be the perfect solution. This may be democracy in action.

However, consider the alternative outcome. If the FDA regulations were deemed valid, the burden of overcoming the status quo would have fallen on, among others, the tobacco companies — a group with special interests that may be seeking to appropriate economic rents.[37] Arguably, democracy would

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would be effective at avoiding the imposition of costs.

32. *Id.* at 15 ("[T]he judge treats the statute as a contract . . . implement[ing] the bargain as a faithful agent but without enthusiasm . . . . What the parties did not resolve, the court should not resolve either."); Eskridge & Frickey, *supra* note 29, at 335 ("[W]hen a court uses purposivist analysis to elaborate a statute, it may actually undo a deliberate and precisely calibrated deal worked out in the legislative process."). *But see generally* Movsesian, *supra* note 26.

33. *Compare* Ryan J. Foley, *Congress Dials Up "Do Not Call" List*, WALL ST. J., Sept. 26, 2003, at A3 (reporting that — the day after a U.S. District Court struck down the "do not call" program being effected by the Federal Trade Commission (FTC) as unauthorized by Congress — Congress explicitly authorized the FTC to so act in light of the popularity of the program; more than fifty million people had registered for the program in hopes of "rid[ding] themselves of pesky telemarketing calls").

34. *See* JESSE H. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 545 & n.12 (5th ed. 2000) (identifying as the seminal works on the problems of collective action: MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); and ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970)).

35. According to its filings under the Lobbying Disclosure Act of 1995, for the period 1998–2003, Brown & Williamson Tobacco Corporation spent approximately $34,730,000 on lobbying activities. *See* MONEY IN POLITICS DATABASES: BROWN AND WILLIAMSON TOBACCO, http://www.fecinfo.com/cgi-win/lb_client.exe?DoFn=&SenateID=7188-12 (last visited June 10, 2004).

36. For discussion of the related issues of Arrow's paradox and vetogates, see WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 47-81 (3d ed. 2001).

37. Easterbrook, *Harvard Foreword, supra* note 31, at 15 ("If statutes generally are designed to overcome 'failures' in markets and to replace the calamities produced by unguided private conduct with the ordered rationality of the public sector, then it makes sense to use the remedial approach to the construction of statutes — or at least most of them."). It could be argued that Congress passed the FDCA because producers of food, drugs, and cosmetics failed to internalize the costs of their products — resulting in a market "failure" — necessitating

still be at work. The tobacco companies would be forced to overcome the FDA regulations by, among other things, convincing: (1) the agency that its policy position was incorrect, (2) the president to direct the agency to reverse courses, (3) Congress to act, or (4) the populace to elect a president who agreed with their position.

If the influence of interest groups has led to ambiguous legislation,[38] then it may be appropriate to interpret ambiguity against those interest groups.[39] The opinions in *Brown & Williamson* surveyed the FDCA and other related statutes without identifying clear language indicating whether Congress authorized the FDA to regulate tobacco products. If the tobacco lobby exerted influence in the passage of the FDCA and the amendments thereto or the related statutes on which the majority relies for context in interpreting the FDCA, then one might argue that the burden of overcoming the status quo should fall on the tobacco companies.[40]

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legislation to cause those producers to compare more accurately the benefits against the costs of those products. Of course, the Act could have been a product of the efforts of special interests. *See* Vanessa O'Connell, *Why Philip Morris Decided to Make Friends with FDA*, WALL ST. J., Sept. 25, 2003, at A1 (noting that even subjecting oneself to regulation may be advantageous).

38. Since the *Brown & Williamson* decision, it appears that at least one tobacco company has altered its position, arguably to further its interests. A statute that may seem public-regarding may be the product of the efforts of special interest groups. Philip Morris supports a bill that would subject the tobacco companies to regulation by the FDA. O'Connell, *supra* note 37, at A1. "Some Philip Morris competitors consider the measure a cynical ploy for the market leader to cement its dominance." *Id.* Philip Morris executives themselves have "wonder[ed] if regulation might . . . prevent more draconian measures down the road and [might] solidify the dominance of the Marlboro maker over its rivals." *Id.*

39. Legislative ambiguity may be intentional.

> Ambiguity serves a legislative purpose. When legislators perceive a need to compromise they can, among other strategies, "obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish." Legislative ambiguity reaches its peak when a statute is so elegantly crafted that it credibly supports multiple inconsistent interpretations by legislators and judges. Legislators with opposing views can then claim that they have prevailed in the legislative arena, and, as long as courts continue to issue conflicting interpretations, these competing claims of legislative victory remain credible.

Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 628 (2002) (footnote omitted) (alteration in original) (quoting ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 779-80 (1997)); *see also* Appendix A (Distributed Benefits/Concentrated Costs) ("[D]raft an ambiguous bill and delegate to agency regulation, so all [legislators] can claim victory . . . .").

40. This may be a familiar argument — that ambiguities in a contract should be interpreted against the drafting party — in different clothes. *See generally* Eric Lane, *Legislative Process*

If a court determines that a statute or pertinent statutory provision resulted from interest group influence[41] and ambiguity therein should be interpreted against such interest group, then the court seemingly has made a normative judgment that invites skepticism. First, the winds of influence may not blow in only one direction. Presumably Congress hears from the tobacco companies whenever it contemplates legislation touching on tobacco regulation. Should we not also presume that Congress hears from public health organizations when it contemplates such legislation?[42] Who influenced what? Did the interest groups engage in trades? How can a court answer these and related questions? Second, the interpretation of ambiguity against an interest group seemingly amounts to a normative judgment by a court of both the appropriate level of influence on the legislative process and the merits of the legislative outcome.[43] Such inquiries may not be appropriate for courts. Certainly one could argue that unnecessary or inappropriate judicial discretion has been simply transported from one interpretive arena to another.

In conclusion, interpreting statutes at a lower — rather than a higher — level of generality aids in limiting inappropriate judicial discretion. Nonetheless, interpretation at a higher level of generality may be appropriate to fulfill the purpose of public-regarding statutes and limit the rent-seeking opportunism of special interest groups. This latter interpretive technique, however, runs the risk of reinjecting inappropriate judicial discretion into the process as courts seemingly make normative judgments as to the appropriate influence that may be exerted in the legislative process as well as the merits of the legislative outcome.

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and Its Judicial Renderings, 48 U. PITT. L. REV. 639, 645 (1987), *reprinted in* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 60-61 (1997) ("[T]he outline of a legislative response will be drafted [jointly by] the legislator, legislative staff and, in many cases, interest groups which favor the measure.").

41. Identifying the influence of an interest group over specific statutory language seems anything but simple, particularly when one supports a legislative position seemingly contrary to her interests. *See* O'Connell, *supra* note 37, at A1 (noting that even subjecting oneself to regulation may be advantageous).

42. The presumption may be fair in light of the numerous amici curiae briefs filed in support of the FDA in *Brown & Williamson*, including those filed by forty states; the American Cancer Society, Inc.; and thirty-three consumer, parent, educator, public health, and health professional organizations.

43. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31, 51-52 n.86 (1991) (One "cannot determine when a minority has excessive political influence without a normative baseline . . . . Judicial review designed to protect the majority *or* the minority from the political process must rest on substantive judgments about when which groups should win.").

Appendix A
CHART OF LEGISLATION BASED ON BENEFITS/COSTS[44]

DISTRIBUTED BENEFITS/DISTRIBUTED COSTS	DISTRIBUTED BENEFITS/CONCENTRATED COSTS
DEMAND: A general benefit-general taxation case that usually involves public goods. Little group activity on either side of most cases. SUPPLY: Because there is no strong pressure from organized interests, legislature will favor no bill or symbolic action. Sometimes delegation to agency regulation will occur. DANGER: These laws are usually in the public interest, but the legislature will often fail to update them as society and the underlying problem change. INTERPRETATIVE RESPONSE: Courts can expand the law to new situations and develop it in common law fashion, subject to the limits imposed by the statutory text.	DEMAND: A general benefit-specific taxation case in which the majority imposes its will on the minority up to the capacity of the minority to pay. Opposition will tend to be well organized. SUPPLY: Because the proposal will be opposed by organized interests, the best legislative solution is to draft an ambiguous bill and delegate to agency regulation, so all sides can claim victory. Regulatory capture can result. DANGER: Regulated groups will tend to evade their statutory duties and press to "capture" the agency created to administer the law. INTERPRETATIVE RESPONSE: Courts can monitor agency enforcement and private compliance, and open up procedures to assure excluded groups are heard. Courts can press the agency to be faithful to the stated public-regarding goal of the law.
CONCENTRATED BENEFITS/DISTRIBUTED COSTS	CONCENTRATED BENEFITS/CONCENTRATED COSTS
DEMAND: Tends to have strong interest group support and weak, if any, organized opposition because of the free rider problem. The benefit to an individual of having the policy changed is simply too immaterial. SUPPLY: Because the costs can be allocated to an uninformed public, legislature will follow a policy of distribution of subsidies and power to the organized beneficiaries. Often self-regulation is the chosen policy. DANGER: Rent-seeking by special interest groups at the expense of the general public. INTERPRETATIVE RESPONSE: Courts ought to construe the law narrowly to minimize the unwarranted benefits. Hold the statute to its public-regarding justifications.	DEMAND: Results in continuous organized conflict over payment of benefits and distribution of costs. A prime example is the NLRB and the conflicts between labor and management. SUPPLY: Because any policy choice will incur the wrath of opposing interest groups, legislators will favor no bill or delegation to agency regulation. DANGER: The statutory deal may grow unexpectedly lopsided over time. INTERPRETATIVE RESPONSE: Do not attempt much judicial updating, unless affected groups are not able to get the legislature's attention.

44. The chart combines three tables from WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 57, 59 & 785 (3d ed. 2001).