Rethinking Uniformity in Statutory Interpretation

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Ryan Doerfler, *Can a Statute Have More Than One Meaning?*, 94 **N.Y.U. L. Rev.** 213 (2019).

It is a persistent theme in statutory interpretation theory—one shared by textualists, purposivists, and intentionalists alike—that a statutory term must have the same meaning from case to case and from litigant to litigant. The word "knowingly" in the same statute cannot mean one thing as applied to Sally and another as to Jim. To hold otherwise, courts and scholars have agreed, would violate fundamental principles of fairness and stability and upend the rule of law. Yet in a provocative and compelling new article, *Can a Statute Have More Than One Meaning?*, Ryan Doerfler makes a convincing case for rethinking this conventional view and contemplating just such variability of meaning.

Like all of Doerfler's work, the article is incredibly smart and forces one to think about statutory interpretation in a fresh and unorthodox manner. Building on the linguistic observation that speakers can and often do communicate different things to different audiences using the same words or written text, the article argues that there is no reason to assume that Congress does not do the same—and several reasons to assume that it does.

Doerfler begins by using examples of familiar real world speech and written text to make the point that, linguistically, it is quite common for speakers and authors to communicate different things to different audiences using the same words. In so doing, Doerfler draws from linguistic theory and concepts such as "indexicals"[1] but manages to do so in a manner that is accessible to non-linguists. The article then turns to making the case that Congress regularly employs terms—*e.g.*, gradable adjectives such as "dangerous," "serious," or "significant"—that acquire meaning only in context, and argues that it makes sense to suppose that Congress would want such context-sensitive language to be interpreted differently across importantly differing contexts.

Ultimately, the article suggests a handful of applications in which its insights about the fallacy of presuming that all statutory terms have one meaning in all situations could have important implications. First, Doerfler points out that Congress deliberately has chosen to give some statutory provisions, such as the Immigration and Nationality Act (INA), both civil and criminal consequences and suggests that such statutes perhaps should be interpreted differently depending on whether the application at issue is civil or criminal. Specifically, he notes that the procedural and interpretive norms that govern criminal cases are much more forgiving to defendants than are those that govern civil cases, and suggests that canons such as the rule of lenity[2] should apply when the provision at issue is being interpreted in a criminal context but not applied to the same statute when it is being interpreted in a civil context. That is, criminal defendants should receive the benefit of the doubt in marginal applications where the statute's scope is ambiguous, but in civil cases, courts could resolve the same statutory ambiguities using other traditional tools of construction or, where appropriate, by deferring to an administrative agency's construction of the provision.

Second, Doerfler observes that Congress often gives multiple administrative agencies authority to administer the same statutory provision—and that different agencies sometimes interpret that shared

provision differently. He argues that at least in certain circumstances, such as where each agency has mutually exclusive authority over separate sets of regulated persons, Congress should afford *Chevron* deference to each agency's individual interpretation of the provision, even where those interpretations differ.

I find Doerfler's argument particularly compelling in the administrative law context. It makes logical sense that Congress could intend that different agencies be able to interpret differently the provisions they jointly administer with respect to the individual entities they independently regulate. That is, it is at least plausible that Congress may wish to allow the Federal Trade Commission to interpret a statutory term differently as applied to the companies it regulates than the Federal Communications Commission does as applied to media companies or than the Securities and Exchange Commission does as applied to securities brokers. Doerfler also argues that that it may make sense for Congress to have intended—and for courts to uphold—differing agency interpretations of "generic" statutes such as the Administrative Procedure Act (APA) or the Freedom of Information Act (FOIA) as applied to the unique proceedings conducted by each agency. That is, to defer to the SEC's interpretation of the APA's adjudication provisions for SEC proceedings, the NLRB's (National Labor Relations Board) interpretation of those same adjudication provisions for NLRB proceedings, and so on.

In the end, Doerfler largely convinces me that scholars and courts should at least consider whether certain statutory provisions should be interpreted differently as applied to different audiences and in different contexts. His article also raises the important follow-on question: Why do courts persist with the one-meaning rule in this and other contexts *(e.g.,* the whole act rule[3] despite evidence that such rules may not accurately reflect congressional intent or legislative drafting realities? It may simply be that irrespective of congressional practice or intent, courts view it as part of their role to impose coherence on the law externally. That is, they may view it as their job, when Congress gives a statute a vague meaning, to step in and give it a settled, fixed one—i.e., to pick the best reading themselves and hold Congress to that meaning going forward. In other words, courts may see themselves as the instruments, or even imposers, of stability and coherence in the law. If so, Doerfler's article rightly pushes them to reconsider whether stability and coherence necessarily must equate with uniformity.

1. *See, e.g.*, Andy Egan, *Billboards, Bombs, and Shotgun Weddings*, 166 **Synthese** 251 (2009) (analyzing cases in which a single verbalization or written text communicates different content to different audiences); Stefano Predelli, *I Am Not Here Now*, 58 **Analysis** 107 (1998) (same); Alan Sidelle, *The Answering Machine Paradox*, 21 **Canadian J. Phil.** 525 (1991) (same).
2. The rule of lenity is an interpretive canon that requires ambiguous criminal statutes to be interpreted in favor of the defendant. *See, e.g.*, Norman J. Singer & J.D. Shambie Singer, 3 **Statutes and Statutory Construction** § 59:3 at 167-75 (Thomson Reuters/West 7th ed 2008); *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008). It is based on a due process concern that only clearly stated laws can justify significant deprivations of liberty. *See, e.g.*, *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 **U. Pa. L. Rev.** 1007, 1029 (1989) ("The rule of lenity rests upon the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable.").
3. The whole act rule presumes that each provision of a statute should be interpreted consistently with other provisions within the same statute, including an assumption that the same word should be given the same meaning throughout a single statute. William N. Eskridge, Jr., et. al, **Cases and Materials on Legislation: Statutes and the Creation Of Public Policy** 862-65 (2007). The whole act rule recently has come under serious empirical critique as a matter of

legislative process reality. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 **Stan. L. Rev.** 901, 954-55 (2013). And yet, it endures and remains popular with courts. *See, e.g.,* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 **Duke L. J.** __ (forthcoming 2020) (Tables 1 & 2) (reporting frequency with which members of the Roberts Court invoked the whole act rule in cases decided between 2006 and 2018).

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