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Foreword

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FOREWORD

Thomas Wm. Mayo*

AS more than a few of the authors for this Symposium observe, the past fifteen years have seen a dramatic increase in scholarly publishing on the topic of statutory interpretation, as well as an escalation in the volume (measured in both numbers of cases and the decibel level displayed in some of the opinions) of judicial forays into the subject. It seems, therefore, like a propitious moment to pause and take stock, to examine the developments revealed in the law reviews and in the case reporters. Accordingly, I applaud the editors of the *SMU Law Review* for their commitment to this Symposium and thank the authors for their thought-provoking articles.

One of the reasons often cited for the burgeoning interest in statutory interpretation is the “statutorification” of American law in this century.¹ There can be no real doubt about the rise of statute law.² For verification, one need only look at the course catalog of any law school in America,³ or at the dockets of the United States Courts of Appeals. As

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1. The word is usually credited to then-Dean Guido Calabresi. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982), although (as Dean Calabresi notes) Professor Grant Gilmore commented seven years earlier that this country was engaged in an “orgy of statute making,” *id.* (citing GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977)), and the truth of his words was undoubtedly widely accepted many years before that.

2. It is striking, however, that over the same two decades that law reviews have devoted an increasing percentage of their pages to the interpretation of statutes (most of them federal), there has been a corresponding downturn in Congress’ production of its primary work product. For example, the 105th Congress (the last to complete two full sessions) enacted into law 394 public bills and 10 private bills. See 145 CONG. REC. D29 (daily ed. Jan. 19, 1999). By contrast, the 91st Congress enacted 695 public bills into law and 246 private bills. See 116 CONG. REC. D739-40 (daily ed. Jan. 2, 1971). Divided government does not provide a ready explanation, since both Presidents Nixon and Clinton came into office with Congresses that were controlled by the opposite party during these years, see *Session Summary, Party Leaders, Turnover in 1969*, XXV CONGRESSIONAL QUARTERLY ALMANAC (91ST CONG. 23 (1969)); *Congressional Overview*, XLIX CONGRESSIONAL QUARTERLY ALMANAC, 103RD CONG. 4 (1993), nor does expenditure of effort, since both Congresses spent comparable numbers of hours in session and recorded similar numbers of yea/nay votes.

3. Here at SMU there are at least 80 upper-level courses with a principal focus upon federal or state statutory law and with judicial attempts to interpret them, from Administrative Law, Antitrust, and Bankruptcy to Unincorporated Business Associations, White Collar Crime, and Wills and Trusts. See SMU SCHOOL OF LAW, 1999-2001 CATALOG 55-78. Even the first-year curriculum—which has long been criticized for emphasizing appellate cases and the common law at the expense of public law in general and statutory analysis in particular—shows to varying degrees the effects of “statutorification” (e.g., Civil Procedure (significant sections of the federal judicial code and the Federal Rules of Civil Procedure), Contracts (Uniform Commercial Code), Criminal Law (various state and model

Professor Crespi points out in his article,⁴ law review scholarship in the field has also increased significantly, particularly during the period on which he focuses, 1988 to 1997. Professor Crespi (perhaps wisely) does not speculate as to the reasons for the blooming of this particular academic rose, but I will offer two.

First is the pioneering scholarship of Professor Bill Eskridge and Phil Frickey, whose law review articles on the subject began appearing in 1985-86⁵ and culminated in the publication of the first edition of their casebook,⁶ which was immediately lauded by Judge Posner for having “done for legislation what Hart and Sacks did for legal process, or Hart and Wechsler for federal courts: it has demonstrated the existence of a subject.”⁷ That three of the seven law review articles most frequently cited by courts should be by one or both of these writers should come as no real surprise.⁸ More importantly, their articles and casebook signaled the rest of the academy that there was real gold to be mined out of statutory interpretation, and (like the original ‘49ers), the rest of us were only too happy to follow the path.

The last two decades would have provided much less material for academics to write about, however, had it not been for the second major cause of this publication activity: the ascendance to the federal bench of a small group of vocal, provocative, and dynamic judicial activists who were committed to changing the way judges interpreted statutes. I am thinking primarily of Judge Frank Easterbrook (who took his commission in April 1985), Judge Alex Kozinski (November 1985), and—*primus inter pares*—Justice Antonin Scalia (who joined the U.S. Court of Appeals in 1982 and the U.S. Supreme Court in September 1986).⁹ These three textualists have produced a body of case law and extra-judicial writings that challenge the eclecticism and pragmatism that have been the hallmark of statutory interpretation for most of this century.

penal codes), Property (zoning ordinances and other public land-use regulation, landlord-tenant law, conveyancing statutes), and even Torts (at least statutory contribution and indemnification schemes, if not also the *Restatement (Second) of Torts*)).

4. Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9 (2000).

5. See, e.g., Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276 (1985); Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237 (1986).

6. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988).

7. Richard A. Posner, *Book Review*, 74 VA. L. REV. 1567, 1571 (1988).

8. What comes as a surprise, at least to me, is the unambitious use to which these articles have been put by the courts. As Professor Crespi observes, most if not all of the judicial citations have been “simply to lend academic support to the application of a standard, straightforward principle of statutory interpretation that was referred to generally and superficially by the article, and that was well-established long before the publication of that article.” Crespi, *supra* note 4, at 21. For a journeyman scholar working in these fields, it is discouraging enough that over half of the judicial citations were to seven articles (out of 132), written by two Supreme Court justices and three leading scholars, but for them not even to be cited for the good stuff is almost too much to bear.

9. See Federal Judicial Center’s website: <http://air.fjc.gov/history/judges_frm.html>.

“Statutory interpretation,” as practiced by the academics and judges whose work is discussed in the pages of this Symposium, is practically a blood sport. As Judge Abner Mikva¹⁰ and Professor Eric Lane demonstrate, the textualist revolution is not just about abstruse theories of language and theories of legislative process.¹¹ Nothing less than a political counter-revolution is behind the move to limit statutes to their plain meaning, even when the meaning of the statutory text is anything but clear. Mikva and Lane argue that Justice Scalia’s textualist revolution has usefully curbed some of the eclectic tradition’s excessive reliance upon legislative history, but has generally failed to achieve the goals set by judicial conservatism for itself. Their article explores, among other themes, the two ways in which statutory interpretation has shown its political nature, not only as a mediating force between Congress and the Executive, between the political branches and the judiciary, and between the central federal government and the states, but also as an occasional corrective for political judgments with which the judicial author disagrees.

Political considerations need not always be the source of disagreement about the Court’s interpretations. In his contribution to this Symposium, Louis Fisher emphasizes the institutionalist considerations that should inform the Court’s reading of statutory language.¹² Fisher argues that the doctrine of separation of powers, as well as a healthy respect for the limitations of the judiciary as a source of public policy, both provides a useful source of judicial restraint and justifies at least limited inquiries into extra-textual sources in order to respect Congress’ distinct role as the author of federal policy.

This institutionalist perspective is also pursued by Professor John Roberts, who offers a detailed discussion of the possible meanings of key terms in the 1996 Telecommunications Act.¹³ He considers Congress, the courts themselves, agencies, and industry groups all as potential sources of meaning and argues for a more supple and realistic approach to reading statutes. In particular, Professor Roberts gives the *Chevron* doctrine¹⁴ a hard look and suggests ways to correct what he regards as the

10. As honorable a title as it is, “Judge” hardly does justice to Abner Mikva’s decades of public service, beginning with his year as a law clerk to Supreme Court Justice Sherman Minton (1951-52), and continuing through his years as an Illinois state representative (1956-1966), member of Congress (1969-1973, 1975-79), a member (and eventually Chief Judge) of the U.S. Court of Appeals for the D.C. Circuit, and then White House Counsel (1994-95) to which the title of “Professor” may be added again (Judge Mikva taught at Northwestern’s law school from 1973-75 and is currently a visiting profess at the Illinois University College of Law and Senior Fellow at Illinois; Institute of Government and Public Affairs). *See id.*

11. *See* Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia’s Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121 (2000).

12. *See* Louis Fisher, *Statutory Construction: Keeping a Respectful Eye on Congress*, 53 SMU L. REV. 49 (2000).

13. *See* John C. Roberts, *The Sources of Statutory Meaning: An Archaeological Case Study of the 1996 Telecommunications Act*, 53 SMU L. REV. 145 (2000).

14. *See* *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (stating that if Congress has been silent or ambiguous on an issue, courts should ordinarily defer to “reasonable” or “plausible” agency interpretations).

four fundamental mistakes upon which the doctrine is based.

Professors Clark and Charles Kelso suggest in their article that one way to bring order to the seeming chaos of competing political, institutional, and linguistic philosophies is to stop looking to interpretive theories for a Grand Unifying Theme.¹⁵ Instead, they suggest, based upon their detailed review of the statutory cases of the Supreme Court's 1998 Term, the lack of a single, coherent approach may be traced to the fact that the justices on the current Court represent four distinct approaches to judicial decision making. To that extent, the eclecticism that has marked the Court's approach to reading statutes for much of this century is an appropriate middle course that puts statutory text first but does not hesitate to test interpretations against common sense, legislative purpose, historical context, and other extra-textual sources of decision.

One of Professor Eskridge's more controversial contributions to this field has been his advocacy of "dynamic" statutory interpretation, which allows a court to update a statute to reflect contemporary social mores, evolving tort doctrine, or other post-enactment developments.¹⁶ Two leading examples of dynamic statutory interpretation in action are *Li v. Yellow Cab Co. of Cal.*¹⁷ and *Bob Jones Univ. v. United States*.¹⁸ In each case, the court chose to update the meaning of the statute before them to reflect tort law developments in the law of comparative fault (*Li*) or the national public policy against racially segregated schools as reflected in the common law of charitable trusts (*Bob Jones*). One of the things that made the decision so difficult in each instance was the court was walking along a shifting border that allegedly separates the common law from statute law. While statutes are usually understood to be enacted in derogation of the common law, both courts consciously relied upon many decades (and in the case of *Li*, a century) of common law development to achieve a result that the statutes' drafters could not have dreamed was possible. Two of the articles in this Symposium consider the complex question of the relationship of statutes to the common law. Professor Jonathan Turley recounts his experiences with a case that rests at the intersection of environmental law and national security law in an attempt to determine when, if ever, it is appropriate for the common law to trump the plain meaning of a statute.¹⁹ Professor Daniel Farber offers up a detailed examination of the New York Court of Appeals' landmark decision in *Riggs v. Palmer*,²⁰ in part to consider how a court should determine

15. See J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81 (2000).

16. See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

17. 532 P.2d 1226 (Cal. 1975).

18. 461 U.S. 574 (1983).

19. Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 SMU L. REV. 207 (2000).

20. 22 N.E. 188 (N.Y. 1889) (holding that a grandson who was the main beneficiary under his grandfather's will and who was also convicted of murdering the same grandfather

where a statute leaves off and the common law begins, or (to put it another way) when a statute preempts otherwise relevant common law.²¹

As all of the articles in this Symposium demonstrate, the most recent two decades of scholarly commentary on statutory interpretation have solved very little. There is still much work to be done, and the pieces offered in this issue make a splendid contribution to the field.

could not inherit under the will, or at least had to give up his ill-gotten gains to the residual beneficiaries).

21. Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 SMU L. REV. 31 (2000).

