

What is New in the New Statutory Interpretation? Introduction to *The Journal of Contemporary Legal Issues* Symposium

MATHEW D. MCCUBBINS
DANIEL B. RODRIGUEZ*

I.

Theoretical debates in the contemporary statutory interpretation literature have made for some rather strange bedfellows. While disagreement rages in the law journals and in the pages of the federal reports about how best to construe statutes,¹ there is widespread agreement among scholars and judges of diverse ideological stripes on the following claim: Intentionalist interpretation, that is, interpretation

* The authors of this introduction, and co-editors of this symposium, are, respectively, Distinguished Professor and Chancellor's Associates Chair VIII, Department of Political Science, University of California, San Diego; and Dean and Professor of Law, University of San Diego School of Law. For help in organizing the workshop in which the symposium articles were presented as working papers, thanks to Theresa Hrenchir and Kay Manansala; for valuable editorial assistance on this special issue of JCLI and for assistance in organizing the symposium, thanks to Cheryl Boudreau, Merina Smith, Nick Weller, and Brigid Bennett.

1. See, e.g., ANTONIN SCALIA, *A MATTER OF PRINCIPLE* (1997); WILLIAM ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); Philip Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUMBIA L. REV. 223 (1986). See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 669-1098* (3d ed. 2001) (discussing theories and collecting cases).

that follows the principle that the will of the authors of the statute ought to govern the interpretation of legislation where the meaning of such legislation is in dispute, is deeply problematic as a method of construing statutes in hard cases.²

These difficulties are viewed by prominent commentators as both theoretical and practical. The essential theoretical objection is that drawing conclusions about statutory meaning from the expressed and implied opinions of (often long-dead) authors is problematic as a matter of both constitutional and lawmaking theory.³ A touchstone in the debate on legislative history is the use of extrinsic aids in interpreting legislative will. The most conspicuous type of extrinsic aid is legislative history, essentially a catch-all category that includes all published sources of context making up the “record” of legislative proceedings, including floor statements by members of Congress and committee reports. Also described as legislative history are pieces of proposals left on the cutting room floor, that is, rejected legislative amendments and trial balloons popped by legislators during, say, committee markups.⁴ And, perhaps most controversially of all, actions of various implementation mechanisms, such as administrative agencies, are oftentimes described as part of the legislative history—and thus an extrinsic aid to interpretation—of the statute.⁵ These extrinsic aids have been criticized vociferously by statutory interpretation scholars and, increasingly, by conservative jurists disturbed by what they see as the uncritical, under-theorized reliance by their judicial colleagues on legislative history to discern statutory meaning.⁶

2. See, e.g., Kenneth A. Shepsle, *Congress is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239 (1992); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1929-1930) Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 60 HARV. J.L. & PUB. POL’Y (1988).

3. See, e.g., Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 674 (1997); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992) Frank Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990); *NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 633 (7th Cir. 1995) (Easterbrook, J.) (“No member of Congress can anticipate all questions that will come to light; and a body containing hundreds of members with divergent agendas can’t answer even a small portion of the questions that do occur to its members”).

4. See, e.g., James Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

5. See, e.g., Jerry L. Mashaw, “Agency Statutory Interpretation” (manuscript on file with author, 2005).

6. See, e.g., Scalia, *Principle*, *supra* note 1.

Of a piece with these practical critiques of extrinsic aids is the critique by these same scholars and judges of the use of interpretive canons when construing statutes. Examples of interpretive canons abound, such as the rule that a statute should be interpreted to avoid a constitutional question or the rule that a statute should be construed to avoid an absurd result. The vast range of canons and, indeed, the ability of jurists to apply these canons to reach nearly any statutory result they desire was noted fifty years ago by Karl Llewellyn in his famous *Vanderbilt Law Review* article.⁷ More recently, scholars have noted the practical difficulties with deploying canons in the service of intentionalist interpretation. Though canonical construction is an omnipresent part of the modern practice of statutory interpretation in both federal and state courts, at no point in American legal history has there been such a paroxysm of criticism of the use of these aids to interpretation.⁸

With skill and energy, statutory interpretation theorists from across the political divide have nearly driven a stake through the heart of intentionalism as a method of interpretation. With intentionalism on life support, interpretation theorists have turned their attention to other topics in legislation and interpretation theory. And with our attention drawn away from debates over, for example, the uses and misuses of legislative history, or the desirability of certain interpretive canons, one might legitimately ask the question: Is there anything new to learn about statutory interpretation theory?

The impetus for this symposium, under the aegis of the joint USD/UCSD Law, Economics, and Politics Workshop Series, was this question. Challenged by the cynical observation that the principal themes in the statutory interpretation debate have been beaten, like the proverbial dead horse, vigorously, we invited some of the leading scholars in public law and legal theory to present their thoughts and ideas. No effort was made to limit the scope of the debate to precise questions of statutory interpretation theory; rather, we were interested in learning as much as possible from these provocative presentations in order to help shape (and maybe even reconfigure?) a new debate over legislation and its interpretation.

7. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed*, 3 VAND. L. REV. 395 (1949-1950).

8. See generally ESKRIDGE, JR. ET AL., *LEGISLATION*, *supra* note 1, at 912-17 (describing the "intellectual warfare" over the canons).

II.

As characterized by its influential critics, intentionalism in interpretation is useless for two overlapping reasons: Either it is useless for the theoretical and practical reasons described above or, where it can be of use, what passes for intentionalism in interpretation is merely an obvious reliance on the incontrovertible view of the statute's framers. In such cases, the basic episode is hardly interpretation at all but, rather, merely the application of the statute to resolve an issue of only minor controversy. In this perspective, interpretation is, by its nature, a creative endeavor; when we do interpretation, we are looking outside the four corners of the statute and also outside the clearly expressed will of the legislature; we are engaging in the act of creating statutory meaning, imbuing the statute with a meaning that its authors may or may not have intended, contemplated, or even understood. To be sure, describing interpretation as a creative act, independent of legislative intent, tells us very little in practical terms. This imbuing of meaning may be wholly distant from the apparent structure of the statute and the process by which the law was enacted, as the most expansive, "dynamic" theories of interpretation illustrate⁹; or the process may struggle to make sense of the statute's *purpose*, as the traditional Legal Process approach counseled.¹⁰ Yet, the key move is to bracket intentionalism and to thereby reject this approach as "not interpretation," and, therefore, neither creative nor especially interesting as a technique for resolving disputes over statutory meaning.

A different analytic box is constructed by modern interpretation theorists such as Stanley Fish and Walter Benn Michaels.¹¹ In this view, interpretation is *necessarily* tethered to the will of the authors of the text. Without fidelity to the authors' views of what his or her text means, interpretation is impossible. This impossibility is not a feature of the semantics of interpretation but, rather is because of the deep nature of the meaning of language and the imperative of attributing to authors of

9. William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

10. HENRY M. HART AND ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1377-80* (W. Eskridge & P. Frickey eds. 1994).

11. See Stanley Fish, *An Exchange on the Nature of Legal Theory: Theory Minimalism*, 37 SAN DIEGO L. REV. 761 (2000); Walter Benn Michaels, *Constitutional Interpretation: Comment: Response to Perry and Simon*, 58 S. CAL. L. REV. 673 (1985). See also Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993); Gerald Graff, *'Keep off the Grass,' 'Drop Dead,' and Other Indeterminacies: A Response to Stanford Levinson*, 60 TEX. L. REV. 405 (1982).

texts the responsibility and authority to shape meaning through their expressions. Elsewhere, we explain how such a view can be defended on the basis of the modern theory of communication¹²; we also explain why fidelity to authorial intent is necessary as a matter of constitutional law and the limited role of the courts in the American lawmaking process.¹³ For now, it is enough to note that there is a well-developed line of analysis that rejects the bracketing of intentionalism and interpretation and insists that the latter *requires* the former.

As with the competing view of interpretation described above, this analysis does not, by its own terms, guide us in the direction of one approach to interpreting statutes over another. We need to grasp more than just the best definition of the term interpretation to ground a comprehensive theory of *statutory* interpretation. After all, we may yet want to reject interpretation as a device for resolving disputes over statutory meaning, instead preferring to reconstruct the statute to implement a vision attached to the wishes of the judge, the community, or the current (as contrasted with the enacting) legislature; or we may want—and, to tip our own hand, we *do* want—to limit the scope of judicial discretion by requiring judges to interpret statutes and, thereby, follow legislative intent;¹⁴ but the key point is that the eschewing of legislative will is an activity fundamentally different than interpretation.

Much of the important recent scholarship of statutory interpretation, including several of the contributions in this symposium, engage this issue at least indirectly by analyzing judicial approaches to statutory construction and assessing whether the practice of (so-called) interpretation in one or another context can be defended on grounds that we can both understand and appreciate. One of the nice features of the symposium considered as a whole is that no author undertakes the unwieldy task of defining the essential purpose of “interpretation” and then proceeding to develop a comprehensive theory of interpretation. The nine scholars whose articles are collected herein understand well that progress in interpretation theory is perhaps best made incrementally; careful attention to the nature of judicial, legislative, and administrative processes is likely to contribute usefully to advancing the statutory interpretation debate.

12. Cheryl Boudreau, Mathew D. McCubbins, and Daniel B. Rodriguez, *Statutory Interpretation and the Intentional(ist) Stance*, LOY. L. REV. (symposium issue on statutory interpretation, forthcoming 2005).

13. MATHEW D. MCCUBBINS & DANIEL B. RODRIGUEZ, WHAT STATUTES MEAN, (ms. 2005).

14. *Id.*

III.

In his symposium article,¹⁵ Vermeule sets out to turn the contemporary social choice insight about legislatures to the service of criticizing the basic prescriptive project of advising courts as to how best to interpret ambiguous statutes. Essentially, Vermeule argues, the same problems that bedevil the modern legislature will also vex the multi-member institution that is the federal judiciary. By making the “fundamental mistake of overlooking the collective character of judicial institutions,”¹⁶ interpretation theorists miss out on the relevant complexities of judicial behavior and thereby risk misaligning their theories with the real world.

This need not be, however, the end of the road for a normative theory of judicial decision in general or statutory interpretation in particular. Non-ideal theory, which we take to represent theory that embraces the messiness of the collective legislative and judicial processes, can assist courts in interpreting statutes. Such assistance, for reasons Vermeule explains in detail, must be humble, targeted, and incremental. More generally, Vermeule suggests that the “fallacy of division,” to which many ambitious interpretation theorists are prone, provides a false scaffold for dynamic and democracy-forcing theories of constitutional and statutory interpretation. He provides another set of reasons for skepticism about these influential views and, thereby, invites us to think afresh about intentionalism, a theory widely associated with more “conservative” approaches to discerning statutory meaning.

In a similar vein, social scientists Lupia and McCubbins tackle head on the social choice questions canvassed in Vermeule’s article and also elsewhere in this symposium.¹⁷ Lupia and McCubbins begin by describing the famous insight of Kenneth Shepsle that the social choice critiques of modern legislative processes—in particular, the theoretical explanation of the point that Congress “is a they, not an it”—justifies a very narrow approach to discerning legislative intent.¹⁸ Lupia and McCubbins use Shepsle’s insight as a jumping off point to consider systematically, and from the vantage point of the very same social choice theory, the lessons purportedly drawn from this body of social science scholarship. They demonstrate that the results of the social

15. Adrian Vermeule, *The Judiciary Is A They, Not An It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

16. *Id.* at 1.

17. Arthur Lupia & Mathew D. McCubbins, *Lost in Translation: Social Choice Theory is Misapplied Against Legislative Intent*, 14 J. CONTEMP. LEGAL ISSUES 585 (2005).

18. See Kenneth A. Shepsle, *Congress is a ‘They’, Not an ‘It’: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

choice critique are actually quite narrow and that adding more realistic assumptions about human cognition to social choice theory allows us to draw meaningful inferences about legislative intent. In short, Lupia and McCubbins argue that social choice theory, when properly understood, hardly justifies the grave skepticism of legal scholars about the nature and function of the modern legislative process.

In the end, say Lupia and McCubbins, the social choice results have been “lost in translation,” that is, have been misconstrued as explaining that legislative intent in any systematic sense is impossible and, moreover, the democratic quality of statutes is very poor. This mistranslation has been a serious problem for the efforts of scholars, particularly those whose training disables them from understanding deeply social choice theory and evidence and, therefore, the scope and limits of the results presented. By construing the claims of social choice theorists as casting doubt on the very notion of a collective legislative intent, legal scholars have missed the basic insights of these seminal findings; hence, a key part of the critique of legislative intent and the use of legislative history has been built on mistakes in the translation of these results.

The Lupia and McCubbins article raises a more global challenge, as well, to the main vein of contemporary process-perfecting (or what Vermeule labels “democracy-forcing”) theories of interpretation. A striking feature of the “contemporary positive political theory and law” scholarship is its embrace of what is seen as the essential thrust of the Rochester School critique of legislative performance.¹⁹ Relying on the accumulated insights of influential rational choice political scientists and economists, leading legal scholars have manifested cynicism about the legislative process in their prescriptive efforts to improve representative democracy through, *inter alia*, reform of the campaign financing system,²⁰ the empowerment of (ostensibly downtrodden) political parties,²¹ fundamental changes in voting rules and procedures,²² and

19. See generally S. Amadae & Bruce Bueno de Mesquita, *The Rochester School: The Origins of Positive Political Theory*, in ANN. REV. OF POL. SCI. 269 (1999).

20. See, e.g., Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999); Todd Lochner & Bruce Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891 (1999).

21. See Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988). See generally Symposium: *Law and Political Parties*, 100 COLUM. L. REV. 593 (2000).

22. See generally Eskridge, et al, LEGISLATION, *supra* note 8, at 121–227 (discussing various deficiencies in the legislative process).

various mechanisms for fostering legislative “deliberation.”²³ More ambitiously, scholars influenced by the Rochester School and its progeny have embraced non-legislative institutions, including courts,²⁴ agencies, and directly democratic techniques such as initiative lawmaking,²⁵ on the grounds of what we might label the “ABL principle”—that is, anything but legislatures. Having seen legislative institutions derided as unrepresentative, unproductive, and infected with the “disease” of strategic behavior, scholars following the ABL principle have succumbed to what Lupia and McCubbins might view, for the same reasons discussed in their symposium article, as the nirvana fallacy. Thus, the larger objective of their article is to invite us to consider the ways in which the marriage between social choice theory and prescriptive legal scholarship must be based on a more nuanced and accurate understanding of the scholarship under scrutiny.

Just as Lupia and McCubbins’ analysis of social choice theory incorporates key characteristics of human cognition, so too does Fred Schauer’s²⁶ analysis of rules and standards. As Schauer correctly notes, rules are directives that are typically interpreted mechanically, while standards give much discretion to the interpreter at the moment of application. Although it is commonplace to distinguish between rules and standards, Schauer adds a new twist to these concepts by noting interpreters’ tendency to blur rules into standards and to translate standards into rules. Schauer then notes that such blurring of rules into standards may lead to interpretations that diverge from the intent of Congress, and he also emphasizes that when interpreters translate standards into rules, they actually choose to limit their own discretion.

Interestingly, Schauer argues that such “standardification of rules” and “rulification of standards” may not entail discretion seeking or blame shirking by judges and agency officials interpreting statutes, but rather may be natural consequences of human cognitive processes. Indeed, humans may strive for an optimal mix of specificity and discretion when making decisions. As Schauer notes, humans often insist on some choice, but also take actions to limit their own choices, presumably to save cognitive and decision making costs. If this is the case, one

23. See, e.g., JAMES FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORMS* (1998).

24. See William H. Riker and Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988).

25. See JOHN MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE PROCESS, PUBLIC POLICY AND AMERICAN DEMOCRACY* (2004).

26. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803 (2005).

implication of Schauer's work is that Congress may need to take into account the cognitive limits of the interpreters of its statutes in its design of rules and standards.

From the Olympian heights of abstract social choice theory and human cognition, the next contribution in this symposium comes down closer to the ground and considers carefully and insightfully a major claim made in the recent literature on statutory interpretation about the characteristics of certain types of statutes. Legal scholars Daniel Farber and Brett McDonnell look closely at the watershed federal antitrust legislation of the late 19th century, legislation that undergirds modern antitrust law.²⁷ Notwithstanding the enactment of key statutes including, most importantly, the Sherman Antitrust Act of 1890, antitrust law is viewed by commentators as a quintessential example of a statute that is more evocative of the common law and the correlative charge to courts to fashion a body of law free from the strictures of statutory language and legislative intent. More broadly, Eskridge and Ferejohn describe the Sherman Act as a "super statute," that is, a statute that . . . "seeks to establish a new normative or institutional framework for state policy."²⁸

In their article, Farber and McDonnell develop a coherent account of this legislation that contradicts the conventional explanation of national antitrust legislation as something distinct, as a "super statute." Their approach is classically inductive; they dig deep into the structure of the law and policy of anticompetitive behavior circa late nineteenth century and explain how the understanding of the congressmen who created the foundational legislation was more maturely formed and comprehensive than was understood either at the time by Justice Holmes and his brethren or by influential modern commentators. Farber and McDonnell build upon these insights to critique both the new textualism as it applies to statutes such as the Sherman Antitrust Act and also the "dynamic" approaches that mostly ignore the text and context of the statute, preferring, *pace* Holmes, to fashion an exogenous common law of antitrust.

The inductive technique of Farber and McDonnell is a neglected, but extremely valuable, one. In a world in which statutory interpretation theorists mostly apply wide-ranging theory to particular statutory contexts, the

27. Daniel A. Farber & Brett H. McDonnell, "Is There a Text in this Class?" *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619 (2005).

28. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

alternative approach helps us better to understand the contour and contexts of real statutes in the real world. The Eskridge and Ferejohn typology of super statutes has an elegant power that grabs our attention; in the hands of these able theorists, we can be tempted to embrace more dynamic interpretation of lodestar statutes on the grounds that such an approach makes the best sense of our heroic political history. On closer inspection, however, this history is compiled through episodes of considerably more complex political activities; statutes are, after all, products of strategic behavior by diversely motivated legislators acting under conditions of institutional constraints, imperfect information, and various sorts of scarcity. Farber and McDonnell's excellent analysis of the antitrust laws raises the question "what makes certain statutes super or, instead, just ordinary?"

The effort to ground a particular approach to interpretation in a positive and normative view of lawmaking is a theme that is discussed, as well, in the co-editors contribution to this symposium. In our article on the appropriations canon of statutory interpretation,²⁹ we revisit the appropriations canon, that is, the rule that substantive legislative changes through the appropriations process are to be disfavored. This canon is the descendant of the hoary rule that "repeals by implication are disfavored." The idea behind this old rule is that courts must be able to discern whether and to what extent Congress *really meant to* repeal an earlier statute. By putting the onus on Congress, legislators presumably had to bear the appropriate costs in refashioning through ordinary legislative processes an earlier statute.

Yet, as Mathew McCubbins and Daniel Rodriguez explain, the modern appropriations canon is really a very different animal. The canon arose first in two major cases interpreting the Endangered Species Act. In both instances, Congress rather clearly amended, and through processes that were clearly consistent with Article I, Section 7, acts that carved out certain federal activity from the scope of that broad statute. Nonetheless, the Court insisted that such changes through the appropriations process were problematic; in particular, this legislative behavior illustrated the essentially undeliberative, and hence flawed, product of modern appropriations lawmaking. The modern canon, thus, is grounded in a distinct normative view of the congressional process.

It is this view that we critique in our symposium article. We unpack, from the vantage point of the positive political theory of lawmaking, the assumptions underlying the appropriations canon. By questioning these

29. Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669 (2005).

assumptions, we raise larger questions about the function of extrinsic aids of interpretation. Canonical construction, we argue, must be built squarely upon a defensible, comprehensive theory of lawmaking and legal interpretation. It is the connection between this lawmaking theory and interpretive approach that squarely frames the new theory of statutory interpretation. Positive political theory is, as we note in this and other work, the lever with which prescriptive theories of interpretation—including, importantly, intentionalism and the critique of intentionalism—will expand in sophistication and in influence.

Elizabeth Garrett offers a very valuable and descriptively rich contribution to the literature on the contemporary legislative process in her article on “framework legislation.”³⁰ At bottom, Professor Garrett’s paper is about how the legislative process in the modern Congress takes shape. Too often, courts look at the legislature and its products and do not see what is really happening. Legislation is typically viewed as policy; through statutes, the legislature fashions policy through the development of substantive commands and the creation of implementation devices. Moreover, the funding choices made by Congress through both its authorization and appropriations power rounds out the ongoing policymaking episodes in the areas in which the legislature is empowered and inclined to act.

Skillfully, Garrett offers a distinctive perspective on this conventional view of legislative procedure by developing the idea of “framework legislation.” Such legislation, she explains “creates rules that structure congressional lawmaking; these laws establish internal procedures that will shape legislative deliberation and voting with respect to certain laws or decisions in the future.” Frequently, Garrett explains, these framework laws will impact directly all three branches of government; hence, courts will frequently be called upon to interpret legislation that, intriguingly, shapes the playing field in which the court itself carries out its own functions.

Garrett’s analysis of framework legislation usefully draws attention to the particulars of the modern legislative process. Insofar as this symposium contribution is part of a larger project, we can look forward to the insights this typology of legislation provides for normative debates about constitutional and statutory interpretation. Do framework laws that set out to regulate the behavior of certain non-legislative

30. Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005).

branches raise difficult separation of powers issues? And, if so, how ought courts to confront, with the benefit of Garrett's typology, these constitutional questions? With regard to the issues of statutory interpretation central to this symposium, what light does this discussion of framework legislation shed on the question of how courts ought best to construe legislation that is more like structural architecture than like ordinary public policy?

More generally, the Garrett article focuses our attention squarely on the idea that the legislative process is deeply political. Statutes are fundamental political instruments. However we might view the role of the courts in construing statutes, courts will only get themselves in trouble when they forget that the nature of the legislative process is deeply political. Interpretations of controversial statutes may yield unintended consequences. Consider the recent example of state marriage legislation. Scholars and pundits alike have noted the connection between the decision of the Massachusetts Supreme Judicial Court and the voter turnout for President Bush.³¹ The political consequences of interpretations are a key element of the calculus undergirding competing theories of statutory interpretation; or, to put the point a different way, interpretation theorists *ought* to be conscious of the real and potential political consequences of certain interpretations and interpretive approaches. Steering our attention toward the political structure of lawmaking in the modern Congress helps us better to understand these consequences.

An equally important policymaking engine in the modern state is the administrative agency. It is now nearly banal to observe that the modern regulatory agency is a key piece of the policy puzzle. We can haggle over the question whether agencies "make" or just "implement" law; but it remains essentially true that a principal location for the creation of what we think to be law, not to mention the performance of public authority in the name of "we the people" are (mostly) unelected regulatory officials.

The sum and substance of the rules governing the activities of these regulatory agencies is what makes up administrative law. A leading scholar of the subject, Peter Strauss writes in his symposium contribution of the connection between more dynamic approaches to statutory interpretation and the classic Administrative Procedure Act [APA].³² Strauss is interested in the difficult question how best to reconcile the courts' circumscribed role as "faithful agent" to the legislature with the

31. See Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives and Policy Making by Direct Democracy*, S. CAL. L. REV. (forthcoming 2005).

32. Peter Strauss, *Statutes That Are Not Static—The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767 (2005).

imperative of bringing public policy into the service of solving modern problems. He notes, apropos, of the dynamic or “presentist” views of interpretation, that “the legal framework as a whole changes as a statute ages—not only because the statute itself may previously have been interpreted, but also as common law develops and as new statutes are enacted.”³³ And the (guarded) case for an approach to interpretation that updates statutes for modern purposes is one that is, in Strauss’s view, fundamentally pragmatic. The overriding consideration ought to be to avoid interpretations that will require excessive efforts on the part of Congress to correct what it believes to be “bad” outcomes.

Strauss draws upon the structure and history of the APA to explain the distinction he draws between more and less static views of legislation. He views the APA as incorporating a more dynamic approach to statutory change and, moreover, to interpretation. This dynamic approach is reflected in both the approach the federal courts were expected to follow in reviewing administrative agency decisions for compliance with the proper norms of administrative fairness and rationality embodied in the APA and in the approach, Strauss argues, courts ought to follow in interpreting the commands of the APA as a statute. In the end, Strauss aims to defend a position that, in their article on the antitrust laws, Farber and McDonnell reject, that is, that there are particular types of statutes which are designed to incorporate a strong role for judges in formulating common law—in the case of the APA, a common law of fair, rational process.

* * * *

The contributions to these symposia, while diverse in focus and perspective, illustrate well the ferment in the new statutory interpretation literature. More specifically, these distinguished authors help us understand better the conundrum of legislative intent and intentionalist theory. Though hardly the last word, the combined contributions shed new light on the enduring puzzle of statutory interpretation in the modern regulatory state.

33. *Id.* at 18.