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## Introduction

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**SYMPOSIUM**

**THEORIES OF STATUTORY  
INTERPRETATION (AND THEIR LIMITS)**

**INTRODUCTION**

*Ellen P. Aprill\**

*Nancy Staudt\*\**

The legal community has long been enamored with statutory interpretation. Recently, and perhaps because of the work of Professors Eskridge and Frickey (together and separately),<sup>1</sup> scholars, judges and analysts have paid increasing attention to the problems and issues that arise when federal courts interpret statutes. This heightened focus may signal scholars' realization that statutes have become the "dominant source of modern American law"<sup>2</sup> and often occupy the

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1. Professor Eskridge's and Frickey's list of publications addressing statutory interpretation is lengthy. A small sampling includes: WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. (forthcoming 2005); Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199 (1999).

2. ESKRIDGE, FRICKEY, & GARRETT, *supra* note 1, at 669.

largest portion of the U.S. Supreme Court docket.<sup>3</sup> Or it might be associated with the widespread view that when judges interpret the language of the law as found in statutes, the threat of social, legal, and political harm is particularly acute, and thus selecting the best means for locating statutory meaning assumes all the more importance when federal judges settle these controversies in the courtroom.<sup>4</sup> Regardless of why statutory interpretation has become popular in legal circles, and notwithstanding the numerous important contributions made to the extant literature, we think it clear there is room for many more such studies—be they empirical, theoretical, or doctrinal. Indeed, statutory controversies not only continue to exist, but also they may be more contentious today than ever before, which makes further study all the more imperative.

The focal point of much of the recent statutory interpretation debate is the theory of textualism, often labeled the “new-textualism,” set forth by Justice Antonin Scalia and various other judges and academics.<sup>5</sup> This theory mandates that federal courts rely on the plain language of the text when endowing a statute with meaning. The new-textualists argue that federal courts must eschew reliance on legislative history and other types of evidence, and then go one step further in arguing “that courts have no authority even to

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3. Lee Epstein, Jeffrey A. Segal, & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. LEGIS. 395, 416, 417 fig.2 (2002) (showing the number of statutory interpretation controversies the Court considered between 1946-1992; in some years, such cases represented close to 80% of the total docket).

4. For a discussion of how interpretive choices can lead to bad outcomes, an imbalance in the separation of powers, and even to a demise in democracy itself, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1997); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

5. See, e.g., Scalia, *supra* note 4, at 23-37; John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501 (1997); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984).

apply a statute to a problem unless the statute's language clearly targets that problem."<sup>6</sup> Advocates of this theory ground their interpretive principles in the idea that statutory language represents the law: what congressional members wanted to say, or expected or assumed would happen if they had thought of a particular case, is not relevant because the legislators subjected only the words of the statute to bicameral consideration and then presented only those words to the president for approval or veto as required by Article I, section 7 of the U.S. Constitution.<sup>7</sup> Not only is this method required by the Constitution, Justice Scalia and others argue, but it also enables the enacting Congress to predict the effects of its language and, just as importantly, it stays the hand of the activist judges who might interpret statutes according to their own political preferences.<sup>8</sup>

Needless to say, this restrictive theory of statutory interpretation has not generated consensus on the proper method for deciding statutory controversies; in fact, empirical data suggest that the new-textualism is not even the dominant judicial approach for interpreting statutes.<sup>9</sup> Yet legal scholars continually focus on this theory, offer new insights on the meaning of the term "plain meaning" (thereby highlighting a problem with the approach!) set forth additional reasons for privileging it in the decision-making process, and critique the method for its limitations. As we note below, many of the

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6. ESKRIDGE, FRICKEY, & GARRETT, *supra* note 1 at 742-43; Easterbrook, *supra* note 5, at 98-99.

7. U.S. CONST. art. I, § 7 (requiring bicameral legislative approval and presentment to the president before a bill can become law); *see also* Scalia, *supra* note 4, at 25.

8. *See* Scalia, *supra* note 4, at 28-29; Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 4, at 129, 131-32; Coverdale, *supra* note 5, at 1507, 1522-25.

9. *See, e.g.*, Nancy Staudt, Lee Epstein, Peter Wiedenbeck, René Lindstadt & Ryan J. Vander Wielen, *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909 (2005) (justices use a range of statutory interpretation approaches and no single approach has ever prevailed to the exclusion of all others); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093, 1094 fig.1 (1992) (justices appear to rely on their own precedent more than any other authority in statutory interpretation cases); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 21-28 (1998) (justices consistently use judicially selected policy norms to decide cases).

contributors to this symposium pick up on these ideas (implicitly or explicitly) and push the dialogue to exciting new levels. Although many of the authors chose to focus exclusively on the new-textualism (a surprise given that our only request was that the contributors investigate some aspect of statutory interpretation), this focus was not uniform. Three of the essays explore the issues and problems of statutory interpretation from a perspective that goes well beyond the textualist debates; moreover, the essays that do make new-textualism their focal point set forth a range of insights that apply to nearly all interpretive approaches.

The first essay places the debates over interpretation into historical context. This essay, coauthored by Nancy Staudt, Lee Epstein, Peter Wiedenbeck, René Lindstädt, and Ryan Vander Wielen offers an empirical assessment of the various techniques that the Supreme Court justices have *actually* relied upon over the course of the last century in statutory controversies.<sup>10</sup> This investigation is the first longitudinal, large-*n* study that examines the entire population of opinions in a single substantive area of the law—tax law—to illustrate the Court's approach to statutory interpretation in the economic context. The authors discovered that the practice of statutory interpretation has undergone many unexpected developments over the course of the last one hundred years. In the early eras, the Court interpreted statutes largely relying on its own precedent. Over time it began to rely more heavily on legislative documents and on administrative rulings; then unexpectedly the modern Court began to curtail reliance on administrative documents.<sup>11</sup> The study also uses comparative data to point to the distinct approaches that the Court uses in different areas of the law. For example, the Court relies on administrative rulings to a far greater extent in cases that raise economic issues than those involving civil rights.<sup>12</sup>

The empirical study undertaken by Staudt and her coauthors highlights several features of statutory interpretation upon which the symposium authors expand. First, with regard to the new-textualism debates, the data indicate the conventional wisdom regarding Justice

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10. Staudt, Epstein, Wiedenbeck, Lindstädt, & Vander Wielen, *supra* note 9.

11. *Id.* at 1912-16.

12. *Id.* at 1966-69.

Scalia's role in fomenting the interpretive revolution may be overstated.<sup>13</sup> In fact, the Supreme Court began relying on the plain language of statutes at notable levels during the Burger Court and perhaps even as far back as the Warren Court—well before Scalia's appointment in 1986.<sup>14</sup> Equally interesting, the text-based approach has never won the day in Court—the justices continue to rely on various other types of evidence beyond the plain language for purposes of interpreting statutory texts.<sup>15</sup> Professors Frickey, Marmor, Solan, and Seto expand our understanding of textualism and offer intriguing explanations for its failure to prevail in the decision-making process.

As Professor Philip P. Frickey writes: “Despite nearly two decades of textualist assault, a longstanding cluster of eclectic interpretive practices—a balancing of textual, institutional, and purposive considerations—seems to have remained largely intact.”<sup>16</sup> Investigating why the new-textualists have failed to displace competing interpretive regimes, Frickey considers four barriers that individuals and groups will encounter when seeking to change current practices. One hurdle is *stare decisis*. As Frickey notes, Supreme Court holdings are accorded precedential effect but everything else—including interpretive method—is generally viewed as mere *dicta*.<sup>17</sup> Second, courts seek to adopt transparent (i.e., predictable and settled) methods for interpretation in order to assure that lower courts, parties, and counsel have a high level of certainty and, at the same time, to assure the judicial system operates in accordance with the rule of law and not the individual preferences of the decision makers.<sup>18</sup> Moving to a new interpretive regime undermines transparency and implies a range of transition costs that courts are often unwilling to impose. Third, Frickey discusses the problems that substantive and policy-based canons pose for new-textualists. These canons are an entrenched means for understanding statutory texts; indeed they seem to have become virtually part of the

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13. *Id.* at 1929-64.

14. *Id.* at 1937.

15. *Id.* at 1912-16.

16. Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1973-74 (2005).

17. *Id.* at 1974-81.

18. *Id.* at 1981-86.

“normal science of statutory interpretation”<sup>19</sup> and thus are unlikely to disappear irrespective of the strong arguments made against them by Justice Scalia and others.<sup>20</sup> Finally, our legal culture has evolved in a common law manner—one that invites judges to find the best and most rational outcome regardless of method, and this implies that judges will not constrain themselves by the new-textualism in cases when it interferes with what they perceive as the best and most rational outcome for a given case.<sup>21</sup>

Professor Theodore P. Seto considers yet another reason for the failure of the new-textualism—or for that matter, any theory of textual interpretation that mandates decision makers to commit to an originalist understanding of the legal text.<sup>22</sup> In making his case, Seto investigates the relationship between evolution and the development of ideas, that only the best are able to survive in our legal and social culture. Expanding on this Darwinian concept, Seto argues, “[T]he very essence of the human evolutionary strategy is to make cultural learning possible.”<sup>23</sup> In Seto’s view, this reality suggests that our most important values, including those associated with liberty, equality, democracy, and the rule of law, can be framed in terms of their adaptivity for modern society.<sup>24</sup> The evolution of ideas leads the author to argue that any technique of interpretation that systematically bars the decision maker from relying upon learning is problematic; after reading Seto’s essay, we could go one step further and argue that any constrained methodological approach is also bound to fail under this theory.

Does the new-textualism completely bar learning or does it allow for some adaptation to the ideas and customs that have emerged since the time Congress enacted the statute? Professor Lawrence M. Solan’s discussion of the new-textualism suggests that the theory is not as cramped as many analysts perceive it to be.<sup>25</sup> The textual model advocated by even the strictest textualists,

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19. *Id.* at 1992.

20. *Id.* at 1986-92.

21. *Id.* at 1992-96.

22. Theodore P. Seto, *Originalism vs. Precedent: An Evolutionary Perspective*, 38 LOY. L.A. L. REV. 2001 (2005).

23. *Id.* at 2016.

24. *Id.* at 2015-17.

25. Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027 (2005).

according to Solan, allows a decision maker to resort to dictionary meanings (entrenched meanings that often do not change with context) as well as to the “ordinary meanings” that emerge from the social, cultural, and legal context.<sup>26</sup> As Solan points out, the psycholinguistic literature indicates that most people use both approaches for purposes of understanding language and that both approaches are found in court opinions.<sup>27</sup> Even this expansive approach, however, may limit judges to interpretations that, at most, accommodate for an understanding of text that the enacting Congress had in mind, but not for the cultural learning that took place between the time the statute was adopted and the time the Court decided the controversy.<sup>28</sup> In short, Solan’s version of new-textualism is nuanced and may be descriptively accurate, but may also suffer from the evolutionary downsides articulated by Seto.

Professor Andrei Marmor examines new-textualism from a moral-political perspective and argues that the theory is problematic in all its forms.<sup>29</sup> Marmor notes that while “easy cases” do exist, for the most part the controversies that reach the courtroom involve vague and ambiguous statutes that courts cannot interpret with the use of a dictionary, with reference to the words’ ordinary meanings, or with an overall better grasp of language—in short, judges need evidence beyond the statutory text to decide the case properly.<sup>30</sup> Marmor insists the problem of indeterminacy cannot have been overlooked by the new-textualists; instead, he argues they use it to their advantage: to avoid applying statutes to legal controversies and thus to limit the government’s ability to pursue regulatory goals through legislation.<sup>31</sup> Marmor makes a strong argument that this agenda is morally bankrupt. First, abiding by the new-textualist methods, in effect, forces judges to *use* people as a means to effectuate political ends rather than interpreting statutes in the best and fairest way.<sup>32</sup> Second, the new-textualists have adopted a teaching role, that is, they hope to force legislators to write more

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26. *Id.* at 2030-31.

27. *Id.* at 2039-44.

28. *Id.* at 2048-53.

29. Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV.2063 (2005).

30. *Id.* at 2074-76.

31. *Id.* at 2065-66.

32. *Id.* at 2068-69.



clearly. This role seriously interferes with federal courts' fiduciary duty to apply the law in good faith and as intended by its authors—even if that intent is not made clear in the text of the statute.<sup>33</sup>

Professor Ellen Aprill focuses not on textualism, but on the underlying power dynamics that emerge in any statutory interpretation controversy.<sup>34</sup> She notes that different interpretive approaches implicitly give different branches of government greater and lesser control over the law making process. To make her point, she examines the effects of the 1984 Supreme Court case, *Chevron v. Natural Resources Defense Council*.<sup>35</sup> Prior to *Chevron*, most theorists agree that the Court adopted a range of approaches for interpreting statutes that could include reliance on the statutory text, congressional hearings, administrative rulings, and so forth.<sup>36</sup> In *Chevron*, the justices adopted a new two-step approach requiring courts to discern congressional intent without relying on administrative rulings. Only in those rare circumstances where federal courts find the statute ambiguous can they look to documents emanating from the executive branch. As Aprill points out, this holding gives a surprising amount of power to the judicial branch. It allows courts to silence the administrative agencies if they are able to find congressional intent—something courts frequently are able to do.<sup>37</sup> In fact, Aprill notes that even when courts find a statute vague and ambiguous, they nevertheless often ignore administrative rulings, in reliance on Supreme Court opinions issued after *Chevron*.<sup>38</sup> Professor Aprill posits that interpretive regimes may cycle in and out of favor, but at the moment it is clear the judicial voice dominates.

Finally, Cheryl Boudreau, Mathew McCubbins, and Daniel Rodriguez offer an altogether new approach for finding the meaning of a statute.<sup>39</sup> They point out that scholars and judges tend to look to legislative intent for understanding statutes when in reality it is

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33. *Id.* at 2070-72

34. Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005).

35. 467 U.S. 837 (1984).

36. *See* Aprill, *supra* note 34, at 2085-90.

37. *Id.* at 2090-95.

38. *Id.* at 2117-18.

39. Cheryl Boudreau, Mathew D. McCubbins & Daniel Rodriguez, *The Intentional Stance*, 38 LOY. L.A. L. REV. 2131 (2005).

virtually impossible to discern *actual* intent given the collective nature of the legislative process.<sup>40</sup> This reality does not mean, in the authors' view, that interpreters should ignore entirely the concept of "intent." Rather interpreters should acknowledge the search for actual intent is a "fool's errand"<sup>41</sup> and thus should pursue an approach that involves imputing intent to legislative actors for purposes of finding statutory meaning.<sup>42</sup> As Boudreau, McCubbins, and Rodriguez note, humans impute intent in virtually every context by assuming actors are rational and have beliefs, desires, and intentions, and indeed federal judges may already subconsciously use this approach for interpreting statutes.<sup>43</sup> Although still in its early stages, the authors set forth a promising new approach for interpreting statutes that relies on the recent theories that have emerged in cognitive science and philosophy.

As the seven essays in this symposium demonstrate, as long as legislative texts govern social and legal interaction, it is unlikely that judges, scholars, and commentators will reach consensus on the proper approach for interpreting statutes. Further, these essays suggest that numerous methods exist for finding meaning—empirical, sociological, evolutionary, linguistic, philosophical, institutional, and psychological—but it is highly improbable that any single approach will win the day either among academics or in the courtroom. Each of the techniques offers its own set of insights, as well as its own advantages and disadvantages. Together they evidence a richness and depth that honors the importance of the issue in modern American law.

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40. *Id.* at 2133-35.

41. *Id.* at 2134.

42. *Id.* at 2137-38.

43. *Id.* at 2138.

