Modern Statutory Interpretation

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Problems, Theories, and Lawyering Strategies

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Linda D. Jellum

David Charles Hricik

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Introduction

A. The Statutorification of U.S. Law

Let's begin with the most basic point: Why should judges be the ones to interpret statutes? Two very fundamental concepts create the need for judges to interpret statutes. One is the application of statutes to actual cases. We will see that the imprecise nature of language, drafting mistakes by legislatures, and the fact that legislatures simply cannot foresee all circumstances that can arise when they enact statutes lead to the need for interpretation. The second is the fundamental judicial principle that it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). As a consequence, judges must apply statutes to particular cases, and in doing so, "must of necessity expound and interpret" statutory language. *Id.*

Once we recognize the need for interpretation, then the question of what is the proper methodology arises. A bit of history will help to bring clarity. Statutes have become pervasive only recently (in terms of the law). Until the late Nineteenth century, statutes were enacted comparatively infrequently. In addition, most of those addressed specific, narrow problems not addressed by the common law. At that time, most statutes were private—meaning they applied only to specific individuals—rather than public. Thus, for "more than a century after the American Revolution, ideals about the meaning of the rule of law were developed within an entirely judge- and court-centered system of thought." Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address at the University of Pittsburgh School of Law*, 43 U. Pitt. L. Rev. 995, 995 (1982).

Around the end of the Nineteenth century, however, Congress and state legislatures became more prolific and enacted statutes that applied more generally. Statutes regulating social and economic behavior became common. Legislatures also enacted statutes that were specifically intended to modify, and sometimes even abrogate, existing common law. *See* John M. Walker, *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. Ann. Surv. Am. L. 203, 207–08 (2001). At the onset of this change, most statutes were very short and general. As such, they left room for judicial development almost in the same manner as the common law. The Sherman Act, for example, was enacted in 1890. It constituted the entire federal law on a comprehensive and expansive subject (federal antitrust law); yet, the entire statute fit easily on a single page, leaving much for judicial development.

Although the number of statutes increased, these short, generalized statutes were the norm for many decades. Judges typically applied their usual common law methods of reasoning when interpreting these statutes; they discerned the purpose of the statute and

its broader context, likely because statutes were so broad that deferring to the text would have been a hollow proposition. Instead, when determining a statute's contours, courts largely did not treat statutes differently from common law.

Statutory evolution intensified before World War II during the creation of the New Deal, which had as its foundation the enactment of an unprecedented number of statutes. The breadth and suddenness of this change was remarkable. Statutes not only became more common, they became much more detailed and, consequently, longer. "Judicial habits die hard, however." Walker, *supra*, at 208. Despite the changes, judges did not "abandon what was familiar to them — common law methods of judging" — but "adapted their common law reasoning to the modern statutory and administrative state." *Id.* Beginning at this time, some thought that treating statutes like the common law was improper. Suggestions were made as to how to approach statutory interpretation, and that debate still rages today.

Another development that made statutory interpretation increasingly important was the advent of the modern form of administrative government. Particularly after World War II, regulatory agencies proliferated. Each agency adopted its own regulations, which had to be interpreted in much the same manner as statutes. In addition, agencies had to interpret statutes, and their interpretations had to be reviewed by courts. Consequently, the proliferation of agencies and of regulations increased the importance of codified law.

As a consequence of their increasing need to decide cases that implicated statutes, the change in the kind of statutes, and a growing belief that separation of powers and functional principles required statutes to be treated differently from common-law judicial decisions, judges began to develop ways to resolve statutory interpretation issues. Early on, for example, judges developed a set of "canons"* to help determine meaning or resolve apparent ambiguity. Courts also looked beyond the text of the statute to discern meaning. For example, some judges turned to the "legislative history" of the statute — the recorded debates and proceedings that led to the enactment of the statute in question. These judges believed that while the words of the statute were important, so, too, was the intent behind the statute as expressed by legislators during debates and hearings. But not all judges agreed — then or now.

Law continues to become "statutorified" (a term coined by Professor Guido Calabresi), and the trend toward greater length of and detail in statutes continues unabated. The Patriot Act, for example, was enacted in 2001 and has 132 pages. Thus, "starting with the Progressive Era but with increasing rapidity since the New Deal, we have become a nation governed by written laws." Guido Calabresi, A Common Law for the Age of Statutes 5 (Harvard Univ. Press 1982). Likewise, the number of regulatory bodies and the number of regulations they promulgate continues to grow. Hence, statutory interpretation has become increasingly important to our legal society.

You should understand that we are still in the midst of this fundamental change, and several aspects of statutory interpretation are, as a consequence, very much in a state of dynamic and important flux. Even today the appropriate "way" to interpret a statute is far from settled. Yet, the question of whether there ought to be "rules" governing statutory interpretation did not become the subject of extensive inquiry until the mid 1980s. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 Minn. L. Rev. 241, 248 (1992). As a result, statutory interpretation only recently became the focus of scholarly treatment as judges, professors, and lawyers dis-

* Authors' footnote: "Cannon" and "canon" are used somewhat interchangeably in the legal opinions and scholarship in this area. We have chosen to use "canon."

agreed about the relative importance to be placed on the text, the legislative intent as expressed in the legislative history, and the statutory purpose.

It is an exciting time to study this subject. Unlike many areas of law, critical jurisprudential, conceptual, and philosophical issues are being hotly debated. Beginning in just the last decade, courts began debating the proper method of statutory interpretation "at a level of theory that far transcends the details of the case at hand" and in a way "that implicates the very question of the" interpretive role of the courts in democratic government. *Id.* at 256. As you will see, even the basic question of what the ultimate goal of statutory interpretation is — to find the legislature's intent, the statute's purpose, or to merely apply the written text — is currently in dispute. Much is unsettled and evolving.

To summarize, today there are more statutes, and they are more detailed. The greater detail that Congress and legislatures include in statutes ostensibly narrows, or at least changes, the role of the courts in interpreting statutes. The words of the statute themselves — and the precise meaning of those words — are critically important. "What does the statute mean?" has become the initial and, often, the most important inquiry that lawyers must make every day in all areas of practice.

That question is the subject of this book. Answering the question of "What does the statute mean?" is more complex than it may seem. "Statutory interpretation requires some of the most complex mental processing that ordinary human beings are called upon to perform." Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. Legis. 1, 5 (2003).

B. Why Statutory Interpretation Requires Its Own Skill Set

Although you may not recognize it — in light of the focus on the common law in most of your other courses — most of the work lawyers do today centers on federal and state statutes or regulations. In the course of representing clients, every lawyer interprets and, sometimes, challenges statutes. Statutes and regulations are displacing the common law. Thus, understanding statutes is critical to your future career.

You may think you've already learned how to discern "the law," at least if you've completed a semester or more of law school. After all, you've learned to analyze and brief cases. But learning to interpret statutes requires skills and knowledge different from those needed to interpret cases. To interpret cases, you analyze the findings, reasoning, and holding of a single court concerning a specific problem. The limited, relevant facts are identified in the opinion. The reason for the decision is explained. A limited number of authors are involved.

Statutory interpretation is remarkably different. First, the *process* of judicial decision making is *never* relevant to a case's meaning. In fact, the judicial decision making process is shielded from public scrutiny: For example, drafts of opinions are not available for review. In contrast, the process of legislative decisionmaking, in large measure, takes place in a public forum, and that process can be relevant to a statute's meaning. Second, approaches and interpretive rules have been developed on how to interpret a statute. There are no similar rules or approaches regarding interpretation of the rule of law announced in a common-law decision. Third, statutory interpretation routinely implicates separa-

tion-of-powers principles. When a court interprets a prior common-law decision, such issues are not raised. Finally (and partly as a consequence of the foregoing), there are functional and political consequences of the approach that a court takes to statutory interpretation. For example, if courts refuse to look past the statutory text to legislative history, the refusal may create incentives for legislatures to be clearer in their drafting, but it may also mean that statutes are given meaning that they clearly were not intended to have and may also result in increased costs as legislatures must too often undo what courts have done.

In sum, although they share analytical similarities, statutory interpretation is distinct from common law interpretation. It requires a different set of skills to answer the question, "What does the statute mean?" than it does to answer the question, "What does the case mean?"

C. Why Study the Theories of Statutory Interpretation?

Why should you care about statutory interpretation and, in particular, its theories, or approaches? You'll come to appreciate the multiple answers to that question as you move onward, but a word about it here. First, it is of extreme practical importance. Because the meaning of a statute can be definitively decided only by a court, lawyers must know how the courts in the pertinent jurisdiction interpret statutes. Accordingly, when litigating or advising clients about legal issues that implicate statutory interpretation, lawyers must know the theoretical approach of the pertinent jurisdiction to statutory interpretation. If you know the jurisdiction's preferred approach to statutory interpretation, you can determine which sources of meaning will prove most convincing or which interpretation of a statute might later be adopted if you are advising a client in a transaction.

For example, if the jurisdiction in which your case is pending takes a textualist approach (one that focuses on the text of the statute), you know that you must persuade the judge that the statute's plain meaning supports your client's position. If it does, you know to be ready to discount and oppose the other side's reliance on other sources. Yet, if the text itself does not favor your client, but the legislative intent or purpose does, you know you must persuade the judge that there is a reason (typically ambiguity or absurdity) to turn to other sources. In contrast, if the jurisdiction takes an intentionalist or purposivist approach, you should start with the language but speak in terms of intent or purpose respectively. You know to look at all the relevant evidence including the text, legislative history, and more.

Lest you think we're exaggerating about the importance of the adopted approach, consider, for example, that whether your client will have any recovery or any liability can turn directly on which approach to statutory interpretation a court applies. *E.g.*, *Cotto v. Citibank, N.A.*, 247 F. Supp. 2d 44, 47 (D. P.R. 2003) (recognizing that the "split in court opinions on the issue of individual liability [under Title VII] is based on differing approaches to the statutory interpretation of Title VII."). There is "much room within which to advocate an understanding of a statute that best suits" a client's needs. Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52

U. KAN. L. REV. 325, 352 (2004). Part of your success as a lawyer will depend upon your ability to persuade courts on proper interpretation.

Second, there are profound political, constitutional, and jurisprudential issues implicated by statutory interpretation. What does it mean to say that a judge is a "strict constructionist," for example? Does that mean she defers to the legislature or keeps power to herself in the guise of deferring to "plain meaning"? What does it mean when courts ignore legislative history, even where that history clearly shows that the plain meaning of the text was not intended?

Third, perhaps for the first time ever, judges are openly "debating statutory interpretation methodologies at a level of theory that far transcends the details of the case at hand, and that implicates the very question of the [judiciary's] role in a democracy." Philip P. Frickey, *supra*, at 256.

D. How This Book Will Teach These New Skills

This book will teach you the art of statutory interpretation. It will not only help you develop the skills to advise a client how a statute will *likely* be interpreted, but will also give you skills to convince a court that a statute *should* be interpreted in a way that will benefit your client. This book will help you understand the different approaches to statutory interpretation and methods to analyze statutory meaning.

In this second edition, we have remained true to our original goals while improving content. We have replaced cases that were overly complicated, included a number of new problems, reorganized topics, and expanded our coverage of some areas, including preemption, clear statement rules, and the relevance of administrative interpretations. We think the changes further our objectives. In addition, we have continued several things from the first edition. First, this book is organized by process: We will learn the art of interpretation in a logical way. We begin by examining the typical legislative process; we then explore the approaches to, or theories of, interpretation, which permeate every ensuing chapter; hence, theory comes early in this edition. Next, we turn to the relevance of the text of the statute, the starting point for interpretation. While it may be the starting point, text is not the stopping point. Hence, after examining the importance of text, we turn to *when* courts will consider information beyond the text and *what* sources of information they will consider. In this part of the book, we begin with the sources that courts are most likely to consider (the textual canons and component parts of bills, for example) and then proceed to those sources that courts are less likely to consider, at least explicitly (legislative history and statutory purpose, for example). Finally, we consider constitutional implications, administrative interpretations, and other, critical topics.

Second, within each chapter we introduce the concepts with concise statements and explanation. After the introduction, we include one or more cases that illustrate the key concepts of the section. We have selected cases and other materials that are interesting and, whenever possible, modern (sometimes even funny!). The cases almost invariably are close cases and typically include at least one dissenting opinion. Notes and questions follow the cases. The questions are designed to help focus your understanding of the case and the issues it raises to better prepare you for class. The notes point out issues to consider to help you delve more deeply into the topic.

Third, we have edited the cases to clarify the issues and relevant analyses. To make the cases as easy as possible to read, we have heavily edited them, eliminating irrelevant information. While we have remained faithful to the text, we have omitted most extraneous citations and quotation marks without so noting. We have included ellipses to indicate all substantive deletions (excluding deleted citations to legal authority, quotations, and internal brackets).

Fourth, we include problems for you to resolve using the skills you learned not only in the chapter housing the problem, but in previous chapters as well. The problems commonly take place in the hypothetical state of Mercer. Each problem lends itself to at least two arguments, sometimes more. Each problem relies upon and further explores the concepts you are learning in your studies. The problems are a central part of the book and should help you learn lawyering skills.

Our approach is unique. It provides a logical and practical approach to this topic while also probing the theoretical approaches to interpretation. When you are done with your studies, you should have a respect for the breadth of arguments that can be made to convince a court to interpret a statute in a way that favors your client's position and that might be made against your client. In sum, this book is intended to provide you with a thorough understanding of modern statutory interpretation: the conceptual, doctrinal, and jurisprudential origins and the skills to be a successful lawyer in this area. Of course, your journey does not end with this course and this book; it is only your beginning. Yet, we hope that we will have helped you acquire the skills you need to be an effective lawyer at a time when statutes are becoming ever more critical to legal practice.

In writing and rewriting this book, we had the goal of making this important journey interesting and informative. We hope that we have succeeded. Along the way, we have benefitted from the generous assistance of a few individuals. We would like to thank the following for their support and assistance with this second edition: Dean Stephen Johnson, Professor Michael Dimino, the editors at Carolina Academic Press, and, especially, Christopher Featherstun, class of 2009.

The second edition is dedicated to our families, who were supportive beyond belief, and (again) to each other. We survived the process once again!

David Hricik
Linda Jellum

Macon, GA (April 2009)