

Statutory Interpretation

Statutory Interpretation

A Pragmatic Approach

William D. Popkin



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To my wife, Prema

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Preface

This coursebook is about statutory interpretation.

It adopts a particular perspective—*pragmatic judging*, which in this setting means that the judge is influenced by substantive background considerations to determine the meaning of a statute. Substantive concerns may be front and center or may be lurking in the wings, but they are always present in the judge’s mind. This is apparent from reading judicial opinions carefully, which is what this book challenges the student to do. To that end, we often focus on opinions written by specific judges, such as judges Hand, Frankfurter, Stevens, Scalia, and Kennedy (among others), whose interpretive approaches are often out in the open and sometimes hard to figure out.

Pragmatic interpretation requires an *historical* perspective, because history provides the vocabulary and institutional framework for modern statutory interpretation. Justice Scalia argued that it was a mistake to let the judge’s common law background influence modern statutory interpretation but escaping history is a daunting and (I contend) impossible task. To make this point, *Part I* of the materials (in Chapters 1–3) discusses the *historical evolution of judicial approaches to statutory interpretation*.

I do not neglect other approaches to interpretation, which are the subject of *Part II (The Technique and Theory of Statutory Interpretation)*. As for *textualism*, I discuss the variety of ways that a text can acquire meaning and the various ways that the text can be uncertain (Chapter 4). The “text” is a complex idea that textualists sometimes do not want to admit. Those uncertainties leave the judge wiggle room to make choices that serve particular substantive values. As for *purposivism* (Chapter 5), I agree with the textualist criticism that reliance on purpose can be a way for the judge to inject substantive values into interpreting the law. Substantively strong purposes, as the judge sees them, are more likely to attract the judge’s sympathetic and imaginative elaboration. Chapter 6 discusses some obvious examples of the influence of *substantive background considerations* on statutory interpretation: *substantive canons of construction*. Part II concludes with a separate Chapter 7 on *change*, because by this time in the course it will be obvious that the fundamental interpretive question is who should decide what issues and when. A judge who applies a statute to changing circumstances is forced to answer that question. That is what Easterbrook means when he says that interpretation is a jurisprudential not a hermeneutical issue.

Part III (Lawmaking Responsibility and Competence) takes the institutional question seriously, discussing *administrative lawmaking* (Chapter 8) and *legislative history* (Chapter 9). Chapter 10 addresses the fundamental jurisprudential issue of allocating institutional power to determine statutory meaning—specifically, *legislative and judicial efforts to establish rules of statutory interpretation*.

Part IV considers *Statutes as a Source of Law*. Chapter 11 examines *how statutes can be extended* both when there is and is not a judicial common law power. Chapter 12 looks at a special corner of this issue: *judicially inferring a private cause of action when the statutory text is silent*. Chapter 13 looks at the *interaction of multiple statutes: when later law might change prior law and when prior law tries to influence how later law is made*.

Part V on the *Lawmaking Process* takes up a number of issues, most of which do not involve statutory interpretation, but which involve institutional relationships between various lawmakers. It gives the student a peek at state constitutional law, which is otherwise likely to go unnoticed in law school. Chapter 14 looks at the *Legislature*, including state rules on procedural requirements for legislation (such as the “one-subject stated in its title” rule) and substantive limits on legislation (such as prohibiting “special” legislation). It also considers how *Direct Democracy* (initiatives and referendums) applies those rules. Chapter 15 deals with the *relationship of the Executive and Legislative branches* (for example, the line item veto and the legislative veto).

Finally, a word or two on pedagogy. First, in the current debate about whether to teach a Legislation (Leg.) or a Legislation-cum-Regulation (Leg.-Reg.) course, this book is on the Leg. side of the ledger.¹ It is not that I think Administrative Law is less important. I simply prefer to go into greater depth about statutory interpretation, which is not possible if the material tries to do too much about administrative lawmaking. (And, of course, the other reason is that I am no Administrative Law scholar.) Administrative rulemaking does show up a bit in this book, primarily in Chapter 8 discussing when a court should defer to an agency’s interpretation of the law and Section 15.04 discussing the legislative veto of agency rules. But a deeper understanding of Administrative Law is not provided by this Legislation course.

Second, this book benefits from 25 years of experience with an earlier version published by Foundation Press. Over time the earlier book became too unwieldy, accumulating new material like barnacles on a ship. It was too long, no doubt because of the author’s inability to delete material with which he had developed a close relationship. The material became pedagogically challenging, insufficiently attuned to what would help the student understand statutory interpretation. The current version is about one half the size and is more teacher-student friendly.

1. The increasing role for Legislation and Legislation-cum-Regulation courses in law school, including as a required first year course, is discussed by articles in *Legislation/Regulation and the Core Curriculum*, 65 J. Legal Educ., pp. 3–163 (2015).