2000

The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis

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THE INFLUENCE OF A DECADE OF
STATUTORY INTERPRETATION
SCHOLARSHIP ON JUDICIAL RULINGS:
AN EMPIRICAL ANALYSIS

Gregory Scott Crespi*

I. INTRODUCTION

Over the last two decades there has been a significant increase in the number of scholarly articles published that examine basic principles of statutory interpretation.1 Several different interpretive approaches have been advanced, extensively elaborated, and critiqued.2 Much of this recent scholarship is of a rather theoretical and abstract nature, drawing heavily upon sophisticated philosophical and linguistic concepts. One therefore wonders whether it has had any discernable impact upon judicial practice, particularly in light of the declarations made by both prominent jurists and leading practitioners that most current legal scholarship is so dissociated from practical concerns that it has very limited relevance for attorneys and judges,3 and given recent studies that suggest sharply declining rates of citation of law review articles in judicial opinions.4

We now live, however, in an "age of statutes."5 Since statutory inter-

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1. See William N. Eskridge, Jr., Dynamic Statutory Interpretation 1 (1994).
5. See, e.g., Guido Calabresi, A Common Law for the Age of Statutes at 1-7 (1982).
pretation is now central to the work of judges, one would think that they would be more cognizant of and influenced by articles concerning theories of statutory interpretation than they might be by, say, more interdisciplinary or postmodern fare. There is some evidence suggesting that this is indeed the case. However, it would be useful to empirically test and refine such intuitions in a more systematic fashion.

In order to better assess the influence of this recent scholarship upon judges, I thought it reasonable to begin by first determining the frequency with which statutory interpretation articles are cited in judicial opinions, and then examining in more detail the character of the judicial citations, at least for the more widely-cited articles. In this study I will undertake this effort for those statutory interpretation articles of a broad, theoretical nature that were published during the 1988-97 decade in North American law journals. There are a number of rather obvious reasons why the results of this study can provide only a very crude assessment of the influence of this literature upon the judiciary. Nevertheless, one must start


The articles on our “most cited” lists share an interest [with those articles most cited by scholars] in statutory interpretation. At least six of . . . [our list of the 30 most cited] articles outline general theories of statutory interpretation, including three of the five articles that overlap with Shapiro’s [articles most cited in law journals] list. The congruence of most-cited articles in this field supports Judge Posner’s observation that “statutory interpretation is an area where the innovations come mainly from the academy.”

Id.

7. I have elected to forego examination of judicial citation of recent treatises and other full-length works that devote much of their analysis to statutory interpretation. There are several significant recent works along this line that might be considered in subsequent studies for their influence upon judges. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1995); ESKRIDGE, supra note 1.

A Lexis search done in early June, 1999, revealed that the Scalia book cited above had been cited in fifteen judicial opinions. Twelve of these citations related to his discussions of statutory interpretation issues. The Lexis search also revealed that the Eskridge and Frickey casebook cited above had also been cited in fifteen opinions, again with twelve of those citations relating to statutory interpretation issues. The Eskridge treatise cited above has only been cited in one judicial opinion.

8. I chose the 1988-97 period because it is recent, and a long enough period of time to contain a significant body of work and to allow for this work to come to the attention of the judiciary, and yet it is still short enough to be analytically tractable.

9. First of all, while scholars have various professional incentives and obligations to cite extensively to the relevant scholarly literature in their articles, judges do not operate under quite the same incentives and constraints. Judicial opinions are, to a significant extent, advocacy pieces prepared to serve as a defense of a decision reached, rather than comprehensive and balanced scholarly essays.

A judge may, for example, choose not to cite, in an opinion, an article that influenced his analysis because his ruling is less ambiguously supported by case law or statutory authority. He may also choose not to cite an article that he has read and seriously considered but that takes a position opposed to that of his ruling; a luxury that is obviously not available to the conscientious scholar. Finally, a judge might not be familiar with a particular article that nevertheless might have a significant impact on the overall “climate of opinion” in legal circles, as legal scholars publicize and explicate its arguments to a broader public, and this
somewhere, and this seems a reasonable place to begin this inquiry.

At the outset, let me briefly summarize my conclusions. I have five main observations to offer on the basis of this study. First, there has been a very significant recent expansion in scholarship in this area; at least 132 articles were published over the past decade alone that address statutory interpretation issues at a broad, theoretical level. Second, almost half of the statutory interpretation articles published between 1988 and 1995 have been cited in at least one judicial opinion. While there is little comparative data available, what there is suggests that this is a relatively high figure compared to the rate of judicial citation of scholarship produced in other fields of law.

Third, at least seven statutory interpretation articles published during the past decade have been rather extensively cited by the courts, and are among the most judicially-cited legal articles published during this period. Fourth, an examination of the nature of judicial citations to these seven articles lends some support to the legal realist claim that scholarly journal articles are generally (although not always) utilized by judges primarily to add academic luster to decisions ultimately based on other grounds, rather than as significant factors in the underlying decision-making process. Finally, if a scholar seeks primarily to have his work provide immediate practical assistance to practitioners and judges—and to be cited extensively in their briefs and opinions—that person would be well advised to engage in close doctrinal analyses of actual, current cases, rather than in broader and more speculative and/or interdisciplinary investigations of larger questions of social policy.

II. THE CITATION SURVEY

A. Frequency of Judicial Citation of Statutory Interpretation Articles

The group of articles that I examined for the frequency and character of their citation in judicial opinions included as many articles as I could locate that dealt primarily with statutory interpretation issues at a general, theoretical level and that were published during the 1988-1997 climate of opinion. For these and other reasons, the extent to which articles are cited by judges may understate their actual influence upon judicial practice. On the other hand, it is possible that in some instances an article that is cited by a court in support of a decision actually had no influence at all in the making of that decision, but was simply marshaled after-the-fact in an advocate’s fashion to lend support to a decision already reached on another basis. To the extent that this is the case, the frequency of judicial citation of scholarly articles would overstate, perhaps dramatically so, their actual influence on the outcome of decisions. To one of a legal realist bent, the ascription of a direct causal relationship between the cited legal authority and the outcome of a judicial decision is highly problematic.

From this group of articles that I investigated, I chose to exclude those journal articles that focused primarily upon constitutional rather than statutory interpretation issues. I also excluded those articles that primarily addressed statutory interpretation questions in the context of a particular law or related set of laws, rather than more generally.
decade either in one of the approximately 150 U.S. law journals that are tracked by Shepard's Law Review Citations,\textsuperscript{11} or in one of the North American law journals that is not included in the Shepard's volume.\textsuperscript{12} The group of 132 articles that I identified as meeting that criterion is set forth in Appendix I.

Table I below presents the data I obtained concerning the frequency of judicial citation of these articles.\textsuperscript{13}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Number of Citations & Number of Articles (\% of Articles) \\
\hline
0 & 80 (60.6\%) \\
1 & 21 (15.9\%) \\
2 & 14 (10.6\%) \\
3 & 5 (3.8\%) \\
4–9 & 5 (3.8\%) \\
10–23 & 7 (5.3\%) \\
\hline
\end{tabular}
\caption{FREQUENCY OF CITATION OF THE 132 1988-97 STATUTORY INTERPRETATION ARTICLES IN JUDICIAL OPINIONS}
\end{table}

did include, however, those articles that had a broad, theoretical statutory interpretation focus, but which applied their reasoning primarily to assess the work of the courts of a particular jurisdiction.

The determination as to which articles so qualify is inherently somewhat subjective, and my list is admittedly vulnerable to the criticism that it is to some extent both over-and under-inclusive. I do believe, however, that this group of articles is relatively comprehensive, in terms of including virtually all significant U.S. journal scholarship that has been done in this area over this period. It is also reasonably well defined in terms of the topical limits applied to exclude those articles exploring primarily constitutional questions or interpretative issues of narrower impact. I strongly believe that the results reached would not be significantly altered if the group of articles considered were modified by making the probably quite modest number of additions and/or deletions that another reasonable observer might deem appropriate.

\begin{enumerate}
\item Shepard's Law Review Citations (1986 & Supp.).
\item The group of journals that are excluded from the Shepard's volume but included in this study consists of the Boston College Environmental Affairs Law Review, the Cardozo Law Review, the Case Western Reserve Law Review, the Cornell Journal of Law and Public Policy, the Harvard Journal of Law and Public Policy, the Harvard Journal of Legislation, the Journal of Law and Politics, the McGill Law Journal, the Seton Hall Legislation Journal, the Supreme Court Review, and the Tulane European & Civil Law Forum. These journals were included because they each contained one or more articles dealing with statutory interpretation issues on a general, theoretical level during the 1988-97 period. I utilized the Lexis service in late May, 1999 to identify subsequent court citations of the articles published in these journals.
\item Both the Shepard's research and my Lexis research concerning articles not tracked by Shepard's included all federal court (including bankruptcy court) and state court citations to the articles considered. The Shepard's citations were tracked through the service's March, 1999 Cumulative Supplement volume, which is current through approximately the end of 1998. Shepard's Law Review Citations viii (March 1999). The Lexis citations were identified during late May, 1999, and are likely current through about the end of April, 1999.
\item I utilized the Lexis service to identify and correct a few inadvertent omissions from the Shepard's list of court citations, but I did not use the service to update the Shepard's citations beyond those contained in their March, 1999, Cumulative Supplement volume.
\end{enumerate}
Let me briefly note some further statistical aspects of the survey information summarized in Table I. 60.6% of the 132 statutory interpretation articles published between 1988 and 1997 have never been cited in a judicial opinion, and the remaining 39.4% of the articles have each been cited at least one time. The fifty-two articles that each received at least one judicial citation garnered a total of 197 citations, and the average number of cites/article for the fifty-two cited articles is therefore 3.8.

This overall average number of cites per cited article is somewhat misleading, however, because it is dominated by the seven articles that each received ten or more citations, and that collectively received over one-half of all citations. The average number of cites/article for those seven articles was 14.7. The remaining forty-five cited articles received only an average of 2.1 cites/article.

TABLE II
PERCENTAGE OF STATUTORY INTERPRETATION ARTICLES JUDICIALLY CITED BY YEAR OF PUBLICATION (1988-97)

<table>
<thead>
<tr>
<th>Year of Article Publication</th>
<th>Percentage of Articles Receiving at Least One Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>76.9%</td>
</tr>
<tr>
<td>1989</td>
<td>62.5%</td>
</tr>
<tr>
<td>1990</td>
<td>57.1%</td>
</tr>
<tr>
<td>1991</td>
<td>30.0%</td>
</tr>
<tr>
<td>1992</td>
<td>25.0%</td>
</tr>
<tr>
<td>1993</td>
<td>20.0%</td>
</tr>
<tr>
<td>1994</td>
<td>63.6%</td>
</tr>
<tr>
<td>1995</td>
<td>21.4%</td>
</tr>
<tr>
<td>1996</td>
<td>0%</td>
</tr>
<tr>
<td>1997</td>
<td>9.1%</td>
</tr>
<tr>
<td>1988-90 average</td>
<td>64.0%</td>
</tr>
<tr>
<td>1991-95 average</td>
<td>31.7%</td>
</tr>
<tr>
<td>1996-97 average</td>
<td>4.6%</td>
</tr>
<tr>
<td>1988-95 average</td>
<td>46.4%</td>
</tr>
<tr>
<td>1988-97 average</td>
<td>39.4%</td>
</tr>
</tbody>
</table>

14. These 197 citations each represent a different opinion. I reviewed the Shepard's and Lexis citation data to remove any duplicative citations to the same opinion from different case reporters.

Table II above presents the percentage of articles that have received at least one judicial citation, broken down by the article's year of publication.

Table II clearly indicates that the earlier 1988-90 group of articles were more frequently cited than the later 1991-95 articles, and that both of these groups of articles were much more frequently cited than the more recent 1996-97 articles. This could reflect the fact that the earlier scholarship in this area is perceived as more seminal than the later work, and consequently has had more influence upon the judiciary. Alternatively, it could be partially or even wholly due to the simple fact that the judges had more time to become aware of and reflect upon the earlier work. This latter explanation seems particularly likely with regard to those later contributions that did not appear in print until 1996 or 1997.

B. NATURE OF THE CITATIONS OF THE SEVEN MOST FREQUENTLY CITED ARTICLES.

The following seven articles have each received at least ten judicial citations—and in some instances as many as twenty-one to twenty-three citations—while none of the other cited articles received more than at most eight citations:


2) William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (11 cites);


6) Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990) (23 cites); and


By way of comparison of these judicial citation frequencies with those of articles relating to other fields of law, a recent study by Deborah Merritt and Melanie Putnam²⁶ examined the rate of judicial citation of all articles published between 1989 and 1991 in leading law journals. They found that articles (5) and (7) above were among the ten articles published in 1989 that were most heavily cited by judicial opinions.³⁷ In addition, they found that articles (4) and (6) were among the ten articles published in 1990 most cited by judges,³⁸ and that article (2) was among

²⁶. See Judge and Scholars, supra note 6.
²⁷. Id. at 899 (Table 1).
²⁸. Id. at 900 (Table 2).
the ten articles published in 1991 most cited by judges. One additional statutory interpretation article published in 1990 was also found by Merritt and Putnam to be among the ten articles published that year that were most heavily cited in judicial opinions. These are, therefore, unusually widely cited articles.

Let me conclude this descriptive portion of my study by briefly summarizing, without comment, the general character of the judicial citations to each of the seven above-listed articles. I will then discuss, at a more general level, the conclusions I have drawn from this survey.

1. The Breyer Southern California Law Review Article.

The article by Justice Breyer—published in 1992 before his appointment to the U.S. Supreme Court—has been cited for a wide range of rather general propositions concerning the use of legislative history in statutory interpretation. For example, a couple of courts cited the article in support of the broad statement that legislative history may occasionally be an appropriate aid for statutory interpretation. Other courts cited the article in support of the claim that the use of legislative history may be particularly appropriate to determine the meaning of a specialized phrase, or where resort to a literal reading of the statute would lead to an absurd result. Four different courts have cited the Breyer article in support of the proposition that legislative history is often unclear and unhelpful. Finally, one court has cited the article for the proposition that it is sometimes unnecessary to resort to legislative history to interpret a statute, and another court cited it in support of the claim that the Supreme Court appears to be increasingly reluctant to rely upon legislative history for guidance.

2. The Eskridge Yale Law Journal Article.

This 1991 article by William Eskridge has been extensively cited by both the Supreme Court and lower federal courts, primarily for his discussion of the frequency of and reasons for Congress overruling court

19. Id. at 901 (Table 3).
20. Id. at 900 (Table 2). This article was Laurence H. Silberman, Chevron—The Intersection of Law and Policy, 58 GEO. WASH. L. REV. 821 (1990). That article received eight judicial citations, and it just fell short of making my "most cited" list of articles.
21. See Gaskell v. Harvard Coop. Soc'y, 3 F.3d 495, 499 (1st Cir. 1993); Strickland v. Commissioner, Maine Dep't of Human Servs., 48 F.3d 12, 17 n.3 (1st Cir. 1995).
24. See Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 117 (5th Cir. 1997); Sundstrand Corp. v. Commissioner, 17 F.3d 965, 967 (7th Cir. 1994); Yellow Freight Sys., Inc. v. Reich, 8 F.3d 980, 987 n.2 (4th Cir. 1993); Estate of Reynolds v. Martin, 985 F.2d 470, 477 (9th Cir. 1993).
decisions by statute. The article has also been cited once for the distinction he draws between congressional acts that overrule court decisions and those that merely clarify ambiguous statutes, once for his discussion of the “originalism-present intent” debate, and once for the support he offers for critics of the “plain meaning” interpretive approach. 30

3. The Eskridge UCLA Law Review Article.

The subsequent 1992 Eskridge article has been cited for a wide range of propositions concerning statutory interpretation. First, a couple of citations merely note without comment Eskridge’s active participation in the debate over statutory interpretation and the “new textualism.” Two other courts cite him for his observation that the Supreme Court is currently tending towards literal readings of statutes. One additional court cites him generally for his outline of Justice Scalia’s theory of statutory interpretation, while another simply notes without comment his coining of the term “legisprudence.”

Along more substantive lines, this Eskridge article has also been cited for his observations that the meaning of a statutory text depends critically upon its context, that committee reports are the most frequently cited and authoritative source of legislative history, that most judicial statutory interpretation decisions are forced by deliberate statutory ambiguity, that statutes with common purposes should be similarly construed, that legislative history can be manipulated to support almost any proposition, that legislatures usually have no concrete expectations about many

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28. See United States v. Soderling, 970 F.2d 529, 533 (9th Cir. 1992).
29. Mississippi Poultry Ass’n v. Madigan, 31 F.3d 293, 303 (5th Cir. 1994).
31. See Arenjay Corp. v. Comm’r, 920 F.2d 269, 271 (5th Cir. 1991).
of the issues their statutes will later pose,\textsuperscript{41} and that the Supreme Court now routinely resorts to legislative history in interpreting statutes.\textsuperscript{42}


The 1990 Eskridge and Frickey article has also been cited in support of a number of very general propositions about statutory interpretation. For example, it has been cited in support of the assertion that numerous theories of statutory interpretation exist,\textsuperscript{43} as a source of "sound statutory hermeneutics,"\textsuperscript{44} and for the claim that courts may utilize information from a variety of sources, including legislative history, when engaging in statutory interpretation.\textsuperscript{45} It has been cited in support of courts using extrinsic aids as well as statutory text in statutory interpretation,\textsuperscript{46} and for the view that "textualism" should control statutory interpretation only if the text offers a complete and reasonably determinate source of meaning.\textsuperscript{47}

This article has also been cited, however, in support of the somewhat conflicting propositions that statutory interpretation must be attentive to statutory text, because that is all that has been formally enacted into law,\textsuperscript{48} and that one must be particularly cautious when relying upon federal legislative history for interpretive guidance.\textsuperscript{49} Finally, the article has been cited for the claims that the "purposive" approach is the traditional method of statutory interpretation,\textsuperscript{50} and that the Supreme Court has historically adhered to a "modest approach" to statutory interpretation that is grounded in "practical reason."\textsuperscript{51}


The 1989 Scalia article has been extensively cited in support of several broad propositions. First, a number of courts cited this article as support for courts giving great weight to the clarity and certainty advantages of bright-line interpretations of rules.\textsuperscript{52} Second, Scalia is cited as a sup-

\textsuperscript{42} See Parker Land & Cattle Co., 845 P.2d at 1050.
\textsuperscript{43} See UNR Indus., Inc. v. United States, 911 F.2d 654, 659 (Fed. Cir. 1990).
\textsuperscript{44} In re Nadler, 122 B.R. 162, 169 (Bankr. D. Mass. 1990).
\textsuperscript{46} See Wisconsin v. Sample, 573 N.W.2d 187 (Wis. 1997) (Abrahamson, J., concurring).
\textsuperscript{48} See Klein Bancorporation v. Comm'r of Revenue, 581 N.W.2d 863, 867 (Minn. Ct. App. 1998).
\textsuperscript{49} See Mortier v. Town of Casey, 452 N.W.2d 555, 564 (Wis. 1990) (Abrahamson, J., dissenting).
\textsuperscript{50} See United States v. Bazel, 80 F.3d 1140, 1144 (6th Cir. 1996).
\textsuperscript{52} See Fagan v. City of Vineland, 22 F.3d 1296, 1320 (3rd Cir. 1994); Act Upl/Portland v. Bagley, 988 F.2d 868, 877 (9th Cir. 1993); American Agric. Movement, Inc. v. Board of Trade, 977 F.2d 1147, 1157 (7th Cir. 1992); United States v. Duran, 957 F.2d 499, 504 (7th Cir. 1992); Taylor v. Freeland & Kronz, 938 F.2d 420, 425 (3rd Cir. 1991); Ross v. Creighton
porter of the rule of law\textsuperscript{53} and the need for standards to constrain judicial power.\textsuperscript{54} Third, he is cited for the proposition that questions of fact at their margin often shade into questions of law.\textsuperscript{55} Fourth, the article is cited by two courts in support of adherence to established precedents and principles.\textsuperscript{56} Finally, one court has cited the article in support of the position that courts should be reluctant to apply a rule that does not seem to extend beyond the facts of the instant case.\textsuperscript{57}

6. The Sunstein Columbia Law Review Article

The 1990 Sunstein article has received more judicial citations than any of the other articles considered in this study. The U.S. Supreme Court cited the piece several times: once for the proposition that the resolution of statutory ambiguity is more often a question of policy than of law,\textsuperscript{58} once in support of the claim that it is not always reasonable to give legal effect to mere implications from statutory language,\textsuperscript{59} and once for the statement that it is reasonable to assume that Congress did not intend for courts to uphold agency interpretations of ambiguous statutes when those interpretations raise serious constitutional doubts.\textsuperscript{60}

This Sunstein article has also been cited extensively by lower federal courts with regard to various issues centered around the proper degree of deference that courts should give agency actions under the principles set down in 1984 by the U.S. Supreme Court in \textit{Chevron v. Natural Resources Defense Council, Inc.}\textsuperscript{61} The article has been cited not only for its extensive general discussion of the implications of \textit{Chevron},\textsuperscript{62} but also for a large number of more specific \textit{Chevron}-related propositions: that the rationality standard of review is necessarily deferential,\textsuperscript{63} that regulation cannot be carried out solely through detailed legislation that leaves regulatory agencies little or no interpretive flexibility,\textsuperscript{64} that courts should not defer to agency interpretations when the issue is the breadth of the

\textsuperscript{54} See Indiana Dep’t of State Revenue v. Felix, 571 N.E.2d 287, 291 (Ind. 1991).
\textsuperscript{55} See Wilcher v. City of Wilmington, 924 F. Supp. 613, 616 (D. Del. 1996); Reed v. Central Soya Co., 644 N.E.2d 84, 86 (Ind. 1994).
\textsuperscript{56} See \textit{In re} the Marriage of John Gallagher, 539 N.W.2d 479, 484 (Iowa 1995) (Ferkins, J., dissenting); People v. Morris, 807 P.2d 949, 1001 (Cal. 1991).
\textsuperscript{57} See United States v. Anderson, 59 F.3d 1323, 1332 (D.C. Cir. 1995).
\textsuperscript{61} 467 U.S. 837 (1984).
\textsuperscript{62} See Air Courier Conference of Am. v. United States Postal Serv., 959 F.2d 1213, 1226 (3d Cir. 1992) (Becker, J., concurring).
\textsuperscript{63} See New York State Ass’n of Counties v. Axelrod, 577 N.E.2d 16, 23 (N.Y. 1991) (Hancock, J., dissenting).
\textsuperscript{64} See Sherman v. Citibank, 668 A.2d 1036, 1058 (N.J. 1995).
agency's area of regulation,\textsuperscript{65} that it is dubious to infer specific legislative intent from legislative silence,\textsuperscript{66} and that legislative history or other sources of background information may be sufficient to foreclose reliance upon contrary agency interpretations.\textsuperscript{67}

Additionally, the article has been cited for the \textit{Chevron}-related propositions: that the courts should grant less deference to agency interpretations of their own ambiguously worded regulations,\textsuperscript{68} that a prior history of consistent agency interpretation does not always counsel deference to agency action,\textsuperscript{69} that the applicability of the \textit{Chevron} principles should not be determined based upon an ad hoc determination of administrative competence,\textsuperscript{70} that \textit{Chevron} principles may not apply when an agency with rule-making authority has not promulgated an on-point rule,\textsuperscript{71} that \textit{Chevron} principles should only apply to agency interpretations pursuant to legislative rulemaking,\textsuperscript{72} that \textit{Chevron} calls for deference to agency actions based upon specialized agency knowledge,\textsuperscript{73} and that deference to agency interpretations under \textit{Chevron} is appropriate absent contrary congressional direction.\textsuperscript{74}

7. \textit{The Sunstein Harvard Law Review Article}

This second, earlier Sunstein article has been extensively cited for a large number of broad, general propositions relating to statutory interpretation. These propositions include: that historical practice is relevant for statutory interpretation,\textsuperscript{75} that the plain meaning approach to statutory interpretation is unhelpful when the context of the statute produces interpretive doubt,\textsuperscript{76} that interpreting statutes is difficult,\textsuperscript{77} that plain meaning interpretation is essential under the Administrative Procedures

\begin{enumerate}
\item See Fleischmann v. Director, Office of Workers' Comp., 137 F.3d 131, 136 (2d Cir. 1998); Teper v. Miller, 82 F.3d 989, 998 (11th Cir. 1996); Garrels v. SmithKline Beecham Corp., 943 F. Supp. 1023, 1042, 1049 (N.D. Iowa 1996); Blagden Alley Ass'n v. District of Columbia Zoning Comm'n, 590 A.2d 139, 142 (D.C. Cir. 1991).
\item See United States v. Barber, 93 F.3d 1200, 1211 (4th Cir. 1996); Lancashire Coal Co. v. Secretary of Labor, 968 F.2d 388, 393 (3rd Cir. 1992); Caterpillar Inc. v. United States, 941 F. Supp. 1241, 1245 (Ct. Int'l Trade 1996).
\item See Southern Ute Indian Tribe v. Amoco Prod. Co., 119 F.3d 816, 830-31 n.21 (10th Cir. 1997); Osorio v. I.N.S., 18 F.3d 1017, 1022 (2d Cir. 1994); International Union, UAW v. OSHA, 938 F.2d 1310, 1317 (D.C. Cir. 1991).
\item See Sekula v. FDIC, 39 F.3d 448, 453 n.13 (3rd Cir. 1994).
\item See Atchison, Topeka and Santa Fe Ry. Co. v. Pena, 44 F.3d 437, 446 (7th Cir. 1994).
\item See Virginia v. Browner, 80 F.3d 869, 878 (4th Cir. 1996).
\item See Georgia Dep't of Med. Assistance v. Shalala, 8 F.3d 1565, 1571 (11th Cir. 1993).
\item See United States v. Pozsgai, 999 F.2d 719, 729 (3d Cir. 1993).
\item See Air N. Am. v. Department of Transp., 937 F.2d 1427, 1436 (9th Cir. 1991).
\item See BHP Petroleum Co. v. State, 784 P.2d 621, 626 n.6 (Wyo. 1989).
\item See Gay v. Sullivan, 966 F.2d 1124, 1129 (7th Cir. 1992).
\end{enumerate}
Act scheme, 78 that flexible statutory interpretation is appropriate under some circumstances, 79 that finding congressional intent with regard to “feasible” or “probable” agency determinations is unlikely, 80 that strong substantive background norms may control statutory interpretation, 81 and that courts do not always need to defer to an agency’s interpretation of the law. 82

This article has been further cited for its general discussion of statutory interpretation principles, 83 as well as for the following specific propositions: that a statutory ambiguity is not a delegation of law-making authority to an agency, 84 that “absent a clear indication . . . Congress should not be presumed to have intended . . . an irrational and unjust result,” 85 that courts should be more aggressive and creative in their interpretations when conventional interpretive techniques lead to absurd or unjust results, 86 that “shared understandings” should be important in statutory interpretation, 87 that deferring to longstanding interpretations helps to promote certainty and predictability, 88 and that statutes should be construed whenever possible to avoid constitutional infirmities. 89

III. DISCUSSION

I learned several things from this research. First, I was surprised to find out just how extensive a body of theoretical statutory interpretation scholarship has been produced during the past decade. 90 This work represents quite a substantial commitment of scholarly effort over this period.

An interesting and somewhat surprising statistic that has emerged from this study is that 46.4% of the 110 theoretically-oriented statutory interpretation articles were published between 1988 and 1995 have been cited in at least one judicial opinion. 91 This strikes me as a very high citation percentage. I admit that I am unaware of any comparative citation per-

80. See Friends of Boundary Waters Wilderness v. Robertson, 978 F.2d 1484, 1490 (8th Cir. 1992).
82. See Osorio v. INS, 18 F.3d 1017, 1022 (2d Cir. 1994).
84. See Elizabeth Blackwell Health Ctr. v. Knoll, 61 F.3d 170, 196, 197 n.16 (3rd Cir. 1995).
89. See Provo City Corp. v. State, 795 P.2d 1120, 1125 (Utah 1990).
90. See Appendix I for a listing of 132 such articles published between 1988 and 1997.
91. See supra Table II.
percentages calculated for any other fields of law. But given the numerous critiques offered by prominent judges as to the infrequency with which they find the journal literature useful in their work, and given the fact that recent research indicates a significant decline in the rate at which court opinions cite scholarly articles, my strong suspicion is that this citation percentage is a relatively high figure compared to overall law journal article citation frequencies. One would think that the statutory interpretation literature would be of particular interest to judges, given the difficult interpretive demands now placed upon them. The fact that Merritt and Putnam found that their 1989 through 1991 annual lists of the ten published articles most heavily cited by judges included an average of two theoretical statutory interpretation articles among those ten articles, lends further support to this intuition.

The identity of the seven statutory interpretation articles that emerged as the most judicially-cited works during the past decade was no real surprise. Their five authors, two sitting Supreme Court Justices and three leading scholars, all maintain great credibility in the profession. After looking over each of the 100+ judicial citations to one or another of these articles, I have several thoughts to offer concerning the roles those articles may have played in the judicial decision-making process.

One observation I will make is that the great majority of the citations appear to have been included in the opinions 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. The articles were rarely cited for their more original, subtle, or controversial claims, and were also rarely cited in contexts that would suggest that they had been particularly useful in helping the court to deal with a complex interpretive issue that did not fit comfortably within the ambit of any of the conventional maxims of statutory interpretation—the usual situation facing appellate judges! These citations instead suggest that the articles were generally marshalled after-the-fact during the writing of the opinion to lend further support to a decision already reached on other grounds, rather than being influential on their own account in determining which of the conflicting policy objectives underlying the different interpretive approaches should take precedence in the making of that decision.

That being said, one can still find a few opinions that cite to some of the more original contributions or more subtle and nuanced discussions

92. There is, however, some evidence that judges do not now cite to the scholarly literature as often as they did in the recent past. See McClintock, supra note 4, at 684 (finding a 47.35% decline in overall federal court and state supreme court law journal citations from 1975 to 1996); Citing of Law Reviews, supra note 4, at 134 (finding a 20% decline in U.S. Supreme Court citations of law journal articles from 1971-73 to 1981-83).
93. See supra note 4 and accompanying text.
94. See supra note 91 and accompanying text.
95. See Judges and Scholars, supra note 6, at 899-901.
This suggests that at least a few courts have seriously reflected upon some of this body of scholarly work, and may even have been influenced by it to some extent. In particular, a number of courts appear to have found the 1990 *Columbia Law Review* article by Cass Sunstein, which analyzes the implications of the *Chevron* case, to be of substantial assistance in understanding the scope and requirements of that important Supreme Court decision. The Sunstein article has been cited not only for its succinct statements of general interpretive principles, but also for its ruminations on the proper application of those principles under various specific circumstances under the *Chevron* directives. This article seems to better embody what judges (and practicing lawyers) apparently desire of legal scholarship than any of the other articles considered in this study: sophisticated theoretical analysis involving basic policy issues, but conducted using conventional legal categories and forms of argument, and grounded in very specific factual contexts that closely resemble the controversies with which courts regularly deal.

Stated another way, the more a law journal article resembles the traditional "casenote" or close doctrinal analysis of a line of cases—literary genres that have largely fallen from favor in legal academia in recent decades—the more helpful it is likely to be to practitioners and judges in their day-to-day activities, at least with regard to providing them with an academic patina for their briefs and opinions. Those legal scholars who first and foremost desire to have their research provide such immediate practical assistance to practitioners and courts, as opposed to conceiving of their central scholarly mission in different terms, would be well advised to select their topics and expositional styles with this consideration in mind.

96. For example, the comprehensive statistics and analysis relating to congressional overruling of court decisions by statute that was provided by William Eskridge in his 1991 *Yale Law Journal* article has apparently proved informative and helpful to a number of courts. See *supra* notes 27-28 and accompanying text. As another example, several of the citations to the 1989 Scalia *University of Chicago Law Review* article refer to positions he takes that are both subtle and highly contested. See *supra* notes 52-57 and accompanying text.


98. See *supra* notes 58-60 and accompanying text.

99. See *supra* notes 61-74 and accompanying text.

100. For a recent general overview of the ongoing debate among academics, practitioners, and judges over the appropriate role of legal scholarship, see generally McClintock, *supra* note 4, at 667-82.
APPENDIX I: STATUTORY INTERPRETATION ARTICLES (1988-97)


