Foreword

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A more than a few of the authors for this Symposium observe, the past fifteen years have seen a dramatic increase in scholarly publishing on the topic of statutory interpretation, as well as an escalation in the volume (measured in both numbers of cases and the decibel level displayed in some of the opinions) of judicial forays into the subject. It seems, therefore, like a propitious moment to pause and take stock, to examine the developments revealed in the law reviews and in the case reporters. Accordingly, I applaud the editors of the SMU Law Review for their commitment to this Symposium and thank the authors for their thought-provoking articles.

One of the reasons often cited for the burgeoning interest in statutory interpretation is the “statutorification” of American law in this century. There can be no real doubt about the rise of statute law. For verification, one need only look at the course catalog of any law school in America, or at the dockets of the United States Courts of Appeals. As
Professor Crespi points out in his article, law review scholarship in the field has also increased significantly, particularly during the period on which he focuses, 1988 to 1997. Professor Crespi (perhaps wisely) does not speculate as to the reasons for the blooming of this particular academic rose, but I will offer two.

First is the pioneering scholarship of Professor Bill Eskridge and Phil Frickey, whose law review articles on the subject began appearing in 1985-86 and culminated in the publication of the first edition of their casebook, which was immediately lauded by Judge Posner for having "done for legislation what Hart and Sacks did for legal process, or Hart and Wechsler for federal courts: it has demonstrated the existence of a subject." That three of the seven law review articles most frequently cited by courts should be by one or both of these writers should come as no real surprise. More importantly, their articles and casebook signaled the rest of the academy that there was real gold to be mined out of statutory interpretation, and (like the original '49ers), the rest of us were only too happy to follow the path.

The last two decades would have provided much less material for academics to write about, however, had it not been for the second major cause of this publication activity: the ascendance to the federal bench of a small group of vocal, provocative, and dynamic judicial activists who were committed to changing the way judges interpreted statutes. I am thinking primarily of Judge Frank Easterbrook (who took his commission in April 1985), Judge Alex Kozinski (November 1985), and—primus inter pares—Justice Antonin Scalia (who joined the U.S. Court of Appeals in 1982 and the U.S. Supreme Court in September 1986). These three textualists have produced a body of case law and extra-judicial writings that challenge the eclecticism and pragmatism that have been the hallmark of statutory interpretation for most of this century.
"Statutory interpretation," as practiced by the academics and judges whose work is discussed in the pages of this Symposium, is practically a blood sport. As Judge Abner Mikva and Professor Eric Lane demonstrate, the textualist revolution is not just about abstruse theories of language and theories of legislative process. Nothing less than a political counter-revolution is behind the move to limit statutes to their plain meaning, even when the meaning of the statutory text is anything but clear. Mikva and Lane argue that Justice Scalia's textualist revolution has usefully curbed some of the eclectic tradition's excessive reliance upon legislative history, but has generally failed to achieve the goals set by judicial conservatism for itself. Their article explores, among other themes, the two ways in which statutory interpretation has shown its political nature, not only as a mediating force between Congress and the Executive, between the political branches and the judiciary, and between the central federal government and the states, but also as an occasional corrective for political judgments with which the judicial author disagrees.

Political considerations need not always be the source of disagreement about the Court's interpretations. In his contribution to this Symposium, Louis Fisher emphasizes the institutionalist considerations that should inform the Court's reading of statutory language. Fisher argues that the doctrine of separation of powers, as well as a healthy respect for the limitations of the judiciary as a source of public policy, both provides a useful source of judicial restraint and justifies at least limited inquiries into extra-textual sources in order to respect Congress' distinct role as the author of federal policy.

This institutionalist perspective is also pursued by Professor John Roberts, who offers a detailed discussion of the possible meanings of key terms in the 1996 Telecommunications Act. He considers Congress, the courts themselves, agencies, and industry groups all as potential sources of meaning and argues for a more supple and realistic approach to reading statutes. In particular, Professor Roberts gives the Chevron doctrine a hard look and suggests ways to correct what he regards as the

10. As honorable a title as it is, "Judge" hardly does justice to Abner Mikva's decades of public service, beginning with his year as a law clerk to Supreme Court Justice Sherman Minton (1951-52), and continuing through his years as an Illinois state representative (1956-1966), member of Congress (1969-1973, 1975-79), a member (and eventually Chief Judge) of the U.S. Court of Appeals for the D.C. Circuit, and then White House Counsel (1994-95) to which the title of "Professor" may be added again (Judge Mikva taught at Northwestern's law school from 1973-75 and is currently a visiting profress at the Illinois University College of Law and Senior Fellow at Illinois; Institute of Government and Public Affairs). See id.


four fundamental mistakes upon which the doctrine is based.

Professors Clark and Charles Kelso suggest in their article that one way to bring order to the seeming chaos of competing political, institutional, and linguistic philosophies is to stop looking to interpretive theories for a Grand Unifying Theme. Instead, they suggest, based upon their detailed review of the statutory cases of the Supreme Court's 1998 Term, the lack of a single, coherent approach may be traced to the fact that the justices on the current Court represent four distinct approaches to judicial decision making. To that extent, the eclecticism that has marked the Court's approach to reading statutes for much of this century is an appropriate middle course that puts statutory text first but does not hesitate to test interpretations against common sense, legislative purpose, historical context, and other extra-textual sources of decision.

One of Professor Eskridge's more controversial contributions to this field has been his advocacy of "dynamic" statutory interpretation, which allows a court to update a statute to reflect contemporary social mores, evolving tort doctrine, or other post-enactment developments. Two leading examples of dynamic statutory interpretation in action are *Li v. Yellow Cab Co. of Cal.* and *Bob Jones Univ. v. United States.* In each case, the court chose to update the meaning of the statute before them to reflect tort law developments in the law of comparative fault (*Li*) or the national public policy against racially segregated schools as reflected in the common law of charitable trusts (*Bob Jones*). One of the things that made the decision so difficult in each instance was the court was walking along a shifting border that allegedly separates the common law from statute law. While statutes are usually understood to be enacted in derogation of the common law, both courts consciously relied upon many decades (and in the case of *Li*, a century) of common law development to achieve a result that the statutes' drafters could not have dreamed was possible. Two of the articles in this Symposium consider the complex question of the relationship of statutes to the common law. Professor Jonathan Turley recounts his experiences with a case that rests at the intersection of environmental law and national security law in an attempt to determine when, if ever, it is appropriate for the common law to trump the plain meaning of a statute. Professor Daniel Farber offers up a detailed examination of the New York Court of Appeals' landmark decision in *Riggs v. Palmer,* in part to consider how a court should determine

17. 532 P.2d 1226 (Cal. 1975).
20. 22 N.E. 188 (N.Y. 1889) (holding that a grandson who was the main beneficiary under his grandfather's will and who was also convicted of murdering the same grandfather
where a statute leaves off and the common law begins, or (to put it another way) when a statute preempts otherwise relevant common law.\textsuperscript{21}

As all of the articles in this Symposium demonstrate, the most recent two decades of scholarly commentary on statutory interpretation have solved very little. There is still much work to be done, and the pieces offered in this issue make a splendid contribution to the field.
