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Legislative Processes and Products

Philip P. Frickey

A little over a decade ago, Robert Weisberg accurately observed: “The general contemporary American view of statutory interpretation is that there is not a great deal to say about the subject. As a result, nothing else as important in the law receives so little attention.”¹ In the past dozen years, an avalanche of scholarly and pedagogical materials on legislative processes and their products has swamped legal education.²

I have argued elsewhere that this explosion in materials on legislation resulted from a variety of factors, including closer attention to empirical and normative theories of legislative processes, a consideration of statutory interpretation as worthy of both high scholarly theory and practical, professionally oriented pedagogy, and a dramatic series of debates on the Supreme Court about the Court’s appropriate role in construing legislative products.³ My goals in this brief essay are to present an overview of some of the most important developments and then suggest several ways in which law professors who teach statutory subjects may profitably enliven their classrooms by situating these developments within the context of their substantive courses.

Theories of Legislation

Perhaps the most common theory of the legislative process is pluralism.⁴ Under pluralist assumptions, citizens are not represented individually in the legislative process. Instead, citizens organize into diverse and cross-cutting interest groups, which in turn pressure legislators into reaching compromises.⁵

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2. For example, three new casebooks were published: William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy, 2d ed. (St. Paul, 1994; 1st ed. 1988); Abner J. Mikva & Eric Lane, Legislative Process (Boston, 1995); William D. Popkin, Materials on Legislation: Political Language and the Political Process (Westbury, 1993). In addition, one casebook that appeared in 1980 has entered its second edition: Otto J. Hetzel et al., Legislative Law and Process: Cases and Materials, 2d ed. (Charlottesville, 1993). The topic has been the subject of countless commentaries as well.

Descriptively, pluralism assumes that citizens have the opportunity to join groups and thereby participate politically, that groups represent essentially all points of view, that power is widely dispersed across groups, and that no single group or subset of groups can dominate politics. The political process serves largely as the arena in which this group competition is channeled, regulated, and resolved through compromise. Normatively, these assumptions might suggest that politics is basically fair (all persons may participate), is basically democratic (no person or group controls political outcomes, and groups representing large numbers of people have proportionally more clout than smaller groups), and basically reaches reasonable policy outcomes (the free-market competition among groups will ordinarily result in the triumph of good policy over inferior alternatives).

These assumptions have come under extraordinary attack. Reminiscent of earlier critiques, but more systematic in its analysis, public choice theory has posited all sorts of empirical and normative problems with pluralism. To simplify at risk of caricature, pluralism posits that the political arena reaches predictable, stable, and responsible outcomes, but work on majority-voting schemes, often summarized as "Arrow's paradox," concludes that majority rule often results in a cycling of outcomes that cannot be resolved by simple majority vote. Only through the imposition of some nondemocratic feature, such as agenda control or strategic behavior, may the "cycling majorities" be broken, and then the outcome arguably loses its democratic legitimacy. Another strand of public choice theory attacks the pluralistic assumptions that most people are represented by groups and that the bigger the group, the more political power it should have. Instead, one would expect most people to avoid politics because the costs of political action exceed any tangible benefit they receive. This so-called "free-rider problem," in which people have an incentive to sit back and hope that someone else will carry the difficult burdens of participation, makes it difficult to form large and diffuse groups. What one would expect, instead, is that people will participate only when they have a strong incentive not to free-ride—that is, when they individually stand to gain or lose a great deal and there is no one else upon whom they can easily rely for virtual political representation.


On the basis of these notions, one can predict that statutes that widely
distribute their costs and benefits (e.g., general benefit/general taxation) will
have little group activity on either side. Statutes that concentrate their costs on
particular entities and likewise have concentrated benefits to other particular
entities (e.g., labor/management statutes) will have interest-group warfare
surrounding them. Statutes that broadly distribute benefits but concentrate
costs will be fiercely opposed by the minority bearing these burdens while
garnering little support from their beneficiaries, who are handicapped in
participating by the free-rider problem (e.g., consumer protection laws).
Finally, statutes that result in concentrated benefits and distributed costs will
be strongly supported by the beneficiaries and not much opposed by those
bearing the burden (e.g., farm subsidies). This perspective undercuts the
optimistic assumptions of pluralism about group politics reaching reasonable
accommodations in the public interest. Indeed, it supports rather cynical
notions about the political arena being the place small, powerful interests go
to obtain benefits that they cannot garner in the free economic market.
Indeed, its assumptions about self-interested political actors using the repre-
sentative process for personal gain can be generalized to legislators them-
selves, who might be conceived of as simply single-minded seekers of reelection and power rather than Burkean representatives who seek office to pro-
mote a deliberation about public values.9

Of course, public choice, or any other model of politics inspired by eco-
nomics—that is, by assumptions about the relationships among self-interested actors—is subject to strong qualification. People, whether elected officials or
private citizens, do often act in something other than their own self-interest, as the scholarly revival in civic republicanism attests and promotes.10 The politi-
cal arena often seems to produce outcomes inconsistent with the mechanical assumptions of either pluralism or public choice, for non-self-interested ideology and fortuity seem to play their own strong roles.11

Moreover, mechanical interest-group explanations can leave out an impor-
tant consideration: the extent to which institutional structures affect political
strategies and outcomes. Positive political theory12 identifies the importance
of understanding public policy within its rich contextual framework, particu-
larly rooted as it is in existing, interrelated institutions of governance. To take
a simple example, whatever might be the preferences of a majority of the
House and Senate, proponents of legislation recognize that a bill cannot
become law unless the president concurs or the Congress has the votes to
override a veto. Thus, in a situation in which the Congress and the president
have very different policy views and the president threatens to veto legisla-

10. Civic republicanism argues, of course, that public officials as well as the rest of us should
deliberate to promote the common good. See, e.g., Symposium, The Republican Civic
11. On ideology to promote the common good, see, e.g., Arthur Maass, Congress and the
Common Good (New York, 1983); on dynamics and fortuity in politics, see, e.g., John W.
strategic congressional proponents might well craft the bill to garner the support of two-thirds of the members of both houses, not a simple majority.\textsuperscript{13}

\section*{Statutory Interpretation}

American law inherited from the English a debate about the utility of several competing approaches to statutory interpretation.\textsuperscript{14} Statutory interpretation in the Supreme Court has sometimes enforced the literal meaning of statutory text,\textsuperscript{15} sometimes attempted to identify and enforce the congressional intent surrounding a statute,\textsuperscript{16} and sometimes tempered literalism and intentionalism by interpreting the statute to promote its overall public purposes.\textsuperscript{17} In practice, American judges have tended to examine all three approaches, blending them together into a pragmatic test balancing fidelity to formal law (statutory text), to legislature (intent), and to functionality and good policy (public purposes).\textsuperscript{18} Within the past decade or so, this debate has become more scholarly and more systematic, for it has been informed by the theories of the legislative process discussed above.

Public choice theory can be employed to attack any focus on legislative intent or statutory purposes. First, the branch of public choice positing that legislative outcomes are incoherent and arbitrary undermines the very existence of these phenomena. As Frank H. Easterbrook wrote in an influential article, a legislature does not have intents or purposes, it merely produces outcomes.\textsuperscript{19} Second, the public choice scholarship contending that statutes will predictably be pluralistic deals favoring powerful small groups at the expense of unorganized interests undercuts the normative attractiveness of relying upon legislative intent or statutory purposes to resolve statutory textual ambiguity.

Accordingly, it is unsurprising that literalism, although viewed in our recent past as a silly way to resolve statutory meaning,\textsuperscript{20} became the dominant theoretical and practical subject of interpretive controversy in the federal
courts in the mid-1980s. Less theoretically, and somewhat more cynically, one might also posit that the judiciary appointed by a conservative Republican president would be loath to examine the intents and purposes of legislation adopted by a Congress of a considerably different ideological stripe. In any event, what has been called "the new textualism" began as an argument against the use of legislative history in statutory interpretation, quickly expanded into an argument for adherence to statutory text, and ultimately became a more sophisticated approach integrating text and the canons of statutory interpretation. To quote Justice Scalia:

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.

It may seem odd to many legal scholars that the canons of interpretation have made a comeback after what seemed to be a death blow by Karl N. Llewellyn almost a half-century ago. The revival—indeed, the resurrection—of the canons is not surprising, however, within the context of literalism. The new textualism is a highly formalistic approach that seeks to stick with the text, the whole text, and nothing but the text. One great problem is that this method sometimes leaves substantial doubt—a great fault for formalistic theories, which are based on the value of certainty and predictability. Another defect, at least if the approach is to gain a majority of adherents on the current Supreme Court, is that it is seemingly agnostic about what values our public law is to promote. It might be speculated that every approach to statutory interpretation provides a safety valve for the judge unhappy with literal statutory text. The nontextualist approaches displace the literal reading if it is inconsistent with legislative intent or public policy purposes, thereby drawing whatever legitimacy they may have from arguable deference to the legislature (democratic theory) and from the promotion of public values (republicanism). The canons provide a literalist with an out when results flowing from plain textual meaning are loathsome. Probably the cases most vividly illustrat-

23. See Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).
24. For evidence that the current Court is much less likely to rely upon legislative history and much more likely to use dictionaries as an aid to interpretation, see Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 Wash. U. L.Q. 351 (1994); Note, Looking It Up: Dictionaries and Statutory Interpretation, 107 Harv. L. Rev. 1457 (1994).
ing this use of canons as safety valves are those applying the “quasi-constitutional” canons protecting structural constitutional values against all but absolutely clear congressional invasions. The canons also have the look and feel of formalism: they purport to be the “rules” of statutory interpretation that can be applied rather mechanically, supposedly promoting certainty and predictability and limiting that bugaboo for the formalist, judicial discretion.

Of course, there is a good deal of tension between avoiding loathsome results and increasing predictability and certainty. In my judgment, the Court has had some lapses in this regard. An alternative, and more realistic, approach to the canons would treat them as a compendium of public values—a civic republican interest—and useful rules of the game—a pragmatic factor of positive political theory—that provide default answers in time of substantial interpretive uncertainty. That approach would emphasize that the use of canons is an exercise in judicial lawmaking—albeit often simply of an interstitial nature—that deserves justification independent of the fact that canons of one kind or another have been around for centuries. It would also demonstrate that the more the new textualists embrace canonical displacement or supplementation of literal meaning, the more their method blends into


29. For this brief discussion, consider three problems. The first is that the Court is creating new canons, and modifying old ones, all the time, undercutting predictability and certainty. For example, when the Court held that federal statutes shall be interpreted as abrogating the states’ Eleventh Amendment immunity from suit in federal court, see Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), or as invading core state governmental functions, see Gregory v. Ashcroft, 501 U.S. 452 (1991), only if there is a clear and precise statement to that effect in statutory text, it was changing the law in unpredictable ways. Second, when the Court applies these canonical modifications to existing statutes, it retroactively changes the rules of the game on Congress. Illustratively, in circumstances in which, at the time of enactment, the statute would have been sufficient to invade state prerogatives and it is clear Congress intended to do so, this judicial behavior has a bait-and-switch quality to it. See, e.g., Dellmuth v. Muth, 491 U.S. 225 (1989) (clear-statement canon judicially adopted in 1985 means that statute enacted in 1975 not clear enough to effectuate abrogation of Eleventh Amendment). Third, the application of these canons has proved highly unpredictable. Consider BFP v. Resolution Trust Corp. 511 U.S. 531 (1994), in which the majority opinion of Justice Scalia interpreted “reasonably equivalent value” of real estate, in the context of the federal bankruptcy code, to mean whatever price the property fetched at a foreclosure sale. To impeach apparent statutory meaning and reach this outcome, Justice Scalia first relied upon the fact that state foreclosure proceedings depend upon the finality of such sales. He then analogized to the canon recognized in Gregory and concluded that the federal bankruptcy provisions should be interpreted to avoid conflict with an essential state interest in unclouded land titles. This was a major expansion of the Gregory canon, which on its terms applied only to federal invasions of core state governmental functions akin to those concerned in National League of Cities v. Usery, 426 U.S. 833 (1976), not to preemption of matters ordinarily within the state police power. Justice Souter, in dissent, had the pleasure of complaining that Justice Scalia’s interpretation of “reasonably equivalent value” was wildly inconsistent with literal meaning and was in violation of the textualist approach Justice Scalia himself has routinely trumpeted. Indeed, the unpredictability of the Gregory canon was evident from the start, for on the same day Gregory was decided the Court handed down Chisom v. Roemer, 501 U.S. 380 (1991), which applied the federal Voting Rights Act to the election of state judges without even mentioning the Gregory canon.

the traditional, eclectic approach to statutory interpretation that they purport to reject.

**Statutes in the Legal Process**

Writing a little over a decade ago, Guido Calabresi convincingly argued that our law had become "statutorified"—that statutes and administrative regulations had replaced the common law as the usual source for regulating private and public conduct—without a thoughtful evolution in the way we think about legal process issues. Calabresi's specific concern, that statutes become obsolescent because the legislature routinely fails to return to them and judges cannot amend them, has not been the subject of reform since his writing. But two other, related issues concerning the role of statutes in the larger legal process have come to the fore in the past several years. Both involve the extent to which changes in law should be applied to prior conduct.

The first concerns the retroactivity of judicial decisions. A decade or so ago, it seemed settled that the Supreme Court would consider whether retroactive application of a decision should be avoided in order to protect reasonable reliance on prior law. Today, a sea change has occurred, with automatic retroactivity the rule for both criminal and civil rulings.

The second concerns the retroactive application of statutes. It is clear that, if Congress chooses to do so, it may, consistent with the Constitution, apply a civil statute retroactively in many circumstances. The harder question has concerned whether, when Congress is not clear, a change in statutory law should be applied in pending cases. The Court had seemingly suggested that this kind of retroactivity should be the default rule, at least where there is no indication that Congress intended the contrary or that manifest injustice would result. Recently, however, the Court returned to the more traditional approach. It concluded that there should be a general presumption against retroactive legislation, so that, in the absence of clear congressional intent, only minor changes in law that do not endanger important reliance interests—e.g., changes that are procedural or collateral—may be applied in pending cases.

These disparate approaches to the retroactivity of judicial and legislative changes in law reflect traditional notions that what judges do is principled and

33. See Griffith v. Kentucky, 479 U.S. 314 (1987) (criminal); Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) (civil). Harper leaves open the question whether purely prospective application of the decision might be appropriate, but makes clear that, if the decision is applied to the parties before the Court, it must be made fully retroactive.
predictable—and therefore may be applied to prior conduct—but that what legislators do is political and unpredictable—and therefore may not fairly be applied retroactively, at least unless the legislature has squarely addressed the issue and, perhaps, has provided some reasonable explanation. It has also been suggested that any relaxation of the rule of judicial retroactivity encourages judges to make law in ways indistinguishable from what legislators do. Indeed, it might be suggested that the approaches taken in this area reflect a desire to deter judicial innovation by making the costs of judicial changes in law higher. In an odd way, therefore, the full retroactivity rule for judicial changes in law actually might protect the status quo—whether reflective of reasonable reliance interests or not—better than the alternative prospectivity approach.

Political theory can enhance our understanding of the roles that statutes play in the broader legal process in general and on questions of changes in law in particular. In addition to the traditional formalist and realistic perspectives, under which law is subsumed within either the commands of the sovereign or the political preferences of the judges, an institutionalist, realistic, yet respectful perspective would suggest that law is a cross-institutional equilibrium. In this light, consider *Central Bank v. First Interstate Bank.* In that case, a bare majority of five justices rejected the settled interpretation of eleven federal circuits and of the administrative agency in question when it held that there was no cause of action for aiding and abetting a violation of a securities statute. The ruling veritably begs a host of questions. For example, what was the “law” when the transactions in question took place, years before this Supreme Court decision and within the regime of the settled lower-court law? Does stare decisis have no meaning except for the Supreme Court’s own precedents? Does it matter that Congress had no incentive to codify the lower-court interpretations because they were settled, yet had sent approving signals over time concerning these decisions? Was it unfair bait-and-switch for the Court to deny the cause of action for an old statute adopted at a time when the Court routinely elaborated upon statutory remedies? Must such a decision be applied fully retroactively, even though a congressional amendment forbidding such a cause of action would presumably be of only prospective application?

Finally, situating the various debates about legislation within a broader legal process framework is necessary to illuminate the essential contested approaches. As Peter L. Strauss has recently demonstrated, the formalism of the current Court—which I have illustrated by reference to its textualist/canonical approach to statutory interpretation and its rigid dichotomy between legislative and judicial changes in law—threatens to unhinge the lawmaking partnership between courts and legislatures that was the hallmark of

39. See *Eskridge & Frickey,* supra note 25.
twentieth-century legal process theory. We must, yet again, ask what law is and what purposes it serves.

**Some Pedagogical Suggestions**

In this brief account, I hope that I have provided reason to be intrigued by developments concerning legislative processes and their products. The issues that I have raised come up in every statutory course taught in a law school. At a few schools, such as my own, the students will have been exposed to at least some of this analysis in a required course on legislation. At more schools, such an offering is available as an upper-level elective, and it will be hit-and-miss whether any given student in your class has encountered these issues. At a regrettable number of schools, no course is presently offered that addresses these concerns.

My advice is simple. At a school that has a basic required course, instructors of upper-level statutory courses should frequently refresh the recollection of the students concerning these issues and encourage them to extend their statutory skills within the framework of the specific subject matter at hand. The students need encouragement and reinforcement, for otherwise some of them will conclude that the legislation course was all theory and no practice. At a school that has no basic required course, the best the students can get is statutory-skills learning by osmosis. Even that can happen only if the corps of instructors in upper-level statutory courses make a point of highlighting these issues and helping the students work through them.

In my experience, what works best for most students is what also works well for many scholars in the field: a blend of the abstract and the specific, the theoretical and the practical. I bring the general (the contents of my first-year required course in legislation) to my particular interests in federal Indian law, both in my scholarship and in my teaching. Other scholars seem to do much the same thing. Give the students a practical reason to want to understand the theoretical and they will do so, and they will especially profit from focusing on these demanding issues within the framework of a specific subject matter. In this age of statutes, doing anything less is shortchanging them in the currency of the realm.

42. For example, my colleagues Jim Chen, Bill Eskridge, and Dan Farber enlighten their courses on regulated industries and agricultural law (Chen), civil procedure (Eskridge, who teaches the Rules much like a code), and environmental law (Farber) with the perspective of general legislation theory and practice.

43. There has been a running debate about the value of teaching the legal process through a relatively comprehensive examination of one subject or by using problems or case studies that range across many areas. Compare Hart & Sacks, supra note 14 (problems on many topics), with Carl A. Auerbach et al., The Legal Process: An Introduction to Decision-Making by Judicial, Executive, and Administrative Agencies (San Francisco, 1961) (one subject). A virtue of looking at one subject is that students can develop some expertise across topics; a vice is that the students assume that they are supposed to be learning workers’ compensation, or whatever the topic is, rather than more general skills. These problems evaporate to a large extent in an upper-level statutory course, where of course the instructor is teaching the students analytical skills and subject-matter expertise simultaneously.