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SYMPOSIUM ON STATUTORY INTERPRETATION

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FOREWORD: NONJUDICIAL STATUTORY INTERPRETATION

William D. Popkin 301

Professor Popkin's Foreword places the symposium in the broader setting of recent literature on statutory interpretation. He briefly reviews the major schools of thought, explains the contributors' perspectives, and then sets forth his own view on judicial reliance on legislative intent found in legislative history.

WHEN THE JUDGE IS NOT THE PRIMARY OFFICIAL WITH RESPONSIBILITY TO READ: AGENCY INTERPRETATION AND THE PROBLEM OF LEGISLATIVE HISTORY

Peter L. Strauss 321

Professor Strauss examines the problem of statutory interpretation and legislative history from the particular perspective of the administrative agency. What gives this problem particular point in that context, he argues, is that an agency already acts in a matrix of political oversight, and with far greater understanding in fact of the political history of its constitutive statutes than courts typically enjoy. He examines the possible implications for political and legal controls over agency action of an approach that would lock an agency out of its legislative history library. He concludes that such an approach would tend to strengthen the President in competition with Congress in contemporary oversight activity; would contribute to Congressional emphasis on oversight rather than legislation in relation to agency activity; and would diminish the constraints of law as they may be experienced within the agency itself. He finds particularly disturbing, in this regard, a combination of the Supreme Court's Chevron decision with an approach that abjures the use of legislative history; that combination, in his judgment, would free up current politics—legislative, executive and judicial—in relation to law, and persuade agency officials to abandon inquiries into historical understandings that have served until now as an important element of a rule of law culture.

RETAINING THE RULE OF LAW IN A CHEVRON WORLD

Michael A. Fitts 355

In recent years, scholars have applied organization theory to show how administrative agencies may not be as independent of Congress as was traditionally feared in administrative law. Professor Fitts views the Strauss article as showing persuasively how traditional policy concerns about legislative delegation remain despite these insights, and that the historical reliance on legislative history in statutory construction can help alleviate some of these difficulties. While agreeing with the Strauss thesis, Fitts suggests there remain grounds for treating legislative history with some care and skepticism.
Although the Supreme Court has long relied on legislative history as a guide for interpreting federal statutes, it has not reflected upon the "value" served by legislative history. Legal scholars have developed three values that might be served: (1) an authority value, as evidence of specific legislative intent; (2) a purpose value, as evidence of general legislative intent; and (3) a truth value, as evidence of a legislative meta-intent. The article critically examines these values in the context of a recent Supreme Court case.

**WHAT DOES LEGISLATIVE HISTORY TELL US?**

*Frank H. Easterbrook* 441

The problem with legislative history is not so much that committee reports and debates are poor ways to establish 'legislative intent' as it is that 'legislative intent' is not what courts should try to understand. The central question in statutory construction is what the legislation means, and not what the legislators meant or intended.

**THE MEANING OF EQUALITY AND THE INTERPRETATIVE TURN**

*Robin West* 451

The article argues that the meaning of the Constitution is determined not only by the preconceptions of the interpretive community, but also by a set of ethical ideals that follows from the identification of the Constitution as judicially enforced law. The article then argues, using the equal protection clause as an example, that those ideals, and hence meanings, would change if the Constitution were identified as a source of higher law guiding legislators, rather than a source of foundational law mandating judicial application.

**DIVESTING THE COURTS: BREAKING THE JUDICIAL MONOPOLY ON CONSTITUTIONAL INTERPRETATION**

*Lawrence C. Marshall* 481

Professor Marshall discusses statutory interpretation in the contexts of the avoidance doctrine and the process of judicial review. Arguing that the goal of promoting constitutional dialogue between the governmental branches is not furthered by either practice, he proposes alternatives for broadening the flow of discourse between Congress and the Court. Professor Marshall suggests that such congressional stimulation could pave the way for the legislative body to act as the first bulwark against assaults upon constitutional rights and values in this age of a decidedly conservative Court.

**SURVEY**

**CHICAGO-KENT LAW REVIEW FACULTY SCHOLARSHIP SURVEY**

*Janet M. Gumm*, 509

Survey Editor

This survey ranks the leading law reviews based on frequency of citation as well as the productivity of law school faculties in those leading reviews.