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What's the Meaning of This?
Making Sense of Statutory Interpretation

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Interpretive Theories

Lawyers have long debated the best approaches to statutory interpretation. Over time, these approaches fall in and out of favor. Practitioners can benefit from understanding how the law of statutory interpretation has developed (generally and in relation to Texas law). Because variations on these theories reappear, practitioners who can identify the influence of the underlying ideas will be at an advantage. You'll be able to spot when your opponent uses an out-of-favor theory or canon and what arguments to use against it. Also, you'll be able to appeal to judges regardless of their approach to interpretation.

Natural Law

At the time of the Founding, natural law predominated. Its proponents believed that a judge could divine the law by focusing on general principles of justice or logic. They did not feel constrained by statutory text because, as independent actors uncovering the one true law, once true law was discovered, any statute to the contrary was wrong. Even when additional structure (like canons of construction and other interpretive rules) was introduced into the law, judges' opinions obfuscated the real motivations for decisions and allowed them to essentially make law without constraint. *See* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 741 (2009).

The Roots of Legal Realism

Skepticism of the claims that judges were arriving at their conclusions by pure legal reasoning (rather than lesser notions of policy or politics) began in the 1880s. *Id*. at 743-44. Chief Justice Marshall had declared it

> emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. This is of the very essence of judicial duty.

Marbury v. Madison, 5 U.S. 137, 177-78 (1803). But there had developed a sense among these skeptics that a judge could always "find" legal authority to reach whatever outcome he wanted, such that judges were really legislating under the guise of higher order logic and reason.

Although the umbrella term for this loosely organized movement—Legal Realism—was not coined until the 1930s,[1] there were sporadic demands for a more realistic view of judging that abandoned the charade that law was "the perfection of human reason." 87 TEX. L. REV. at 734-47. Oliver Wendell Holmes said it this way: "The life of the law has not been logic: it has been experience."

Plain-Meaning

An approach that centered around enforcing the literal words of the statute had already been operative in England (called the Literal Rule) and can be found in early Texas decisions around this time. *See, e.g.*, *Harris v. State*, 17 Tex. App. 132, 1884 WL 8637, at *2 (1884) ("Whether or not the statute … is wise legislation is not for us to determine. We can only administer the law as we find it"). As Holmes famously said in his essay on interpretation, "We do not inquire what the legislature meant; we ask only what the statute means." *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

This ancestor theory of modern or "new" textualism was criticized because it focused only on the four corners of the text, disregarding that context is frequently essential to meaning.[2]

Intentionalism

Throughout this same period, early American decisions reflect the idea that the ultimate job of interpreting statutes is to implement the intent of the Legislature—even if that conflicted with its chosen words:

> If courts were in all cases to be controlled in their construction of statutes by the mere literal meaning of the words in which they

[1] Karl Llewellyn played an important role in naming the group and, many years later, famously argued that because nearly every canon of construction has a mirror opposite, they provide no determinacy to interpretation. *See* Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401-06 (1950).

[2] John Manning, "What Divides Textualists from Purposivists?" 106 COLUM. L. REV. 70, 79 (2006).

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