Michigan Law Review

Volume 81 | Issue 4

1983

The Twentieth-Century Primacy of Statutory Law

Albert Tate Jr.
United States Court of Appeals for the Fifth Circuit

THE TWENTIETH-CENTURY PRIMACY OF STATUTORY LAW

Albert Tate, Jr. *

DEALING WITH STATUTES. By *James Willard Hurst*. New York: Columbia University Press. 1982. Pp. viii, 140. $15.

A legal professional — practitioner, judge, or academic — tends to focus research and reasoning upon judicial decisions. Even if the issue concerns the application of a statute, usually the exposition primarily relates to the enactment as refracted through prior cases interpreting and applying it. Partly this is due to our Anglo-American legal heritage, where, prior to the twentieth century, law primarily evolved through the decisions that were the foundation and fabric of the common law. The case method of instruction, common to our legal training, perhaps contributes to this persisting concentration on the development of legal principle in judicial decisions. Similarly, constraints of *stare decisis* often pragmatically require us to look first at the cases interpreting a statute rather than to the statute itself for its meaning and present application.

Professor James Willard Hurst's *Dealing with Statutes* is a thoughtful analysis of the central importance of statutory law in the twentieth-century United States. The three essays comprising this relatively brief work[1] — "Legislative Process," "The Interpretation of Statutes," and "The Constitutionality of Statutes" — do not attempt to do more than present a broad overview of the role of statutory law and of judicial interaction therewith. Fundamental principles are restated with insight, and critical points of possible dysfunction are perceptively noted. Most probably, these theoretical propositions, critiques and insights have previously been stated elsewhere by Professor Hurst and others, but the importance of *Dealing with Statutes* lies in its having concentrated in intense and brief focus the central modern-day issues of legislative function and of judicial function with regard to legislation. The truths it speaks may be self-evident, but I, at least, recognized some of them as self-evident only *after* Hurst's skillful and scholarly analysis.

The first essay, "Legislative Process," affords penetrating insight into the fundamental essence of legislative power, including its unique and pervasively controlling role in affording social catharsis and regulation for the

* Circuit Judge, United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana.

1. The essays in the work were derived from the 1982 James S. Carpentier Lectures delivered at Columbia University by the author, who is the Vilas Professor of Law at the University of Wisconsin. Professor Hurst is also the author of several important works on the social history of law, including: THE GROWTH OF AMERICAN LAW (1950); LAW AND ECONOMIC GROWTH (1964); LAW AND SOCIAL ORDER IN THE UNITED STATES (1970); A LEGAL HISTORY OF MONEY IN THE UNITED STATES, 1774-1970 (1973); THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 (1970).

ever more complex and congested society of twentieth-century America. Initially, Hurst notes that "[c]entral to the practical importance of legislative process is the range of jurisdiction of legislatures over parties and subject matter" (p. 2), especially as contrasted with the limits of initiative in lawmaking that hedge executive and judicial agencies. "The open-door principle governing legislative jurisdiction gains emphasis from the fact that there are almost no judicially enforceable procedural limits on how the legislature does its business" (p. 3) — what facts it does or does not hear, what subject matter it does or does not consider, what notice or opportunity to rebut it does or does not give. Hurst summarizes:

> [W]ith all the limitations, imposed by the realities of unequal means, knowledge, and skill of petitioners, the open-door character of legislative jurisdiction has given a distinctive place to legislative process. In the country's experience statute law has had special importance in giving content to public policy and adapting the legal social order to changing currents of interest and circumstances. [P. 4.]

The first essay analyzes the "unique array of legislative powers" (*i.e.*, defining standards and rules; taxing, borrowing, and spending; creating new forms of governmental and private organization; and investigating) and offers a perceptive but brief historical perspective on the changing use of these powers in performing the legislative role from our nation's earliest days to the present. He also reminds us that, due to the roles of legislative oversight and budget committees, "legislation is in important measure a continuing process" (p. 17). The statutes themselves set limits on the jurisdiction and procedures of executive agencies, and "in large part . . . have set the terms on which judges may review the procedures and substance of executive and administrative action" (p. 17). Hurst points out that in modern America, "legislators and the executive and administrative officers in central and in local government to whom they delegated power produced a body of service and regulatory law that dwarfed the common law performance" (p. 27).

The concluding portion of the first essay is in the nature of a paean to the central role of the legislative process — that process of harnessing collective effort and balancing conflicting interests for the purposes of establishing both broad principles of public policy and also particulars of regulation essential to the vitality and social order of a constantly evolving society. Hurst concludes:

> The need to effect a proper balance between responsibilities to make general policy, to respond by proper delegation to needs for more particularized development of policy, and to exercise effective supervision of executive and administrative agencies, has posed constant challenges to twentieth-century legislators . . . . [T]he problems of relating general and particular policy are fixed firmly in the structure of the legal and social order. These problems will not go away. They present the principal challenge of the times to the conscience, skill, and experience of legislative lawmakers. [Pp. 28-29.]

The second essay, "The Interpretation of Statutes," while maintaining the broad philosophical perspective of the first, addresses more mundane and practical concerns, as indicated by the essay's subheadings: "The Intention of the Legislature," "Legislation as Product of a Continuing Pro-

cess," "Form and Substance in Statute Law," and "Rules of Construction." The essay is not, however, a trite restatement of prior propositions or debates but rather, in this reviewer's opinion, an original and forceful exposition of the few most central and controlling principles that, explicitly or not, motivate the approach of a twentieth-century American court in assigning meaning to and devising application of a statute.

By way of introduction, Hurst rejects (for convincing reasons) the thesis of Max Radin[2] and others that it is a judicial fiction to assign any specific legislative intent to the enactments of a multi-membered, often inattentive, committee-dominated legislature. First, while a legislature may not have particular applications in mind, legislation undoubtedly involves "general goals" and a "general range of means" (p. 36) directed at courts or other agencies to assist them in enforcing the statute and its ends. Second, while a "statute is normally the product of focused effort and detailed attention of a relatively few individuals," and while the "committee is the key workplace of the legislature," the work product is, nevertheless, designed for acceptance by the entire body (p. 37). Although "normally the role of the general membership is a cautionary, residual one, [which promotes] responsible work by the specialists," "the limited circle that works up the bill must make such choices and adjustments as they calculate will pass muster before the larger body or not unduly arouse opposition there" (p. 37).

Professor Hurst rather eloquently concludes:

> [A] statute embodies a choice of values carrying obligations on those within its governance, backed by the force of the state. Under our constitutional arrangement of official powers, legislators may legitimately thus set guiding or limiting frames of action for other people. Because the statute's function is to make authoritative value determinations, fulfillment of the function is impossible without inquiry as to what values and what order of values the legislators had in mind. Inevitably those who put statutes to use must exercise considerable discretionary judgment on specifics that the legislators have not directly resolved. Also, they must exercise cautious wisdom in consulting materials outside the statutory text. But in the end the presence of the statute tells them that they deal with an area of public policy where not their value choices but those of a distinct body are to set the course. [P. 40.]

It seems to me that few should disagree with these observations.

I must add, however, that the problems of statutory interpretation most troublesome to me, as a federal appellate judge for the past three years, are not those arising from legislative wording or intention, but rather how a court, bound by *stare decisis*, can reconcile legislatively expressed intent with the judicial encrustations that have added dimension to the original enactment beyond those initially contemplated by its enacted wording.[3] Of

2. *See* Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 406-12 (1942); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-72 (1930).

3. *See, e.g.*, United States v. M/V Big Sam, 681 F.2d 432 (5th Cir. 1982), *petition for rehg. and suggestion for rehg. en banc denied per curiam*, 693 F.2d 451, 452 (5th Cir. 1982), where application of a provision of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1265, 1281-1293, 1311-1328, 1341-1345, 1361-1376 (1978), was rather clearly expressed in unambiguous statutory language. Nevertheless, identical statutory language directed at a different but related situation had previously been interpreted otherwise by a prior decision, and four judges dissented from the denial of an en banc rehearing in the view that

course, the brevity and breadth of the work precludes discussion of such particularized problems, as well as of the rather common situations where, in truth, there is no easily discernible legislative intent extending to unforeseeable circumstances that inevitably reach the court.[4]

The remainder of this second essay on statutory interpretation is the best single treatment I have read of twentieth-century judicial approaches. Partly, perhaps, because of succinctness, Hurst's insights have crystallized my own gropings toward an articulated theory over twenty-eight years of appellate service. Hurst barely refers to the traditional maxims, which are in fact usually spoken of (if at all) as if they prescribed the result. Actually the often contradictory maxims merely help describe an asserted process of reasoning by which the judge, independently, has determined the proper meaning and application of the statute to the case before him.[5]

Having made his point as to the importance of acknowledging the criterion of legislative intent, Hurst suggests that of second importance is "the need to recognize that if legislation becomes a living part of social experience typically it does so as the result of a continuing process, only part of which is represented by putting words into a statute book" (p. 40): "The statutory text is central and commands deference. But to grasp the full reality of its impact we should see it as part of a flow of policy-making activity" (p. 41). As he observes, modern-day courts do not regard legislation as an extraneous growth in the common law garden that needs cropping and weeding. Rather, in an effort to determine and enforce the legislative intent, and responding to the changes in the legislative process in this century, today's courts tend to emphasize and give weight to four principal factors: (1) *the particular legislative history* of the enactment before it, with especial reference to legislative committee reports and floor-explanations and to amendments or changes in the bill between its introduction and enactment, but with appropriate credibility-discount as to other floor statements or committee testimony; (2) *the pattern of succession of other statutory enactments in the particular field*, with the guidance as to the delineation of public policy and consequent interpretation of the present statute furnished by successive statutes over the years; (3) *the bearing of general sectors of legislation on the meaning to be given a particular act*, since "the content of public policy may grow by accretion of statutory precedents in a fashion analogous to the growth of common law" (p. 45);[6] and (4) *the practical, consistent administrative construction* given the statute by the officials charged with its administration, thus recognizing that "a statute of broad reach is not a finished product the day the legislature adopts it" (p. 45). Hurst summa-

---

this prior interpretation had, so to speak, frozen the legislative intent for purposes of subsequent interpretation of the related provision.

4. *See, e.g.*, Tate, *The Judge's Function and Methodology in Statutory Interpretation*, 7 S.U. L. REV. 147, 158-59, 167-69 (1981); Tate, *The "New" Judicial Solution*, 54 TUL. L. REV. 877, 888-90, 897-900 (1980).

5. *See* 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).

6. "Statutes dealing with a variety of subjects may begin to cluster around some common value judgment. Recognizing this reality, a court is warranted in finding evidence of legislative intent under a given act by reference to what legislators have done regarding like subjects under other acts." P. 45.

rizes "these several lines of doctrine and practice" by stating that "[t]he statutory text is basic and central. But if law is to be a vital force in society, the text usually must be seen as part of a flow of policy-making activity that originates before the text is voted and continues after it is on the books" (p. 46).

Hurst also perceptively discusses the hard problem that sometimes arises in reconciling the express wording of a statute (its form) and an application thereby directed that seems contrary to or not contemplated by the statutory choice of policy-values (the substance). Admitting the theoretical difficulty of performing this reconciliation, Hurst suggests that on the rare occasions when this is appropriate the courts may be recognizing the reality that legislatures "[n]ormally . . . act for limited, or at least specialized ends" (p. 52); therefore, it may sometimes be appropriate to go behind the words of the statute to the narrowed legislative intent as reflected by the legislative history. But this admission is appropriately accompanied by a notation of the cautionary limitations (burden of persuasion, alleged ambiguity of statute at least as applied, etc.) that demonstrate why, for most practical purposes, this approach to statutory construction is discussed more often in a classroom than in a courtroom.[7]

The final section of this essay on statutory interpretation, "Rules of Construction," clears away much dead-maxim timber and charts workable rules that are in fact utilized by modern-day courts. These rules are of two natures: those that best reflect the realities of the legislative process as most consistent with the deference owed the legislature in policy-making, and those that explicitly endorse broad value preferences not tied to any particular statutory subject matter. The *former* "rules of construction that reflect familiar patterns of communication or operations in the legislative process" (p. 62) include: customary word usage, indicating either broad or particular applications; statutory context —"we read particular words or phrases in the light cast by other parts of the same statute" (p. 59) — including exception clauses; and material in other actions dealing with the same subject or the same subject matter — since typically the legislature "is likely to deal at one point of time with less than the whole" — so that "legislative intent may emerge in full definition only through a succession of acts" (p. 61). Of the *latter* type of rules declaring broad policy preferences, Hurst deems worthy of mention only the rule requiring strict construction of penal statutes and (surprisingly, at least initially) "the rule (presumption) that a statute in derogation of common law should be construed as not intended to change common law unless that intent is made plain" (p. 62).

The essay emphasizes, however, that these "rules" are only presumptions, casting the burden of persuasion upon those attempting to read a statute broadly or to overturn the common law. The presumption may be rebutted, for example, by the legislative history or by the explicit choice of policy-values represented by the enactment as a whole. After a lifetime of scoffing at the rule that a statute in derogation of the common law should

7. Despite my deprecating remarks, in my own judicial experience I have noted some instances where statutory words literally applied to a changed social or statutory context produce results obviously beyond the contemplated legislative intent, so that there is a substantial issue whether statutory meaning should be frozen to the original context, and statutory language not literally applied to the changed circumstances. *See, e.g.*, sources cited in note 4 *supra*.

be strictly construed, I find myself persuaded, somewhat reluctantly, by Professor Hurst that this construction maxim, if not mechanically applied, represents the realities of the legislative process. The legislature normally considers only one aspect of a problem, and may not in the least consider how its actions might disturb accepted jurisprudential rules related to but beyond the scope of the problem alone addressed.

To use an example from my recent experience, the courts, by considering this principle, might have avoided some of the confusing, laborious, and conflicting opinions associated with the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act.[8] Prior to the 1972 amendments, coverage of the Act was restricted to injuries on the navigable waters; moreover, all injuries to amphibious non-seamen on the navigable waters were regarded as occurring in maritime employment.[9] This clear delineation had been arrived at, however, only after more than thirty years of litigation, during which it was often uncertain whether a land-based worker injured on the waters was required to obtain relief through federal or state compensation remedies.[10] According to rather specific legislative history, the 1972 amendments were designed solely to expand coverage to include maritime workers injured in areas adjoining the navigable waters, as well as actually upon them; nevertheless, in addition to describing this expanded "situs," it became necessary to define those covered by the act as only those "engaged in maritime employment" who were injured on the expanded situs.[11]

The issue then surfaced as to whether the new statutory "status" test of *maritime employment* excluded amphibious workers injured on the water (and, by pre-1972 jurisprudential definition, in maritime employment because of the navigable water situs). Courts laboriously wrestled with the application of this new statutory test in that context.[12] Finally, in its 1982 en banc decision in *Boudreaux v. American Workover, Inc.*,[13] the Fifth Circuit, taking into consideration the complete absence of any contrary legislative intent and the limited and specific changes expressly intended by the Congress, concluded that the new legislative language was not intended to change the prior concept of on-water injury to any amphibious worker as being in maritime employment for purposes of compensation coverage by the Act.[14] It seems to me that much of the confusing, cumbersome, and conflicting judicial reasoning might have been avoided, had we followed Professor Hurst's analysis based upon the realities of the modern legislative

8. 33 U.S.C. §§ 901-950 (1978).

9. *See* Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962).

10. For a summary, *see* Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1043-45 (5th Cir. 1982) (en banc) *cert. denied*, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 82-605).

11. 33 U.S.C. § 902(3) (1978) (as amended in 1972). The legislative history is described in *Boudreaux*, 680 F.2d at 1045-48.

12. *See Boudreaux,* 680 F.2d at 1045-48.

13. 680 F.2d 1034 (5th Cir. 1982) (en banc), *cert. denied*, 51 U.S.L.W. 3549 (U.S. Jan. 25, 1983) (No. 82-605).

14. To be fair, the Second Circuit reached a conclusion contrary to that of the Fifth Circuit in *Boudreaux*; however, the Supreme Court has subsequently adopted the view of the Fifth Circuit. *See* Churchill v. Perini N. River Assocs., 652 F.2d 255 (2d Cir. 1981), *revd.*, 51 U.S.L.W. 4074 (U.S. Jan. 11, 1983) (No. 81-897).

process — that we should presume that legislation directed at a narrowed issue was not intended to change the pre-existing jurisprudential rules on related topics unless that intent is made plain.

This essay concludes with the following excellent summary of the approach of modern-day courts to statutory interpretation:

> If we regard together uses judges make of statutory text, legislative history, and general rules of construction in the second half of the twentieth century, one approach is clearly dominant, standing in sharp contrast to nineteenth-century treatment of legislation: The twentieth-century emphasis is on coming to a specific focus on a given statute in its full-dimensioned particularity of policy, rather than emphasizing material or values not immediately connected to that enactment. Courts now seem usually to strive to grasp the distinctive message of statutory words, taken in their own context, with reference to the documented process that produced that particular act, including legislative history deserving credibility, and policy guides supplied by the legislature's successive development of the given policy area and related areas. The twentieth-century emphasis thus is not on broad, standardized formulas, but on custom-built determinations, fashioned out of materials immediate and special to the legislation at issue. It is an approach both more pragmatic and more deferential to the functions of courts under the separation of powers. [P. 65.]

The final essay, "The Constitutionality of Statutes," "examines key procedures for achieving the necessary adjustments between constitutional grants and limits and exercise of legislative will and choice in making particular public policy" (p. 68). The essay is an invaluable analysis of current theory and practice with regard to judicial review of the constitutionality of statutes. The concern is not with substantive content of constitutional law but rather "with the criteria and procedures developed to deal with special problems involved in analyzing, briefing, arguing, or deciding questions about the constitutionality of legislative action" (p. 68).

Aside from a brief discussion of the institutional roles of legislators and judges, the essay concentrates on the presumption of constitutionality. Relying in part upon an early analysis by Judge Learned Hand, Professor Hurst points out that a statute typically (if not always explicitly) embodies (a) a goal of what ought to be done for the general interest, based on (b) the legislature's actual or supposed appreciation of the present facts that justify this end; together with (c) a choice of means of how the goal should be accomplished, based (d) (similarly to (b)) upon facts of human behavior or human experience relevant to making judgments about the legislative choice of ends and means. Since the court is merely a reviewer and must constitutionally defer to the legislative originator's choices, those attacking the constitutionality of a statute must, in effect, bear the burden of persuasion that under no reasonably contemplated set of facts can the legislature's choice of ends and means be regarded as other than arbitrary. In discussing the application of the presumption, the essay succinctly summarizes its base and reach, the weight of the burden of persuasion to be put on the challenger, the scope of the required rebuttal of the presumption, the influence of the state of the record, and the practicability of meeting the burden of persuasion on issues of fact or of value relating to the enactment's constitutionality. This relatively brief essay is a primer of central issues that should

almost be required reading for legislators, advocates, or judges concerned with issues of the constitutionality of statutes.

The final portion of this essay concerns the development in the latter portion of this century of doctrines of stricter scrutiny of statutes when constitutionally preferred values are at issue, such as those that make race a criterion to the detriment of a disadvantaged class, those that hinder or limit the right to vote, those that explicitly or in practice discriminate against interstate commerce, those that burden processes of public communication, and those that intrude on areas of life that individuals value as of private rather than public concern (such as affairs of the family, childbearing, and freedom to practice religion). The six pages (pp. 99-105) that discuss and critique the workings of preferred-value review once again, as throughout the work, afford insights, perspective, and intelligent appreciation of the central issues and values of the subject.

The thrust of this essay on judicial review emphasizes that judges in this portion of the century have acted with restraint. Even taking into account the courts' preferred-value review (to some extent a creation by the judiciary of values that *it* perceives as constitutionally preferred), the relative role of the judge in public policy is far from "judicializing the law of the late twentieth century" (p. 106). In conclusion, the essay brings into perspective the apparent surge in judicial scrutiny of the constitutionality of statutes that arguably impinge on preferred values:

> First, judges have not been the only actors on behalf of these values. Tardy and cumbersome as it tends to be, the legislative process has also contributed, as in legislation increasing access to public records, regulating use of money in politics, and enlarging legal protection of civil rights. Second, save in the limited instances in which constitutional rules apply, the presumption of constitutionality provides the frame within which the validity of the great bulk of legislation is judged; important as they are, preferred-value categories apply only to a small part of the whole body of statute law. Finally, contests in court carry drama which encourages people to exaggerate their range and incidence. The overwhelming bulk of statute law and the delegated legislation that exists within a framework of statute law never comes into any kind of constitutional litigation. [P. 106.]

The three essays in *Dealing with Statutes*, brief but broad in content, synthesize with perceptive evaluation the current roles of the legislature and the courts in the enactment and application of statutes. The work would be invaluable if it did no more than sum up so succinctly the central thrusts in the twentieth century toward the primacy of statute law and the underlying reasons for the modern changes in the treatment and interpretation of statutes by the courts. The essays, however, are not only a summing-up and critique of this nature and of the relevant considerations and key problem points of the subject. In this reviewer's opinion, *Dealing with Statutes*, with its fresh insights based upon the realities of today's legislative and judicial processes, convincingly discards theoretical approaches mooted by modern circumstances and in their place furnishes a theoretical framework for the understanding of the ongoing relationship between enacted words, legislatures, and courts that is based upon how and why twentieth-century legislators and judges actually act in our always-changing society.