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# Introduction to Symposium on Administrative Statutory Interpretation

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# INTRODUCTION TO SYMPOSIUM ON ADMINISTRATIVE STATUTORY INTERPRETATION

*Glen Staszewski\**

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One of the most significant developments in public law over the past quarter-century has been the resurgence of interest in statutory interpretation.<sup>1</sup> Until recently, virtually all of this scholarship has focused on the judiciary's proper role in carrying out this enterprise in a representative democracy with separated powers. It is increasingly understood, however, that the judiciary does not have primary responsibility for interpreting statutes in the modern regulatory state.<sup>2</sup> Rather, this task is performed initially, and often exclusively, by administrative agencies and other executive officials who have been delegated authority to implement federal programs.<sup>3</sup> Yet, the manner in which the executive branch does and should carry out this task has only recently begun to receive scholarly attention.<sup>4</sup> This Symposium brings together some of the nation's leading scholars of administrative law and legislation to build on this early work. These scholars were asked to (1) comment on the manner in which administrative agencies and other executive officials interpret regulatory statutes; (2) offer normative propositions that could guide the executive branch in this enterprise; and (3)

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\* Associate Dean for Research & Associate Professor of Law, Michigan State University College of Law. This Symposium benefitted from the valuable contributions of many people. I am especially grateful to Mahfouz Ackall, Katherine Beasley, Noga Morag-Levine, Sally Rice, and Cliff Thompson. I would also like to thank all of the Symposium participants for devoting their considerable talents, efforts, and insights to this project.

1. See Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

2. See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502-03 (2005) (stating that "agencies are, by necessity, the primary official interpreters of federal statutes").

3. See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1190, 1196 (2006) (recognizing that statutory interpretation is "a core function of the executive branch," and explaining "that in a great many instances of executive branch statutory interpretation, the question of judicial review does not arise").

4. For some of the early work on this topic, see Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673 (2007); Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889 (2007); Mashaw, *supra* note 2; Morrison, *supra* note 3; Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197 (2007); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990).

explore the relevance of this learning for the judiciary when it reviews the validity of agency action or interprets statutes in other contexts. The following contributions address these and other related questions from a variety of historical, empirical, and normative perspectives.

The Symposium begins by showing that even though the academic interest in this topic is recent, administrative agencies and other executive officials have engaged in statutory interpretation for a very long time. Jerry Mashaw and Avi Perry claim that “well before the Civil War, national administration in the United States was substantial, and statutes were never self-interpreting.”<sup>5</sup> Moreover, they explain that “statutory interpretation was largely an *administrative function* at the national level because administrative action was virtually free from appellate-style judicial review.”<sup>6</sup> Their contribution provides an important examination of the structures and processes for administrative interpretation in the early American republic, which includes an unprecedented survey of every official opinion of the twenty-four United States Attorneys General who served between 1789 and 1860, beginning with Edmund Randolph and ending with Jeremiah Black.<sup>7</sup>

Noga Morag-Levine reaches back even farther and looks across the Atlantic to explore “the process through which the work of agencies came to be equated with statutory interpretation under common law.”<sup>8</sup> She traces this development to a longstanding debate in England over the legitimacy of prerogative royal authority that was available under the civil law in other parts of Europe and whether this authority comported with common law principles. When opponents of the royal prerogative prevailed at the end of the seventeenth century, “the Crown’s regulatory authority was subordinated to parliament, and executive regulation could proceed only under statutory delegation. By definition, agency action became contingent on statutory interpretation.”<sup>9</sup> Morag-Levine explains that the fundamental question of “whether and when administrators [are] entitled to make, rather than strictly interpret law” is still being contested in the United States, but the terms of the debate have shifted to more familiar questions regarding the permissible scope of delegation and the degree of deference that should be accorded to statutory interpretation by agencies.<sup>10</sup>

With this historical background in mind, the Symposium proceeds to explore the nature of statutory interpretation by administrative agencies in

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5. Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 10 (2009).

6. *Id.* (emphasis added).

7. *See id.* at 11, 32 n.95.

8. Noga Morag-Levine, *Agency Statutory Interpretation and the Rule of Common Law*, 2009 MICH. ST. L. REV. 51, 52 (2009).

9. *Id.* at 53.

10. *Id.*

the modern regulatory state. Richard Pierce addresses the fundamental question of which factors “an agency must, can, and cannot consider in making a decision.”<sup>11</sup> He claims that the Supreme Court and D.C. Circuit had followed a consistent and sensible approach to these questions until recent decisions by the Supreme Court, including *Massachusetts v. EPA*,<sup>12</sup> significantly muddied the waters. Pierce sharply criticizes these decisions, claims that they are best explained by the political and ideological preferences of the Justices, and calls for a return to an appropriate set of doctrines on this important subject—which, he suggests, needs to be taken more seriously by the Court.<sup>13</sup>

Pierce’s recommended approach would essentially allow agencies to consider any logically relevant factor that is not precluded from consideration by statute when making a decision, which would presumably give agencies flexibility to interpret statutes in a purposive fashion or one that takes into account substantive background principles from the relevant field of law. In this regard, Michael Herz explains that there has been an “institutional turn” in recent literature on statutory interpretation, and he proceeds to “examine the standard critiques of purposivism, developed with judges in mind, and [to] consider whether th[o]se objections are strengthened, weakened, or unaffected when it is an agency rather than a court that is doing the interpreting.”<sup>14</sup> He concludes that almost without exception, those critiques lose much of their force when applied to agencies, and agencies are therefore “in a better position to interpret statutes in light of their purpose than are courts.”<sup>15</sup>

Similarly, Jonathan Siegel “examines the methodological implications that follow from one of the distinctive characteristics of administrative agencies, namely, their deep engagement with and knowledge of their organic statutes.”<sup>16</sup> He argues that “this distinctive degree of knowledge puts agencies in a particularly good position to utilize an interpretive method which gives special weight to substantive background principles of law and which understands the meaning of statutory text in light of such background principles.”<sup>17</sup> He therefore concludes that in appropriate cases, agencies can help to maintain a sound and coherent legal structure by ensuring that the

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11. See Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 67 (2009).

12. 549 U.S. 497 (2007).

13. See Pierce, *supra* note 11, at 81-88.

14. Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 91, 92 (2009).

15. *Id.* at 94.

16. Jonathan R. Siegel, *Guardians of the Background Principles*, 2009 MICH. ST. L. REV. 123, 124 (2009).

17. *Id.*

statutes they administer make sense in light of the background principles of the relevant field of law.

While these persuasive contributions might suggest that “we are all purposivists again,”<sup>18</sup> my own contribution, in effect, considers whether modern textualists could agree with Herz or Siegel on a principled basis.<sup>19</sup> I claim that the primary theoretical arguments for the new textualism apply with full force to statutory interpretation by administrative agencies and most other executive officials. Meanwhile, however, the proponents of this methodology have endorsed a variety of legal doctrines that increase executive power in ways that are incompatible with textualist theory. Because recent efforts by prominent textualists to explain the apparent tension between their theories of executive and judicial power are either beside the point or unpersuasive, I conclude that their broader legal theory—which simultaneously embraces the new textualism and relatively unbridled executive discretion—is fundamentally incoherent.

After discussing appropriate methodologies of statutory interpretation by agencies in general, the Symposium considers the importance of the identity of the executive officials who are interpreting a statute and the procedural format used by an agency to make its decision. Specifically, Margaret Lemos examines the role of the Solicitor General in shaping the arguments that reach the Supreme Court in cases that involve the interpretation of statutes administered by federal agencies.<sup>20</sup> She conducts an empirical study of the briefs filed in the Supreme Court in every case involving agency statutory interpretation over more than two decades, and finds that the relevant agency did not join the brief filed by the Solicitor General in twenty-seven percent of those cases, which she suggests can serve as a rough proxy for agency participation in the formulation of the arguments being advanced. She claims that because the Solicitor General is more like the Justices than the agencies on every significant point of comparison—congressional intent, expertise, accountability, and public access—the Solicitor General’s screening process “perpetuates a court-centered rather than agency-centered mode of statutory interpretation.”<sup>21</sup>

Meanwhile, Kevin Stack examines the relevance of an agency’s policymaking form to its approach to statutory interpretation.<sup>22</sup> He claims that the considerations that ordinarily distinguish agency and judicial interpreta-

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18. Cf. Herz, *supra* note 14, at 109 & n.73 (citing literature proclaiming that at least when it comes to the judiciary’s role in statutory interpretation, “we are all textualists now”).

19. See Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143 (2009).

20. See Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185 (2009).

21. *Id.* at 187.

22. See Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225 (2009).

tion, such as the appropriate role of politics and the relevance of resource limitations, also have a significantly different place when the agency acts in the context of rulemaking as opposed to formal adjudication. He therefore suggests that an agency's choice of policymaking form may imply a different approach to statutory interpretation—and that an agency's ability to incorporate political preferences and budgetary concerns into its decisions may be greater in the context of rulemaking than in the context of adjudication.

The Symposium concludes by examining administrative statutory interpretation in the wake of the Supreme Court's decisions in *Chevron* and *Mead*. Kristin Hickman examines the role and legal significance of various forms of informal guidance published in the Internal Revenue Bulletin by the national office of the Internal Revenue Service.<sup>23</sup> Not only does she identify inconsistencies between the accepted wisdom and the contemporary reality of this "IRB Guidance," but she also concludes that the contemporary reality "pushes IRB Guidance directly into a large doctrinal void of what it means for a rule to carry the force of law and the extent to which that concept defines the intersection between Administrative Procedure Act (APA) rulemaking procedures and judicial deference doctrine."<sup>24</sup> For example, she points out that the IRS's current litigating position is that IRB Guidance is simultaneously exempt from notice-and-comment rulemaking procedures *and* entitled to *Chevron* deference.<sup>25</sup> She therefore concludes that "IRB guidance requires administrative law to confront questions thus far left unanswered: what does the force of law mean, and does it mean the same thing for purposes of APA rulemaking requirements and judicial deference?"<sup>26</sup>

As might be expected of any relatively new field of inquiry, there is some underlying disagreement about the most fundamental questions that this Symposium addresses. For example, Professors Mashaw and Pierce have previously debated whether it even makes sense to think of agency statutory interpretation as an autonomous enterprise.<sup>27</sup> Even if it does, which actors within the executive branch merit our attention? To the potential consternation of advocates of unitary executive theory, the executive branch is not a monolith. Rather, statutory interpretation by the executive branch will potentially be influenced by the views of the President, White House agencies (such as OMB), the regulatory agencies themselves (both within the executive branch and those that are formally independent), and

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23. See Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239 (2009).

24. *Id.* at 242.

25. See *id.* at 260-64.

26. *Id.* at 271.

27. Compare Mashaw, *supra* note 4, with Pierce, *supra* note 4.

the Department of Justice (including the Attorney General, the Solicitor General, and the Office of Legal Counsel)—not to mention congressional oversight and the prospect of judicial review. Indeed, there may even be “turf wars” within agencies. The question of “who is in charge” and the appropriate institutional hierarchy for authoritatively resolving issues of statutory interpretation that arise within the executive branch will be heavily influenced by one’s views on the appropriate role of “politics” in this enterprise. And, of course, there is a wide range of perspectives on whether the central role of politics in administrative statutory interpretation is something to be celebrated or feared. I have learned a great deal from the contributions that follow, and I look forward to future work on this incredibly complex and fascinating topic.