Report of the Legislative and Campaign Law Section of the State Bar of Texas

Legislative Lawyer

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Legislative Lawyer welcomes a diversity of viewpoints and, from time to time, may feature articles on controversial issues. The views expressed in articles and other items appearing in *Legislative Lawyer* are those of their authors only and are not those of the Section on Legislative and Campaign Law, the State Bar of Texas, or the editors. The articles and information appearing in *Legislative Lawyer* should not be taken as legal advice.

Despite the Challenges, 2020 Has Been a Good Year for Section

Elizabeth Ross Hadley

We closed out 2019 after what most considered a successful regular session and headed into 2020 with wide eyes looking ahead to a busy year of elections, interim hearings, and getting ready for the 2021 session. I don't think any of us knew what was headed our way in 2020 . . . .

First and foremost, I hope this finds you and your families safe and healthy. The Section has had a busy year, even if the last few months have looked quite different. In addition to massive health and economic issues, COVID-19 has changed what campaigning, fundraising, and elections look like, as well as the way the Legislature normally functions in an interim year. We saw the primary run-off election moved due to COVID-19. It was encouraging to see friends heading to the polls to vote early in that election. I hope as many people as possible can vote in the high-stakes November election.

In this important election year, candidates have not been able to go door-to-door meeting constituents, and those of us in the lobby haven't been standing in lines at the Austin Club for fundraisers where we all get to catch up during the interim. I have been impressed, though, with how everyone has quickly pivoted to the virtual world of campaigning, fundraising, and more. Of course, we haven't had the interim hearings we are accustomed to either, but we know there will be a legislative session starting January 12, 2021, no matter what, and it will be interesting to see how that works—masks, sneeze guards, and all.

The Section continued to build on the success of previous years as one of the Bar's newer sections. The most exciting accomplishment of this year is the legal specialization in legislative and campaign law approved by the Texas Board of Legal Specialization and the Texas Supreme Court. Our section worked hard to get this specialization recognized. The application and planning process for the first certification exam later this year is underway. We look forward to welcoming our first class of lawyers as certified specialists in legislative and campaign law!

The section hosted its annual CLE in December; we hoped to host a Spring CLE, but that also changed due to COVID-19. In the fall and early in 2020 we enjoyed hosting several happy hours for members to network and get to know one another. We hope that can continue once we can all gather together again safely. While we will not be able to meet at the Annual Meeting this year in person, we are looking to plan some virtual CLE events later this year, so stay tuned.

It has been an honor to serve as Chair of this section for the 2019-2020 year, and I appreciate the hard work of our entire council. It has been exciting to watch the section continue to grow, especially in diversity both in the section and on the council, and I look forward to watching the growth continue in the next year and beyond, especially as we welcome five new council members. Stay safe, and I hope to see everyone in person sooner than later!

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A Beginning

The Legislative and Campaign Law Section was founded to organize the community of lawyers who practice in and before, scholars who study, and judges who implement the decisions made by the political branches of government. "Legislative and campaign law" is, broadly speaking, the law of democratic structure and political process practiced not only before courts, but before legislatures, executive officials, political parties, and other public and private non-judicial actors.

The section was also founded to educate our colleagues in the Bar and judges about this specialized practice of law. Many of them loosely categorize us as lobbyists, legislative aides, gubernatorial advisers, election law scholars, and other narrow terms that overlook that we practice law to solve the challenges of democratic self-governance to ensure its continued viability.

For popular government to work, Justice Neil A. Gorsuch wrote in *A Republic, If You Can Keep It,* we must be able "to talk to one another respectfully; debate and compromise; and strive to live together tolerantly." The *Legislative Lawyer* was birthed to provide a neutral forum, divorced from unnuanced sound bites and social media feeds, for candid and civil examinations of present and emerging political law issues and their potential solutions. The *Legislative Lawyer* seeks to spark substantive, helpful dialogues that generate ideas and create norms that improve governance in the 21st century; "puffs of lawyers cannot be had through our columns," as the editor of the *Texas Law Review Weekly* announced in an 1883 editorial, and will have to be looked for elsewhere.

We also seek to be a record of the law in this area by highlighting ongoing regulatory and judicial activity because e-mail notifications of opinions and enforcement activity often get lost in swamped in-boxes.

No publication has a natural life span, and the *Legislative Lawyer* will survive only to the extent that it is useful to the legislative and campaign law community and the larger Bar. "In . . . getting this first issue out, we have not reached our idea of perfection," that 1883 editor wrote, "and trust we will not be hastily judged." Through trial and error, and with your help, we hope to make the *Legislative Lawyer* of lasting service to the profession.

Statement of Editorial Policy

Legislative Lawyer is the report of the Section on Legislative and Campaign Law of the State Bar of Texas. It is a journal for lawyers who practice in the arena where the people determine their elected representatives and, through them, determine how best to live in safety and happiness. (That's not us, that's Jefferson). *Legislative Lawyer* is a forum for the discussion of the legal issues surrounding the political and legislative processes by the bar and the academy.

Legislative lawyers enable citizens to effectively exercise their rights of political participation. While they may not personally agree with the causes they defend, they defend them because demagoguery is the death of democracy. Thus, *Legislative Lawyer* does not shun controversy in its pages. Direct engagement with the issues from all viewpoints is the only way to provoke serious thought about the role lawyers do, might, and ought to play in the functioning of our democratic institutions.

Serious thought does not require sour expression or dull prose. *Legislative Lawyer* seeks to be useful. Lively and readable articles with a considered viewpoint are preferred to wooly writing and unchallenged assumptions. *Legislative Lawyer* seeks to stand out from the usual run of bar publications—one that is welcomed each time with expectation.

The views expressed in *Legislative Lawyer* are not those of the Section on Legislative and Campaign Law, the State Bar of Texas, or the editors. Rather, the views are those of thoughtful practicing and academic lawyers and judges who are concerned with the mechanics of democracy and are willing to share those concerns with their colleagues and the public.

Submission Guidelines

Legislative Lawyer seeks thoughtful, well-researched articles on any topic connected with the practice of law in the legislative or political processes. *Legislative Lawyer* prefers articles with a conversational tone, and articles with overly formal writing are discouraged. Articles should be between 1,200-2,000 words, excluding endnotes, and prepared as a Microsoft Word document. Book reviews and shorter articles focused on case updates or practice topics should be between 600 to 1,200 words.

Please use endnotes, which should be limited and concise. Include a one- to two-sentence description of your current professional affiliation, including your title (if any) and firm, law school, or organization. All citations to authority should follow *Texas Rules of Form: The Greenbook* (14th edition) and *The Bluebook: A Uniform System of Citation* (20th edition). For other style matters, refer generally to the *Texas Law Review Manual on Usage and Style* (14th edition).

Submit your manuscript as an e-mail attachment and send to *hugh.brady@utexas.edu.* Please include your postal mailing address and daytime telephone number. The editors reserve the rights to reject, edit, and/or refuse to publish any article for any reason without explanation.

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ARTICLE

Some Reflections on "Spent" Statutes

Tobias A. Dorsey

Which statutes have permanent effect and which do not? In most cases this is not terribly difficult to sort out. When the Federal murder statute states "Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life," we recognize that this statute has lasting effect. On the other hand, when an act of Congress directs an agency to provide grants during fiscal year 2020, we recognize that this statute does not have effect beyond fiscal year 2020.

But there are plenty of gray areas. Imagine, for example, a statute that says the following: "Not later than May 1, 2021, each amusement park in the United States must submit to the Congress a report on the aggregate happiness accrued by visitors during calendar year 2020." This is not a permanent statute, surely—but precisely when does it cease to have effect?

The knee-jerk response might be May 1, 2021—the deadline for submitting the report. But not so fast. What if every amusement park submits its report early, by February 1, 2021? Isn't it fair to say that the statute has been fully executed as of February 1, and therefore ceases to have effect on that date?

And conversely, what if some amusement parks fail to submit their reports by the deadline? We might all agree that those parks have violated the statute. But does it follow that the statute ceases to have effect on May 1, or does it mean that the statute continues in effect until all parks are in compliance (or, perhaps, until they cease to qualify as amusement parks)?

To be sure, there may well be related statutes that shed light. Perhaps there is a statute that tells us the consequence of non-compliance—a single fine of $10,000, perhaps, or a continuing fine of $1,000 for each day of delay. The nature of the consequence likely dictates how long the reporting statute lasts. If a single fine, the legal effect almost certainly ends on May 1; but if a daily fine, the legal effect almost certainly continues beyond May 1, perhaps indefinitely.

I suggest from this that when we ask whether a statute has permanent effect, what we really want to know is whether legal consequences continue, perpetually, to arise under the statute. If they do, it is a permanent statute. If they don't, it isn't—the statute will, at some point, stop applying. It will become . . . well, we don't really have a word for this. "Expired," perhaps? That seems unsatisfactory.

We in the United States might do well to import some vocabulary from Commonwealth jurisdictions, which tend—for various reasons—to have systems of codification and law revision that are more well-developed than ours. In Canada, for example, a distinction is made between statutes that are "permanent" and those that are "temporary," and both categories can, eventually, become "obsolete." But they become obsolete in different ways.

A statute, even though permanent on its face, can become superseded by events—that is, reality may

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shift to such a degree that, as a practical matter, it no longer applies to any set of facts. Imagine, for example, a law governing an endangered species that has become extinct, or a law imposing sanctions on a foreign government that has collapsed into a failed state.

Or a statute, even though permanent on its face, can become seen as archaic—so much so that it ceases to be followed or enforced. Imagine, for example, a law based on wholly outdated norms or values. To be sure, it is ordinarily the province of the legislature, not the executive or the courts, to determine whether a law should be revised or repealed, but the legal concept of "desuetude" does exist in the states, though not at the Federal level.

But the main topic here are statutes that are temporary on their face. These can, of course, become obsolete in either of the two ways described above—but typically they become obsolete the old-fashioned way: they apply only for a period of time or only to a particular class of things. Again, we in the United States don't have a word for this. We could say they become expired or obsolete, but we might do well to borrow from Commonwealth jurisdictions, where a temporary statute that has run its legal course is said to be "spent."

A spent statute, in other words, is a temporary statute whose legal effects have all occurred—all benefits and liabilities have vested, all duties have been discharged. One example of a spent statute is the amusement-park statute we imagined above—at a certain point, the legal consequences stop accruing. But our session laws are full of other examples. Consider what happens when one statute amends another: the amendatory language—striking this and inserting that—is typically deemed to be executed (and, therefore, to become spent) the moment the statute takes effect. Similarly, when a statute includes a transition provision or grandfather clause, the provision or clause becomes spent as soon as the transition is complete or the grandfathered matters have ceased to be.

This idea that some laws are temporary, and temporary laws become spent, should matter to each of us as lawyers, but it probably matters most to government lawyers. Above all, it matters to lawyers who work in law revision offices, such as in the Office of the Law Revision Counsel of the U.S. House of Representatives, because determining whether laws are permanent or temporary is a key part of their daily work.

Indeed, a law revision office can probably offer great insight to the rest of us into the criteria we should consider when determining whether a law is permanent or temporary, or has become spent or otherwise obsolete. But law revision offices often prefer to be opaque. If they have internal conventions or manuals, they ordinarily do not publish them. Thus, while courts in recent years have taken an interest in legislative drafting offices and in using drafting conventions and drafting manuals as a guide to meaning, courts have not yet turned to using law revision conventions or law revision manuals as a guide to statutory permanence or obsolescence. Perhaps they should—and perhaps law revision offices should make this possible by making their conventions and manuals available to the public.

In the meantime we can look at the code books themselves, where the final rulings of the law revision offices are self-evident, even if the reasons are not. Consider the United States Code, whose codification notes indicate that thousands of such rulings have been made. The notes employ the phrase "omitted from the Code" more than 1,300 times and the phrase "omitted as _____" more than 3,500 times—where the blank space can be filled by any of a wide number of terms. Some indicate a judgment about semantics: "omitted as surplusage," "omitted as unnecessary," "omitted as included in [other statutory term or provision]". But many indicate a judgment about permanency, or lack thereof: "omitted as obsolete," "omitted as superseded," "omitted as executed," "omitted as terminated".

In the codification notes to 2 U.S.C. § 44, for example, we learn that the Congress in 1906 authorized a mileage allowance for the Congressional delegate from the territory of Alaska—but after Alaska was granted statehood in 1959, losing its nonvoting delegate but gaining two senators and a representative, the law revision office ruled the statute "obsolete" and dropped it from the Code. A similar thing happened with a mileage allowance provided by a 1902 statute to the resident commissioner from the Philippine Islands—after the Philippines was granted independence in 1946, the law revision office ruled the statute "no longer in force" and dropped it from the Code.

These rulings seem straightforward and uncontroversial: the mileage-allowance statutes were designed to be permanent but were superseded by events. Other rulings by the Law Revision Counsel may be less straightforward and more controversial, but of great interest to government lawyers.

What may be of most interest are rulings on statutes that involve interbranch relations, because the interpretation of such statutes can be fraught with political concerns. It is fairly routine for the Congress to pass a law requiring an agency to submit a report on X or promulgate a regulation on Y. These laws may, of course, be drafted as permanent law—a report to be submitted annually, or an ongoing duty to maintain a set of regulations. But a great many of these laws do not appear to be permanent. On their face, they require the completion of a single task or set of tasks. Is such a law permanent or temporary? If temporary, when does it become spent? These are legal questions, but agency lawyers can be tempted to turn them into political ones.

Consider a simple requirement for a one-time report. A typical example is section 1703 of Public Law 101-647 (1990), which stated that "Not less than six months after the date of enactment of this Act, the United States Sentencing Commission shall transmit to the respective Judiciary Committees of the Senate and House of Representatives a report on mandatory minimum sentencing provisions in Federal law." The analysis here seems straightforward—this is a temporary statute that becomes spent on the date on which the Commission transmits the report or the date that is six months after enactment, whichever is later.

In theory, if the Commission fails to transmit the report on time, a one-time criminal fine could be imposed under 18 U.S.C. § 2705. But in reality, agencies miss deadlines like these all the time, and criminal fines are never imposed. When Congressional committees want a report, they do not enforce it by legal process. They enforce it by bringing political pressures to bear.

And there's the rub. In the context of interbranch relations, there are many statutes that no longer accrue legal consequences and, therefore, should be treated as temporary (and, eventually, as spent). But they may still accrue political consequences—so agency lawyers, out of an abundance of political caution, can be tempted to call them permanent.

Consider the original freestanding statutes that required the display of the POW/MIA flag at certain federal locations on certain days. These statutes were eventually repealed and their provisions codified into positive law at 36 U.S.C. § 902, but the law revision office determined that several provisions did not need to be included in the positive-law codification because they had been "executed." They were:

1. A requirement that, within 180 days after enactment, the head of each responsible agency prescribe such regulations as may be necessary. Section 1082(h) of Public Law 105-85.

2. A requirement that, within 30 days after enactment, the Administrator of General Services procure flags and distribute them as necessary. Section 1082(i) of Public Law 105-85.

3. A provision repealing the law previously in effect. Section 1082(j).

These three rulings seem entirely correct. Each provision is temporary on its face. The third provision became spent immediately; the second provision became spent on Day 30 (or when the flags were procured and distributed); and the first provision became spent on Day 180 (or when the regulations were prescribed). Is the Administrator under a continuing duty to procure and distribute flags? Are the agencies under a continuing duty to maintain those regulations? The ruling of the law revision office is no, and this seems uncontroversial. The requirements were one-time requirements, not permanent ones.

To be sure, there may be members of Congress who are unhappy with this result. They may, for example, want the Administrator to procure and distribute flags on an ongoing basis. Agency lawyers, out of an abundance of political caution, may disagree with the ruling of the codifiers and decide instead that the statute is permanent.

In this particular example, we are not likely to see agency lawyers disagreeing with the ruling—for the simple reason that, because the ruling took place in the course of a positive-law codification, the underlying provisions (subsections (h), (i), and (j) of section 1082) were ultimately repealed. But in other situations, political caution may hold sway, and cause agency lawyers to construe as permanent a statute that properly should be construed as temporary.

My example of this comes from personal experience as special counsel for the Sentencing Commission.

One of the Commission's ongoing annual duties is to review and amend the Federal sentencing guidelines, which are calculated by the Federal judge whenever a defendant is sentenced for a Federal crime. *See* 28 U.S.C. § 994(a), (o), (p). There are many instructions, permanent on their face, telling the Commission how to construct the guidelines and what the left and right limits of the guidelines must be. *See generally* 28 U.S.C. § 994.

Over the years, the Congress has enacted a vast number of statutes that direct the Commission to review and amend the guidelines in one way or another. In many cases the Congress has given the Commission discretion over precisely what to do (and whether to do it), such as by directing the Commission to "review and, if appropriate, amend" the guidelines to account for a particular sentencing factor. In other cases, the Congress has dictated a particular result. The most forceful example is section 401 of Public Law 108-21, which contained a series of direct amendments to the guidelines—i.e., language stating that guideline X is amended by striking Y and inserting Z.

The law revision office has treated every one of these statutes as temporary rather than permanent. The statutes are referenced in the code in the same manner as appropriations provisions and other temporary provisions—in the notes following 28 U.S.C. § 994, by listing the relevant citations rather than by printing the language. The position of the law revision office seems entirely correct—these provisions are temporary on their face. They became spent as soon as the Commission completed action or, in the case of the direct amendments, as soon as the direct amendments were executed. These requirements are in the same posture as the requirement to prescribe regulations for flying the POW/MIA flag.

Is the Commission under a continuing duty to maintain the guidelines in their as-amended form forever? The ruling of the law revision office seems to be no, and this seems correct. On their face, these are temporary, one-time requirements to change the guidelines. The statutory language, as drafted, does not set forth any permanent requirement to keep them that way forever—at least not in the legal sense.

But again, there's the rub: while there are no legal consequences, there is a fear of political consequences—so over the years, the Commission's lawyers, out of an abundance of political caution, have generally yielded to the temptation to call them permanent. There may be members of Congress who want these provisions to remain as they are, so Commission lawyers disagree with the ruling of the law revision office. In their legal analysis they find, as a matter of statutory interpretation, that there is an implied duty to honor the directive on an ongoing basis—reasoning, perhaps, that such a duty is "congressional intent." What is really happening, it seems to me, is the lawyers are playing at legislative affairs.

I do not suggest that agency lawyers should ignore legislative relations when advising their clients—that would be foolish and quite possibly dangerous. I simply suggest that agency lawyers should keep legislative relations out of the legal analysis. It is one thing to say that a statute is spent and no longer binding on us, but the Congress remains interested and we should weigh that carefully; it is another thing to say that a statute is permanently binding.

To do this requires the skills of a legislative lawyer, and those skills are in short supply. We in the legal profession should foster the development of these skills and the maturation of legislative lawyers—lawyers who understand legislation in all its aspects, from legal and parliamentary matters to politics and policy. Only then will we have lawyers with the intellectual ability to see the difference between legal analysis and legislative affairs, and the professional integrity to convey it.

ARTICLE

Voting Absentee in Texas: Disability, COVID-19, and Statutory Interpretation

Chad W. Flanders and Kristen Spina

During the COVID-19 pandemic, some states began allowing voters to vote by mailing in their ballots rather than having to go to the polls. New Hampshire, for example, announced in April that voters who were concerned about getting COVID-19 could vote claim a "physical disability" under its state election rules and vote absentee.[1] Election officials in Texas had supposedly been giving voters similar guidance about its own election code.[2] In a letter to election officials and clerks, the Texas Attorney General said that if this was what clerks were telling voters, they should stop.[3]

Local officials and the Texas Attorney General were disagreeing over how expansively to read a single provision in the Texas Election Code regarding when voters can vote absentee due to "disability."[4] That provision specifies that a voter has a "disability" if the voter "has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health."[5] The Texas Attorney General believes that having a fear of contracting COVID-19 by going to the polls does not amount to a "physical condition;" it is at best an "emotional" condition, i.e., the state of being afraid.[6] Those on the other side—which includes not only election officials but now a number of other groups—believe that the condition of "lacking immunity to COVID-19" is indeed a "physical condition" not merely a subjective fear and (what's more) a physical condition that could injure the voter if he or she goes to the polls and gets infected.

The Texas Supreme Court, in a unanimous decision in late May 2020, sided with the State's interpretation. But there were several concurring opinions, which revealed a somewhat divided court. When it comes to whether any individual voter has a disability, the court was unanimous that Texas pretty much has the electoral equivalent of "don't ask, don't tell."[7] Clerks shouldn't affirmatively mislead voters into thinking that an otherwise "healthy" person could claim a disability based on a fear of getting COVID-19; in fact, they shouldn't give much advice about what a disability is at all. If they are asked, then (at least according to the seven justices who signed on to the majority opinion) they can't say that fear of getting COVID-19 makes a voter disabled. Beyond that, however, clerks are not required to ferret out any voter who *might* claim a disability based on his or her fear of catching COVID-19 at the polls. If a voter marks the box next to "disability" on the absentee ballot application, they get an absentee ballot.

Five justices, however, wrote concurring opinions, and two of those five only joined the judgment, and not the opinion of the court—which shows a less "unanimous" opinion underneath the surface. In what follows, we focus more on what divided the court rather than on what united it, which turns out

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to be much more interesting. We make three brief points regarding the interpretation of the provision concerning "disability." Our first point revolves around the plausible plain meaning of the code provision. The second point discusses the possibly absurd results that might come from interpreting the statute one way rather than another. Our final point concerns Texas courts and the "democracy canon" of statutory interpretation, which might act as a tie-breaker between the two sides, but which the court, in its decision, did not employ.[8]

Plain Meaning

The starting point of the interpretation of any law is the "plain meaning" of the text.[9] In a letter to county judges and county election officials, the Attorney General helpfully divided the disability rule into two parts.[10] The first part of the rule is that in order to be disabled you must have a "sickness" or a "physical condition," and the second part is that this sickness or physical condition prevents you from going to the polls either because you need personal assistance to do so, or if you go to the polls, there is a "likelihood" of being injured or harmed. The Attorney General said, we think correctly, that to have a disability under the regulation, *both* parts must be satisfied: that is, you must both have a sickness or physical condition *and* that sickness or physical condition prevents you from going to the polls for either of the two listed reasons (i.e., you need personal help or you will get injured).[11]

The two parties, and some of the justices, disagreed over what "physical condition" means in the regulation. The majority opinion sided with the Attorney General and broke it down this way: physical pertains to the body, and "condition" is an "illness or medical problem."[12] But there is a second possible definition, appealed to by some of the concurring justices (Boyd and especially Bland), which suggests a more general interpretation of the term "physical condition": a condition is simply a state of being. The majority's position is that if you are a *health*y person but do not happen to be immune to COVID-19, you are not sick or suffering from a physical illness or medical condition. But it seems possible to assert, plausibly, that a general lack of immunity is a condition of your physical person, and so a "physical condition" under the regulation. Lacking immunity from COVID-19 is something having to do with your physical body, and not—as the Attorney General said—only a subjective fear in your mind.

But this is not the end of interpreting "disability" in the code, and it is here where the justices find some consensus. For the definition also has a second part, regarding the likelihood of physical injury based on one's physical condition. Although the justices split over whether lack of immunity to COVID-19 was a "physical condition," they came closer to agreeing on the meaning of "likelihood," and the role it played in defining "disability." Those justices that believed lack of immunity by itself could be a "physical condition" nonetheless doubted (and here they sided with the majority) there was a "likelihood" that going to vote *and* not being immune to COVID-19 would injure one's health. In interpreting "likelihood" they took it to mean (citing some Texas cases) "probable" rather than merely "possible." It would not be enough, in other words, that one had a chance of one's health getting injured if one went out to vote, even if lack of immunity did count as a qualifying physical condition.[13] But the concurring justices also left open that a particular voter, given his or her situation,[14] might face a higher risk of injury by catching COVID-19 on election day.[15]

Absurd Results

The plain meaning of the terms "disability" and "physical condition," we think, aren't obvious, as the disagreement between the justices seems to show. But when a law is ambiguous, other canons of statutory interpretation can come into play. For example, one might contend that by reading physical condition as implying *illness*, this makes physical condition as "mere surplusage,"[16] because it simply repeats the idea behind "sickness." But a more relevant canon here might be the canon against "absurd results." As one Texas court put it, "if a statute may be interpreted reasonably in two different ways, a court may consider the consequences of differing interpretations in deciding which interpretation to adopt." In particular, "[i]f one reasonable interpretation yields absurd results while the other interpretation yields no such absurdities, the latter interpretation is preferred."[17] Both the majority opinion and the Texas Attorney General made arguments in this vein.

The Texas Attorney General believes that reading "physical condition" to cover any case where a healthy person fears they might get sick if they go to the poll leads to the absurd result that *anyone* can get a mail-in ballot, because one could be afraid of getting the flu by going to vote. That, they argue, would be absurd. The legislature surely could not have meant to cover everyone under the category of "disability."[18] The majority opinion took a similar position, arguing that if physical condition merely meant "physical state of being" then the disability definition would "encompass the various physical states of the entire electorate."[19]

But one can blunt the force of the absurdity argument by reading the *entirety* of the definition of disability. It is not only that one has the physical condition of lacking immunity to COVID-19, it must also be the case that this lack of immunity makes it likely that one's health will be injured if one goes to the polls. Thus, while lack of immunity to COVID-19 is indeed a physical condition, it will not *always* be the case (we hope) that going to the polls would make it "likely" that you get injured, so that "disability" is not a blanket excuse, but one that is context-sensitive to presently existing risks. In other words, not all physical conditions at all times mean that having such a condition makes it more likely that going out to vote will cause one to be "injured."[20] And of course, if anybody is now immune to COVID-19, then they would *not* be disabled, because they would not face a risk of being injured at the polls—at least, not by catching the COVID-19 virus.[21]

The Democracy Canon

There is yet another canon of statutory construction that is relevant here, which Richard Hasen has dubbed "the democracy canon."[22] The democracy canon is basically the rule of lenity applied to election laws: in a case where an election rule or regulation is ambiguous, it should be read in a way to favor the voter's ability to vote, rather than in a way that restricts that right. In a mid-century Texas absentee ballot case, the court adopted an especially strong version of the democracy canon.[23] "The right of the citizen to cast his ballot and thus participate in the selection of those who control his government is one of the fundamental prerogatives of citizenship and should not be impaired or destroyed by strained statutory constructions," the court said.[24] Therefore, if one was going to declare invalid the ballot of someone "not morally at fault" the legislature must say so "in clear and unmistakable terms"[25]—i.e., unambiguously.

This canon certainly favors a broad interpretation of disability; here, reading "physical condition" and "likelihood" expansively is a feature, not a bug. More generally, using the democracy canon could provide a sort of safe harbor for those election officials who may not be especially eager to look behind voters' reasons for claiming disability. And one can also look to Texas's history to endorse the idea behind the democracy canon. Texas used to require a doctor's certification in order to claim a disability.[26] It no longer has this rule.[27] Moreover, previous opinions from the Attorney General at least seemed to have a general orientation consistent with the democracy canon: that disability should be construed broadly, rather than narrowly.[28] That the court did not appeal to the democracy canon, let alone refer to it, seems a missed opportunity.[29]

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[1] Memorandum from William M. Gardner, Secy. of State, & Gordon J. MacDonald, Atty. Gen., to N.H. Election Officials (April 10, 2020), https://perma.cc/N2YU-T3V6.

[2] Petition for Writ of Mandamus at 1-2, *In re State of Texas,* No. 20-0394, 2020 Tex. LEXIS 452 (Tex. May 27, 2020), https://perma.cc/Q5NB-CX67.

[3] Letter from Ryan M. Vassar, Depy. Atty. Gen., to Hon. Stephanie Klick, Chairwoman, H. Comm. on Elec. (April 14, 2020), https://perma.cc/JN62-WHZZ.

[4] Elec. Code § 82.002(a).

[5] *Id.*

[6] Petition for Writ of Mandamus at 13; Tex. Atty. Gen., Guidance Letter on Ballot by Mail Based on Disability (May 1, 2020), https://perma.cc/S7CF-CEQV [hereinafter Disability Guidance Letter].

[7] *See* Richard L. Hasen, *Texas Voters Face Malicious Prosecutions After COVID-19 Absentee Ballot Ruling*, Slate (May 27, 2020, 8:10 PM), https://perma.cc/HU9N-2PT3.

[8] We expand more on this third canon of interpretation in our *Texas Is the Next Major Battleground Over Pandemic Voting Rights,* Slate (Apr. 17, 2020 7:10 PM), https://perma.cc/2M4E-KU8U.

[9] McIntyre v. Ramirez, 109 S.W.3d 741, 745 (Tex. 2003).

[10] Disability Guidance Letter. This distinction was also highlighted by Justice Boyd in his concurring opinion. *In re State of Texas,* 2020 Tex. LEXIS 452 at *38-39 (Tex. May 27, 2020).

[11] In a 2017 opinion, Paxton opined that a sexually violent offender might suffer from a "sickness" and could fit under the definition of "disability." Atty. Gen. Op. No. KP-149 (May 18, 2017). Strangely absent from the opinion, however, is any consideration of whether the sex offender's sickness would create a likelihood of injury by going to the polls (there is also nothing about whether they would need physical assistance).

[12] As an aside, all the opinions seem to agree that "physical condition" cannot mean a "mental" condition. This raises the possibility that one suffering from a *mental* disability could not qualify as being disabled under the code—even if, because of this disability, one might suffer an injury (e.g., a panic attack) if one went to the polls in person.

[13] Although, interestingly Merriam-Webster's definition for likelihood along with "probability," explicitly says "the chance that something will happen." Likelihood, Merriam-Webster Online (2020).

[14] "Situation" here is meant to be read multiple ways. One may have an underlying health condition that would increase one's risk of being infected. It also could be the case that one's polling place was in an area that had recently seen a spike in infections, making it more likely that one would get infected with COVID-19.

[15] *In re State of Texas,* 2020 Tex. LEXIS 452 at *52 (Tex. May 27, 2020). It is here where the concurring justices go back to the idea that it is up to the voter to determine whether they have a disability, and it is not the job of the election official to second guess voters.

[16] *In re Caballero,* 272 S.W.3d 595, 599 (Tex. 2008).

[17] *Griffith v. State,* 116 S.W.3d 782, 785 (Tex. Crim. App. 2003).

[18] It is sometimes suggested that the Americans with Disabilities Act could be interpreted such that most people would be "disabled." *See, e.g.,* Walter Olson, *Under ADA, We May All Be Disabled,* Wall St. J. (May 17, 1999), https://www.wsj.com/articles/SB926717427783756921.

[19] *In re State of Texas,* 2020 Tex. LEXIS 452, at *24.

[20] A point Justices Boyd and Bland emphasized.

[21] In its petition for writ of mandamus before the Texas Supreme Court, the Attorney General says that COVID-19 would certainly count as a "sickness." But according to the Attorney General's letter to the clerks, even if having COVID-19 is a sickness, one can be considered disabled only if going to the polls would likely further injure one's health. This would mean, potentially, that someone who had COVID-19 but who was asymptomatic could not vote absentee. This strikes us as a scary result, but it is unclear how to get around it. (Nor does it help things if we interpret physical condition as not being immune to COVID-19, for if a person already *has* COVID-19 he or she can no longer be injured by getting COVID-19 at the polls.)

[22] Richard L. Hasen, *The Democracy Canon,* 62 Stan. L. Rev. 69, 71 (2009).

[23] *Sanchez v. Bravo,* 251 S.W.2d 935, 938 (Tex. Civ. App.—San Antonio 1952, no writ).

[24] *Id; see also Owens v. State,* 64 Tex. 500, 509 (1885) ("All statutes tending to limit the citizen in his exercise of this right should be liberally construed in his favor.")

[25] *Sanchez,* 251 S.W.2d at 938.

[26] *McGee v. Grissom,* 360 S.W.2d 893, 894 (Tex. Civ. App.—Fort Worth 1962, no writ).

[27] Megan Hurley, *How Absentee Ballots and Voter Fraud Stopped Texans from Voting by Mail,* Dallas Morning News (April 14, 2020), https://perma.cc/E982-DK4J.

[28] *See, e.g.,* Atty. Gen. Op. No. KP-149 (identifying civilly committed sexually violent offenders as "disabled"); Atty. Gen. Op. No. KP-9 (Mar. 9, 2015) (qualified voter need only satisfy definition of disabled under the statutory language, even though the voter may not be "disabled" under other definitions).

[29] There is other, pending federal litigation against the various absentee balloting provisions, although that litigation deals with questions of Constitutional law, not questions of statutory interpretation.

DANIEL PETALAS, ASSOCIATE EDITOR

Background

The Federal Election Commission is an independent Federal agency vested with exclusive authority to interpret and civilly enforce the Federal Election Campaign Act of 1971, as amended. The FEC consists of six members appointed by the President and confirmed by the Senate, no more than three of which may belong to the same political party. Commissioners must approve FEC activities by a majority affirmative vote. This means that at least four Commissioners must be confirmed to establish a quorum for the agency to conduct its statutory activities. Congress has invested exclusive jurisdiction over the criminal investigation and prosecution of violations of the Act with the U.S. Department of Justice, under the oversight of its Public Integrity Section in the Criminal Division. The FEC and DOJ together oversee civil and criminal enforcement of campaign finance laws related to Federal candidates and spending to influence Federal elections, including the statutory ban on the participation of foreign nationals in local, state, and Federal elections.

Recent FEC Developments

Following the departure of Commissioner Matthew S. Petersen on August 31, 2019, the Commission lacked a quorum for nearly ten months and was unable to conduct any of its statutory functions, including the issuance of guidance through the FEC's advisory opinion process, revising or promulgating new regulations, and conducting civil enforcement activities.

On May 19, the Senate confirmed in a party-line vote the nomination of Section member James E. "Trey" Trainor, 3d, as a commissioner, briefly restoring the agency's quorum. With its quorum restored, the FEC was again able to conduct its statutory oversight activities. However, any proposed activity required the unanimous affirmative vote of all four to take effect.

Within a month of Mr. Trainor's confirmation, Commissioner Carolyn Hunter announced that she intended to resign effective July 3. Consequently, at that time the Commission will again lack a quorum and again be unable to conduct its regulatory activities, unless and until the President nominates and the Senate confirms at least one new commissioner.

Civil Enforcement

The FEC's investigation and settlement activities are confidential by statute until the Commission votes to close the file concerning a particular Matter Under Review (MUR). Nonetheless, the Commission's current enforcement docket reportedly includes between 300-350 pending MURs, many of which suffer from serious statute of limitations concerns. As it works through its enforcement backlog, the Commission likely will prioritize those MURs that include violations that are in jeopardy under the relevant five-year limitations period or "low-hanging fruit" in which consensus can be reached without prolonged debate. Historically, the Commission has met in bi-weekly, non-public executive sessions to consider and vote on pending enforcement matters. The Commission scheduled two executive sessions for the week before Commissioner Hunter's departure, and was expected to resolve at least some of the pending MURs at that time.

Pending Advisory Opinion Requests

As a result of its inability to act since September 2020, four advisory opinion requests were pending Commission review when Commissioner Trainor was confirmed. On June 18, the FEC held its first open meeting after Commissioner Trainor's confirmation, during which it elected him to serve as Commission chairman and approved three of those advisory opinion requests.

Specifically, the Commission concluded that a non-connected political action committee was permitted to deduct a percentage from earmarked contributions to reimburse its own administration and solicitation costs, and that the deducted fee would constitute a contribution to the PAC. Advisory Op. 2019-15 (NORPAC).

The Commission determined that a non-authorized PAC may use a candidate's initials in its own name—at least where the initials are not commonly used to refer to the candidate (citing, for example, JFK and LBJ). Advisory Op. 2019-16 (Shemanski).

Finally, the Commission determined that the paid advertisements a for-profit firm places on an online political discussion forum would not constitute contributions, expenditures, or electioneering communications, would not require disclaimers, and would not require the entity to register and report with the

FEC. Advisory Op. 2019-18 (IDF Intl. Techs., Inc.).

Pending advisory opinion requests are listed on the FEC's website at *https://www.fec.gov/data/legal/advisory-opinions/*. The timeline for decisions on requests is mandated by statute and Commission regulation, requiring action within 60 days (or 20 days for certain urgent matters) of the determination by the Commission's Office of General Counsel that a request satisfies the statutory requirements for a request. Absent a requestor's consent to additional delay or withdrawal of the request, once the Commission regains a quorum, it must address any then-pending advisory opinion requests at public meetings immediately.

Rulemaking Activity

On June 18, the Commission also approved a Notification of Availability regarding a Petition for Rulemaking that proposes an amendment to the Commission's regulations that would limit the amount a self-funded Federal candidate can transfer from his or her authorized campaign committee to a national party committee. The proposal would limit that amount to the individual contribution limit for national party committees. The proposal comes after the reported transfer of $18 million from the Bloomberg presidential campaign committee to the Democratic National Committee in March 2020. The Commission's action in response to the request is ministerial and required to open the rulemaking proposal for public comment; it does not reflect any position on the merits.

Litigation

Civil litigation involving the FEC has continued apace in the Federal courts, notwithstanding the agency's lack of a quorum. Of recent interest, the Supreme Court denied certiorari on March 23 in *Doe v. Federal Election Commission*. The D.C. Circuit's decision which permitted the FEC to publish the names of individuals and groups it found had violated the Act remains in place. Specifically, in Matter Under Review 6920, the FEC entered into a conciliation agreement with the American Conservative Union (ACU), Now or Never PAC, Government Integrity LLC, and attorney James C. Thomas 3d after determining that they illegally funneled $1.71 million from ACU to Now or Never PAC during the 2012 election, the true source of which funds were not in fact ACU. After entering the conciliation agreement, the parties sued the FEC to prevent it from publishing their names in public documents related to the matter. D.C. District Judge Amy Jackson Burman rejected the argument for non-disclosure, concluding that it was foreclosed by *Citizens United v. FEC*, 558 U.S. 310 (2010). The D.C. Circuit later affirmed the district court in a 2-1 decision.

COVID-19 and FEC Filing Deadlines

The FEC has not altered any of its filing deadlines in response to the COVID-19 pandemic. Absent a quorum, the FEC had been unable to do so, nor has it done so since Commissioner Trainor took office.

Criminal Enforcement

Several criminal cases alleging violations of campaign finance laws have resulted in convictions and prison sentences for those involved.

On February 21, in the Eastern District of Virginia, the court sentenced Scott B. Mackenzie, a Virginia political consultant who was treasurer of multiple PACs, to one year and a day in prison and to pay $172,000 in restitution for filing false reports with the FEC concerning roughly $32,500 in PAC money he directed to himself and a close friend. *U.S. v. Mackenzie,* Case No. 1:19-CR-309 (E.D. Va.).

On January 24, in the Northern District of California, the court sentenced James Tong, a California real estate developer, to 15 months in prison for funneling $38,000 of his own money through straw donors into two consecutive congressional campaigns of Representative Eric Swalwell. *U.S. v. Tong,* Case No. 4:17-CR-00474 (N.D. Calif.).

Finally, on January 17, in the Eastern District of Virginia, the court sentenced Kelley Rogers, a Maryland political consultant, to three years in prison, and ordered him to pay $491,299 in restitution and forfeit at least $208,954 in proceeds obtained from fraudulent solicitations of political contributions through several PACs. In pleading guilty, Rogers admitted that during the course of his scheme he solicited contributions from the general public for his PACs based on materially false and fraudulent pretenses, representations, and promises, fraudulently billed his PACs for services that were not performed, and filed false reports with the FEC. *U.S. v. Rogers,* Case No. 1:19-CR-00270 (E.D. Va.).

NEW COMMISSION OFFICERS

At its June 19, 2020 meeting, the Commission unanimously Commissioner Chad Craycraft to serve as chairman and Commissioner Mary K, (Katie) Kennedy as vice-chairman for the period ending June 2021.

ADVISORY OPINIONS ADOPTED

ADVISORY OPINION No. 552

Adopted February 27, 2020

ISSUES

Whether a city employee violates section 255.003(a) of the Election Code by allowing members of the public to display or distribute political advertising at a city-owned facility during or in connection with a candidate debate or forum if the city-owned facility is rented to and paid for by the sponsor of the candidate debate or forum.

Whether a city employee has knowingly authorized the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a city-owned room that is rented to and paid for by the sponsor of a candidate debate or forum.

Whether a city employee has knowingly authorized the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a corridor outside the city-owned room rented to and paid for by the sponsor of a candidate debate or forum or in the parking lot of the city-owned facility where the candidate debate or forum is being conducted. (AOR-629)

SUMMARY

1. A city employee does not violate section 255.003(a) of the Election Code by allowing members of the public to display or distribute political advertising at a city-owned facility during or in connection with a candidate debate or forum if the city-owned facility is rented to and paid for by the sponsor of the candidate debate or forum, and if the sponsor uses non-public funds to pay the city its standard rental rate for the use of the city-owned facility.

2. A city employee does not knowingly authorize the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a city-owned room that is rented to and paid for by the sponsor of a candidate debate or forum and the sponsor uses non-public funds to pay the city its standard rental rate for the use of the city-owned room.

3. A city employee does not knowingly authorize the spending of public funds for political advertising as prohibited under section 255.003(a) of the Election Code if members of the public display or distribute political advertising in a corridor outside the city-owned room rented to and paid for by the sponsor of a candidate debate or forum or in the parking lot of the city-owned facility where the candidate debate or forum is being conducted, and the city employee takes no action to prevent the display or distribution of the political advertising.

ADVISORY OPINION No. 553

Adopted February 27, 2020

ISSUES

Whether section 36.07 of the Penal Code or section 253.034(a) of the Election Code prohibits an elected officeholder from accepting from a political committee transportation, lodging, and meals, or reimbursement for expenses for transportation, lodging, and meals, during a regular legislative session to attend and perform official actions at the political committee's meetings. (AOR-630)

SUMMARY

Neither section 36.07 of the Penal Code nor section 253.034(a) of the Election Code prohibits an elected officeholder from accepting from a political committee transportation, lodging, and meals, or reimbursement for expenses for transportation, lodging, and meals, during a regular legislative session to attend and perform official actions at the political committee's meetings provided that the officeholder renders services at the meeting that are not merely perfunctory.

ADVISORY OPINION No. 554

Adopted June 19, 2020

ISSUES

Whether a contribution from a federal political committee to a federal "Super PAC" is a political expenditure made "in connection with elections voted on in Texas." (AOR-632)

SUMMARY

In our opinion, a contribution from a federal political committee to a federal Super PAC is a political expenditure made in connection with elections voted on in Texas only if the federal political committee intends for the contribution to be used to support or oppose a candidate or measure in an election voted on in Texas. Conversely, a contribution to a Super PAC for a general or unspecified purpose is not a political expenditure made in connection with elections voted on in Texas.

ADVISORY OPINION No. 555

Adopted June 19, 2020

ISSUES

Whether a judge may use political contributions to pay *for equipment and services in connection with producing an educational podcast for practicing lawyers. (AOR-633)*

SUMMARY

A judge may use political contributions to pay ordinary and necessary expenses incurred in connection with producing an educational podcast for practicing lawyers.

ADVISORY OPINION No. 556

Adopted June 19, 2020

ISSUES

Whether a registered lobbyist can be "present" at an event via videoconference technology. (AOR-635)

SUMMARY

No. To be "present" for purposes of Texas Government Code Sections 305.006(f) or 305.024(a), a registered lobbyist must share a physical location with the recipient of the expenditure.

ADVISORY OPINIONS MODIFIED

At its February 27, 2020 meeting, the Commission considered the possible revisions of Advisory Opinion No. EAO-550 (adopted June 28, 2019) holding that public officers may not use government resources for political advertising. The Commission unanimously delayed the deletion of footnote 2 until June 1, 2020.

TEXAS ETHICS COMMISSION RULEMAKING

At its February 28, 2020, meeting, the Texas Ethics Commission voted to adopt new or amended rules or repeal current rules as noted below. The Commission's rules are codified at Title 1, Texas Administrative Code.

ADOPTED RULES (effective March 30, 2020)

Chapter 12. Sworn Complaints.
Subchapter C. Investigation and Preliminary Review
§ 12.86. Motions for Continuance (New)

Subchapter E. Formal Hearing
Division 7. Disposition of Formal Hearing
§ 12.174. Summary Disposition (New)

Chapter 18. General Rules Concerning Reports
§ 18.9. Corrected/Amended Reports (Amended)
§ 18.10. Guidelines for Substantial Compliance for a Corrected/Amended 8-Day (New)
§ 18.11. Guidelines for Waiver or Reduction of a Late Fine for a Corrected/Amended 8-Day (New)

REPEALED RULES (effective March 30, 2020)
Chapter 20. Reporting Political Contributions and Expenditures
Subchapter A. General Rules
§ 20.1. Definition
s. (Partial Repeal of Rule Provisions)

Chapter 22. Restrictions on Contributions and Expenditures
§ 22.6. Reporting Direct Campaign Expenditures. (Partial Repeal of Rule Provisions)
§ 22.5 (Contributions to Direct Campaign Expenditure Only Committees) (Repealed)
§ 22.33 (Expenditure Limits of the Judicial Campaign Fairness Act) (Repealed)

Chapter 27. Judicial Campaign Fairness Act
Subchapter A. General Rules
§ 27.1 (Applicability) (including chapter and subchapter headings) (Repealed)

Subchapter C. General Reporting Rules
§ 27.101 (When a Declaration of Compliance or Declaration of Intent Is Required) (including subchapter heading) (Repealed)

At its June 19, 2020, meeting, the Texas Ethics Commission voted to adopt new or amended rules as noted below. The Commission's rules are codified at Title 1, Texas Administrative Code.

ADOPTED RULES (effective July 13, 2020)

Chapter 8. Advisory Opinions
§ 8.1. Definitions (Amended)
§ 8.3. Subject of an Advisory Opinion (Amended)
§ 8.5. Persons Eligible to Receive an Advisory Opinion (Amended)
§ 8.7. Request for an Advisory Opinion (Amended)
§ 8.11. Review and Processing of a Request (Amended)
§ 8.13. Time Period (Amended)
§ 8.15. Publication in Texas Register; Comments (Amended)
§ 8.17. Request Answered by Letter Response (Amended)
§ 8.18. No Defense to Prosecution or Civil Penalty (New)
§ 8.19. Confidentiality (Amended)

Chapter 12. Sworn Complaints
Subchapter A. General Provisions and Procedures
§ 12.29. Subpoenas (Amended)
§ 12.30. Subpoenas Issued by Counsel for the Respondent (New)
§ 12.34. Agreed Orders (New)
§ 12.83. Preliminary Review (Amended)
§ 12.84. Notice of Preliminary Review Hearing (New)

Chapter 20. Reporting Political Contributions and Expenditures
Subchapter A. General Rules
§ 20.1. Definitions (Amended)
§ 22.35. Corporate Contributions to Certain Political Committees (New)

Chapter 24. Restrictions on Contributions and Expenditures Applicable to **Corporations and Labor Organizations**
§ 24.18. Designation of Contribution for Administrative Purposes (Amended)
§ 24.19. Affidavit Required by a Political Committee Making a Direct Campaign Expenditure from a Political Contribution Accepted from a Corporation or Labor Organization (New)

Daniel Olds, *Ordinary Meaning, Context, and Textualism in Texas Statutory Interpretation,* 53 Tex. Tech L. Rev. (forthcoming 2020), available at https://ssrn.com/abstract=3563087 This Article touches on one of the most important issues in Texas law: how to properly interpret statutes. Statutory interpretation is one of the most important issues in Texas law because there are now statutes that touch nearly every area of life. As former Texas Supreme Court Justice Don Willett once said: "The lion's share of modern-day appellate judging is 'legisprudence'—interpreting statutes. Day by day, the universe of free-form, common-law judging shrinks, meaning the bulk of this Court's time is spent deciding what the Legislature's words mean." Of course, it is well known that the justices on the Texas Supreme Court are textualists, meaning that they focus exclusively on the text of statutes when interpreting an ambiguous word or phrase in a statute and eschew legislative history. But, just knowing that textualism reigns supreme in Texas statutory interpretation methodology does not tell the whole story of how to properly interpret statutes in Texas. In fact, the justices on the Texas Supreme Court do not all apply the principles of textualism the same way. Their disagreements have left many questions in Texas statutory interpretation unanswered, and possibly even conflict with some of the traditional principles of textualism. Even more, how the Texas Supreme Court eventually resolves these unanswered questions has implications for whether Texas courts come to adopt new methods of statutory interpretation that federal courts and other states are starting to adopt. This article seeks to examine how the Texas Supreme Court applies textualism, what disagreements exist on the Texas Supreme Court, and what those disagreements mean for the future of statutory interpretation in Texas.

Aaron-Andrew P. Bruhl, *Eager to Follow: Methodological Precedent in Statutory Interpretation,* N. C. L. Rev. (forthcoming 2020), available at SSRN: https://ssrn.com/abstract=3562715 An important recent development in the field of statutory interpretation has been the emergence of a movement calling for interpretive methodology to be given precedential effect. In such a system, a case would establish not only what a particular statute means but could also establish binding rules of methodology — which tools are valid, in what order, and so on. The movement for methodological precedent has attracted sharp criticism on normative grounds. But both sides of the normative debate agree on the premise that the federal courts generally do not give precedential effect to interpretive methodology.

This Article shows that both sides have misapprehended the current state of affairs. The federal courts already display a substantial amount of methodological precedent. Commentators have underestimated its prevalence for a few reasons, some conceptual and some empirical. On the conceptual side, scholars are rarely explicit about what they believe methodological precedent entails, and some of their implicit criteria are incorrect. On the empirical side, commentators focus too much on the Supreme Court and a few of its fiercest methodological battles rather than viewing the federal judiciary as a whole. If one applies the right criteria and expands the field of view, one sees that we already have a federal interpretive system that is at least semi-precedential. Methodological precedent is most prominent in the lower courts, but there is unappreciated evidence from the Supreme Court too, and the precedential nature of the system is likely to increase.

Adopting a proper understanding of methodological precedent's nature and extent has some implications for the normative debate over expanding the role of precedent in interpretive methodology. Some of the implications should hearten the proponents of methodological precedent. But the fact that the current level of methodological precedent has not received its proper due may show that its proponents' real aims are unlikely to be satisfied even as methodological precedent expands and solidifies.

Anuj C. Desai, *The Dilemma of Interstatutory Interpretation,* 77 Wash. & Lee L. Rev. 177 (2020) Courts engage in interstatutory cross-referencing all the time, relying on one statute to help interpret another. Yet, neither courts nor scholars have ever had a satisfactory theory for determining when it is appropriate. Is it okay to rely on any other statute as an interpretive aid? Or, are there limits to the practice? If so, what are they? To assess when interstatutory cross-referencing is appropriate, I focus on one common form of the technique, the in pari materia doctrine. When a court concludes that two statutes are in pari materia or (translating the Latin) "on the same subject," the court then treats the two statutes as though they were one. The doctrine thus permits judges to use ordinary doctrines of intra-statute interpretation across the two statutes. Determining that two statutes are "on the same subject" thus gives interpreters a powerful tool of interstatutory interpretation.

How, then, should courts determine whether to treat two statutes as one? If we frame the question through the lens of the two currently predominant theories of statutory interpretation — textualism and intentionalism—we can see that the traditional approach of asking about the statutes' "subject matter" in the abstract makes little sense. For textualist judges who care about objective meaning, it makes more sense to engage in interstatutory cross-referencing if and only if the audience for the two statutes—the appropriately informed objective reader of the statutes—is the same. For interpreters who care about subjective legislative intent, interstatutory cross-referencing would generally be appropriate if and only if the two statutes were drafted by and came through the same Congressional committees.

Even if one rejects my proposed approaches, thinking about how to fit interstatutory cross-referencing into modern theories of statutory interpretation raises some confounding issues for those theories. In particular, it requires textualists to articulate explicitly who the audience for any given statute is, for without doing so, the textualist has no theoretical basis for determining when interstatutory cross-referencing is appropriate and when it is not. Thus, irrespective of the specifics of my proposals, looking at the ancient doctrine of in pari materia through the lens of modern theories of statutory interpretation sheds light on important questions about statutory interpretation that courts and theorists have largely ignored.

Anita S. Krishnakumar, *Cracking the Whole Code Rule,* N.Y.U. L. Rev. (forthcoming 2020) Over the past three decades, since Justice Scalia joined the Court and ushered in a new era of text-focused statutory analysis, there has been a marked move towards the holistic interpretation of statutes and "making sense of the corpus juris." In particular, Justices on the modern Supreme Court now regularly compare or analogize between statutes that contain similar words or phrases — what some have called the "whole code rule." Despite the prevalence of this interpretive practice, however, scholars have paid little attention to how the Court actually engages in whole code comparisons on the ground. One prominent article on the topic, published twenty years ago, criticized the Court for treating statutes enacted at different times by different legislators as though they were enacted by one, never-changing Congress. Other scholars have touched on the topic in passing, but no one has systematically studied how judges employ this interpretive tool.

This article provides the first empirical and doctrinal analysis of how the modern Supreme Court uses whole code comparisons, based on a study of the full universe of 532 statutory cases decided during the Roberts Court's first twelve-and-a-half terms. The article first catalogues five different forms of whole code comparisons employed by the modern Court and notes that the different forms rest on different justifications, although the Court's rhetoric has tended to ignore these distinctions. The article then notes several problems, beyond the unrealistic one-Congress assumption identified by other scholars, that plague the Court's current approach to most forms of whole code comparisons. For example, most of the Court's statutory comparisons involve statutes that have no explicit connection to each other, and nearly one-third of the cases compare statutes that regulate entirely unrelated subject areas. Moreover, many of the Court's analogies involve generic statutory phrases — such as "because of" or "any" — whose meaning is likely to depend on context rather than some universal rule of logic or linguistics.

The article argues that, in the end, the Court's whole code comparisons amount to judicial drafting presumptions that assign fixed meanings to specific words, phrases, and structural drafting choices. The article critiques this judicial imposition of drafting conventions on Congress — noting that it is unpredictable, leads to enormous judicial discretion, reflects an unrealistic view of how Congress drafts, and falls far outside the judiciary's institutional expertise. It concludes by recommending that the Court limit its use of whole code comparisons to situations in which congressional drafting practices, rule of law concerns, or judicial expertise justify the practice — e.g., where Congress itself has made clear that one statute borrowed from or incorporated the provisions of another, or where it is necessary to harmonize two related statutes with each other.

Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code,* 112 L. Libr. J. (forthcoming 2020) Many legal researchers may be unaware that some valid statutory provisions appear as statutory notes rather than in sections of the United States Code. This article examines the history, creation, and purpose of statutory notes in the United States Code and provides data on the number of statutory notes that exist. It also explores the challenges statutory notes present in the research process and offers guidelines and best practices for researching and teaching this often overlooked aspect of the United States Code.

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Report of the Legislative and Campaign Law Section of the State Bar of Texas