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Book Review - Reviewing William D. Popkin, Statutes in Court: The History and Theory of Statutory Interpretation (1999)

Stephen R. Alton
Texas A&M University School of Law, salton@law.tamu.edu

of the Confederacy. Areas of "persistent Unionism" such as East Tennessee, western Virginia, and coastal Virginia and North Carolina produced more political prisoners than other areas for which records survive. The mere "belief in the political idea of the Union" was a frequent cause for arresting political prisoners. Furthermore, Neely perceptively suggests, Confederate ideology allowed southerners to label northerners as "alien enemies" and expel them from the South, while Union war aims forced northerners to consider southern sympathizers political prisoners.

Neely concludes his examination of civil liberties in the Confederacy by examining Jefferson Davis's evolving policies and comparing them to those of Abraham Lincoln. Much of the initial difference between the two presidents' policies centered on their relationship to the border slave states. Davis needed to induce them to leave the Union; Lincoln had to convince them to remain in the Union. By late 1862, when it was clear that the border states would not join the Confederacy, Davis adopted harsher measures to deal with internal dissent. By 1864, he came to the conclusion that "civil rights would have to be sacrificed to military necessity" (p. 165). In the final analysis, both Davis and Lincoln ignored constitutional restrictions on government authority in their quest to hold on to territory and to win the war. "Under the pressure of a war for national existence, the Confederate Constitution proved as 'flexible' as the Constitution of the United States, on which it was modeled. And the white people of the South embraced order and sacrificed liberty as readily as Northerners did" (p. 169).

Neely's evidence and analysis effectively destroy historians' unexamined assumptions about confederate fidelity to civil rights during wartime. He also rightly draws attention to the different imperatives facing the Lincoln and Davis administrations, especially in their policies toward the border slave states. This volume will force legal historians to reevaluate the relative reputation of North and South in violating civilians' civil rights, but they may not, as Neely would have it, conclude that there was no substantive difference between "the fate of liberty" in the North and in the South during the Civil War.

DANIEL W. STOWELL
The Lincoln Legal Papers

WILLIAM D. POPKIN, *Statutes in Court: The History and Theory of Statutory Interpretation.* Durham, N.C.: Duke University Press, 1999. 340 pp. $54.95.

In his well-written and well-argued book, William D. Popkin delivers on the promise denoted in his title. Part I of the book details the Anglo-American history of statutory interpretation. Part II begins by surveying the most important contemporary theories in the field of statutory interpretation. Part II ends with the author's rejection of these theories and the exposition of his own theory, which he calls "ordinary judging." Popkin argues that his is "the best perspective for understanding the discretionary judicial role [in interpreting statutes] . . . whereby judges indulge a modest competence to contribute to good government" (p. 3).

The book starts with an examination of the history of the English experience with judicial interpretation of statutes. Despite England's long common law tradition, the judge's role in divining the meaning of the acts of Parliament arose only gradually, because "statutory interpretation could not exist until legislatures developed a sense of separation from judging" (p. 9). This development took several

centuries and coincided with Parliament's achievement of a sense of its own institutional competence as lawmaker and its acquisition of sovereignty, which was accomplished by the end of the seventeenth century. Before that time, the primary lawmakers in England were the judges, whose vehicle was the common law. Not surprisingly, English judges jealously guarded their primacy through devices such as the canon of statutory construction requiring the narrow interpretation of statutes that are in derogation of the common law. According to Popkin, "the judicial role in statutory interpretation was broad and undifferentiated," as English judges continued to view "the common law as the predominant and preeminent source of law" (p. 18). Nor had this view changed appreciably by Blackstone's day: eighteenth century judges "took only halting steps toward abandoning" the practice of equitable interpretation of statutes a practice that regarded the statute's spirit (as discovered by the judges) as superior to its letter (as enacted by Parliament) (p. 18). This practice resulted in an extremely active, substantive role in statutory interpretation and lawmaking on the part of the English judges.

There has been much debate among scholars about the role of judges in statutory interpretation in late eighteenth century America, because, according to Popkin, the historical evidence from this period is ambiguous. However, late eighteenth century American legal thought regarding the relationship between courts and legislatures differed from that of England in two ways. First, Americans viewed legislative sovereignty as a concrete expression of the popular will, something very separate from judging. Second, the American state legislatures of the day had more experience as lawmakers than did Parliament. Thus, in America, at the republic's inception, judgemade law was more "suspect" than in England.

During the nineteenth century, there was increasing reliance on legislation as a source of law in the United States. But, by the second half of the century, it appeared that the courts had begun to "set themselves actively against legal change, whether judicial or legislative, as American judges (perhaps in imitation of their English brethren) more jealously guarded their common law prerogative (p. 59). In spite of judicial rhetoric indicating hostility to legislation, Popkin opines that late nineteenth century American judges often actually engaged in "ordinary legitimate judging, whereby judges exercised their competence to help fit statutes into their temporal setting by integrating them with prior law" (p. 97). He maintains that most of what these judges were doing was legitimate statutory interpretation, which merely forced legislators to express themselves clearly regarding how far they "meant to go in changing prior law" (p. 101). In fact, some of these judges freely invoked the remedial canon of statutory construction, under which a statute whose purpose was remedial was to be construed liberally; this, in contradistinction to the traditional canon requiring the narrow interpretation of statutes in derogation of the common law. In short, nineteenth century American judicial practice was not nearly so hostile to legislation as much of the judicial rhetoric suggests.

Still, in all nineteenth century American judges did evince a general tendency to interpret statutes narrowly, in order to preserve the predominance of the common law, and, with it, the judicial role in lawmaking. In the twentieth century, the judicial practice of purposive interpretation reversed this earlier tendency, by extending the meaning of statutes in order to achieve the perceived legislative purpose or spirit. With the rise in use of legislative committees to draft statutes, legislative history became a reliable source for guiding the judicial process of discovering the meaning of statutory text. Twentieth century America also saw a vast increase in the competence of legislatures in their role as lawmakers; height-

ened legislative competence "forced courts to be less arrogant regarding statutes and their own lawmaking potential" (p. 149). By mid-century, most judges "operated in an environment in which the creative element in purposive judging was hard to deny; but it was also an environment in which no agreement had been reached about how careful the judge must be to avoid the exercise of judicial discretion" (pp. 132-33).

After setting out his view of the history, Popkin, in Part II of the book, propounds his theory of "ordinary judging." "Ordinary judging" represents a middle way of statutory interpretation between two extremes: the earlier philosophy that overstated judicial competence and an indeterminate descriptive pragmatism, which threatens to leave judges without any basis at all for collaborating with legislatures to work out statutory meaning" (p. 151). In the process of developing his theory, the author critiques other theoretical bases for statutory interpretation, most notably textualism and Republicanism. Popkin deprecates modern textualists, who seek to give judges "as little to do as possible by sticking close to statutory language" (p. 153). He rejects the assumption on which textualism is based, that the statutory text is "a stable and reliable source of information about statutory meaning on which the judge can rely" (p. 177). Nor, in Popkin's estimation, does modern Republican theory provide a much better basis for statutory interpretation. Republicanism focuses on "the judge's role in protecting fundamental values," but the problem is that judges do not necessarily have any greater insight than other groups when it comes to defining fundamental societal values (p. 199). Moreover, the traditional substantive canons of statutory construction, on which both textualist and Republican judges often rely, are themselves contradictory and, thus, are malleable.

As a result of the inadequacies of both textualism and Republicanism, Popkin puts forth his theory of "ordinary judging." In this conception of the law, statutes are neither static nor innocent of their past, and judges can help legislatures make law" (p. 247). In Popkin's opinion, "ordinary judging" gets the judge's role right, neither usurping the legislative function (by doing too much), nor abdicating the judicial function (by doing too little). The 'judge's job is to work out the relationship of specific statements of law (whether from common law decisions or statutes) to the broader fabric of the law, sensitive to the institutional competence of various lawmaking institutions" (pp. 247-48). "Ordinary judging" proposes that judges do just this with due sensitivity to the institutional competence of various lawmaking institutions, including their own. As the basis for a moderate judicial role in statutory interpretation, Popkin' s concept of "ordinary judging" presents a promising and useful tool for courts, legislatures, and legal theorists alike.

STEPHEN R. ALTON
Texas Wesleyan University School of Law