

Eleventh Annual Judicial Symposium

THE VEXATION OF LEGISLATION:
Judicial Analysis of Unclear, Incomplete, or Obsolete Statutes

Presented by

NATIONAL FOUNDATION
FOR JUDICIAL EXCELLENCE

July 17–18, 2015
Loews Chicago Hotel
Chicago, Illinois



PROMOTING EXCELLENCE AFFIRMING JUSTICE

A strong, independent, responsive judiciary adhering to the rule of law is one of the hallmarks of a democratic society. Although every citizen has an interest in the maintenance of an effective judicial system, lawyers (as officers of the court) have an even keener interest in this.

It was with this in mind that DRI created the National Foundation for Judicial Excellence (NFJE) in 2004. NFJE is an independent, 501(c)(3) charitable foundation that provides judges with educational programs and other tools to enhance the rule of law and administration of justice.

For eleven years, the NFJE has successfully produced a first-rate symposium, hosting nearly 1,200 appellate court judges from 44 states.

Judges' responses to the programs have been universally enthusiastic, and many have expressed appreciation for the high caliber and balanced nature of the program. Comments include:

- This was a fantastic program—intellectually stimulating and thorough.
- The speakers were excellent and the topics were timely. I anticipate next year's symposium.
- Thanks to everyone for a great program. I already look forward to next year's program.
- This is one of the best organized and informative seminars that I have ever attended. Keep up the good work.
- The program and the entire experience were excellent. I encourage the Foundation to continue this long into the future.
- The program was well planned and of high intellectual caliber.
- Bravo! Keep up the good tradition for which you have laid a sound foundation.
- Thank you for providing us with an opportunity to get together and compare notes with judges from other states.



This Year's Symposium

More than ever before, lawsuits call on judges to interpret the sometimes vague language found in statutes. From state products liability and consumer fraud disputes to federal environmental, employment, and intellectual property statutes, entire fields of the law are now dominated by the dictates of statutes. Few acts of modern judging fall fully outside the scope of statutes.

The task of applying these statutes raises a host of questions that judges must address—in Justice Marshall's immortal words—"say what the law is." These questions range across a spectrum of concerns going to the core of the relationship between the judicial and legislative branches: Should judges resort to legislative history when a statute is ambiguous, or does judicial restraint require judges to rely solely on the text of a statute? What qualifies as legislative history? Does it differ from statutory history? What is the role of legislative "purpose" in determining how to resolve real-world disputes? How can judges identify legislative purpose even if they deem it appropriate to do so? What can judges do when the legislature remained silent on the meaning of a statutory provision that affects the litigants before the court?

And a more recent question has come to the forefront: how should courts deal with technological innovation not contemplated by the legislature at the time a relevant statute was passed?

The 2015 NFJE Symposium aims to help jurists wade through these often conflicting concerns and thereby improve judicial reasoning in real cases. The Symposium will help conceptualize the various approaches to statutory construction and the dangers embedded within each. Through panels blending the views of judges, academics, and lawyers alike, the Symposium will delve into the important questions raised when judges must apply the language used by the legislative branch. To assist participants in developing the practical skills needed in facing the conundrums posed by many modern statutes, the Symposium will include discussions of scenarios that have arisen in actual state supreme court cases and provide lively debate on different ways the tools of statutory interpretation can affect the outcome of those cases.

The Symposium will begin on Friday, July 17, 2015, with a presentation by Bryan Garner, who co-authored (with Justice Antonin Scalia) the book *Reading Law: The Interpretation of Legal Texts*. The Symposium will continue on Saturday, July 18, 2015, with panel discussions by state appellate judges and renowned scholars on statutory interpretation.

Please join our nationally recognized panel of judges, attorneys, and scholars as we explore the nature of statutory construction in the 2015 NFJE Symposium.



THE VEXATION OF LEGISLATION: Judicial Analysis of Unclear, Incomplete, or Obsolete Statutes

Schedule of Events

Friday, July 17

- 4:00 – 5:00 p.m. Registration
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- 5:00 – 6:00 p.m. *Thoughts on “Reading Law”*
Keynote and Introductory Speaker Bryan A. Garner will kick off the symposium with highlights from his recent book (co-authored with Justice Antonin Scalia), entitled *Reading Law: The Interpretation of Legal Texts*.
Bryan A. Garner, *LawProse, Inc., Dallas, Texas*
-
- 6:00 – 7:30 p.m. Welcome Reception
-
- 7:30 p.m. Dinner on your own

Saturday, July 18

- 7:30 – 8:15 a.m. Continental Breakfast
-
- 8:15 – 8:30 a.m. Welcome and Introductions
Marc E. Williams, NFJE President
Tristan L. Duncan, 2015 Symposium Program Chair
-
- 8:30 – 10:00 a.m. *The Interplay of Text and Purpose*
This panel of renowned state Supreme Court justices and scholars will use two recent cases to discuss the issues and problems that arise when statutory text is subject to varying interpretations. The panel will engage in a robust debate regarding the relative strengths and weaknesses of interpretive methodologies from the perspectives of the Bench, Bar, and Legal Academy.
Moderator: Suzanne K. Richards, *Columbus, Ohio*
Associate Justice Goodwin Liu, *California Supreme Court, San Francisco, California*
Associate Professor Jeffrey Pojanowski, *Notre Dame Law School, South Bend, Indiana*
Former Justice Philip Talmadge, *Washington Supreme Court, Olympia, Washington*
-
- 10:00 – 10:15 a.m. Break
-
- 10:15 – 11:15 a.m. *Legislative Silence and the Dance Between the Legislature and the Judiciary*
Silences, gaps, and ambiguities create an interesting interaction between the legislative process and judicial decision making. Our esteemed panelists are eminently qualified to discuss the impact of this interaction on statutory and decisional law.
Justice Jeffrey S. Boyd, *Texas Supreme Court, Austin, Texas*
Professor Carlos Gonzalez, *Rutgers Law School, Newark, New Jersey*
Judge Michael F. Gadola, *Michigan Court of Appeals, Lansing, Michigan*

11:15 – 12:15 p.m.	<p><i>The Void for Vagueness Doctrine and Rules of Constitutional Avoidance</i> When should a court strike down a law on the grounds that it is unconstitutionally void for vagueness as applied, and when should a court give a narrow construction to a statute to avoid serious constitutional problems? One school of thought posits that a law is unconstitutionally vague when it fails to provide reasonable people acting in good faith with fair notice of what conduct is lawful or actionable. Our panel of lawyers and scholars will engage in a lively discussion about the void-for-vagueness and constitutional-avoidance doctrines and their application (or misapplication) in a variety of contexts. Thomas H. Dupree, Jr., <i>Gibson, Dunn & Crutcher, Washington, DC</i> John M. Thomas, <i>Dykema, Ann Arbor, Michigan</i> Professor Margaret Lemos, <i>Duke University Law School, Durham, North Carolina</i></p>
12:15 – 1:30 p.m.	<p>Luncheon</p>
1:30 – 2:15 p.m.	<p><i>Update on United States Supreme Court Decisions</i> Professor Yoshino will provide an overview and give his insights into the U.S. Supreme Court decisions from the 2014-15 term. The discussion will include cases of statutory interpretation and cases of particular interest and importance to state courts. Professor Kenji Yoshino, <i>New York University School of Law, New York, New York</i></p>
2:15 – 2:30 p.m.	<p>Break</p>
2:30 – 3:30 p.m.	<p><i>Deference to Administrative Agencies in Construing Statutes</i> Nationally-recognized expert, Professor Tom Merrill from Columbia Law School, will discuss principles and approaches for judicial deference to administrative agencies when construing statutes, as well as some of the problems and debates associated with this doctrine. Professor Thomas W. Merrill, <i>Columbia University School of Law, New York, New York</i></p>
3:30 – 5:00 p.m.	<p><i>Speaker Panel</i> All of our speakers will engage in a lively discussion of topics generated from the audience and from among themselves. Moderator: Mary Massaron, <i>Plunkett Cooney PC, Bloomfield Hills, Michigan</i></p>
5:00 p.m.	<p>Closing Remarks Marc E. Williams, NFJE President</p>
5:00 – 6:00 p.m.	<p>Closing Reception</p>
6:30 p.m.	<p>Dinner on your own</p>

Speakers



Jeffrey S. Boyd was appointed to a vacancy on the Texas Supreme Court by Governor Rick Perry in December 2012 and was elected to a full term in 2014. Before his appointment, he served as the governor's chief of staff, and before that, as general counsel for the governor's office. He is a graduate of Abilene Christian University and earned his law degree summa cum laude from Pepperdine University, where he graduated second in his law school class. After graduation, he clerked for Judge Thomas M. Reavley on the U.S. Fifth Circuit Court of Appeals. He practiced for 15 years as a litigator with Thompson & Knight L.L.P. in Austin in two stints. He left T&K in 2000 to join then-Texas Attorney General John Cornyn as deputy attorney general for civil litigation, and continued in that position with then-Attorney General Greg Abbott. He rejoined Thompson & Knight as a senior partner in 2003, and then left in January 2011 for the governor's office.



Tristan L. Duncan, co-chair of Shook Hardy & Bacon, LLP's Energy Law and Constitutional Law practice groups, has expertise in class actions, multidistrict litigation, and constitutional law. She has spoken and widely published on these areas of law and has received multiple awards, including most recently, the Association of Corporate Counsel's "Value Champion" award for her "innovative approach" to litigation defense, the BTI Client Service All-Star award, the Missouri Lawyer Media's "Legal Champion" award for her victory on behalf of multiple defendants in the first (c)(4) class action ever tried in the country, and Kansas City's 2014 Most Influential Woman award. Education: BA political science, Duke University; JD with distinction, University of Iowa; Post-doctoral scholar, Yale Law School.



Thomas H. Dupree, Jr., is a nationally known trial and appellate advocate, having argued over 70 appeals in the federal courts, including in all 13 federal circuits and the U.S. Supreme Court. In 2013, he successfully argued the landmark personal jurisdiction case *Daimler AG v. Bauman* in the Supreme Court. From 2007-09, he served as Deputy Assistant U.S. Attorney General, overseeing 900 lawyers and managing many of the government's most significant regulatory, commercial, and constitutional matters. In 2013 and 2014, Chambers and Partners named him one of the leading appellate lawyers in the United States. He appears frequently on national television as a legal analyst.



Michael F. Gadola was appointed to the Michigan Court of Appeals effective January 5, 2015. He is a graduate of Michigan State University's James Madison College (B.A., 1985) and graduated with honors from the Wayne State University Law School (J.D., 1990), where he served as Editor-in-Chief of the *Wayne Law Review*. He practiced law with the Dickinson Wright law firm in both Detroit and Lansing. He served as Deputy Legal Counsel, Counsel for Executive Organization, and Director of the Office of Regulatory Reform for Governor John Engler. He went on to serve as House Majority Counsel in the Michigan Legislature and as Michigan Supreme Court Counsel. He then served as Legal Counsel to Governor Rick Snyder. Judge Gadola is a fellow of the Michigan State Bar Foundation, a member of the Michigan Supreme Court Historical Society, and a member of the Advisory Board for the Michigan Chapter of the Federalist Society.





Bryan A. Garner is the author of more than 20 books on legal writing and language in general. He is best known as editor in chief of the venerable *Black's Law Dictionary*, now in its tenth edition. Since 1991, he has taught more than 130,000 lawyers, judges, and paralegals in continuing legal education seminars throughout the U.S. and abroad. His company, LawProse, Inc. of Dallas, is the country's largest provider of legal-writing and -drafting CLEs.



Carlos González is a Professor of Law and Herbert Hanooh Scholar at Rutgers School of Law, Newark, where he teaches Constitutional Law, Statutory Interpretation, and Torts. His publications include *Trumps, Inversions, Balancing, Presumptions, Institution Prompting, and Interpretive Canons: New Ways for Adjudicating Conflicts Between Legal Norms* in the *Santa Clara Review* (2005), *Representing Structures Through Which We The People Ratify Constitutions: The Troubling Original Understanding of the Constitution's Ratification Clauses* in the *UC Davis Law Review* (2005), and *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice* in the *Duke Law Journal* (2011).



Margaret Lemos is a Professor of Law at Duke University. Her scholarship focuses on the institutions of law interpretation and enforcement. Before joining the Duke faculty in 2011, Professor Lemos was an Assistant Professor at Cardozo Law School and a law clerk to Judge Kermit Lipez of the U.S. Court of Appeals for the First Circuit and U.S. Supreme Court Justice John Paul Stevens. She received her law degree summa cum laude from NYU School of Law.



Hon. Goodwin Liu is an Associate Justice, California Supreme Court. Before joining the state's highest court in 2011, Justice Liu was Professor of Law at the UC Berkeley School of Law (Boalt Hall). His primary areas of expertise as a law professor included constitutional law, education law and policy, and the U.S. Supreme Court. He has published widely on these subjects in books, law reviews, and the general media. His 2006 article, "Education, Equality and National Citizenship," won the Steven S. Goldberg Award for Distinguished Scholarship in Education Law, conferred by the Education Law Association. Before his teaching career, Justice Liu clerked for U.S. Supreme Court Justice Ruth Bader Ginsburg, and worked in the appellate practice group of O'Melveny & Myers.



Mary Massaron is a past president of DRI—The Voice of the Defense Bar. She is Vice Chair of the Lawyers for Civil Justice (LCJ) and currently chairs its Class Action Reform Committee. In addition to being a recognized leader of the defense bar, Ms. Massaron's skill as an appellate lawyer has been nationally recognized. She is a fellow in the American Academy of Appellate Lawyers, a member of the American Law Institute (ALI), and has served as chair of the ABA Council of Appellate Lawyers (CAL), a division of the Appellate Judges Conference, the ABA TIPS Appellate Advocacy Committee, and the Appellate Practice Section of the State Bar of Michigan. She has handled many significant appeals in state and federal appellate courts for government and private clients.



Thomas W. Merrill is the Charles Evans Hughes Professor of law at Columbia Law School. Previously, he served on the faculty at Northwestern and Yale Law Schools. From 1987-90 he was Deputy Solicitor General, U.S. Dept. of Justice. Professor Merrill has taught Administrative Law for many years, and has written extensively about the *Chevron* doctrine, among other topics.



Jeffrey Pojanowski joined the faculty of the Notre Dame Law School in 2010, where he was named Distinguished Professor of the Year in 2013. He has published work in the *Northwestern University Law Review*, *Texas Law Review*, *UCLA Law Review*, *Fordham Law Review*, and *Jurisprudence*. At present, his scholarship focuses on statutory interpretation, the common law, and legal theory. Prof. Pojanowski graduated magna cum laude from Harvard Law School. He served as a law clerk to then-Judge John Roberts on the D.C. Circuit and then to Justice Anthony Kennedy on the Supreme Court of the United States.



Suzanne K. Richards is a retired partner of Vorys, Sater, Seymour and Pease LLP, Columbus, Ohio, and a former head of the firm's Litigation Group. Her practice centered on business and employment law with an expertise in class actions and alternative dispute resolution. She is also a member of the Board of Commissioners on Character and Fitness of the Supreme Court of Ohio and the Board of Trustees of the National Conference of Bar Examiner, and speaks widely on bar admission issues.



Phil Talmadge received his J.D. from the University of Washington, where he was on the Law Review. Mr. Talmadge served in the Washington State Senate from 1979 to 1995, chairing the Judiciary and Health Care Committees. He was a Justice of the Washington Supreme Court from 1995 to 2001. Mr. Talmadge is a fellow of the American Academy of Appellate Lawyers, and a founding member of the Washington Appellate Lawyers Association. He has authored numerous articles on legal issues, including statutory interpretation.



John M. Thomas is recognized nationally as a class action and appellate practitioner. He has briefed and argued appeals in federal and state courts throughout the country. Before joining Dykema, he led Ford Motor Company's appellate practice for 27 years. In that role, he supervised Ford's most significant appellate, class action, and complex litigation. He pioneered Ford's acclaimed Advanced Motions program, designed to influence the long-term development of the common law, by integrating legal scholarship and appellate practice with successful trial strategy. Mr. Thomas was one of the founding members of the Product Liability Advisory Council.



Marc E. Williams is the managing partner of the West Virginia office of Nelson Mullins Riley & Scarborough. His practice focuses on class actions, mass torts, and commercial litigation. He has had primary responsibility for over 100 trials and appeals during his career. He is a Fellow of the American College of Trial Lawyers. He has served as President of DRI and Lawyers for Civil Justice. He currently serves as President of the National Foundation for Judicial Excellence.



Kenji Yoshino is the Chief Justice Earl Warren Professor of Constitutional Law at New York University School of Law. His work involves Constitutional law, anti-discrimination law, and law and literature. He is the author of three books: *Speak Now: Marriage Equality on Trial* (2015); *A Thousand Times More Fair: What Shakespeare's Plays Teach Us About Justice* (2011); and *Covering: The Hidden Assault on Our Civil Rights* (2006). Before arriving at NYU, he was the Guido Calabresi Professor of Law and Deputy Dean at Yale Law School from 1998 to 2008. He has won many distinctions for his teaching, most recently the Podell Distinguished Teaching Award.



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The Loews Chicago is close to many Chicago attractions, including Navy Pier, Millennium Park, and the Magnificent Mile. Other nearby attractions include The Hancock Building, the Museum of Modern Art, the Art Institute, the Theatre District, and the Museum Campus featuring the Field Museum of Natural History, the John G. Shedd Aquarium, and the Adler Planetarium.

Registration

To register:

Phone 312.698.6230
Fax 312.795.0748
Online www.nfje.net

Contact Information

First Name _____ Middle Initial _____ Last Name _____

Preferred Name _____ Title _____

Court _____

Street (Business) _____ Suite _____

City _____ State _____ Zip Code _____

Telephone (Business) _____ Fax _____ E-mail (required) _____

Will a spouse or guest be traveling with you? Yes No If yes, please indicate his/her name _____

Hotel and Travel Arrangements

This program has limited attendance. Registration is on a first-come, first-served basis. Once NFJE receives your completed registration form, you will be sent an e-mail confirmation with instructions about making your hotel and travel reservations. Please note: If you do not receive an email confirmation within 48 hours, you will need to contact the NFJE directly. Please be advised you will need to secure your hotel reservations on or before June 19, 2015.

NFJE will pay for the cost of a standard room for the nights of Friday, July 17 and Saturday, July 18, as well as transportation costs (air, rail, ground) not to exceed \$500. When making your travel arrangements, please plan to arrive by 3:00 p.m., Friday, July 17. *If you would like to extend your stay at the hotel, you are welcome to do so at your own expense.*

Loews Chicago Hotel
455 North Park Drive
Chicago, Illinois 60611
Phone: 312.840.6600
www.loews.com/chicago

Cancellations

If you must cancel your attendance, please do so at least three weeks before the symposium, so a judge on the waiting list may attend. All cancellations must be received in writing via fax (312.795.0748) or email (tcaldwell@dri.org).

The Annual Judicial Symposium is a tuition-free program for state appellate court judges.

Transportation and hotel accommodations are provided at NFJE's expense.

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