

STATUTORY INTERPRETATION AND REGULATION
Syllabus
Spring 2015
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Welcome to Statutory Interpretation and Regulation. Much of the 1L curriculum focuses on common-law doctrines extracted from judicial opinions. But most lawyers today spend more time dealing with statutes (i.e., laws enacted by legislatures) and regulations (i.e., rules promulgated by administrative agencies) than they spend dealing with common law. Judges and commentators who agree on little else agree on the centrality of legislation and regulation to the modern practice of law. Consider these comments, for example:

We live in an age of legislation, and most new law is statutory law. By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers. – Justice Antonin Scalia.

Most of the work currently done by federal courts, including the Supreme Court, involves not grand constitutional principle, but the interpretation and application of laws passed by Congress, laws that are sometimes ambiguous or obscure. – Justice Ruth Bader Ginsburg.

I believe that it is important for all law students to be taught about the workings of the legislative process; this is so essential if they are to make sense of statutes. Law schools have made great strides in recent years in offering, indeed requiring, courses on legislation and the administrative state. – Chief Judge Robert Katzmann, U.S. Court of Appeals for the Second Circuit.

This course will introduce you to the legislative and administrative processes that generate statutes and regulations, the theories and doctrines of statutory interpretation used in federal and state courts, and the methods of challenging agency action.

COURSE MATERIALS

The primary text for this course is Eskridge, Gluck, and Nourse, *Statutes, Regulation, and Interpretation: Legislation and Administration in the Republic of Statutes* (West, 2014, ISBN: 9780314273567). That book will be supplemented from time to time by additional readings such as recent court opinions; those supplemental materials will typically be distributed on Blackboard.

COURSE REQUIREMENTS AND OBJECTIVES

Exam – Your grade will be based primarily on a scheduled final exam. The test is open book/open notes in that you may use the required textbook, additional materials I distribute on Blackboard, handouts from class, your class notes, and your outline (including one prepared as part of an outline group), all in hardcopy form. During the exam you will not be permitted to

use commercial outlines, electronic resources, or other materials you did not help create. If you have questions about what materials are permitted, ask me well before the exam.

Participation – Participation in class discussion is necessary both for your own understanding of the material and for the benefit of your classmates. At my discretion, I may increase your grade by one notch (e.g., B+ to A-) for outstanding participation (judged primarily by quality, not quantity). Typically, a handful of students will earn this adjustment. In rare cases, I may lower a grade by one notch for failing to participate adequately or for consistently being unprepared for class.

There will be a few drafting exercises or other in-class activities. Those items are not graded, but they are considered an aspect of class participation. As noted above, your grade can be lowered for inadequate participation, and that includes failing to make a good-faith effort on these exercises.

Practice exams and exam preparation – Sample final exams and answers will be available (through Blackboard) to help you prepare for the final exam. In addition, we will sometimes do practice questions in class or in your tutor sessions.

Tutor – We are fortunate to have Kyle Doherty as our tutor. You can reach him at ktdohert@central.uh.edu.

Attendance policy – Regular attendance (at least 80%) is required as a matter of law school and ABA policy. I treat the sign-in sheet that I circulate at the beginning of each class session as presumptive evidence that you were present or absent.

Laptops and other electronics – Students are permitted to use laptops, tablets, and the like for taking notes or for other class-related purposes, but such devices are not to be used for other purposes during class. Students are not permitted to record class sessions.

Learning objectives – The learning objectives for the course are for you to understand the theory and doctrine of statutory interpretation so that you can formulate persuasive and lawyerly statutory arguments; for you to understand the methods for controlling agency action; for you to understand the key aspects of the legislative and regulatory processes; and for you to be able to integrate the information you learn in this class with other practical and analytical skills necessary to the practice of law.

OFFICE HOURS

You are welcome and indeed encouraged to come to my office (BLB, 1st floor) to discuss the material, especially if you are having difficulty. I have regular office hours Tuesday/Thursday 1pm-3pm, but you are welcome to come other times too.

COURSE TOPICS/FIRST SET OF READING ASSIGNMENTS

The materials in this course are drawn from many different subject areas, including environmental law, employment discrimination, voting rights, and criminal law. The aim is not for you to learn the substantive law of those fields. Rather, you should read the cases and other materials with a focus on the reasoning and the principles they represent, not so much on the “bottom line” outcome.

Class # Topic

1	<p>I. Introduction to Statutes and the Regulatory State</p> <p>This initial class session will introduce you to statutes and regulations and their role in the modern legal system.</p> <p>Casebook pp. 1-27; SCOTUSblog article: “Court to rule on health care subsidies,” http://www.scotusblog.com/2014/11/court-to-rule-on-health-care-subsidies/.</p>
	<p>II. The Legislative Process</p> <p><i>Most of the course will concern how courts and agencies interpret and implement statutes. This brief unit sets the stage by examining how legislatures work, how statutes are enacted, and why legislatures delegate so much authority to agencies.</i></p>
2	<p>How the legislative process works, using the Civil Rights Act as an example.</p> <p>pp. 33-58.</p>
3	<p>Legislative process, cont’d; theories of the legislative process.</p> <p>pp. 58-80 (go through the end of Problem 1-2);</p> <p>two articles on the legislative process:</p> <p>http://mobile.nytimes.com/2014/12/15/us/politics/in-final-spending-bill-salty-food-and-belching-cows-are-winners.html - and -</p> <p>http://www.reuters.com/article/2013/06/12/us-usa-congress-fundraising-insight-idUSBRE95B05520130612.</p>
4	<p>Delegation of authority and congressional control of delegations.</p> <p>pp. 83-106 (skip Problem 1-4 on p. 89);</p> <p>http://www.scotusblog.com/2014/12/scotus-for-law-students-non-delegation-doctrine-returns-after-long-hiatus/.</p> <p>Question: As you have probably heard, the Obama administration has announced that it will not try to deport certain categories of persons who are in the country without authorization. As you read today’s materials, ask yourself how Congress could respond if it disagrees with the administration’s actions.</p>

	<p>III.A. Approaches to Statutory Interpretation</p> <p><i>One basic question in statutory interpretation concerns the ultimate goal of interpretation. Should an interpreter follow the intent of the legislature, promote the statute's purposes, pursue the most socially beneficial interpretation, or enforce the ordinary meaning of the words no matter what the consequences? Perhaps surprisingly, there is no universally accepted answer. This unit discusses the leading approaches.</i></p>
5	<p>Legislative intent (the <i>Holy Trinity</i> case as example).</p> <p>pp. 299-318;</p> <p>watch 25 minutes of a Scalia/Breyer discussion on statutory interpretation, http://www.youtube.com/watch?v=-oIBM02Lw7w. (This link takes you to Part 1 of the debate. Links to the rest of the debate will be on the right side of your screen. You should watch Parts 1 and 2 in full and the first 5 minutes of Part 3, which is 25 minutes of video total. After that, they start talking about constitutional interpretation.)</p>
6	<p>Legislative purpose.</p> <p>pp. 318-348 (skip Problem 4-2 on p. 333).</p>
7	<p>Textualism and the “plain meaning” approach.</p> <p>pp. 349-66 (the top of p. 349 cross-references <i>Bob Jones</i>; you don’t need to read that case).</p>
8	<p>Textualism, cont’d: the “new textualism.”</p> <p>pp. 366-70, 386-409.</p>
9	<p>Pragmatic approaches; statutory interpretation in state courts.</p> <p>pp. 409-35;</p> <p>handout on state legislative attempts to control interpretive methodology (Blackboard).</p>

	<p>III.B. Doctrines of Statutory Interpretation</p> <p><i>In this unit, we will cover the various doctrines, rules, and canons of statutory interpretation.</i></p>
10	<p>Textual canons: word meaning and grammar.</p> <p>pp. 447-64;</p> <p>Texas Code Construction Act/Rules §§ 311.011, 311.012, 311.016, 312.002, 312.003, 312.012 (Blackboard).¹</p>

¹ We will read various sections of this code in later assignments throughout the course.

11	<p>Textual canons, cont'd: the whole act rule.</p> <p>pp. 464-90 (Read <i>Babbitt</i>, which starts on p. 476, carefully. There is a lot to it, and it is very educational. You can skip Problem 5-1 on p. 490.);</p> <p>Texas Code Construction Act/Rules § 311.024.</p>
12	<p>Substantive canons: the rule of lenity.</p> <p>pp. 490-512 (Note: We will focus on a few of the most important substantive canons, but a quick glance at Appendix 6 to the casebook will show you that there are many, many more.);</p> <p>Texas Code Construction Act/Rules § 311.022;</p> <p>excerpts from Texas Penal Code and Code of Criminal Procedure (Blackboard).</p>
13	<p>Substantive canons, cont'd: the doctrine of constitutional avoidance.</p> <p>pp. 512-20, 529-32; excerpt from <i>Bond v. United States</i> (2014) (Blackboard);</p> <p>Texas Code Construction Act/Rules §§ 311.021, 311.032, 312.013.</p>
14	<p>Substantive canons cont'd: federalism canons.</p> <p>pp. 532-52;</p> <p>Texas Code Construction Act/Rules § 311.034.</p>
15	<p>1) Harmonizing potentially conflicting statutes; rule against implied repeals.</p> <p>pp. 566-75; Texas Code Construction Act/Rules §§ 311.025, 311.026.</p> <p>2) Wrap-up on canons.</p> <p>pp. 552-66.</p>
16	<p>Legislative history as an interpretive aid.</p> <p>pp. 601-07, 630-49.</p>

IV. Implementation of Statutes by Agencies

The final unit of the course will consider agencies and administrative law. Assignments will be distributed later, but we will cover the following topics:

- Agency rulemaking
- Agency adjudication
- Informal agency action
- Control of agency action by the executive
- Judicial review of agency policymaking ("arbitrary and capricious" review)
- Judicial review of agency statutory interpretation (*Chevron doctrine*)

Drafting Exercise

You will practice writing a simple statute. Details and materials to be distributed.

Final Exam

Our final exam is scheduled for 5/11/15 from 9am-12pm.