

Advanced Legislation: Theories of Statutory Interpretation

Harvard Law School

Professor Rabb

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Office hours: M, 3.00-4.30

Griswold 450

Syllabus

Overview

Most modern law is contained in statutes and administrative regulations, which lawyers tend to confront alongside case law in almost every area of practice. Building on basic concepts of Legislation and Regulation, this course aims to further explore the theories of the legislative process, judicial interpretation of statutes, and agency implementation of legislation. We will explore ongoing controversies about legislation, regulation, and interpretation, including deep debates about textualist, purposive and dynamic interpretation; about the use of legislative history and canons of construction; and about the constitutional foundations of statutory interpretation. Although there is no single subject matter focus of the course, a significant portion of the substantive areas of law will cover discrimination law, criminal law, and environmental law.

Prerequisite: Legislation and Regulation is required. LLM students will need to seek the permission of the instructor to waive the prerequisite and enroll in this course.

Part I. Interpretive Theories

BACKGROUND

Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NAT'L REV. (Aug. 24, 2012), available at <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism#>

Bryan A. Garner, *Response to Richard A. Posner*, LAW PROSE (Sept. 5, 2012), available at <http://www.lawprose.org/blog/?p=570>

An Interview with Judge Richard A. Posner: *Do One's 'Real World' Activities—Writing, Theorizing, Blogging—Negatively Impact One's Judging?*, ABA JOURNAL (July 1, 2014), available at http://www.abajournal.com/magazine/article/an_interview_with_judge_richard_a_posner/

WEEK 1 INTRODUCTION TO STATUTORY INTERPRETATION: HISTORY AND THEORY

Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983)

Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. L. Rev. 179 (1986-87)

SUPPLEMENTAL: *Heydon's Case* (England 1584) + Notes in Hart and Sacks

CASE: *Holy Trinity Church v. United States*, 153 U.S. 457 (1892)

STATUTE: Alien Contract Labor Act of 1885

WEEK 2 LEGISLATIVE SUPREMACY VS. LEGISLATIVE INTENT: INSTITUTIONAL ROLES

William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L. J. 381 (1989)

John Manning, *Second Generation Textualism*, 98 CAL. L. REV. 1287-1318 (2010)

SUPPLEMENTAL: Daniel A. Farber, *Statutory Interpretation & Legislative Supremacy*, 78 GEO. L. J. 281 (1989)

Kenneth A. Shepsle, *Congress is a They, Not an It: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239-56 (1992)

Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005)

United Steelworkers of America v. Weber, 443 U.S. 193 (1979)

CASE: *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)

STATUTE: Endangered Species Act of 1973

WEEK 3 TEXTUALISM VS. PURPOSIVISM: INTERPRETIVE DEBATES

Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION* 3-47 (Amy Guttmann ed., 1997)

William N. Eskridge, *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509-60 (1998)

SUPPLEMENTAL: WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994), chapter 2

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 867 (1992)

CASE: [King v. Burwell \[Oral Argument: March 4, 2015\]](#)

STATUTE: [Affordable Care Act \(ACA\) §1401 \(Internal Revenue Code, 26 U.S.C. § 36B\); ACA §1311 \(42 U.S.C. § 18031\)](#)

Part II. The Canons of Statutory Interpretation

WEEK 4 TEXTUAL CANONS: REALIST CRITIQUES

Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983)

David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 NYU L. REV. 921 (1992)

SUPPLEMENTAL: W.N. ESKRIDGE, *Appendix [List of Canons]*, in *DYNAMIC STATUTORY INTERPRETATION*

K. Llewellyn, *Appendix [List of Canons]*, in *Remarks on ... Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1949-1950)

Antonin Scalia and Bryan Garner, *Introduction/Table of Contents [List of Canons]*, to *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (Westlaw 2012)

Microsymposium on Scalia and Garner's Reading the Law, 18 GREEN BAG 2D 105-123 (2014) [Part I] & 4 J. Law 265-299 (2014) [Part II]

CASE: [McFadden v. United States \[Oral Argument: TBD\]](#)

STATUTES: [Uniform Controlled Substances Act of 1970, 21 U.S.C. § 841\(a\); Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. §§ 802\(32\)\(A\), 813](#)

WEEK 5 SUBSTANTIVE CANONS: RULE OF LENITY

Dan Kahan, *Lenity and Federal Common Law*, 1994 SUP. CT. L. REV. 347 (1994)

Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* (Cambridge, MA: Harvard University Press, 2008), chapter 9

SUPPLEMENTAL: *McBoyle v. United States*, 283 U.S. 25 (1931) + National Motor Vehicle Theft Act

Keeler v. Superior Court, 2 Cal. 3d 619 (Ca. Sup. Ct. 1970) + California Penal Code, Sec. 187

Muscarello v. United States, 524 U.S. 125 (1998) + National Firearms Act, Sec. 924

CASE: [Johnson v. United States \[Oral Argument: Nov. 5, 2014\]](#)

STATUTE: [Armed Career Criminal Act \(ACCA\), 18 U.S.C. § 924\(e\)](#)

WEEK 6 EXTRINSIC SOURCE CANONS: AGENCY DEFERENCE

Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989)

Dan Kahan, *Is Chevron Relevant to Federal Criminal Law?* 110 HARVARD LAW REVIEW 469 (1996)

SUPPLEMENTAL: Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 Harvard L. Rev. 2043-2064 (2010)

William N. Eskridge, Jr. and Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEORGETOWN L. J. 1083-1226 (2008)

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) + Clear Air Act Amendments of 1977

CASE: **Mellouli v. Holder [Oral Argument: Jan. 14, 2015]**

STATUTE: **Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2)(B)(i) [criminal provision of INA]**

Part III. Positive Theories of Statutory Interpretation: Institutional Dialogue

WEEK 7 EXECUTIVE: INSTITUTIONALIST CASE FOR AGENCY DEFERENCE

ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006), Chapter 4

William N. Eskridge, *No Frills Textualism*, HARV. L. REV. (2006)

SUPPLEMENTAL: *Holy Trinity* [revisit]

Carol Chomsky, *The Story of Holy Trinity Church v. United States: Spirit and History in Statutory Interpretation*, STATUTORY INTERPRETATION STORIES 3-35 (William Eskridge et al. eds., Foundation Press 2011)

CASE: **Michigan v. Environmental Protection Agency [Oral Argument: TBD]**

STATUTE: **Clean Air Act, 42 U.S.C. § 7412(c)(1), (d)(1), (n)(1)(A)**

WEEK 8 CONGRESS: OVERRIDING STATUTORY INTERPRETATION DECISIONS

Richard L. Hasen, *End of the Dialogue? Political Polarization, The Supreme Court, and Congress*, 86 SOUTHERN CAL. L. R. 205-261 (2013)

Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEXAS L. R. 1317-1479 + Appendix (2014)

SUPPLEMENTAL: William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331-423 + Appendix (1991)

TEXAS LAW REVIEW SEE ALSO, VOL. 92: SYMPOSIUM ON CHRISTIANSEN & ESKRIDGE ARTICLE (2013)
 [Responses by James Buatti & Richard L. Hasen (forthcoming 2015); James J. Brudney (2013), Victoria F. Nourse (2013), and Deborah A. Widdis (2013)]
<http://www.texaslrev.com/category/seealso/volume-92-seealso/>

CASE: Integrity Staffing Solutions, Inc. v. Busk [Oral Argument: Oct. 8, 2014]

STATUTES: Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 206, 207, as amended by; Portal to Portal Act of 1947, 29 U.S.C. § 254(a)

WEEK 9 COURTS: THE CANONS AND CONGRESS (REVISITED)

James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VANDERBILT L. R. 1-116 (2005)

Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons*, 65 STANFORD L. R. 901-1025 (2013)

SUPPLEMENTAL: Anita S. Krishnakumar, *Dueling Canons* (forthcoming 2015)

Nicholas Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARVARD L. R. 2085-2157 (2002)

CASE: Yates v. United States [Oral Argument: Nov. 5, 2014]

STATUTE: Sarbanes-Oxley Act of 2002, 8 U.S.C. § 1519 (“anti-shredding provision”)

**Part IV. Normative Theories of Statutory Interpretation:
 Institutional Role**

WEEK 10 DEMOCRACY AND STATUTORY INTERPRETATION

Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593-663 (1995)

Victoria F. Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEORGETOWN L. J. 1119-1177 (2011)

SUPPLEMENTAL: *Holy Trinity* + Notes from Hart & Sacks [revisit]

CASE: EEOC v. Abercrombie & Fitch Stores, Inc. [Oral Argument: Feb. 25, 2015]

STATUTE: Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1)

WEEK 11 STATUTORY INTERPRETATION AS ENACTED LAW (AND LEGISLATIVE HISTORY?)

JEREMY WALDRON, *LAW AND DISAGREEMENT* (Clarendon/Oxford 1999), chapters 3 and 4

Muriel Morisey Spence, *The Sleeping Giant: Textualism as a Power Struggle*, 67 S. CAL. L. REV. 585 (1994)

SUPPLEMENTAL: *Holy Trinity* + Notes from Hart & Sacks [revisit]

CASE: Whitfield v. United States [Oral Argument: Dec. 2, 2014]

STATUTE: 18 U.S.C. § 2113(a) (federal bank robbery statute)

WEEK 12 STATUTORY INTERPRETATION AS MORALITY, LAW AS INTEGRITY

RONALD DWORKIN, LAW'S EMPIRE, 313-54 (1986) [+ pp. 15-23]

Dworkin-Scalia Debates: Dworkin, *Response to Justice Scalia*, in A MATTER OF INTERPRETATION 115-27 +
Scalia, *Reply to Professor Dworkin*, in A MATTER OF INTERPRETATION 144-49

SUPPLEMENTAL: *Holy Trinity* + Notes from Hart & Sacks [revisit]

TVA v. Hill, 437 U.S. 153 (1978) + Endangered Species Act of 1973 [revisit]

CASE: *Young v. United Parcel Service* [Oral Argument: Dec. 3, 2014]

STATUTE: Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k)

Class Organization and Grading

The class will proceed as follows. It will be divided into a format that allows us to explore both the theory and practice of legislation and statutory interpretation.

On the first day of each week, we will discuss major theories of statutory interpretation. Student(s) will present an argument for and against a specific proposition for the week. Students may choose to write a short research paper on any one of the questions presented.

On the second day of each week, we will analyze current statutory interpretation cases, keeping in mind the theoretical issues raised (in the aggregate, not just for that week) and the extent to which they apply to interpreting these actual cases. For this “court day,” students will read the cases as if in preparation for a moot court. One student will act as chief judge and present the case. Two other students will act as lawyers, arguing for and against the question presented. The presiding student judge will write a proposed opinion and circulate it, and get concurrences or dissents from other students. The final paper will be a full opinion—a majority, concurring, or dissenting opinion.

Short Papers – 40%. Students are required to submit 4 writing assignments throughout the course of the semester plus a final paper or opinion at the end: an initial majority opinion and 3 dissenting or concurring opinions.

Presentations/Participation – 40%. Students will present twice on the “theory day,” at least once on “court day,” and once on the final day of class. Each presentation is worth 10% of the final grade.

Final Papers/Opinions – 20%. As a final paper, students may choose between writing a short research paper for the class, and writing a majority opinion that takes the concurring and dissenting opinions into account. Either choice should result in a paper 15 pages in length, due the last day of class.