

The Legislative Process, Statutory Interpretation, and Administrative Agencies

The Legislative Process, Statutory Interpretation, and Administrative Agencies

SECOND EDITION

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*To my father, Thomas R. Dyckman.
You exemplify integrity in all you do, even when it is not easy.
I hope to live up to your standard.*

And

*To my friend David Pope.
You have always been there for me when I most needed you.
Thank you.*

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Preface

Leg-Reg courses, as they are colloquially known, are multiplying as law schools incorporate them into the first-year required curriculum. The practice of law today involves statutory interpretation and regulatory work. Hence, students need to know both subjects; Leg-Reg is the perfect vehicle for that.

However, law professors often struggle to identify what topics within these three areas (legislative process, statutory interpretation, and administrative law) to cover and how deeply to cover those they do select. At this point in a student's education, too much information can be overwhelming, but too little leaves students without the background they need to be successful law students and, ultimately, good lawyers. In this text, I have chosen to focus more attention on interpretation and agencies and less on the legislative process, because I believe more graduates will work in these areas. Of the two, I sink deeper into interpretation, because every lawyer will encounter this topic and must understand how to interpret legal language, whether it be in a contract, constitution, regulation, or statute.

After the first edition of this text came out, I spoke to Professor Benjamin Bratman. He had adopted the text but had some criticisms. While we spoke, it became clear to me that while I had written the first edition for students in my course, who were second-year students, Professor Bratman and many other adopters were teaching first-year students, even first semester students. Because of that conversation and ones with other adopters such as Professors Erica Bristol, Neil Sobol, and Marily Nixon, I revised this text significantly to make it more user friendly to the beginning law student. Further, I examined a contracts text written by Professor Benjamin Templin, which exemplifies excellence in student learning. As a result of all these conversations, I have simplified some problems, added new ones, included problem questions, added learning objectives, added text boxes to explain terms and canons, and eliminated a few overly complicated cases and problems. I have no doubt the book is in better shape because of their help. My thanks to each!

This text is organized as follows. Chapter 1 introduces the legislative and interpretive processes with the well-known ambulance in the park hypothetical. Chapter 2 describes the legislative process and legal process theories. Chapter 3 explains separation of powers, which underlies statutory interpretation and the administrative state. Chapter 4 explains the plain and technical meaning canons. Chapter 5 addresses grammar and punctuation. Chapter 6 explores the theories of, or approaches to, statutory interpretation and the sources of meaning: intrinsic sources, extrinsic sources, and policy-based sources. Chapter 7 addresses the times when a judge must

choose among ordinary meanings or must reject the ordinary meaning for another fair meaning: ambiguity, constitutional avoidance, absurdity, and scrivener's error.

The ensuing chapters are organized around the sources of meaning. Thus, Chapters 8 and 9 cover the other intrinsic sources, including linguistic canons and statutory components. Chapters 10 through 13 cover the extrinsic sources, including conflicting statutes, legislative history, statutory purpose, legislative acquiescence, and post-enactment activities. Chapters 14 and 15 cover the policy-based sources, including both constitutional ones, such as the rule of lenity, and prudential ones, such as the remedial canon. Chapters 16 through 21 turn to agencies, what they are, why they regulate, how they regulate, and what deference they receive when they do regulate. Finally, Chapter 22 outlines the linear approach to interpretation, an organizational approach to the course (if you are a student reading this preface, you might wish to glance at Chapter 22 before you get started).

Within each chapter, I have tried to do several things. First, I begin and end each chapter with learning objectives. Next, I explain the relevant rules and canons in detail; I do not use cases to explain the basics. Instead, I include the highly edited cases to explore the parties' use of the canons in argument and the judges' reaction to those arguments. Interpreting legal language and arguing about its meaning are skills. The cases show lawyers using those skills. Many of the cases illustrate instances in which the court did not apply the canons or concepts accurately. It can be frustrating for students to read cases in which the judges got it wrong, but learning to identify flaws in reasoning is part of legal education. Lawyers need to learn how to challenge opposing counsel's arguments and identify the flaws in them. To appeal a decision, lawyers must be able to identify the fault in a lower court's opinion. Lawyering is learning how to make convincing arguments of your own while fairly criticizing those of your opponent. Statutory interpretation is no different. Lawyers do not want to know what a statute means as much as they want to know how to convince a judge that the statute means what their client wants it to mean. Hence, critiquing judicial opinions is valuable and educational.

Unlike most textbooks, I have identified the justices who joined the majority and dissenting opinions in every Supreme Court case and many lower court opinions. These cases can make for strange bedfellows; it can be interesting to see when judges abandon their approaches to interpretation or separation of powers to join an opinion that is more consistent with their political views. The agency deference cases are particularly relevant here.

Like most textbooks, I have removed extraneous information using ellipses, and I have removed citations without any reference to keep clutter at a minimum. While lawyers do not have the luxury of having cases edited for them in this way, and for this reason some professors prefer less edited cases, at this early stage of student learning, I prefer to help students swim in the relevant immediately without forcing them to drown first in the irrelevant.

At the end of every case, I have included notes and focused questions (*Points for Class Discussion*) to help students prepare the case for class. For example, for cases involving interpretation issues, I suggest to students that they always ask themselves the following four questions: (1) What is the legal issue; (2) what is the language related to that issue that the parties are arguing about; (3) what does each party want that language to mean; and (4) how did each judge interpret that language and why? In answering that fourth question, it can be helpful to ask further: (a) what intrinsic sources did the judges consider or fail to consider; (b) what extrinsic sources did the judges consider or fail to consider; (c) what policy-based sources did the judges consider or fail to consider?

Finally, I have included essay problems and multiple choice questions that address one or more topics in the chapter — “Applying What You’ve Learned” and “Test Your Understanding.” The problems and questions can be assigned for in or out of class work. One of the most important skills that students learn by tackling the problems is to identify the relevant language and a section of a law. When students simply read cases, the judges do this important work for them. But judges will not be pointing the way when our students practice. Hence, the problems are an important way to develop this important skill. The problems vary in their complexity, so judicious use is advised.

I have included a few additional things in the appendices. Appendix A is a greatly expanded glossary. Words that are included in the glossary are italicized in the text the first time they appear or are discussed. Appendix B and C include a simple sample bill (both the original House bill and the companion Senate bill). Appendix D contains the Senate Report for this bill. The bill was never enacted, so it never became an act. It is instructive for students to see the differences between a bill and a statute (codified sections of an act). Appendix E contains select provisions from the U.S. Constitution. Appendix F contains select provisions from the Administrative Procedure Act, which governs agency procedure.

This textbook will help students learn an art. Because different scholars and courts use different theories of statutory interpretation, this text cannot definitively explain how a judge or court will interpret a statute or regulation. But it will help students understand the process of enactment, learn to argue for their client, begin to speak this new language, and anticipate how laws are likely to be interpreted. At the conclusion of this text, students should: (1) know how statutes and regulations become law; (2) be familiar with the canons of interpretation, knowing how to use them and how to counter their opponent’s use of them; (3) understand the theories of interpretation judges use when interpreting written legal language; (4) know the breadth of arguments that can be made about seemingly clear language; and (5) understand the exceedingly important role that agencies play in regulating and interpreting written legal law.

For those of you who adopt this text, I look forward to hearing from you regarding ways to improve the next edition. I particularly love to hear about the wonderful local cases you find. Too many of these textbooks are overly focused on Supreme

Court cases, as if no other courts are interpreting statutes. Yet state cases are often more accessible and tend to be more interesting (*see Ohio Division of Wildlife v. Clifton*, 692 N.E.2d 253 (Ohio Mun. Ct. 1997), in Chapter 12). Indeed, some of these cases were contributed by my former students.

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Finally, and as I have said before, I would not be nearly as productive in life without my husband, Lee, who understands me when I say, "Git yer arse in the truck!"

LINDA JELLUM
Macon, GA
May 2021

