Advanced Legislation: Theories of Statutory Interpretation
Harvard Law School
Professor Rabb
Spring 2015

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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


WEEK 1  INTRODUCTION TO STATUTORY INTERPRETATION: HISTORY AND THEORY


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)


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)


STATUTE: Endangered Species Act of 1973
**WEEK 3**  
**TEXTUALISM VS. PURPOSEIVISM: INTERPRETIVE DEBATES**


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

**SUPPLEMENTAL:** William N. Eskridge, *Dynamic Statutory Interpretation* (1994), chapter 2


**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)

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**Part II. The Canons of Statutory Interpretation**

**WEEK 4**  
**TEXTUAL CANONS: REALIST CRITIQUES**


**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)  

**CASE:** McFadden v. United States [Oral Argument: TBD]


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**WEEK 5**  
**SUBSTANTIVE CANONS: RULE OF LENILITY**


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


**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


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


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


WEEK 9 COURTS: THE CANONS AND CONGRESS (REVISITED)


Part IV. Normative Theories of Statutory Interpretation: Institutional Role

WEEK 10 DEMOCRACY AND STATUTORY INTERPRETATION


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


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

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


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

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]
**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.