

SYLLABUS AND COURSE INFORMATION: LEGISLATION (LAW 416-10)

Professor Joshua I. Schwartz
Fall 2008
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Class hours: Mondays, Wednesdays and Thursdays, 9:55 - 10:50 a.m.

Drop-in Office Hours: Mondays and Wednesdays, 3 - 4:30 p.m.

Other office hours: by appointment

Course Information

Required Course Materials

1. Eskridge, Frickey & Garrett, Cases and Materials on Legislation (West Publishing Co. 4th ed. 2007)
2. Farber & Frickey, Law and Public Choice: A Critical Introduction (Univ. of Chicago Press 1991)

Grading Policy

Your grade in this course will be based on the final examination (described below). However, I reserve the right to add up to one grade increment to your exam-based grade to reflect exemplary class participation. For example, a B could become a B+, a B+ could become an A-, or an A- could become an A, etc.

For most, but not all, class sessions, a group of students will be assigned in advance to be “on deck”—especially responsible and liable to be called on for discussion of the day’s materials. All students are nonetheless expected to be prepared for each day’s class. Volunteers are always welcome to join in the class discussion, on deck or not.

I expect that the final examination will work as follows—as it has in the past: I will distribute a packet of materials (a case or cases, statutes, etc.) on or shortly after the last day of classes so that you can go over them to your heart's content on your own. The materials thus distributed in advance of the actual exam date will form the basis for a significant portion of the exam questions—though not necessarily all of them. The actual essay question or questions will not be distributed until you actually sit down in the exam room on the regularly scheduled exam date, Friday December 12 at 2:00 p.m.

SYLLABUS

Note: This syllabus breaks the semester's readings into blocks that correspond to our scheduled class meetings. Unless you are told otherwise **explicitly** in class you should adhere to the schedule by preparing the next succeeding assignment for each class. Unless otherwise indicated, pages assigned are in the Eskridge, Frickey & Garrett casebook. Readings denoted with "F&F" are in the Farber and Frickey paperback book.

I. INTRODUCTION; MODELS OF THE LEGISLATIVE PROCESS

Assignment 1: 1-23 (Case Study: the Enactment of the Civil Rights Act of 1964)

Assignment 2: 24-38 (How a bill really becomes a law)

Assignment 3: 38-47 (Griggs); Review pages 1-23

Assignment 4: 47-65; F&F 1-37 (Pluralism and Its Critics)

Assignment 5: 65-87; F&F 38-62 (Alternative Perspectives)

Assignment 6: 87-104 (Weber); Review pages 1-23; Reread statutory provisions on pages 38-41

Assignment 7: reread 86-103 (Weber) and statutory provisions on pages 38-41

Assignment 8: 104-121 (Johnson)

II. LEGISPRUDENCE: THE ROLE OF STATUTES IN THE LAW

Assignment 9: 630-649 (stare decisis in statutory interpretation; Flood)

Assignment 10: 587-595 (pre-legal process approaches), 598-616 (legal process approach, Moragne) (You should read, but need not prepare answers for class, to the problems on pages 613-616.)

Assignment 11: Review Moragne (601-616); read 618-629 (Calabresi, post-legal process approaches); 663-672 (introducing retroactivity issues; Jawish)

Assignment 12: Review 663-672; read 672-688 (retroactivity and statutes; Landgraf; Rivers)

III. THE ROLE OF JUDICIAL REVIEW WITH RESPECT TO STATUTES; DIRECT DEMOCRACY AND JUDICIAL REVIEW

Assignment 13: 409-411; 420-428; F&F 116-131 (Mow Sun Wong; due process of lawmaking)

Assignment 14: 428-446 ("The Conscientious Legislator"; legislative drafting)

Assignment 15: 523-528 (Introduction to direct democracy); 535-543 (direct democracy; St. Paul Citizens); 544-559 (direct democracy and equal protection; Arthur v. Toledo; Romer v. Evans)

Assignment 16: 559-574 (direct democracy and due process; City of Eastlake; Philly's v. Byrne)

IV. STATUTORY INTERPRETATION: THEORIES, TECHNIQUES AND DOCTRINE

A. Theories of Interpretation

Assignment 17: 689-712 (Pre-Legal Process Theories; Holy Trinity; Intentionalism)

Assignment 18: 712-729 (Legal Process Theories; The Case of the Speluncean Explorers; Correcting Legislative Mistakes; Shine)

Assignment 19: 729-749 (Dynamic Statutory Interpretation & the problem of "updating" statutes; Matter of Jacob; Li (note case); Coherence with Public Norms & the problem of judicial "surgery": Public Citizen (note case); 1979 Pontiac Trans-Am)

Assignment 20: 749-764 plus supplemental handout on TVA v. Hill (Concerns about Legal Process Theories; TVA v. Hill; Griffin)

Assignment 21: 765-781; F&F 88-102 (New Textualism; Bock Laundry)

Assignment 22: 781-798; F&F 102-115 (Textualism continued; Chisom)

Assignment 23: 798- 818; F&F 63-87 (Economic Theories; Marshall; Perez)

Assignment 24: 818-846; F&F 132-143 (Brown & Williamson; Pragmatic and Critical Theories; The Case of the Speluncean Explorers: Contemporary Proceedings)

B. Intrinsic Devices

Assignment 25: 847-880 *plus* the Hart & Miller Island problem handout (Textual canons; Babbitt v. Sweet Home Chapter; Hart and Miller Island problem)

Assignment 26: 880–907 (Introducing Substantive Canons; the Rule of Lenity; Muscarello)

Assignment 27: 907-922 (the Ashwander doctrine—interpretation to avoid constitutional problems; Witkovich; Catholic Bishop)

Assignment 28: 922-941 (federalism canons; Gregory; clear statement rules)

Assignment 29: 941-955 (Llewellyn and the debate about canons and rules of clear statement); prepare problem 8-2 on pages 952-953

C. Extrinsic Devices

Assignment 30: 955-970 (common law; Smith v. Wade)

Assignment 31: 971-981 (surrounding circumstances/history/context; Leo Sheep); plus 981-991 (Legislative History--Committee Reports; Blanchard v. Bergeron)

Assignment 32: 991-1014 (Legislative History continued; In re Sinclair; Pepper)

Assignment 33: 1014-1026 plus review 820-827 (Legislative History: Drafter’s statements (Kosak), Hearings and floor debates; rejected proposals; FDA v. Brown & Williamson Tobacco; Rapanos)

Assignment 34: 1027-1035 (Legislative History: “Silver Blaze”: “the dog that didn’t bark”—first Montana Wilderness); 1035-1047 (Post-enactment legislative history; second Montana Wilderness; Presidential signing statements)

Assignment 35: 1047-1064 (legislative inaction, ratification; Bob Jones)

Assignment 36: 1066-1089 (interpretation in light of other statutes; Cartledge; Lorillard; Zerbe; Morton v. Mancari)

Assignment 37: 1185-1186; 1194-1227 (deference to administrative interpretation; Chevron; MCI v. AT&T)

Assignment 38: 1247-1258 (Review on Statutory Interpretation; State Statutory Interpretation in a Controversial Context: Palm Beach County v. Harris)