

STATUTORY READING AND INTERPRETATION - SECTION 1
PROFESSOR BEARD
SPRING SEMESTER, 2014
M-W 8:00-9:20, Room 103

This Syllabus can be found through the Library E-Reserve System

SYLLABUS

- I. **REQUIRED CASEBOOK:** Manning and Stephenson, *Legislation and Regulation* (Foundation/Thomson Reuters, 2010)

NOTE: All page references in this Syllabus are to the Casebook.

YOU ARE RESPONSIBLE FOR:

1. All material assigned in this Syllabus.
2. All material raised in class whether by me OR by your PEERS.

- II. **PRINCIPAL COURSE OBJECTIVES:**

A. **Statutory Reading:** At the risk of stating the obvious, *the ability to carefully and critically read statutory material is an essential skill for any lawyer!* As you are aware, statutes and regulations are important sources of the law. In developing the legal skill of statutory reading, we will:

1. Learn to read carefully and specifically the words of the statute or regulation;
2. Learn how grammar, syntax and sentence structure, and word choices inform the proper way to read and construe the language of a statute or regulation;
3. Learn how to apply rules of statutory construction to interpret properly statutory and regulatory language, resolve ambiguities inherent in statutory and regulatory language, and fill gaps not covered by the specific language of the statute or regulation;
4. Learn what other extraneous material, e.g., legislative history, social settings, etc, might be appropriately applied to find the meaning of statutory language, and how to use such materials in analyzing statutory and regulatory language;
5. Appreciate the difference between reading and articulating the rule found in a statute or regulation, as opposed to reading and articulating the rule from a case; and
6. Be able to recognize when a statutory rule is a mandatory rule or is a “default rule” (a rule that might be varied by agreement of the parties);

THESE SKILLS OF STATUTORY READING AND CONSTRUCTION WILL

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 2

BE APPLICABLE IN READING AND CONSTRUING ANY LANGUAGE, E.G., CONTRACT LANGUAGE, THE LANGUAGE IN A WILL OR OTHER DOCUMENT.

- B. Application of Statutory Rules to Different Facts:** We will learn how to identify the problem to be solved by determining the facts that are relevant and then identifying the language in the statute/regulation that allows us to resolve our client's problem.
- C. Problem Solving:** *THE* principal role of lawyers is to *solve the problems* brought to them by their clients. Litigation is ALWAYS a last resort – it is time-consuming, very expensive, and usually leaves all parties dissatisfied – even the victor. In order to avoid litigation, or better yet, to properly plan the best way to resolve, or avoid legal problems, the lawyer MUST understand what rules will apply in the event the parties fail to reach some other arrangement. It is this “default position” that is the beginning of problem solving. In order to solve clients' problems the lawyer must:
1. Be able to distill from an avalanche of facts, those facts that are relevant to the client's *real legal* problem.
 2. Based on those facts to be able to identify and state the client's legal problem clearly.
 3. Finally, be able to explain a resolution of the client's problem through application of the legal rules to the relevant facts that have been identified. Put another way, the lawyer must be able to provide a solution to the client's legal problem through clear, cogent, analysis of the applicable law as applied to the relevant facts. **IT IS THIS FINAL STEP THAT YOU WILL BE EXPECTED TO SET FORTH TO ME ON THE FINAL EXAMINATION.** The examination will present you with 1) a set of facts brought to you by a client and 2) statutory language that may be applicable in resolving your client's problems. You will need to determine which facts are relevant to the problem and which statutory rules are applicable and **THEN APPLY THE RULES TO THE FACTS TO REACH A REASONED CONCLUSION.**

This is a *process*, an *iterative* process that began last semester, continues this semester, and will continue to require practice and repetition. Through thorough preparation and participation in class you will become better and better at honing these skills. As you know, your legal career began the first day of Orientation. It is called the *practice of law* because you learn and refine your skills for the rest of your life – beginning last semester and continuing for the rest of your career.

III. PROFESSIONALISM:

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 3

- A. **Attendance Policy**: Regular attendance is necessary in this course. Under Law School and American Bar Association rules, excessive absence from class sessions may result in a reduction of your grade in this course or, in extreme cases, dismissal from this course with a grade of F. If your cumulative absences (for any reason) exceed three (3) class sessions, please see me to discuss the problem. Failure to so advise me will be considered a breach of professional standards and responsibility and will be treated accordingly.

More importantly, I want you to come to *every* class. You should be prepared for class with notes that can aid you if you are called upon. With respect to every assignment, I have provided questions *in this Syllabus* that you will be expected to have considered as you read and study the material assigned for that day. These questions provide a good starting point regarding what you can expect will be discussed in class. However, **even if you are not prepared I want you to come to class**. If you are not prepared for that day, simply advise me before class, and I will not call on you. This ability to take a “pass” is intended to encourage students to come to class even if there are times when you are not prepared. There is no penalty for taking advantage of this ability to “pass,” UNLESS THE PRIVILEGE IS ABUSED. In the event a student abuses the privilege, the privilege may be revoked, for that student.

- B. **Preparation and Participation (See II. Principal Course Objectives, above)**: This class will be conducted utilizing a case and problem method. The Casebook contains numerous cases and problems which will be studied and worked and discussed. In addition, for each assignment I have provided, and will provide study questions and class objectives for you to consider as you read and study the material assigned for that day. These questions will give you a good starting point regarding what you can expect will be discussed in class. So, as you prepare for each class, I expect that you will *write out answers* to those questions and problems provided with the assignment and included in the casebook. **You will note that class will not include the use of laptops (See III.D. Policy Regarding Laptop Use in Class below). Accordingly you will need to prepare your written answers and print them out to have with you for use in class.**

You are expected to have read, studied, and prepared the ENTIRE assignment for each class and to be prepared to participate in class discussion of the statutes, cases, questions, **and problems** assigned. Some assignments will be discussed over more than a single class. You are to read the assignment AS A WHOLE and be prepared with respect to the ENTIRE assignment on the first class day for which the assignment is given. If an assignment extends over more than one day YOU ARE EXPECTED TO **REREAD AND RESTUDY** THE ASSIGNMENT for subsequent

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 4

days' discussion.

NOTE: We may not cover in class all the material assigned for a given class period, **though you are responsible** for reading and understanding all the material. Much of the reading will be background information that you will be expected to read, study and learn on your own. *You are welcomed and encouraged* to raise in class, or discuss with me outside of class, any questions on any assigned material.

NOTE: I have been known to fall behind the Syllabus, although I intend to do my best to remain on track with the assignments as listed. However, since the class must understand the material before we move on, there is a real possibility that we will not keep up with the Syllabus. In all events, *we will go in the order set forth in the Syllabus* – so if we fall behind the syllabus you CAN judge our pace and keep ahead by at least one day in your reading.

Class participation may affect your grade - See IV.B. Grades and Class Participation, below. While I plan to call on every student at some point in the semester, I also will call on volunteers. I encourage all of you to participate regularly, and to raise your hand. Only the LACK of class participation can negatively affect your grade. Repeated failure to participate or be prepared may result in a downward adjustment of your final grade.

- C. **Office Hours:** My office is Room 128. I do not post office hours because I am in the building and available to meet with you between 6:30 am and 5:00 pm almost everyday (excepting, of course, times when I am preparing for or in class or in meetings). I encourage you to come by any time you like, or to make an appointment, to discuss class, jobs, family or anything else that is on your mind. I like to talk with students, and try to keep my door “unlatched,” though the door is usually not open wide because of hall noise. You may also call me at 885-6747 or email me at beardb@uidaho.edu.
- D. **POLICY REGARDING LAPTOP USE IN CLASS:** I do not permit the use of laptops or any other device in class. I have chosen to implement this “**No Laptops Policy**” for the following reasons:
1. Laptops in class are a significant distraction that detracts from student participation and engagement in class discussion. The very process of class discussion and engagement is critical to learning the skills needed to be a good lawyer.
 2. Prohibiting laptop use also strengthens the review process following class, since students must consider the material and class discussion in order to incorporate the material into outlines for future study.

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 5

3. The post-class review will also help students memorize the applicable rules we have discussed. This memorization aspect will be essential come exam time because my exam will be closed book. See IV. B. below.

IV. ACADEMIC MATTERS

A. Subject Matter and Additional Objectives of this Course:

Subject Matter: This course introduces you to the legal **skill** of reading and applying statutory and regulatory material. The way one reads and applies statutory language and material is quite different from the way in which one applies common law rules derived solely from cases. In all of this we will discuss the pros and cons of **the ways and methodologies and sources** courts employ to read and construe the statutory language and material being applied. The same methodologies, if not interpretive sources, will be essential **when construing any ambiguous language** – whether in a statute, contract, will, or other writing. So **think critically** and come prepared to advocate and defend your positions, *and to be convinced by your classmates of their positions.*

You simply cannot succeed in this class without careful, detailed, critical reading of the language involved in the statute. While reading cases critically and in detail is essential, the statutory *language* (or contract language, will language, etc) IS THE SOURCE for determining the rule. If you do NOT start and end with the language and words of the Statute you will fail in your analysis.

Additional Objectives (to II. Principal Course Objectives discussed above): In addition to the principal objectives outlined above I want you to (1) continue to practice discussing the law spontaneously in a group setting; (2) through some group problem solving exercises, learn how to discuss and collaborate with your student colleagues in a smaller setting; and (3) continue to develop a professional (including an ethical) perspective on the material.

- B. Grades and Class Participation: Final Examination: The main component of your grade will be a “three-hour” **closed-book** final exam which is currently scheduled for Friday, May 9 at 1 pm. While the exam is a “three hour exam,” (that is, an exam designed to be completed in three hours) you will be given four hours in which to complete the exam. You may bring into, and use during, the exam **ONLY** pen and paper, or your laptop computer with ExamSoft test software properly downloaded. The final exam usually has a maximum of 100-120 points.**

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 6

Midterm Examination: *I reserve the option* to give you a midterm examination likely sometime in the 7th or 8th week of class. The midterm will account for no more than 20 points, and will be given as a single question to be completed during a regular class period. More information on any possible midterm will be forthcoming during the semester.

Exercises, Projects, and Quizzes:

1. The Reading Exercise during Orientation counts for 5 points toward your final grade.
2. I may have you do one or more other individual or group projects, e.g., asking you to draft a statute, likely outside of class.
3. I may have periodic, short, 5 point multiple choice quizzes that will be based on the readings for the day - the study questions provided in connection with each assignment, the notes in the casebook, the questions posed in the casebook, and the class objectives provided in connection with each assignment. These quizzes will be unannounced.
4. Finally, I may ask you to hand in your casebrief for a particular case. *I expect you to brief all cases and come to class with the casebriefs.* I will ask you to hand them in periodically to make sure you are doing the work. I will review the casebrief to assure that a fair effort was put into your preparation, will not grade them per se, and will hand them back through the front office.

The total points available for Exercises, Projects (including the Orientation Reading Exercise), quizzes, and casebriefs will not exceed 50 points.

Class Participation: I reserve the right to adjust your final grade upward (but not downward) by one-third of a letter grade for class participation (e.g., from “B” to “B+”). I will *not* lower any grades based on the *quality* of class participation (although repeated failure to be prepared may be taken into account, and may result in a possible lowering of your final grade). I may raise a grade when, in my judgment, a grade received based upon the exercises, projects, and final examination does not accurately reflect the understanding of the material demonstrated by that student through class participation. In short, **CLASS PARTICIPATION CANNOT HURT YOU AND MAY HELP YOU.** For purposes of upward grade adjustments, “Class participation” relates to the **quality** of your contributions to class discussion (**including your willingness to ask what may seem to you to be “stupid” or “obvious” questions**) and, **equally important**, your willingness to give time and respectful attention to the questions and comments of your classmates (including your willingness to listen carefully to what may seem to you to be “stupid” or “obvious” questions). The importance of your ability to listen carefully, and respond meaningfully and **respectfully** to the questions and comments of your classmates reflects upon your ability to act

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 7

professionally, and cannot be emphasized enough.

C. Disability Support Services Reasonable Accommodations Statement:

Reasonable accommodations are available for students who have documented temporary or permanent disabilities. Please notify Dean Dodge, during the first week of class, of any accommodation(s) needed for the course. All accommodations must be approved by Dean Dodge in conjunction with University Disability Support Services located in the Idaho Commons Building, Room 306. Contact DSS

- by phone at 885-6307
- email at <dss@uidaho.edu>
- website at www.access.uidaho.edu

IT IS THE STUDENT'S RESPONSIBILITY TO SEEK A DISABILITY ACCOMMODATION, AND UNTIL AN ACCOMMODATION IS APPROVED THROUGH DEAN DODGE'S OFFICE, NO STUDENT WILL BE ENTITLED TO RECEIVE ANY ACCOMMODATION.

- D. Missed Classes:** Currently, it does not appear that we will miss any classes this semester, but I may cancel classes to allow you to attend/participate in special events in the law school. In the event additional class cancellations occur, I will give as much notice as I can, and **WE WILL MAKE UP ANY ADDITIONAL MISSED CLASSES.**

V. ASSIGNMENTS

The following is the basic list of assignments for the semester. I may augment the assignment list if we end up having time. I have noted the class day and calendar date on which the material is scheduled to be discussed.

The Assignment sets forth the pages to be covered in class. Note that we are not covering all the material in the book. I anticipate covering Chapters 1, 2, and 5 of the Casebook, with assigned readings for background out of Chapters 3 and 4. You are responsible for material in ALL assigned pages – however, you are not responsible for, and we will not cover, material on pages that are not assigned. So pay close attention to the pages assigned.

Study questions and class objectives are provided to help you focus your reading as you prepare. These study questions and class objectives are critical for you to better prepare and understand where we are going in the class, and what the material you are to master is.

Class Objectives for each Class are listed at the end of the Assignment. These are the “take-aways” I want you to have at the end of class.

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 8

YOU SHOULD AT ALL TIMES BE PREPARED FOR ONE ASSIGNMENT AHEAD OF WHERE WE ARE IN CLASS. **See section III.B Above!**

STATUTORY READING AND INTERPRETATION – ASSIGNMENTS

WEEK 1

DAY 1&2 **The Syllabus – First you MUST read this Syllabus completely and carefully.** I
1-13&1-15 have endeavored to set forth my expectations and the “rules of the road” for this class clearly, but I, like legislators and all people, am human and cannot avoid inevitable ambiguities. **SO, come prepared with questions!**
Administrative Introduction. Introduction to Statutory Lawmaking and Interpretation. 1. Why do we need to “interpret” language? Justice John Paul Stevens, “The Shakespeare Canon of Statutory Construction”(Emailed with this Syllabus); 2. Figuring out what the legislature meant *TVA v. Hill*, P. 1-19.

STUDY QUESTIONS: 1) What “rules” does Justice Stevens set out as guides to understanding written language? 2) In Justice Stevens’ Essay – A) what is the “text” he suggests must be read under Canon 1? B) What is the equivalent of the “entire statute” to which he refers in Canon 2? C) What is the “context” to which Justice Stevens alludes in Canon 3? D) What is the “legislative history” to which he refers in Canon 4? and E) How does “common sense” get applied in Canon 5? 3) In light of the Stevens’ Essay and the Casebook material, when applying a *statute*, where does one begin, what is the “starting point?” 4) In *TVA v. Hill* which words in the Endangered Species Act did the Majority and the Dissent point to as critical in determining the proper application to this case? Did they agree? 5) Which is more important – A) the words of the statute, or B) the purpose of the statute? Why? 6) What weight should courts give to statements of individual legislators uttered during the course of enactment? 7) What “tools” do courts have to help inform the meaning of the words used? 8) Are there any “rules” to guide courts in trying to figure out what a statute says or means? What do we call those rules? How do these “rules” compare to Justice Stevens’ Canons? 9) In the end, what is the Court’s job when it interprets a statute? Did the majority and Dissent in *TVA* agree on the ultimate job to be accomplished by the Court?

CLASS OBJECTIVES: 1) To appreciate that language a) **does** have content and meaning, but b) the meaning is not always clear and precise. 2) To see that intelligent and principled people can read the same language and arrive at different analytical outcomes when applying the language to specific facts. 3) To see the “fun” in seeking to divine the “true meaning” of language used.

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 9

WEEK 2

1-20 **MLK Day Holiday**

DAY 3 **Theories of Interpretation and the Legislative Process. P. 19-28**

1-22 **STUDY QUESTIONS:** 1) What are the different, *broad* theories of statutory interpretation? 2) In your own words be prepared to state the commonalities and differences between each theory. 3) In considering the legislative process, what overarching considerations inform the constitutional structure of the enactment process. Do you think these considerations are beneficial or detrimental? Or do these considerations have both positive and negative aspects? 4) What considerations inform the rules of procedure adopted by Congress to govern the enactment process? Do you think these considerations are beneficial or detrimental? Or do these considerations have both positive and negative aspects?

CLASS OBJECTIVES: 1) To begin considering the roles of the governmental branches, i.e, courts and administrative agencies in relation to the legislature regarding the process of law making. 2) To appreciate the concept of legislative supremacy vis a vis the judiciary. 3) To see that there are different approaches to interpreting language of any kind – in our case statutory (and regulatory) language – but that even different approaches have more common goals than may at first seem apparent. 4) To get a grounding in BASIC legislative process - to understand the structural limits built into the process, and to appreciate some of the technicalities in enacting statutes.

WEEK 3

DAY 4&5 **The Letter of the Law versus the Spirit of the Law – The Classic Approach**
1-27&1-29 **P.28-49**

STUDY QUESTIONS: RECALL the broad theories of statutory interpretation and the “tools” for interpreting language.1) In *Riggs* what result if the letter of the law were followed – what result if one follows the spirit? Who (the Majority or the Dissent) advocated for the letter, and who the spirit? 2) In addition to the statutory language, what other “objective” factors did the Majority and Dissent consider in *Riggs*? 3) How did the Majority in *Riggs* discern the purpose (or spirit) of the statute? 4) In *Holy Trinity* what did the Supreme Court look to in discerning the purpose behind the statute? 5) In *Holy Trinity* what sources, other than the express language of the statute, did the Court look to in determining the meaning of the Alien Contract Labor Act? 6) How valid are those sources in interpreting the statute in *Holy Trinity*?

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 10

OBJECTIVES FOR CLASS: 1) To appreciate the struggle between applying the express language of a statute in the face of a distasteful outcome we “know” the legislature could never have anticipated or intended. 2) To begin to identify differing methods and tools employed for *interpreting* statutory language and divining legislative purpose. 3) To begin an appreciation of how even seemingly clear language can be problematic when applied to specific cases.

WEEK 4

DAY 6 **The New Textualism – P. 49-67**
2-3

NOTE REGARDING the framing of the issue in *WEST VIRGINIA UNIVERSITY HOSPITALS, INC. V CASEY (WVUH), P. 49* – In part II of the Opinion, the Court discusses *Crawford Fitting Co. v. J.T. Gibbons, Inc.*. In *WVUH*, 42 U.S.C. §1988 authorizes the award of “attorneys’ fees.” *Crawford Fitting* held that the authorization for the award witness fees under 28 U.S.C. §1920 was limited under the provisions of 28 U.S.C. §1821(b) in the absence of “express statutory authority” to award greater amounts or different categories of litigation costs. So the issue in *WVUH* is whether the court has the authority to award witness fees in amounts greater than provided for in §1988 without explicit statutory authority to do so. See first full paragraph top p. 51. So §1920, at issue in *Crawford Fitting*, is not applicable to this case, but led to the rule requiring explicit statutory authority to shift fees in litigation.

STUDY QUESTIONS: 1) The majority recites many *statutory* fee shifting regimes highlighting the presence of specific language for witness fees as distinguished from attorneys’ fees. How does this demonstrate Congressional intent regarding shifting the costs of litigation? 2) How does the majority avoid the argument that Section 1988 was a direct CONGRESSIONAL response to reverse the Supreme Court’s decision in *Aleyeska Pipeline* and reestablish the equitable basis for cost shifting and the “private attorney general doctrine?” 3) How does the Majority address the purpose over text argument? 4) Is the Majority’s distinction between witness fees and paralegal fees as falling under the heading of “attorneys’ fees” persuasive? 5) What about WVUH’s argument that the Court should correct the “mistake” of Congress when it simply “forgot” to include expert fees in §1988? 6) How do you feel about Stevens’ reference to past Court constructions, and legislative history to find that expert witness fees are within the ambit of “attorneys’ fees” under §1988? 7) When referencing congressional intent, and prior court decisions, note that Justice Stevens refers to fee shifting generally and not to attorneys’ fees or witness fees, specifically. Should this matter given that §1988 speaks of “attorneys’ fees?” 8) How persuasive is Stevens’ argument that Cong. has reversed overly technical interpretations of Congressional legislation?

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 11

OBJECTIVES FOR CLASS: 1) *To begin* to see the broad differences in approach between so-called textualists, and so-called purposivists. 2) *To begin* to determine for yourselves, which approach, if either, is more persuasive or compelling to you – AND WHY! 3) *To begin* to see how these approaches are NOT mutually exclusive. 4) Take note of the positions – text or purpose – being staked out by members of the Court so that we can determine in other cases, the intellectual consistency of the members.

DAY 7 **Textually Constrained Purposivism; Legislative Purpose and Dynamic**
2-5 **Statutory Interpretation – P. 67-85**

STUDY QUESTIONS: 1) How "constrained" do you think purposivism has become in light of decisions like *Cline* (p. 68) and *Zuni* (p. 78)? 2) Are the efforts by the Majority in each case really efforts to tie purposivism to the textual meaning – or are they just articulating the justifications for a purposivist interpretation? Are there advantages and disadvantages to this new approach? 3) Is this approach more or less transparent in terms of what the court seeks to do in construing legislative language? 4) Explain in your own words Eskridge's construct of the "relational agent." Is this a good or useful way to view the inevitable need to keep legislation up to date? 5) Do you have any sense what was *really* going on in *Welosky*? 6) Do Courts have any business "updating" legislation?

OBJECTIVES FOR CLASS: To see the blending of two different interpretative approaches – and to determine if the result is something "new."

WEEK 5

DAY 8 **Judicial Correction of Legislative Mistakes – The Absurdity Doctrine**
2-10 **P. 85-101**

STUDY QUESTIONS: 1) Articulate, in your own words, WHY OR WHY NOT a literal application of the statutory language in *U.S. v Kirby* would lead to an absurd result. 2) Articulate, in your own words, WHY OR WHY NOT a literal application of the statutory language in *Public Citizen* would lead to an absurd result. 3) State in your own words, the standard/the rule to be applied in determining whether a particular application of statutory language to a set of facts would qualify as an absurd result.

OBJECTIVES FOR CLASS: To recognize the advantages, disadvantages, and potential for abuse when invoking the Absurdity Doctrine.

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 12

DAY 9 **Judicial Correction of Legislative Mistakes – The Scrivener’s Error**
2-12 **Doctrine P. 101-111**

STUDY QUESTIONS: 1) Is the “Scrivener’s Error” Doctrine just the “Absurdity Doctrine” with different verbal formulae? 2) Is the “Scrivener’s Error” Doctrine less discretionary than the “Absurdity Doctrine”? Are there more defined boundaries and rules for when it might be applicable? 3) Is it more justified to “correct” legislation based on errors in punctuation, than on poor word choice or missing words? 4) How does one “know” that there has been a “Scrivener’s Error” any more than one can determine that a given result would be “absurd?”

OBJECTIVES FOR CLASS: 1) To see the *outer limits* of statutory interpretation - modification and correction of statutory text and language. 2) To appreciate that even at these outer limits, Courts feel constrained and obligated to deal with the meaning of the text adopted by the legislature.

WEEK 6

2-17 **President’s Day Holiday**

DAY 10&11 **What is the Text – Scientific or Ordinary Meaning P. 111-115; Legal**
2-19&2-24 **Terms of Art P. 115-126; Colloquial Meaning or Dictionary Meaning**
 P. 126-140

STUDY QUESTIONS: 1) How does one determine the meaning of text? Is a dictionary all that one needs? 2) How did the court in *Nix* determine that a tomato is a vegetable even though it is the part of the plant with the seeds and so technically is a fruit? 3) Note the presumption that the legislature intends words to be applied in their “ordinary” or “common” sense/meaning. BUT what IS the ordinary sense/meaning of the word tomato and how did the court arrive at that determination? 4) Who argued for the “ordinary meaning (Maj or Dissent in *Moskal*? Who asserted the legal, or common law meaning? 5) What factors does the Majority in *Moskal* weigh in determining whether to construe terms in an ordinary way as opposed to as a legal term of art? 6) How significant is statutory purpose when determining whether a term is to be construed in accordance with its ordinary as opposed to legal meaning? 7) What do you think of the position that says we should presume, even if realistically untrue, that Congress legislates with the intention to employ terms with their legal/common law meaning? 8) In *Smith* are not BOTH the Majority and the Dissent arguing for the “ordinary” meaning of the term “use?” - with the Majority deriving that “ordinary” meaning from the dictionary and the Dissent deriving the “ordinary” meaning from the colloquial meaning (that is the more informal or everyday meaning of the term)?

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 13

Is the Dissent correct that there is a difference? Couldn't the dictionary meaning – as found by the Majority – also qualify as the colloquial meaning? 9) Is there but a single meaning of the term “use?” 10) How else might one communicate how the gun was involved in the transaction for which Smith was prosecuted – would that way of articulating the issue lead to a clearly distinct meaning for the term “used”? 11) Which position do you find more convincing regarding the colloquy between Maj and Dissent regarding “use” of a cane?

OBJECTIVES FOR CLASS: 1) To begin our focus on the meaning of the text itself and appreciate the many factors - beginning with societal context - that inform our understanding of statutory text. 2) To begin learning certain rules for construing language. 3) Recognize that rules sometimes are at odds - pointing to opposite constructions. 4) To learn the distinction between the “ordinary meaning” versus the “technical/legal/common law” meaning of a term. 5) To see the distinction between the “ordinary” versus “colloquial” meaning of a term. 6) To appreciate that the “dictionary meaning” need not encompass every possible meaning listed – and to again see that context is critical. 7) To appreciate further that the quest is always to discern the *legislature's intent* behind the words used.

WEEK 7

DAY 11 **SAME ASSIGNMENT AS DAY 10**
2-24

DAY 12 **Legislative History – The Post-New Deal Approach P. 140-163**
2-26

STUDY QUESTIONS: 1) What are the various sources of “legislative history?” 2) When assessing legislative history we seek its probative effect in establishing what? 3) Be prepared to articulate the reasons why different forms of legislative history might have different levels of probative validity.

OBJECTIVES FOR CLASS: 1) To appreciate the differences in sources of legislative history. 3) To begin to articulate the valid reasons for relying on legislative history in interpreting statutory language. 3) To understand the benefits and limits of legislative history as a resource to interpret legislative text.

WEEK 8

DAY 13 **Legislative History – The Textualist Critique of Legislative History P.**
3-3 **163-181**

STUDY QUESTIONS: 1) In *Blanchard* explain how the Majority used the

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 14

Senate Report to support their interpretation of the attorneys' fees provision. 2) Was the use of the Senate Report legitimate? Why? Why not? 3) Is Scalia more upset that the Court seems to be following district court decisions, or that the probative value of the Senate Report is an unreliable resource to determine legislative intent? 4) Is it fair to say that the legislative history supporting the interpretation of the phrase "substantially all" as meaning 50% plus 1 was an example of arguably contrived or manufactured legislative history? 5) Is it problematic to us legislative history to discern legislative INTENT? Is the use of legislative history to discern textual meaning more justifiable? Why?? Why not? 6) Why are Committee Reports considered most persuasive in demonstrating legislative intent? Do you think the Reports are persuasive – why? Why not? 7) What to do about manipulative and calculated statements inserted into legislative history – consider Sen. Durenberger's statements noted in *Continental Can.*

OBJECTIVES FOR CLASS: 1) To understand that there are different "uses" to which one might put legislative history, e.g., to discern intent, to discern meaning of words as used, etc.. 2) To appreciate the qualitative differences in different sources of legislative history.

DAY 14 **Legislative History – The New Synthesis P. 181-193; Other Potential**
3-5 **Uses of Legislative History P. 193-201; The Judicial Power and**
 Equitable Interpretation P. 201-217

STUDY QUESTIONS: 1) What problems relating to the use of legislative history in statutory interpretation have been acknowledged widely? 2) Be prepared to state the holding in the *Zahn* case, and THEN be prepared to articulate how the Court's decision in *Exxon Mobil* affected the *Zahn* case, and the question of diversity jurisdiction in class action lawsuits under §1367. 3) What sources of legislative history does the Majority rely upon? How does the Majority employ the legislative history – to what purpose? How does the Dissent use the legis. hist.? 4) How do the Maj. And the Dissent deal with the conflicting Reports regarding the effect of §1367 on *Zahn*? Which, if either, source of legis. hist. do you find more persuasive? authoritative? Are they the same? 5) In *Corning Glass* what is the legis. hist. used to show? Do you find this use of legis. hist. any more legitimate that using legis. hist. to determine legislative intent? 6) *Marshall* reflects a clear articulation, by Posner, of different philosophical bases for the role of the judiciary in statutory interpretation. Are the philosophical differences more apparent than real? Does the historical background of the understanding of the role of the judiciary at the time of the founding undermine the "faithful agent" view of the judiciary's role – or was the understanding of the judiciary as more of a junior partner an English attribute rejected by the Constitution's stricter separation of powers?

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 15

OBJECTIVES FOR CLASS: 1) To see that both proponents and opponents of the use of legislative history have come “closer together?” That there is an emerging “Synthesis” in the authors’ word? 2) To recognize different uses for legis. hist. apart from “divining” legislative intention. 3) To continue to see the varied approaches to, and philosophies related to, the Judicial Role in statutory Interpretation – and hopefully - to see that, notwithstanding the strong arguments made by proponents on both sides, the “truth” – such as it exists – falls somewhere in the middle based upon reasoned analysis focused on the ultimate goal of determining legislative intention.

WEEK 9

DAY 15&16 Legislative History – The New Synthesis P. 181-193; Other Potential
3-10&3-12 Uses of Legislative History P. 193-201; The Judicial Power and
Equitable Interpretation P. 201-217 (cont.); Canons of Construction –
Introduction P. 218-222; Semantic Canons of Construction P. 222-266

STUDY QUESTIONS: 1) What problems relating to the use of legislative history in statutory interpretation have been acknowledged widely? 2) Be prepared to state the holding in the *Zahn* case, and THEN be prepared to articulate how the Court’s decision in *Exxon Mobil* affected the *Zahn* case, and the question of diversity jurisdiction in class action lawsuits under §1367. 3) What sources of legislative history does the Majority rely upon? How does the Majority employ the legislative history – to what purpose? How does the Dissent use the legis. hist.? 4) How do the Maj. And the Dissent deal with the conflicting Reports regarding the effect of §1367 on *Zahn*? Which, if either, source of legis. hist. do you find more persuasive? authoritative? Are they the same? 5) In *Corning Glass* what is the legis. hist. used to show? Do you find this use of legis. hist. any more legitimate than using legis. hist. to determine legislative intent? 6) *Marshall* reflects a clear articulation, by Posner, of different philosophical bases for the role of the judiciary in statutory interpretation. Are the philosophical differences more apparent than real? Does the historical background of the understanding of the role of the judiciary at the time of the founding undermine the “faithful agent” view of the judiciary’s role – or was the understanding of the judiciary as more of a junior partner an English attribute rejected by the Constitution’s stricter separation of powers? 7) LIST ALL the Semantic Canons of Construction – and their meanings – discussed in the material (HINT there are more than those listed in the subheadings to the readings). 8) In *Silvers* which do you find more persuasive - the Majority’s use of the canon, or the Dissent’s use of legislative history? 9) Are the canons and presumptions discussed in *Gustafson* inconsistent? If so, how do you determine when to employ one presumption rather than the other? 10) Is the use of *ejusdem generis* in either *Smith* or *Circuit City* justified or

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 16

make sense to you? Why/why not?

OBJECTIVES FOR CLASS: 1) To see that both proponents and opponents of the use of legislative history have come “closer together?” That there is an emerging “Synthesis” in the authors’ word? 2) To recognize different uses for legis. hist. apart from “divining” legislative intention. 3) To continue to see the varied approaches to, and philosophies related to, the Judicial Role in statutory Interpretation – and hopefully - to see that, notwithstanding the strong arguments made by proponents on both sides, the “truth” – such as it exists – falls somewhere in the middle based upon reasoned analysis focused on the ultimate goal of determining legislative intention. 4) To discern the varying contexts and applications for the various – and often seemingly opposing – canons and presumptions used to aid interpretation.

SPRING BREAK MARCH 17-21

WEEK 10

DAY 17&18 **Semantic Canons of Construction P. 222-266 (Cont. from WEEK 9);**
3-24&3-26 **Substantive Canons of Construction – Avoiding Serious**
Constitutional Questions P. 266-288 (and Recall *Public Citizen* P. 89);
Protecting State Sovereignty and Autonomy – Federal Regul. of State
Governmental Functions P. 288-306

STUDY QUESTIONS: 1) Should courts seek to avoid constitutional questions properly presented by the record before them? Why? Why not? 2) Does a rule of construction requiring a) the court to find a plausible, constitutional construction of a statute or b) avoid addressing a constitutional question if at all possible, demonstrate greater respect by the judiciary for legislative supremacy? Even if the “clear reading” of the statute reflects the intention of the legislature, and leads to an unconstitutional result? 3) In *Catholic Bishop* the question was whether federal regulation of the labor relations between church-affiliated schools and their teachers (even those teaching only secular subjects) would involve “excessive entanglement” of the government in religion in violation of the First Amendment. In order to avoid addressing the constitutional question, the Majority reviews the Statute to determine if it was clearly the intention of Congress to cover this labor relationship. The Court requires a “clear expression” of congressional intent to cover the relationship, and finds none. How similar is this “clear expression” to the “clear statement” rule in *Gregory*? 4) Is requiring Congress to provide such clear direction a) realistic? b) appropriate in light of the legislative process and who is in charge of that process, or c) imposing *judicial* biases and values onto the legislative branch? 5) Was there anything unclear in

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 17

the statutory language of the NLRA regarding coverage of the school/teacher relation in *Catholic Bishop*? 6) Be prepared to articulate the rule of the majority's Avoidance Canon, and the Dissent's statement of the Avoidance Canon. How significant must the const. ques. be and how far should the Court go to avoid addressing a constitutional question. 7) Are any of the listed justifications (P. 280-288) for the Avoidance Canon persuasive? 8) Is the "clear statement" rule applied in *Gregory*, simply another avoidance canon – employed to further a different "constitutional value" favored by the Court?

OBJECTIVES FOR CLASS: 1) To learn these additional canons of construction 2) To see the commonalities and distinctions between these canons 3) To determine whether the canons should have any greater influence than semantic canons we discussed - or any other interpretive tool we've studied.

WEEK 11

DAY 19&20 **Subst. Canons (cont) Federal Preemption of State Law P. 306-326;**
3-31&4-2 **The Rule of Lenity P. 327-337 (and Recall *Moskal* P.116); Problems of Scope and Application of Subst. canons P. 337-357**

STUDY QUESTIONS: 1) In assessing these rules of construction as they relate to preemption (displacement of state law), consider whether this is a more concrete and justified application of a substantive canon than in the case of the clear statement canon in *Gregory* that was designed to preserve the autonomy of state governments. 2) How surprising is the holding in *Rice* given the portion of Douglas' opinion provided in the casebook? What do you think we are missing that justifies the holding? 3) NOTE the changes in language and scope of preemption between the 1965 and 1969 Acts in *Cippolone*. 4) In *Cippolone* would you expect the majority, given its analysis, to find some common law actions preempted, and others not? WHY? WHY NOT? 5) Is it reasonable to employ the presumption against preemption in order to determine the scope of an express preemption provision? What other rules of construction are applied by the majority in *Bass*? 6) Is *Spector* consistent with the general canons derived from *The Schooner Charming Betsy* that federal statutes should be narrowly applied to avoid extra-territorial application, or application to non-citizens?

OBJECTIVES FOR CLASS: 1) Learn these critical substantive canons. 2) Consider whether these Substantive Canons are more firmly grounded than Semantic Canons or are they similarly subject to judicial bias and manipulation? 3) To consider the legitimacy of Courts applying substantive canons in order to vindicate judicial constitutional or other values, even if Congress' intent seems contrary.

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 18

WEEK 12

DAY 21&22

4-7&4-9

Introduction to Administrative State – P. 357-384 and The Regulatory Process – P. 579-604; Judicial Review of Agency Statutory Interpretation – Early Cases and Evolution P. 791-814

STUDY QUESTIONS: 1) Is the delegation of regulatory authority to agencies at least nominally in the Executive Branch a) consistent with the separation of powers under the Constitution? B) in any event necessary for the need of our modern world? 2) Can you conceive of alternatives to the administrative bureaucracy that exists? 3) Can the administrative law system be conceived as a sort of system of “checks and balances” specifically designed to control the unelected bureaucracy? Might the APA be viewed as a sort of “constitution” that establishes “checks and balances” between the various “legislative,” “executive,” and “judicial” functions performed by administrative agencies? 4) There are trade-offs when imposing administrative procedures – between effective and efficient decision-making and democratic accountability – HAVE WE SEEN PRECISELY THESE SAME TRADE-OFFS BEFORE? WHERE? 5) Is judicial review of agency action a sufficient check on agency misconduct? 6) How do the rules of statutory interpretation we’ve discussed seem to apply when reviewing the actions (rule-making, enforcement, or quasi-judicial) of agencies?

OBJECTIVES FOR CLASS: 1) To appreciate the significance of administrative agencies in the legal schema. 2) To get an overview of how the current legal system “controls” the actions of governmental agencies. 3) To begin to understand how agencies operate, the powers and restraints applicable to them in the legal system.

WEEK 13

DAY 23&24 **Judicial Review of Agency Statutory Interpretation the *Chevron* case P. 814-835;**
4-14/16

STUDY QUESTIONS: 1) What standards of review have been applied by the Courts in testing the validity of administrative action. 2) Is the analysis under *Hearst* and *Packard* different? In what ways? 3) What is the distinction between *Hearst/Packard* and *Skidmore* that justifies the different level of deference afforded to the agencies in those cases? 4) How does *Chevron* depart from the long-standing structure of judicial review of administrative actions that came out of *Hearst/Packard*? Are agencies granted more or less deference under *Chevron*?

STATUTORY READING AND INTERPRETATION - SECTION 1
SPRING SEMESTER, 2014
PROFESSOR BEARD
SYLLABUS
PAGE 19

5) Whatever its drawbacks, does *Chevron* provide a clearer rule for understanding when agency action is invalid?

OBJECTIVES FOR CLASS: 1) To understand the methods for judicial review of agency action. 2) To answer for yourself whether agency action is afforded the appropriate level of discretion in order to balance the recognized benefits and detriments associated with delegation to agencies. 3) To learn the standards of review applied to agency actions.

WEEK 14 OPEN for Now
DAY 25&26
4-21/23

WEEK 15 OPEN for now
DAY 27&28
4-28/30