

Questions to Think About

Classes 1 and 2: The Legislative Process

How might purposes provisions in a statute be used to interpret the statute? What are severability and preemption clauses? Who actually drafts the text of legislation? Are there limits on which Chamber a bill can be introduced? Must bills be sent to committees and how can committees influence whether legislation is enacted? What are the important differences between the manner in which bills reach and are debated on the floor of the House and the Senate? What is the purpose of the filibuster and what are some potential reforms? How are bills reconciled when each chamber passes a bill with different text? What is “unorthodox” lawmaking?

Class 3: Legislative History

What was the traditional hierarchy of persuasiveness of the various types of legislative history? When will courts examine legislative history to interpret a statute? Only when the plain meaning is ambiguous? To determine that the plain meaning is ambiguous? Will courts interpret language against its plain meaning when the legislative history is clearly at odds with the plain meaning of the language? What weight do courts give to legislative inaction in interpreting statutes? What are some of the traditional criticisms raised against relying on legislative history to interpret a statute?

Class 4: Theories of Interpretation - Background and Textualism

What problems are created because there is no uniform method of statutory interpretation? What are statutory directives and are they constitutional? What is the difference between intrinsic sources of statutory interpretation, extrinsic sources and policy-based sources? What is the difference between the “faithful agent” and “junior partner” models of the relationship between the legislative and judicial branches? Which theories of statutory interpretation are based on each model? What is the difference between a universalist and anti-universalist statutory interpreter? How does a textualist interpret statutes? Why do textualists argue that textualism is the appropriate theory to use to interpret statutes? Will textualists ever examine legislative history to interpret statutes? Will textualists examine extrinsic sources to determine whether language is ambiguous or only after determining language is ambiguous?

Class 5: Theories of Interpretation - Purposivism

How do purposivists interpret statutes? Do they ignore the statutory text? How is it different from textualism? What criticisms are raised to purposivism? What sources did the Holy Trinity majority consult to interpret the language at issue in the case? How is the Holy

Trinity majority's discussion of America as a Christian nation relevant to the Court's interpretation of the statute? What meaning should a court give to the fact that the Alien Contract Labor Act was amended after the Holy Trinity decision? How do purposivist judges apply their theory when a statute has more than one purpose? What were the potentially conflicting purposes of the Superfund statute in Daigle v. Shell? Why did the Daigle majority decide that the statute did not authorize the challengers to recover medical monitoring costs? Did they rely on legislative history to identify the purpose of the statute?

Class 6: Theories of Interpretation - Other Theories

What is intentionalism? How is it similar to, yet different from, purposivism? What criticisms are raised to intentionalism? What is imaginative reconstruction? How is it different from intentionalism? What criticisms are raised to imaginative reconstruction? What is "dynamic statutory interpretation" and how is it different from purposivism? What criticisms are raised to "dynamic statutory interpretation"? In Hively v. Ivy Tech, do the majority or Judge Posner see the court as a "faithful agent" of the legislature? What is the difference between the approaches that the majority and Judge Posner used to reach the conclusion that "discrimination based on sex" includes "discrimination based on sexual orientation"? Did either rely on traditional tools of interpretation to support their interpretation? When does Judge Posner argue that the approach that he used to statutory interpretation should be used? In the Case of the Speluncean Explorers, which Justices adopted a textualist interpretation of the statute and what is the textualist interpretation? Which Justice would have overturned the defendants' conviction based on purposivism and what was the purposivist reading of the statute set forth by that Justice? When does Justice Foster suggest that a court should depart from a literal reading of the statute and adopt a purposivist approach? Is Justice Foster ignoring the plain meaning of the statute? Two other Justices criticize the purposivist approach in their opinions. On what grounds do they criticize the approach as applied to the facts of this case? On what grounds would Justice Handy overturn the defendants' convictions? On what theory is Justice Handy relying? What are the conflicting views expressed by the Justices regarding the relationship of the judicial branch and the executive branch in interpreting the law?

Class 7 - Ordinary Meaning

Should dictionaries be used to determine the ordinary meaning of words? Which dictionaries? How should courts interpret the ordinary meaning of words when dictionaries include more than one definition for a word? How do three different courts interpreting the same statutory language justify reaching different interpretations of the plain meaning of "use" of a firearm?

Class 8 - Technical Meaning

When will a court interpret a statutory term according to a technical meaning as opposed to its ordinary meaning? How does a court determine whether a statute was crafted to

incorporate a technical meaning of a word? What role do statutory directives play in determining whether to adopt a reading of a statute consistent with its technical meaning? What were the potentially different meanings of “assault” in Patrie v. Area Coop. Education Services? What were the TWO statutory interpretation questions that the court was trying to resolve in St. Clair v. Commonwealth? What were the potentially different meanings of “conviction” in that case?

Class 9 - Ambiguity

What is the text that courts use to decide whether the plain meaning of a statute is ambiguous? Does the answer to that question depend upon the theory of interpretation adopted by the court? In Florida Department of Revenue v. Picadilly Cafeterias, Inc., why does Florida argue that the statutory language is clear and why does Picadilly argue that it is ambiguous? Does the majority look at extrinsic sources to determine whether the language is ambiguous or only after determining that the language was ambiguous? Why does the dissent believe that the language is ambiguous? Did they consult extrinsic sources to determine whether the language was ambiguous? What theories of interpretation were relied on by the majority and dissent?

Class 10 - Absurd Results

Will courts examine extrinsic sources to determine whether the plain meaning of a statute is absurd? Will courts examine extrinsic sources to determine the meaning of a statute if the plain meaning is absurd? When will a court conclude that the plain meaning of the statute is absurd? What challenges could be made to a court’s decision to ignore the plain meaning of a statute when the plain meaning leads to an absurd result? What was the plain meaning of the statutory text in Robbins v. Chronister that the plaintiff claimed was absurd? How did the court determine whether the plain meaning was absurd and how did they interpret the statute in light of their conclusion about whether the plain meaning was absurd? Why do the challengers in Green v. Bock Laundry Machine Company argue that the plain meaning of the statute at issue in the case is absurd? Does the majority agree? How do they interpret the language of the statute?

Class 11 - Whole Act Rule and Similar Statutes

What does the “whole act rule” require when interpreting statutory language? What is the rationale for the rule and does the rationale make sense? In Rhyne v. Kmart, did the majority conclude that the statutory language was ambiguous on its face? If so, how did it resolve the ambiguity? How might the court have interpreted the statute if it was adopting a purposivist approach and (a) the purpose was to ensure that conduct is punished only once; or (b) the purpose was to limit punitive damages? What were the allegedly “similar statutes” at issue in Smith v. Jackson? What made them similar? When is a statute similar enough that a court should examine it to interpret a statute? Did the plurality and Justice O’Connor agree on whether the language of the ADEA was ambiguous before turning to

examine the precedent relating to the Civil Rights Act? Is the “rule” that similar language in similar statutes should be interpreted consistently a hard and fast rule or merely a presumption? How should a court interpret language that is similar to language in two different statutes when the language in the different statutes has not been interpreted consistently?

Class 12 - Rule Against Surplusage / Noscitur a Sociis

What is the rule against surplusage? Are there exceptions to the rule? What is the rationale for the rule and does it make sense? How does “noscitur a sociis” operate? In People v. Vasquez, how did the majority, dissent and concurring judges identify the theme that the words surrounding “obstruct” had in common? Did the various judges rely solely on the textual canon to support their interpretation of the statute?

Class 13 - Eiusdem Generis / Expressio Unius

How does “eiusdem generis” operate? Does it apply when the list only includes one item? Does it apply when the general words precede specific examples or only when the general words follow specific examples? How is “noscitur a sociis” similar to, but different from, “eiusdem generis”? Did Justice Thomas, in Ali v. Bureau of Federal Prisons, rely on noscitur a sociis or eiusdem generis to support his reading of the statute? What theory of interpretation did he use? How does he address the rule against surplusage in the case? How do Justices Kennedy, Stevens and Souter justify their reading of the statute? How does “expressio unius” work? What criticism could be raised to the canon? What was the expressio unius argument raised by the challenger in Chevron U.S.A. v. Echazabal and how did the majority respond to the argument?

Class 14 - Titles and Preambles

When should a court consult titles to interpret statutory language? Are the rules different for long titles as opposed to short titles? How did the majority in Holy Trinity use titles to aid in interpreting the statute in that case? Did the Court examine the titles to interpret the statute against its plain meaning? Did the Court find that the statute was ambiguous before examining the titles? Did the majority in Caminetti v. United States rely on titles to interpret the language at issue in the case? Why or why not? Does the dissent find the titles to be helpful in interpreting the statute? What theories of interpretation were used by the majority and dissent in the case? What is a preamble to a statute? What roles do preambles play in interpreting statutes? Was the court in Commonwealth v. Besch really examining preambles to interpret the statute?

Class 15 - Legislative Acquiescence and Stare Decisis

What weight should be given to the legislature’s failure to overturn a court’s interpretation of a statute when a court is called upon to interpret the same statute in a subsequent

case? Does the rationale for the rule make sense? Why might a legislature fail to overturn a court's interpretation of a statute if the legislature does not agree with the interpretation? What role does the Court suggest Congressional inaction should play in interpreting the Sherman Act in Flood v. Kuhn? What is stare decisis? What are the rationales for stare decisis? Does stare decisis apply in the same manner when a court is being asked to overturn a prior constitutional interpretation and a prior interpretation of a statute? Why or why not? When will a court overturn a precedential interpretation despite stare decisis? If, after the Court decided Flood, Congress made substantive amendments to the Sherman Act, but didn't amend the provisions that were at issue in Flood, and, at the hearings regarding the amendment of the Sherman Act, the Flood decision was discussed, how might that subsequent legislative activity be used to interpret the continuing vitality of the Sherman Act exemption for baseball? Alternatively, suppose that after the Flood decision, Congress enacted a statute that did not remove baseball's antitrust exemption, but prohibited owners from taking certain actions that would normally constitute violations of the Sherman Act. Could you make any argument, based on that Congressional activity, that Congress affirmed the Flood court's holding that baseball is exempt from the Sherman Act? Did the Curt Flood Act of 1998 overturn the Federal Baseball Club and Flood decisions?

Class 16 - Statutes in Derogation of Common Law; Remedial Statutes; Rule of Lenity

How does the "statutes in derogation of common law" canon operate? What is the rationale for the canon? How does the remedial statutes canon operate? Is there a conflict between the two canons? If so, how do courts resolve that conflict? In Behrens v. Rahleigh Hills Hospital, were punitive damages available at common law for wrongful death actions? What canon does the court rely on to resolve the statutory interpretation question in the case? Cohen v. Rubin was decided the same year as Behrens and involved a similar statutory interpretation question, but the court reached a different result. Why? Was the language of the statute significantly different? Was the common law precedent different? Did the court rely on different canons or theories of interpretation? How does the rule of lenity operate? Is it limited to criminal statutes? Is the rule of lenity a hard and fast rule or does it create a presumption? What is the rationale for the rule of lenity? Should the rule of lenity apply when it is apparent that a defendant was aware that their actions violated a statute?

Class 17 - Constitutional Avoidance Canon

How does the constitutional avoidance canon operate? Does a court have to determine that a reading of a statute would be unconstitutional before avoiding that interpretation under the canon? Does a court have to determine that an alternative reading of a statute is better than a potentially unconstitutional reading before adopting the alternative reading under the constitutional avoidance canon? When will a court adopt a reading of a statute that is potentially unconstitutional under the constitutional avoidance canon? What is the

rationale behind the canon? What interpretation of the NLRA would be potentially unconstitutional, according to the NLRB v. Catholic Bishop of Chicago court, and why? What is the difference between plain meaning and a clear statement? Does the majority find a clear statement that Congress intended to regulate church operated schools as employers under the NLRA? Does it focus solely on the text of the statute when looking for the clear statement? What criticism does the dissent raise to the majority's reliance on the constitutional avoidance canon? Does the dissent find a clear statement that Congress intended to regulate church operated schools as employers under the NLRA? Is it looking for that? If the dissent concludes that the statute should be interpreted in a way that is potentially unconstitutional, does it address the constitutional question?

Class 18 - New Federalism Canons

How does the "new federalism" canon operate? How is it related to the constitutional avoidance canon? What are "fundamental state powers" (or "traditional state powers") interference with which triggers the canon? When will courts, relying on the canon, find that a statute should be interpreted in a way that would interfere with "fundamental state powers" or "traditional state functions"? Will courts, relying on the canon, limit their search for a clear statement of Congressional intent to the words of the statute? What does the 10th Amendment provide? At the time of Gregory v. Ashcroft, what did Supreme Court precedent provide regarding whether the 10th Amendment prohibited federal regulation of important or traditional state functions? Would treating the state judges as employees under the ADEA violate the 10th amendment? Why does Justice O'Connor feel that the "new federalism" canon should apply in the case? Does the majority believe that there is a clear statement that Congress intended to regulate the state judges as employees under the ADEA? What concerns does the dissent have regarding the canon adopted by the majority? How do Justices White and Stevens justify their interpretation of the statute?

Class 19 - Similar Statutes, Borrowed Statutes and Subsequent Statutes

What is a uniform statute? What weight will a court give to decisions in another jurisdiction adopting a uniform statute when the jurisdiction in which the court sits has adopted the same uniform statute and the court is interpreting that statute? If courts refuse to give any weight to interpretations of the uniform statute in other jurisdictions, will the uniform statute really be "uniform"? Should courts give any weight to interpretations of uniform statutes in other jurisdictions when the interpretations arise AFTER the jurisdiction adopted the uniform statute? What is a borrowed statute? When a jurisdiction borrows a statute from another jurisdiction, will courts in the borrowing jurisdiction give weight to judicial interpretations of the statute from the original jurisdiction when interpreting the statute? Would it matter whether the judicial interpretations came before or after the borrowing jurisdiction enacted the statute being interpreted? Would it matter whether the judicial interpretations were from the original jurisdiction's highest court or lower courts? If a court gives weight to another jurisdiction's judicial interpretations of a borrowed statute, how much deference are those decisions accorded? How does a court determine whether a

statute has been borrowed from another jurisdiction?

Class 20 - Subsequent Statutes and Implied Repeal

How will courts generally interpret statutes when there is a conflict between a statute that addresses issues in a general manner and a statute that addresses issues in a very specific manner? What is the rationale for that approach? What is the “last enacted statute” canon? What is the rationale for that canon? Do courts only apply these canons when there is legislative history to support the rationales behind the canons? How do courts interpret statutes when the two canons seem to conflict? How does the “presumption against implied repeal” operate? Does that seem to conflict with any of the other canons? In Williams v. Commonwealth, how did the defendant argue that the last enacted canon and the specific v. general canon supported his argument that he should be eligible for community service as an alternative to imprisonment? Why did the majority disagree? What was the alleged conflict between the statutes in Morton v. Mancari? Why were the appellants arguing that the government’s employment policy was illegal? Does the majority conclude that the 1972 statute implicitly repealed the 1934 statute? Why or why not? Did it rely solely on the canon regarding implied repeals or did it rely on other canons as well?

Class 21 - Introduction to Agencies

What section of the Constitution creates and authorizes agencies? What types of actions do agencies take? Are they legislative, judicial, executive? What is the difference between rulemaking and adjudication? What are legislative rules? What are the important differences between legislative rules and non-legislative rules? What is the Administrative Procedure Act (APA)? What procedures are required for formal rulemaking? When do agencies have to use formal rulemaking procedures? What procedures are required for informal (notice and comment) rulemaking? When do agencies have to use formal adjudication procedures? What agency actions are reviewable under the APA? What are the standards for judicial review under the APA?

Class 22 - Non-delegation doctrine

What does the Constitution provide regarding lawmaking by agencies? When agencies make rules, are they exercising legislative or executive functions? When will a statute delegating rulemaking authority to an agency be invalidated under the “non-delegation doctrine”? In A.L.A. Schechter Poultry v. United States, where did the Court look to find Congressional limits on the President’s power to set standards of fair competition? Did the majority find that the statute included any “intelligible principle” limiting the President’s power to set standards? Was it significant that the statute at issue in the case authorized regulated entities to participate in the drafting of the standards that would be adopted by the President? If Congress delegates unconstitutionally broad authority to an agency to make rules, is the delegation valid if the agency narrows its authority when it adopts rules?

Does the nature of the Court's review of a statute to find an "intelligible principle" limiting an agencies rulemaking authority vary depending on what is being regulated? Did the majority in Whitman v. American Trucking Association find that Congress provided EPA with an intelligible principle for setting air quality standards under the Clean Air Act? How many times has the Supreme Court struck down a statute as violating the non-delegation doctrine since the court struck down statutes in Schechter Poultry and in the Panama Refining case in 1935? Does the non-delegation have continuing vitality?

Class 23 - Chevron and Judicial Review

Why should courts defer to agencies' interpretations of statutes when interpreting statutes? Why should courts interpret statutes without deferring to agencies' interpretations? Did the agency interpret the Clean Air Act in Chevron v. NRDC through rulemaking or adjudication? What procedures did the agency use to interpret the statute? Why did NRDC oppose EPA's interpretation of "stationary source" to include all of the sources of pollution within a factory as opposed to each individual smokestack? What is the two step test created by the Chevron Court? Does the Court rely on any presumptions or clear statement rules at Step One? Did the Chevron Court find that the Clean Air Act addressed the precise question at issue in the case? Why did the Court uphold EPA's rule? Why does the Court suggest that it is appropriate to defer to agencies' interpretations of statutes? How frequently will agencies' statutory interpretations be upheld by courts under the Chevron test (overall; at Step 2)? Does the Chevron analysis apply when a court is reviewing an agency's interpretation of its own regulations? How does the Auer test differ from the Chevron test and when does it apply?

Class 24 - Chevron's Scope

Does the Chevron analysis apply when a court reviews an agency's interpretation of a statute in a non-legislative rule? When did the Supreme Court, in Christensen v. Harris County suggest that Chevron applies to an agency's statutory interpretations? Did the Christensen Court apply the Chevron analysis to review the Department of Labor's statutory interpretation? What test did the Christensen Court use? When will a court, under the test established in Skidmore v. Swift, uphold an agency's statutory interpretation? How is the test different from the Chevron test? When did the Supreme Court, in United States v. Mead Corp., hold that courts should apply the Chevron analysis? Did the Mead court accord Chevron deference to the Customs Service's revenue rulings? After Mead, will Chevron apply to decisions made by agencies through formal rulemaking or formal adjudication? informal rulemaking? informal adjudication?

Class 25 - Agency Deference to Judicial Interpretation; Legislative Inaction Following Agency Interpretation

Why did the cable companies care about whether the broadband Internet services that they provided were "telecommunications services" under the Communications Act of 1934?

What had the 9th Circuit concluded on that issue in AT&T v. Portland? After the 9th Circuit held that the Internet service providers were providing telecommunications services under the Communications Act of 1934, how did the FCC interpret the statute? Was that interpretation adopted as a legislative rule through notice and comment rulemaking? When the FCC's rule was challenged in the 9th Circuit, the court struck down the rule on the basis of stare decisis. What did the Supreme Court hold in National Cable and Telecommunications Association v. Brand X internet Services regarding whether a court should apply Chevron to review an agency's interpretation of a statute when the agency adopted the interpretation after a court had interpreted the statute and the agency's interpretation conflicts with the court's precedent? Should the court apply stare decisis or review the agency interpretation under Chevron? Does the majority ultimately uphold the FCC's interpretation? Why or why not? Does the majority's decision allow agencies to reverse judicial decisions? If so, isn't that a violation of separation of powers? Does Congress' failure to amend a statute after an agency has interpreted the statute in a particular manner indicate that Congress approves of the agency's interpretation? What theory of interpretation did the majority apply to interpret the Internal Revenue Code in Bob Jones University v. United States? What weight did the majority give to legislative activity or inactivity after the IRS interpreted the statute addressing the question at issue in the case? What theory of interpretation did Justice Rehnquist rely on in dissent and what weight did he give to legislative activity or inactivity?