

## ***Questions to Think About for classes meeting in person***

### **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: 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 4: 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 5: Theories of Interpretation - Other Theories - Asynchronous**

### **Class 6 - Ordinary Meaning/Dictionary Definitions**

What are intrinsic sources of interpretation? What is the plain meaning rule? How do courts determine the “plain meaning” of language? How is the “ordinary meaning” of text different from the plain meaning, if at all? What was the statutory interpretation question that the Supreme Court was trying to resolve in Bostock v. Clayton County? What theories of interpretation did the majority and dissent use to interpret the statute? Did they apply the plain meaning rule? What is the basis for the disagreement between the majority and dissent? What was the statutory interpretation question that the Supreme Court was trying to resolve in Taniguchi v. Kan Pacific Saipan, Ltd.? 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?

### **Class 7 - 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 was the statutory interpretation question that the court was trying to resolve in Nix v. Hedden? Did the court apply the technical meaning canon to interpret the statute? Did the court rely on dictionaries or some other means to determine the meanings of “fruit” or “vegetable”? What were the two statutory interpretation questions that the court was trying to resolve in Almond Alliance of California v. California Fish & Game Commission? Did the California Endangered Species Act include a definition for “fish”? Did the court interpret “fish” according to its ordinary meaning? Why did the court interpret the California Endangered Species Act based on the California Fish and Game Code? Why does the court conclude that the definition of “fish” in the California Fish and Game Code is broad enough to include bumblebees?

### **Class 8 - Ambiguity - Asynchronous**

### **Class 9 - 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? Can a court adopt an unreasonable interpretation of a statute to avoid an absurd interpretation? What was the statutory interpretation question that the Supreme Court was trying to resolve in Public Citizen v. Department of Justice? What tests did the majority and concurring Justices use to determine whether statutory language was absurd? Did the majority or concurring

Justices find that the President “utilized” the ABA committee under the plain meaning of the statutory language? Did the majority or concurring Justices consult extrinsic sources to determine whether the plain meaning interpretation of the statute was absurd? Once the majority determines that the “plain meaning” interpretation of the statute is absurd, do they interpret it according to a textualist theory? What is a “scrivener’s error”? How do courts respond to “scrivener’s errors”? How frequently will courts conclude that language in a statute is a “scrivener’s error”?

## **Class 10 - Punctuation Canons - Asynchronous**

## **Class 11 - Noscitur a Sociis; Eiusdem Generis; Expressio Unius**

What are textual canons? How does “noscitur a sociis” operate? How does “ejusdem 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, “ejusdem generis”? How does “expressio unius” work? What criticisms could be raised to the canon? What was the statutory interpretation question that the Supreme Court was trying to resolve in Yates v. United States? Based on the plain meaning of the text, is a fish a “tangible object”? Which of the textual canons does the plurality rely on to interpret “tangible object” narrowly and what does it say the term includes? What canons of construction or other tools of interpretation does Justice Alito, concurring, use to conclude that “tangible object” is limited to objects that are similar to documents and records? Do the dissenting Justices believe that the Court should look at textual canons to determine the meaning of “tangible object”? How does the dissent interpret the statute and are they relying on textualism alone to reach that interpretation?

## **Class 12 - Structural Canons**

What does the “whole act rule” require when interpreting statutory language? What is the rationale for the rule and does the rationale make sense? How do the canons of consistent usage and meaningful deviation operate? What criticisms are raised against the canons? What is the rule against surplusage? What is the rationale for the rule and does it make sense? What weight do courts give to preambles, titles and purpose statements when interpreting statutory language? In Rhyme v. Kmart, did the majority conclude that the statutory language was ambiguous on its face? If so, how did it resolve the ambiguity?

## **Class 13 - Extrinsic Sources of Interpretation - Similar Statutes, Borrowed Statutes and Model Statutes**

How are extrinsic sources of interpretation different from intrinsic sources of interpretation? What is the “whole code” rule and how is it similar to, or different from, the “whole act” rule? How does the similar statute canon operate? Does it apply to statutes from different

jurisdictions? What was the statutory interpretation question that the Supreme Court was trying to decide in Smith v. Jackson? 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? The plurality and Justice O’Connor found different expressions of Congressional intent in the inclusion, in the ADEA, of Section 4(f)(1), the “reasonable factors other than age” provision. How did the plurality use that provision to support its interpretation of the statute to authorize “disparate impact” claims and how did Justice O’Connor use that provision to support her reading of the statute? 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?

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?

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?

## **Class 14 - Conflicting Statutes**

What is the first step that courts will take when interpreting a statute that appears to conflict with another statute in the same jurisdiction? 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? What was the statutory interpretation question

that the Supreme Court was trying to resolve in Radzanower v. Touche-Ross and how did the two statutes conflict? How would the dissenting Justices harmonize the two statutes? Which canons does the majority rely upon to resolve the conflict between the two statutes? How do the majority and dissent address the presumption against implied repeal?

## **Class 15 - Stare Decisis / Legislative Acquiescence**

What weight should be given to the legislature's failure to overturn a court or agency'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? How does the rejected proposal rule operate? 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? What statutory interpretation question was the Supreme Court trying to resolve in Flood v. Kuhn? What had the Court decided regarding that issue in the past? Does the majority believe that the precedent decision would be an appropriate reading of the statute if the Court were interpreting the statute for the first time in Flood? What role does the Court suggest Congressional inaction should play in interpreting the Sherman Act in Flood v. Kuhn? What significance do Justices Douglas and Marshall attribute to legislative action or inaction in their separate opinions? How did Justices Marshall and Douglas address the majority's concerns about stare decisis and reliance on precedent? 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? Did the Curt Flood Act of 1998 overturn the Federal Baseball Club and Flood decisions?

## **Class 16 - Substantive Policy Canons; Common Law and Remedial Canons - Asynchronous**

### **Class 17 - Rule of Lenity**

How does the rule of lenity operate? Is it limited to criminal statutes? Is it applied at the outset of the interpretation of a statute? 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? What are the criticisms of the rule? Should the rule of lenity apply when there is not a reasonable alternative interpretation of the statute? What was the statutory interpretation question that the Supreme Court was trying to resolve in United States v. Bass? Did the majority apply the rule as a tie-breaker or as a presumption at the outset? What sources did the majority consult before applying the rule of lenity? In Wooden v. United States, what justifications does Justice Gorsuch advance for applying the rule of lenity? How do Justices Gorsuch

and Kavanaugh differ in their opinions regarding when the rule of lenity should apply? What sources of interpretation does Justice Gorsuch suggest courts should consult before applying the rule of lenity?

## **Class 18 - Constitutional Avoidance Canon**

How does the constitutional avoidance canon operate? Is it a tie-breaker canon or is it applied at the outset of interpretation? 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 criticisms are raised to the canon? What was the statutory interpretation question that the Supreme Court was trying to resolve in NLRB v. Catholic Bishop of Chicago? What interpretation of the NLRA would be potentially unconstitutional, according to the NLRB v. Catholic Bishop of Chicago majority, 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 19 - New Federalism Canons - Asynchronous**

## **Class 20 - Introduction to Agencies**

What section of the Constitution creates and authorizes agencies? What types of actions do agencies take? Are they legislative, judicial, executive? Why does Congress delegate fairly broad authority to agencies to interpret and administer statutes? 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 21 - 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)?

## **Class 22 - 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? Why did the Skidmore Court suggest that some deference was due to agency interpretations of statutes? 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? When did Justice Scalia, in his separate opinion in Mead, think Chevron should apply? Would his approach mean more or fewer agency decisions would be subject to Chevron deference?

## **Class 23 - Agency Deference to Judicial Interpretations; Major Questions Doctrine**

What was the statutory interpretation question that the Supreme Court was trying to resolve in National Cable and Telecommunications Association v. Brand X internet Services? 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 9<sup>th</sup> Circuit concluded on that issue in AT&T v. Portland? After the 9<sup>th</sup> 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 9<sup>th</sup> 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?

What was the statutory interpretation question that the Supreme Court was trying to resolve in NFIB v. Department of Labor? What theory of interpretation did the dissenting Justices use in the case and why would they interpret the statute as authorizing OSHA's action? What is the "major questions doctrine"? When does it apply and how does the majority use it to conclude that the statute does not authorize OSHA's action? What is the rationale for the "major questions doctrine", according to Justices Gorsuch, Thomas and Alito?