

Professor Richard C. Reuben
Legislation and Statutory Interpretation 5745L
Winter 2021. ONLINE.
Tuesday and Wednesday, 10-11:15 am
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Legislation & Statutory Interpretation **Preliminary Syllabus Winter 2021**

This is a course in Legislation and Statutory Interpretation. It is divided into three components: the rule of law and democratic governance within the framework of the U.S. Constitution, the legal environment of legislation as a vehicle for implementing policy within that framework, and how courts interpret legislative actions. The scope will be national, while also addressing Missouri law as appropriate.

Learning Outcomes: Learning Objectives and Outcomes. Students will learn:

- the federal and state constitutional frameworks for legislation;
- the legal, policy, practical constraints on legislative decisionmaking;
- the doctrines courts use to interpretive statutes,
- to articulate legal, policy, and practical arguments relating to legislation and statutory interpretation.

Readings: The assigned readings for this course are primarily drawn from the required text for this course, *William Eskridge, James Brudney, Josh Chavetz, Philip Frickey, and Elizabeth Garrett, Cases and Materials on Legislation and Regulation; Statutes and the Creation of Public Policy* (6th ed. 2019). We will also have a Canvas course that will include some additional required readings.

Pace: We will cover about 20-30 pages a day -- some days more, some days less -- and generally track the order of the *Eskridge* book. I expect to spend a day or two on each syllabus topic.

Class Format: This class will be taught in an online format, which can present its challenges, as you know. It will teach it in seminar style, and we will break up into Zoom breakout groups to discuss various issues or hypotheticals. My experience is that this will help facilitate learning and mitigate Zoom fatigue. I will post slides on Canvas shortly before class.

Class Communication: I use Canvas Announcements as my primary means of communicating with the class. I generally post reading assignments for the week the preceding weekend. If you don't receive an announcement from me by noon on Monday, you should read the next 20 pages or so pages on the syllabus.

Class Attendance: Regular class attendance and participation is expected, consistent with the Law School's formal attendance policy, which may be found on the Law School's web site at <http://catalog.missouri.edu/academicpolicies/attendancel/>. I do not use excused absences, but

rather give you eight absences for any reason – a third of the semester – after which you will be required to file a Motion for Leave to Take the Final Examination explaining your circumstances and why you should be permitted to take the exam. The motion will be considered in consultation with the Associate Dean for Academic Affairs. Covid-related absences will not count toward the total number of absences you are permitted.

Participation Policy: I value your class participation and therefore allocate 25 percent of your grade to participation. I am looking for your engagement, insight, sophistication, and other indicia of mastery. Please note that mere attendance is not participation for purposes of the class participation component of your grade.

Also, I understand that some of you may feel uncomfortable participating in class, even when you are prepared. Unfortunately, in our chosen profession we are often required to speak verbally, whether it is to a client, partner, or judge. Please use this class to help develop your skills, comfort, and confidence speaking like a lawyer. You will not be penalized for awkwardness, or even inaccuracy. This is a part of your law school education. You will only be penalized for lack of effort and engagement. On the other hand, you will, of course, be rewarded for the quality of your participation so it is worth your effort, before and during class. If you consider yourself an introvert, I highly recommend Heidi K. Brown, *The Introverted Lawyer* (2017)

Grading: Final grades will be assigned on the basis of the following allocation: 75 percent exam, 25 percent class participation. The exam will be a traditional two-hour law school exam, administered during the regularly scheduled examination period.

My Class Style: I love teaching constitutional law and enjoy bringing the fascinating issues they raise to students with clarity, energy, and occasional humor. However, I have come to learn over the years that my class style is not for everyone, and prefer to be up front about that so you can make your own choices about whether this is a class for you.

To begin with, I use a modified version of the Socratic Method and do not spoon feed, provide rubrics, use panels, or other such classroom gimmicks. I do some lecturing in class. But mostly I ask questions because, as I hope you know by now, the questions are much more important than the answers. We learn in law through discussion, the exchange of ideas, and a rigorous process of respectful critical analysis. In this regard, my job is to help you learn, not to “teach you.”

I use cold-calling, and the best way to avoid it is to volunteer. Otherwise, you *will* be cold-called – and please know that it is generally not enough to say “I don’t know” or “I am not prepared,” “I didn’t read this case,” or otherwise pass. These are not options for practicing lawyers, and they aren’t for you in this class.

I am deeply committed to my classes, and to you as my students and future members of my profession. I will work very hard to make these materials understandable, relevant, and engaging for you, and to support you as students and as individuals in the process of becoming members of our noble profession. If I am doing my job well, I will challenge you in the process in a way that will deepen your understanding of legislation and statutory interpretation, the law in general, and perhaps yourself as a person as you situate yourself within the challenging terrain of law.

If this is what you are looking for, great. We will have a wonderful experience this semester. If

not, I would encourage you to consider taking another course. There are many other good electives you can take to get the credit you require. Please be honest with yourself about why you are here and what you want to get out of this class, and make your decisions about the class accordingly. I will respect those choices and not be offended.

Finally, I have a small favor to ask: There is a tradition at the law school of students giving standing ovations to professors at the end of their classes. I do not particularly like this tradition as it too often seems pro forma and insincere. If you would like to show me how much you liked the class, participate in class and work hard on your paper and presentation.

Comment on these Challenging Times: This is a very tough time to be a law student. In fact, it's a very tough time to be or do anything. It's just a tough time.

In my view, however, tough times are the nature of life in the law, even during good times. In a variety of ways, many of my academic colleagues are lowering their expectations for law students because of the tough situation you are in.

In all candor, I am not, for I believe doing so would sell you short as students and as people, and deprive you of the opportunity to learn what you will need to survive and thrive as a lawyer well after the pandemic is over. Grit and resilience in the face of adversity is what forges the metal of a lawyer. Adaptability, resourcefulness, creativity, and the ability to solve problems -- in the heat of the moment and with a positive and constructive attitude -- are the hallmarks of successful lawyers "in the real world."

There is no question you have been dealt a tough hand. However, it is no tougher than the hand you will be dealt when the deck of your professional development is reshuffled after you graduate, pass the bar, and enter practice.

Much of life depends on how we approach and respond to it. My humble suggestion is to view the challenges you face this year as the opportunity they present rather than the barriers they can be. If you do, my sense is that many years down the road, when you look back on your career, you will be grateful for having been in law school during these difficult times. That is my personal experience of adversity, and my hope for each of you as we enter the semester.

Schedule of Classes

I. The Rule of Law and the Structure of the U.S. Government

Topic 1. The Rule of Law

Canvas, Lon Fuller, *The Morality of Law*

Topic 2. The Separation of Powers

Canvas: Article I – *Mistretta v. U.S.*

Article II – *Yoo, Unitary, Executive, or Both?*

Article III – *Crowell v. Benson*

Topic 3. Democratic Governance Within Our Constitutional System

Canvas: Rudd, *The Evolution of ... Institutional Competence*

John Hart Ely, *Democracy and Distrust*

II. Introduction to Statutes and Statutory Interpretation

Topic 4. The Story of the Civil Rights Act of 1964

Eskridge: Pages 2-36

Topic 5. Introduction to Statutory Interpretation

Canvas: *Chevron v. NRDC*

Topic 6. Eligibility to Serve in the Legislature

Eskridge: Pages 176-189

III. Structure of Legislative Deliberation

Topic 7. Bribery and Extortion

Eskridge, Pages 252-272

Canvas: RSMo. §§ 576.010, 566.200

Topic 8. Lobbying

Eskridge: Pages 277-297

Canvas: Missouri Ethics Commission, Guide to Ethics Laws 2021 (skim)

Missouri Ethics Commission, Lobbying Videos (16 minutes, view)

U.S. House of Representatives, Lobbying Disclosure Act (Rev. 2017, skim)

Topic 10. Generality and the Single-Subject Rule

Eskridge: Pages 297-305 (skip *Lewis* and read Missouri case on Canvas instead)

Canvas: Mo. Const., art. III., § 23

Missouri Coalition for the Environment v. State

Topic 11. The Line Item Veto

Eskridge: Pages 305-306
Canvas: Mo. Const. Art. IV, Sec.26
Hammerschmidt v. Boone County

Topic 12. Direct Democracy

Eskridge: Pages 352-378
Canvas: Materials on Direct Democracy in Missouri
Arizona State Legislature v. Arizona Independent Redistricting Commission

IV. Theories of Statutory Interpretation

Topic 13. Eclecticism

Eskridge: Pages 405-425

Topic 14. Legal Process

Eskridge: Pages 425-433, 483-499

Topic 15. The New Textualism

Eskridge: Pages 500-517

Topic 16. Economic Theories of Interpretation

Eskridge: Pages 526-550

Topic 17. Pragmatic and Critical Theories of Interpretation

Eskridge: Pages 551-580

V. Intrinsic Doctrines of Statutory Interpretation

Topic 18. Ordinary Meaning and Language Canons

Eskridge: Pages 581-595

Topic 19. Maxims of Word Association and Grammar Canons

Eskridge: Pages 595-617

Topic 20. Structural Canons and the Whole Act Rule

Eskridge: Pages 617-639

Topic 21. Substantive Canons: Lenity and Constitutional Avoidance

Eskridge: Pages 649-681

Topic 22. Debunking and Defending the Canons: Llewellyn's Thesis

Eskridge: Pages 700-713

VII. Extrinsic Doctrines of Statutory Interpretation

Topic 23. The Common Law
Eskridge: Pages 713-727

Topic 24. Other Statutes
Eskridge: Pages 816-825

Topic 25. The Rule Against Implied Repealers
Eskridge: Pages 825-835

Disclosures

Statement on COVID-19

MU cares about the health and safety of its students, faculty, and staff. To provide safe, high-quality education amid COVID-19, we will follow several specific campus policies in accordance with the advice of the Center for Disease Control and Boone County health authorities. This statement will be updated as information changes. **If you need an educational accommodation because of COVID, please contact your instructor directly.**

- **If you are experiencing any COVID-related symptoms**, or are otherwise feeling unwell, do not attend in-person classes and contact your health care provider and/or student health immediately. COVID symptoms include: fever greater than 100.4 or chills; cough, shortness of breath or difficulty breathing; fatigue; unexplained muscle or body aches; headache; new loss of taste or smell; sore throat; congestion or runny nose; nausea or vomiting; diarrhea.
 - We will all wear **face coverings while in the classroom**, unless you have a documented exemption due to a disability or medical condition.
 - We will maintain a **6-foot distance from each other at all times** (except in specific lab/studio courses with other specific guidelines for social distancing).
 - We will enter the classroom and **fill the room starting at the front, filing all the way across a row**. When class ends, we will exit the row nearest to the door first; the instructor or TA will give the signal for the next row to exit, in the same manner.
 - In any small section or lab class that requires them, **additional measures will be listed in the syllabus and be mandatory for class participation**.
 - Online office hours will be available for all students.
- This course may be recorded for the sole purpose of sharing the recording with students who can't attend class. The instructor will take care not to disclose personally identifiable information from the student education records during the recorded lesson.

Compliance with these guidelines is required for all; anyone who fails to comply will be subject to the **accountability process**, as stated in the University's **Collected Rules and Regulations**, Chapter 200 Student Code of Conduct.

If an instructor has concerns about how a student is following COVID-19 policies and protocols, please report those concerns to the Office of the Dean of Students. You can fill out a COVID Safety Measures Reporting Form here: https://cm.maxient.com/reportingform.php?UnivofMissouriSystem&layout_id=38

By taking the above measures, we are supporting your health and that of the whole Mizzou community. Thank you in advance for joining me and your peers in adhering to these safety measures.

Statement on Recording of Class

University of Missouri System Executive Order No. 38 lays out principles regarding the sanctity of classroom discussions at the university. The policy is described fully in Section 200.015 of the Collected Rules and Regulations. In this class, students may make audio or video recordings of course activity unless specifically prohibited by the faculty member. However, the redistribution of audio or video recordings of statements or comments from the course to individuals who are not students in the course is prohibited without the express permission of the faculty member and of any students who are recorded. Students found to have violated this policy are subject to discipline in accordance with provisions of section 200.020 of the Collected Rules and Regulations of the University of Missouri pertaining to student conduct matters.

Statement Regarding Mental Health

The University of Missouri is committed to supporting student well-being through an integrated network of care, with a wide range of services to help students succeed. The MU Counseling Center offers professional mental health care, and can help you find the best approach to treatment based on your needs. Call to make an appointment at 573-882-6601. Any student in crisis may call or go to the MU Counseling Center between 8:00 – 5:00 M-F. After hours phone support is available at 573-882-6601.

Visit our website at <https://wellbeing.missouri.edu> to take an online mental health screening, find out about workshops and resources that can help you thrive, or learn how to support a friend. Download Sanvello, a phone app that teaches skills and strategies to help you maintain good mental health. Log in with your Mizzou e-mail to unlock all the tools available through Sanvello at no cost to you.

Statement Regarding Americans with Disabilities Act

If you anticipate barriers related to the format or requirements of this course, if you have emergency medical information to share with me, or if you need to make arrangements in case the building must be evacuated, please let me know as soon as possible. This sample statement is posted on the web at: <http://provost.missouri.edu/faculty/syllabus.html> and at <http://disabilityservices.missouri.edu/faculty/syllabus.php>.

If disability-related accommodations are necessary (for example, a note taker, extended time on exams, captioning), please register with the Office of Disability Services (<http://disabilityservices.missouri.edu>), S5 Memorial Union, 573- 882-4696, and then notify me of your eligibility for reasonable accommodations. For other MU resources for students with disabilities, click on "Disability Resources" on the MU homepage.

Statement Regarding Academic Dishonesty

Academic integrity is fundamental to the activities and principles of a university. All members of the academic community must be confident that each person's work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The academic community regards

breaches of the academic integrity rules as extremely serious matters. Sanctions for such a breach may include academic sanctions from the instructor, including failing the course for any violation, to disciplinary sanctions ranging from probation to expulsion. When in doubt about plagiarism, paraphrasing, quoting, collaboration, or any other form of cheating, consult the course instructor.

Statement Regarding Intellectual Pluralism

The Law School community welcomes intellectual diversity and respects student rights. Students who have questions or concerns regarding the atmosphere in this class (including respect for diverse opinions) may contact the Dean's Office, the Director of the Office of Students Rights and Responsibilities <http://osrr.missouri.edu/> or the MU Equity Office (equity@missouri.edu). All students will have the opportunity to submit an anonymous evaluation of the instructor(s) at the end of the course.