

Legislation and Statutory Interpretation
Law 266-001 (12192)
Section 1

Prof. Claeys
Spring 2022

Syllabus
Current as January 14, 2022

Meeting Times: Thursday 1:50-3:50 p.m.
Exam: Monday, May 2, 2022, 12:00-2:00 p.m.

Office hours and contact information

My phone number is (703) 993-8247. My email address is eclaeys@gmu.edu. The course also has a TWEN site, and I am reachable on the discussion board of that site. Please register for the TWEN site; it is my primary medium for group communications with students.

This semester, I will hold office hours Thursdays, 4 – 5 p.m. These are “drop-in” hours, meaning that I do not have any other appointments during them. You are free to come in to my office without appointment; I will also have my Zoom program on, I will have my Personal Meeting Room open, and you may virtually-join my meeting room. However, I am happy to schedule appointments if you have a conflict during office hours or if you prefer for other reasons.

Course coverage

An overview of how statutes and regulations are made.

An introduction to the theory and practice of statutory interpretation.

Learning outcomes

Familiarity with the legislative process and the process of making administrative regulations.

Basic competence at interpreting statutory text.

Familiarity with the main theories for statutory interpretation.

Familiarity with canons of construction.

Cancellations and make-up classes

At this time, I do not anticipate canceling any classes. If I need to cancel class suddenly due to illness or some emergency, I will have my secretary post notices in the atrium and on the door of our classroom, and I will send an email to the class via the course TWEN page’s email system.

Class reading

Reading will vary anywhere from 7 pages per class session to 40 pages per class session.

Class attendance

Regulation 4.1 in the law school's Academic Regulations requires that students attend class at our law school on a regular basis. The same regulation specifically states: "If a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course." For a 13-class-session course like Legislation/Statutory Interpretation, AR 4.1 requires that students not be absent for more than 3 (110-minute) classes. I do not enforce this requirement when I need to reschedule class due to illness or non-GMU commitments. Otherwise, however, I do follow this regulation, and I administer it by asking you to sign an attendance sheet during class.

AR 4.1 applies to absences "for any reason." In other words, it is your responsibility to keep track of your absences. It is also your responsibility to anticipate possible absences. You may decide you need to be absent to explore professional opportunities, to observe holidays in your religion, or to take care of personal matters. It is your responsibility to limit the number of class days for which you're absent for such reasons, and also to factor in the possibility that you may be absent from class unexpectedly for illnesses or personal emergencies.

I do not need to be notified in advance if you're going to be absent. Ordinarily, over the course of the semester, I communicate with you about the number of classes for which you've been absent. In such correspondence, I am not interested in knowing the grounds for absences; my intention is to administer AR 4.1, and that being so my intention is simply to get on the same page with a student about the number of class-hours attended and missed.

I reserve authority to take measures reasonably appropriate to ensure compliance with the law school's attendance requirements. If a student misses more classes than allowed by AR 4.1-1, the student is not eligible to sit for this course's examination. In extraordinary circumstances, I reserve discretion to have a student ineligible for the exam under AR 4.1-1 perform substitute work equivalent to class attendance ... as long as the student does not miss more than 30% of classes (meaning four (4) 110-minute class sessions total). Students who believe they are eligible for this exception should petition me in writing and explain why (AR 4.1-2) they "have merit" in their request to substitute work for class lectures missed over the 3-class limit.

If a student misses more classes than allowed by AR 4.1-1, and does not receive the benefit of an exemption consistent with AR 4.1-2, I notify the law school's administration and the student is not eligible to sit for this course's final examination.

Class preparation and participation

I expect you to be prepared for class. For any case excerpted at any length longer than a page, I expect you to understand the facts, the lawsuit, the theories of the case adopted in the majority and any separate opinions.

When the casebook presents a “squib” case—that is, a case consolidated into a paragraph or so, I expect you to know the facts, the holding, the rationale, and the contribution to the general line of doctrine covered in class. When the casebook refers to statutes, I expect you to read them closely enough to answer questions about them.

I call on students during class, to discuss material that a lawyer should have been able to digest from the reading without much assistance. If you are unprepared and wish to avoid getting called on, please notify me before the beginning of class. (I prefer emails, at least an hour before class.)

Classroom decorum

During class, I expect you to be generally respectful to me and your classmates. Imagine the standards of comportment you would use if you were a lawyer, sitting in front of a judge, watching as the judge engages another lawyer in the proceeding. Please treat me and any of your colleagues with whom I am conversing with the same professional courtesy.

I reserve the authority to take actions reasonably appropriate to ensure compliance with the participation and decorum policies discussed in this section. In particular, if a student refuses on several occasions to participate in class when called on, that refusal may justify lowering the student’s final grade below the grade earned on the final examination.

This respect and courtesy also extend to dress. (I’m sorry I need to raise the subject, but it became an issue with online teaching.) Please dress in a manner appropriate for a classroom setting. Some examples: Please be clothed as fully as you’d be if going to an ordinary store or office. Please avoid attending class (in person or virtually) in sleep wear, gym wear, or beach wear. I reserve the authority to ask students to leave class if they are dressed inappropriately (with appropriate repercussions following for class attendance.)

Virtual Classroom Management and Logistics

As I write this syllabus, I understand that our class is going to be in-person. In a world with COVID, however, I can’t rule out the possibility that I may be directed to teach you remote or hybrid. Herewith some policies for online or virtual learning:

- If I need to teach hybrid, I’ll teach synchronously in person and on Zoom. I’ll set up the meeting links on Zoom, and I’ll send those to everyone in advance of class.
- *Everyone* will be expected to sign in and join class on Zoom. This requirement applies to students attending in person and also students attending virtually.

- On your videoconference platform account, please make sure that your first name, last name, and school profile picture are all uploaded.
- *If you are attending in person*, please keep your computer microphone muted at all times. Keep your microphone muted even when you speak; we'll rely on ceiling microphones to carry your comments on Zoom. You may have your video feed OFF when you are not speaking in class. However, whenever you speak in class, please turn your video feed back ON.
- *If you are attending on line*, when class is in session, you are expected to have your computer camera ON and your microphone OFF. (Of course, please do turn your microphone on when you participate in class discussion.)
- If you're attending in person and have something to say, please put your hand up.
- If you're attending on line and have something to say, please send me a message via Zoom's chat function. I prefer that you send a short message that you have a question, and that you ask the question orally. (If you don't, I'll read your question back to the class anyway before answering it.)
- You are encouraged (though not mandated) to use a microphone or earphone/mike headset during class.
- To a large extent, we'll need to play things by ear if we need to go to remote learning for the whole class. That said, it is very likely that, for reading assignments that DON'T already have problems assigned, I'll construct problems in advance of class and we'll discuss those in addition to the materials assigned in the reading schedule below.

Recording classes

I reserve all property rights in my class lectures, presentations, and discussions. As a general rule, I prefer that classes not be recorded. I like to encourage free and frank discussions of class materials, and in my experience the recording of class tends to chill discussions. However, I will grant permission in specific cases when a student can demonstrate a special need. If you think you have such a need, please inquire.

How you should inquire depends on the nature of the need. If your need is COVID-related, please let me know a.s.a.p. I'll record class and make the lecture available.

If you think you have a disability-related need, please contact GMU's [Office of Disability Services](#). ODS has a process for administering disability-related requests for accommodations, and in that process ODS serves as a go-between between a student-applicant and that student's instructor.

If your need is neither COVID- nor disability-related, you are free to ask me in personal communication or to ask me anonymously. To make an anonymous request, please contact

Annamaria Nields, Associate Dean for Student Affairs (anields@gmu.edu) or Christine Malone, Director, Student Affairs (cmalone4@gmu.edu). Deans Nields and Malone will be happy to explain the basis for a recording request to me while leaving a student's identity out of the request.

Grading

The grade for this class will be based exclusively on a 2-hour examination. (The only exception to the exclusivity of the exam is for serious breach of the class participation policy, see above.) If it is possible for the exam to be administered in person, it will be, and it will be a closed-book closed-note exam. It may not be possible for the exam to be administered in person. If so, it will be administered on line with Exam Pro (or some similar software program if the Records Office surprises me and gives up on Exam Pro). If the exam is online, it will be open-book, open-note.

Course materials

We will rely primarily on a casebook: William N. Eskridge, Jr., James J. Brudney, Josh Chafetz, Philip Frickey and Elizabeth Garrett, *Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy*, 6th ed. St. Paul, MN: West Academic Publishing, 2017. ISBN: 978-1-68328-183-2.

I will assign a few supplemental readings. I will distribute a supplement the first day of class. I will also make arrangements to have the supplements available for you to pick up if you want to pick up a copy before our first class. All supplements will also be available on TWEN, in a folder for "Supplemental readings and course materials."

Reading schedule

What follows is a list of reading units I hope to cover in this class. I will post this portion of the syllabus on TWEN as a "Reading schedule." This schedule lists units of reading but does not indicate the dates on which we'll cover them. Please follow the schedule available on TWEN. I will record there what units we cover on which class dates.

When readings are assigned to "Pp.," the assignment is to Eskridge et al.

For our first class (Th. 1/21) read units 1 and 2.

Unit 1. Why care about statutory interpretation?

Pp. 737-47.

Supplemental reading. Letter of the South Carolina Attorney General to Rep. Putnam (Dec. 2017).

Supplemental reading. *Cernauskas v. Fletcher* (Ark. 1943).

Unit 2. An overview of legislation.

Pp. 2-28.

U.S. Const. art. I, secs. 1, 5, 7; U.S. Const. art. II, sec. 1; U.S. Const. art. III, sec. 1. (The Constitution is reprinted in Eskridge et al. starting p. 1134.)

Think about the following questions when you read pp. 2-28 (about the enactment of the Civil Rights Act of 1964). Which steps in the legislative process were required by the Constitution? Which steps in the process were authorized by the Constitution without being required? Which provisions of the Constitution authorized or required which steps?

Unit 3. Theories of Statutory Interpretation: The classical view.

Pp. 405-18, 421-24.

Supplemental Reading. Excerpts from Blackstone's Commentaries, v. I, chs. 2-3.
Supplemental Reading. Riggs v. Palmer.

Unit 4. Theories of Statutory Interpretation: Legal process.

Pp. 424-34.

Pp. 465-76.

Pp. 483-89.

Unit 5. Theories of Statutory Interpretation: Textualism.

Pp. 499-516.

Unit 6. Theories of Statutory Interpretation: Pragmatism.

Pp. 60-71.

Pp. 551-57.

Unit 7. Canons of Construction: Ordinary meaning rules.

Pp. 581-95.

Unit 8. Canons of Construction: Word association.

Pp. 595-607.

Unit 9. Canons of Construction: Grammar canons.

Pp. 607-17.

Unit 10. Canons of Construction: structural canons.

Pp. 617-21.

Pp. 543-48.

Unit 11. Canons of Construction: Consistency and variation.

Pp. 623-24.

Pp. 635-48.

Unit 12. Canons of Construction: The rule of lenity.

Pp. 648-66.

Unit 13. Canons of Construction: The rule of avoidance.

Pp. 670-86.

Unit 14. Canons of Construction: Critiques and questions.

Pp. 700-12.

Unit 15. Extrinsic Material: The common law.

Pp. 713-27.

Unit 16. Extrinsic Material: Legislative background.

Pp. 727-37.

Unit 17. Extrinsic Material: Committee reports.

Pp. 749-65.

Unit 18. Extrinsic Material: Supporters' statements.

Pp. 772-87.

Unit 19. Extrinsic Material: Materials from hearings and floor debates.

Pp. 787-98.

Unit 20. Extrinsic Material: Post-enactment legislative history.

Pp. 798-811.

Unit 21. Extrinsic Material: Other statutes and the *in pari materia* rule.

Pp. 816-24.

Unit 22. Extrinsic Material: Conflicts among statutes.

Pp. 825-47.

Unit 23. Statutes and the Administrative State: background.

Pp. 849-65. I will lecture on this material and take questions.

Unit 24. Statutes and the Administrative State: Nondelegation.

Read U.S. Const. art. I, sec. 1; art. I, sec. 18, cl. 18; art. IV, sec. 3, cl. 2.

Pp. 865-75.

Supplemental reading: One case about nondelegation and avoidance to be selected later.

Unit 25. Statutes and the Administrative State: Judicial deference.

Pp. 1041-50, 1057-67.

Unit 26. Statutes and the Administrative State: Deference and agency authority.

Pp. 1074-83.

Unit 27. Statutes and the Administrative State: Deference and the major questions doctrine.

Pp. 1091-96.

NOTE: I expect to add to this assignment excerpts from the Supreme Court decision from *NFIB v. Department of Labor*, argued at the U.S. Supreme Court January 7, 2022. Stay tuned.

Unit 28. Statutes and the Administrative State: Deference and *stare decisis*.

Pp. 1111-17.