Welcome

There are various ways of reading a statute (or Constitution, treaty, regulation). Some work, in the sense of sounding persuasive or at least plausible to (some, many, all) judges. Others don’t. You’ll have to learn which is which. Here’s the general idea:

You have to assume that the relevant legal text means something—and that judges ought to make a good-faith effort to figure out what that “something” is. Otherwise it’s hard to see the point of law. In this minimal sense, everyone has to be a “textualist.” Fifteen minutes into this course, though, you’ll discover that in cases that become the stuff of litigation, the text doesn’t explain itself—not even with the help of a dictionary. To resolve questions of this sort courts deploy certain rules-of-thumb, or canons (some “textual,” others “extrinsic,” still others “substantive”). That, in substance, is this course. “Statutory Interpretation” isn’t primarily about precedents, or grammar and syntax, or high-level legal hermeneutics. All those things matter now and then but in the end, all the work is in the canons.

Learning what they are and how to use them takes it bit of work. Some canons are well-accepted; others are very controversial. The canons often point in different directions, and as a rule they apply except when they don’t. So the enterprise is more an art than a science. You can call it a charade and sneer at the canons (you’ll encounter legal scholars who do). But the fact is, everyone uses the canons, especially including judges. So the canons matter at least on the margin, where good lawyers are paid to operate. You might as well learn to think like them. Believe like a lawyer.

Appendix B of your textbook (pp. 851-870) contains an extremely useful compilation of “The Rehnquist-Roberts Court’s Canons of Statutory Interpretation.” Study it; read it through more than once. There’s another compilation in Garner & Scalia, Reading Law (pp 425-441), which I’ll put on TWEN. Read and study that, too.

Class Participation

I’ll cold-call, enough to keep you on your feet. But it’s not my preferred m.o. This course lends itself to active class discussion, and I yugely welcome volunteers. Consistently active and constructive contributors to the discussion will receive a .33 upgrade.

Exam

Closed-book, except: a clean copy of Appendix B will be provided for your use during the exam. I’ll explain the exam format in due course.
Syllabus

The Syllabus is subject to change, depending on our progress and my sheer whim. The operative version at all times is the one on TWEN. Make a habit of checking it periodically.

All page references to Eskridge, Frickey & Garrett, CASES AND MATERIALS ON STATUTORY INTERPRETATION (West, 2012). The operative assignments are identified by page numbers, not the corresponding case names etc. All other readings will be posted on TWEN.

Session (1): Introduction: Text and Consequences

King v. Burwell (excerpts) (TWEN)
Civil Rights Act of 1964; Weber (85-102)

What’s the best argument for the result in Weber? Against?

Michael Carvin, plaintiffs’ counsel in King and a very good lawyer, called it “the easiest case I’ve had in my lifetime.” Then why did he lose? I’ve assigned the lengthy opinions in this case because they are a festival of canons. Excellent exercise for this class, and again for exam prep: put the King opinions next to Appendix B in the textbook. See how many of the canons you can find here.

Session (2): Law and Courts

The Federalist, No. 78 (TWEN)
Marbury v. Madison (TWEN)

You’ll encounter this stuff again in ConLaw I but you might as well get a flavor of it now. One theme is judicial review (i.e. the courts’ power to declare acts of Congress unconstitutional) but there’s lots more going on. What do we actually want courts to do, and why and in what sense do they have to be “independent”?

Marbury is widely read as presenting two different models of “law and courts.” See if you can identify them. I’ll cold-call on someone to defend the statutory interpretation of Section 13. Heaven help you.

Session (3): Theories of Statutory Interpretation I

139 – 150 top (Holy Trinity)
158 – 167 (Fuller, Speluncean Explorers)
176 – 194 top (“Dynamic” Interpretation)
197 – 212 (Griffin; TVA v. Hill)

Various riffs on “this statute cannot mean what it seems to be saying.” Is it ever okay for a court to depart from the “plain meaning”? Why or why not?

Session (4): Theories of Statutory Interpretation II

214 – 232 top (Green v. Bock Laundry); 256-259 (Zuni Pub. Sch. Dist.)
259 – 292 (Economic Theories)
The “New Textualism” (p. 214) is substantially that of the late Justice Antonin Scalia. It’s proven enormously influential; on some accounts, including Justice Kagan’s, “we are all textualists now.” The true and correct rule is that the statute means what your client wants it to mean; your job is to torture the text until it confesses. Justice Kagan is among the best at explaining that night is day and black is white because the text says so. You must acquire that skill: your work on the margin.

Would you characterize Bock Laundry as a “statutory re-write” (p. 224)? How would you distinguish a “re-write” from a creative (aggressive, questionable) interpretation?

The most important part of “Economic Theories” starts on p. 274. FDA v. Brown & Williamson is a very big deal and a great introduction to several themes we’ll study in later sessions.

Session (5): Textual Canons

328 – 360 (Textual Canons; Sweet Home Chapter)
851 - 855 (list of textual canons)
Massachusetts v. EPA (excerpts) (TWEN)
UARG v. EPA (excerpts) (TWEN)

You’ll have to cram the canons into your heads. We'll devote class time to the cases. Sweet Home Chapter is fun unless you happen to work for a living. Mass v. EPA establishes an “environmental law” canon (p. 869) that mows down all other canons: see if you can make a list. Is UARG consistent with Mass v. EPA? With the canons?

The litigants in Mass and UARG had to anticipate and, to the extent possible, manipulate the Court’s use of canons. That’s often true, and it shapes the way you’ll want to handle a case. Good thing to learn and remember, and fun stuff to knock around.

Session (6): Substantive Canons

362 – 387 (Introductory remarks; Rule of Lenity)
391 – 405 (Constitutional Avoidance; Catholic Bishop)
634 – 643 (Romer v. Evans)
859 - 864 (list of substantive canons)

More cramming. Two general things to comprehend: (1) to a much greater extent than textual canons, substantive canons require some normative justification—a plausible argument about how the legal (constitutional) system ought to work, and to what ends. (2) Textual canons are sufficiently ancient to have Latin names (inclusio unius etc.). In Justice Scalia’s book that means that they must be right, except when they’re “purposive” (he never liked dolphins). The substantive canons, in contrast, were cranked up recently, by justices with a very tenuous hold on Latin (and at times English.) Why is that? And does it mean the canons are wrong or at least suspect?

We’ll spend less time on the rule of lenity, more on constitutional avoidance. You remember Marbury, right? Is that an argument for or against avoidance canons?

Session (7): More Substantive Canons, and Especially Federalism

Rice v. Santa Fe Elevator (excerpts) (TWEN)
806-814 (Geier v. Honda Motors; Wyeth v. Levine)
406 – 426 (New Federalism Canons; Gregory v. Ashcroft)
Read the materials in this order. When you get to the textbook preemption cases (806-814) ask: why would one want to lard up preemption cases with “federalism” canons and presumptions? Why aren’t they just extra-dry statutory interpretation cases, straight-up (no twist, no olives)?

*Re Gregory*: the canon is “super-strong” and trumps any other canon—*e.g.*, the canon that statutes in favor of the Indian nations are to be liberally construed. The questions in n.3, p. 420 are well-put. What are your answers?

**Session 8: Extrinsic Sources – Legislative History**

461 – 484 (*Leo Sheep; Blanchard v. Bergeron; In Re Sinclair*)
495 – 508 ([*The One and Only Sergeant*] Pepper v. Hart[*’s Club Band]*)
517 - 524 (Legislative Deliberation, or Stuff That Never Happened)
541 – 562 (Signing Statements; Legislative Inaction; *Bob Jones Univ. v. U.S.*)
855 – 859 (list of canons)
*Youngstown Sheet & Tube Co. v. Sawyer* (excerpts) (TWEN)

Lots of readings; certainly a thrill. Focus on the big theme: Congress is a “they,” not an “it,” not just at any moment in time but also over time. It’s been dominated by Speakers; Presidents; bipartisan committees; polarized party leaderships; and no one at all. And that’s just the past eight or so decades. To what extent (if any) should the canons depend on the legislature’s actual operation?

You’ll study *Youngstown* in depth in ConLaw I. I’ve added it to the copious readings here to impress a single point: on the authority of the concurring justices, one of the biggest cases in our history eventually hung on what Congress had failed to do. Persuasive? You tell me. Do the canons matter? Asked and answered.

**Session 9: Extrinsic Sources – Common Law**

443 – 456 (Common Law; *Smith v. Wade*)
864 – 865 (list of canons)
Garner & Scalia, *Reading Law* Sec. 52, 53 (TWEN)
*Clearfield Trust Co. v. U.S.* (TWEN)

One of the deepest, hardest problems in all of American law. In the age of statutes and regulations, who gives a rip about common law? Common law is usually *state* law; why does that matter for interpreting *federal* statutes? And get a load of *Clearfield Trust* (probably your first of many encounters, hopefully, with that case): surely, Congress can legislate to protect federal instruments, no? But it didn’t. Why is that not the end of the case? And why *this* common law rule?

**Session 10: Extrinsic Sources - Other Statutes; Specialized Canons**

564 – 600 (Interpretation in Light of Other Statutes)
865 – 870 (list of canons)
*Leegin Creative Leather Prod’s v. PSKS* (excerpts) (TWEN)

The “In Light of Other Statutes” stuff is mostly rote; just memorize the rules. The statute-specific canons are something else. I can’t teach them all—just know that whatever field you practice in, there might be a special canon that dominates. I’ve chosen the antitrust canon for four reasons. (1) You may end up studying antitrust law at ASLS; if you don’t, you might as well know a little bit about it. (2) *Leegin* is just too good for words. (3) The antitrust canon was made up, seven decades after the

If I told you that antitrust law is just about the only branch of American public law that makes any kind of sense, does that change your mind on canons? If I told you that arbitration law has followed the same pattern (makes sense; totally made up by soi disant "textualists"), would that impress you?

**Session 11: Interpreting the Constitution**

*M'Culloch v. Maryland* (TWEN)
*Bond v. U.S.* (TWEN)
*Noel Canning* (TWEN)

*M'Culloch* is the case you must understand. It's widely acclaimed as John Marshall's greatest opinion ever. (You can fight that but I wouldn't recommend it.) On "new textualist" grounds, though, it is—or ought to be—a horror show from top to bottom. Give me three reasons why.

*Bond* is kind of cool because it, again, involves a multitude of canons. How good are courts at identifying a "second-best" rule? *Noel Canning* is a fine example of "formalist" versus "functionalist" interpretation.

**Session 12: Statutory Interpretation in the Administrative State**

644 – 652 (History)
*Crowell v. Benson* (TWEN)
724 – 734 (*Skidmore*; *Chevron*)

Recommended/review: 655 – 661 (private rights of action)
Optional: 664 – 693 (congressional oversight; veto)

The "law" that governs me and you and your future clients rarely comes from Congress; it usually comes from administrative agencies, many of which you've never heard of. With apologies to the divine Tina Turner: What's law got to do with it? What's law but a second-hand emotion? What's a court supposed to do with this stuff, canon-wise?

To comprehend the canons you have to know a bit about the history of administrative law. You may want to start by re-reading *Marbury*—more precisely, the parts on the Court's authority to review (as we now say) the administrative action at issue. Then, read *Crowell*. What are the *Crowell* canons on the judicial review on questions of fact, and questions of law? Do you like them? Can you defend them? Finally, take a deep breath and read the *Skidmore* and *Chevron* stuff.

**Session 13: Judicial Deference—*Chevron*'s Domain**

734-743 (New Textualism; *MCI*)
661 – 664 (delegation canons)
743 - 757 (*Mead*)
Optional: 757 – 776 (*Gonzales v. Oregon*; Auer deference)

Re-read *Chevron*, then these materials.

**Session 14: Judicial Deference – Hard Look and Such**
Courts review agency action for “reasonableness” because the APA tells them to do so. Is that game worth the candle?