

LEGISLATION AND REGULATION – FALL 2022

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CANVAS: <https://vermontlaw.instructure.com/courses/1011>

Class meetings: Mondays and Wednesdays 2:10-3:25 in Oakes 012

TEXT: *The Legislative Process, Statutory Interpretation, and Administrative Agencies* (2nd edition 2021 Carolina Academic Press) by Linda D. Jellum

SUPPLEMENTAL READING/VIEWING/LISTENING: As noted in the syllabus below

**** NOTE THERE IS READING AND VIEWING TO BE COMPLETED PRIOR TO THE FIRST CLASS****

ADDITIONAL TEXTS AND STUDY AIDS (not required):

The West Academic Study Aids database has loads of material available in all subject areas. Please visit [www.https://libguides.vermontlaw.edu/databases](https://libguides.vermontlaw.edu/databases) and look for West Study Aids. Use your VLGS login if prompted for a password.

Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*. Thomson.West, 2012.

Jellum, Linda D., *Mastering Statutory Interpretation*, Second edition, Carolina Academic Press, 2013.

Jellum, Linda D., *Mastering Administrative Law*, Second edition, Carolina Academic Press, 2018

Funk and Seamon, *Administrative Law: Examples & Explanations* (6th ed. 2020 or 5th ed. 2015).

GRADING:

- Attendance, class participation, professional conduct including preparedness, timeliness, clarity, follow up, items assigned as “graded for completion,” current event postings 20%
- 3 graded short assignments, 5% each 15%
- 2 projects, 15% each 30%
- Final exam 35%

EXPECTATIONS and COMMITMENTS:

I expect that you will:

- Attend class, on time.
 - If you need to miss class for any reason, please provide advanced written notice.
 - Attendance is required and counts toward class participation. *Students who are absent from twenty (20%) percent of the regularly scheduled classes or who fail to complete required hours for other work shall be automatically withdrawn from the course with a grade of F-Wd.* Students are responsible for monitoring their own compliance with this policy. Please refer to the Vermont Law School Academic Regulations II(A)(1) in the VLGS 2022-2023 Student Handbook for details.
- Participate in class, in a professional manner.
 - I will call on you if I need to, but prefer organic and *respectful* discussions. If any discussion makes you uncomfortable for any reason, please come talk to me – especially if it is something that I said that caused the discomfort. Conversely, the class is expected to receive all viewpoints that are expressed courteously with respect and courtesy.
- Sign the attendance roster and please take your seat prior to 2:10 pm.
- For the first two weeks, sit in the same seat you occupied for the first class (so that I can put names to faces). If you are comfortable doing so, please send to me a brief video introduction to help me with this process and fill out the student questionnaire on CANVAS.
- Not access your phone or the internet during class unless asked to do so as part of the class.
- Complete the assignments for each class, prior to that class, and come prepared to participate in class discussions. This is your class – the more people participate the more useful I can be.
- If you have any technology questions, or more likely notice that I do, raise them as early in the semester as possible so that we can address them as soon as possible.

You should expect that I will:

- Start and end on time.
- Hold every class as scheduled EXCEPT for that on Monday, October 31, for which there is a makeup scheduled for Thursday, November 3 (same regular class time).
- Try to be accessible in or near the classroom for at least 15 minutes prior to and after each class.
- Keep my office days (with the exception of weeks when there is no class on Monday).

- Be available to you at virtually all other times via phone or email between the hours of 6:00 am and 10 pm, 7 days a week, and by appointment, *except* for Thursday and Friday from 9:00 am – 5:30 pm.
 - If you call and I am not able to pick up, please send a text or email and I will get back to you as soon as I can; let me know in that text or email either when you *are*, or when you *are not* available for a return call.
- Provide at least 2 weeks’ notice for any changes to the syllabus assignments that may be needed; listen to suggestions in this regard (gratefully received).
- Provide edits and suggestions and an opportunity to revise for a potentially better grade for each of the first three short assignments.
- Return each assignment promptly to allow adequate time for study/consultation/revision prior to the next assignment.
- Respectfully listen to your concerns and questions and do my best to address both.
- Come prepared for each class.

WHAT YOU SHOULD EXPECT TO LEARN:

1. The separation of powers within the constitutional structure of the US legal system.
2. The legislative and regulatory processes and the role of each in the regulatory state.
3. How to distinguish among the various theories of statutory interpretation and how to identify and apply canons of statutory construction.
4. The role and function of administrative agencies and the rulemaking process.
5. How agency action is impacted by legislative action, executive action, and judicial review.
6. How to access resources widely used by attorneys, government officials, and policy analysts working in the administrative law arena.
7. Anything you are curious enough to ask about (related to the scope of this course).

CALENDAR AND ASSIGNMENTS

Current Events: In addition to scheduled readings and discussions, please identify and share important legislative, regulatory, and judicial updates from federal, state and local government using the Discussions tab available on Canvas. This will give us a chance to apply what we learn to what we read in the news.

1 – Week of August 27 (two classes)

8/29, Class 1: Introduction and Separation of Powers

Text: Chapter I, pages 3-13

Watch: from 11:00 to 25:00 -

<https://www.c-span.org/video/?301909-1/constitutional-role-judges&start=6314>

ASSIGNED: Problem 1B: Use the chart on page 9. Use either the ADA as provided in the textbook or the Lacey Act, Pub. L. 97-79, 110-246, 16 U.S.C. 3371 et seq. Graded for completion. Due no later than the start of class Wednesday August 31.

8/31 Class 2: The Legislative Process – How a Bill Becomes Law

Text: Chapter 2, pages 31-53

Watch: How a Bill Becomes a Law:

<https://m.youtube.com/watch?v=66f4-NKEYz4> (Crash Course)

https://youtube.com/watch?v=kH_iNZp-7LO (I Learn Something)

<https://www.youtube.com/watch?v=2nKyihov9z8> (Schoolhouse Rock)

DUE: Page 9 chart

2 – Week of September 5 (one class on September 7)

9/7, Class 3: Statutory Interpretation – Introduction and Theories of Interpretation

Text: Chapter 1, pages 13-24,

Chapter 6, pages 191-206, 209-212, 228-230, 253-266

ASSIGNED: Short Assignment #1: Explain in no more than 3 pages (brevity is rewarded if complete and well reasoned), whether you agree with 10th Circuit in *Apollo Energies* or the 5th Circuit in *CITGO* (see below), or neither, and why. Due no later than 4 pm Friday September 16.

3 – Week of September 12 (two classes)

9/12, Class 4: Intrinsic Sources: Plain and Technical Meaning

Text: Chapter 4, pages 121-148

United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010)

United States v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015)

Prepare to discuss Problem 4A and *CITGO* and *Apollo* – which one do you think will/should prevail?

9/14, Class 5: Intrinsic Sources: Technical Meaning, Grammar and Punctuation

Text: Chapter 4, pages 148-158

Chapter 5, 159-161, 168-174, 177-179, 183-185, 188-190

Prepare to Discuss Problem 5C

DUE: by 4 pm Friday, September 16 – Short assignment #1

4 – Week of September 19 (two classes)

9/19, Class 6: Ambiguity and Constitutional Avoidance

Text: Chapter 7, pages 269-299

Prepare to discuss Problem 7B

9/21, Class 7: Absurdity Doctrine and Scrivener's Error

Text: Chapter 7, pages 300-318

ASSIGNED: page 318, chart D. Complete each activity and check each box. Graded for completion

5 – Week of September 26 (two classes)

9/26, Class 8: Linguistic Cannons: *In Pari Materia*, the Identical Words Presumption and *Noscitur a Sociis*

Text: Chapter 8, pages 319-346

DUE: page 318, Chart D, by noon

ASSIGNED: Project #1 – Legislative Drafting project. This is a small group project, no more than 5 persons to a group, TBD. You are working for a legislator (state or federal) who asked you to draft either a new statute or amendments for an existing statute, which makes it illegal to sell or trade in agricultural products produced on land recently converted from forest to agricultural production. The purpose of the bill is to remove incentives to clear forestlands, and thus to address one of the contributing causes of climate change. You may wish to look at any existing legislation, regulations, and proposed legislation in the U.S., UK and EU as a starting point but each of these has significant challenges – if you use any as a starting model, improve upon them. Include at least the following components of a statute – Title, Purpose Clause, Definitions as needed, Operative provisions, and Enforcement provisions.

ALSO ASSIGNED: Role for Yates debates on 9/28 (applies, does not apply, judge) **DO NOT LOOK UP RESULT/OPINION IN YATES!!**

9/28, Class 9: Linguistic Cannons: *Ejusdem Generis*, the Rule Against Surplusage and *Expressio Unius*

Text: Chapter 8, pages 346-355, 358-364, 367-372, 374-380

https://apps.oyez.org/player/#/roberts6/oral_argument_audio/23280

(click on the link to hear the oral argument)

Come prepared to argue Yates DO NOT LOOK UP RESULT/OPINION IN YATES!!

6 – Week of October 3 (two classes)

10/3, Class 10: The Role of Components: Title, Purpose Clause, Definitions

Text: Chapter 9, pages 385-391, 392-397, 398-408, 413-419

Prepare to discuss Problem Questions 1-4, pages 412-413

10/5, Class 11: The Role of Components: Operative Provisions, Savings Clauses, Severability

Text: Chapter 9, pages 421-top of 423, bottom of 424 to top of 431, 432-439, 441-445

7 – Week of October 10 (one class on October 12)

10/12, Class 12: Harmonizing Statutes

Text: Chapter 10, pages 451-456, 461-466, 467-468 (#8), 474-488, 489-492

Prepare to discuss Project #1

Prepare to discuss Problem 10C

8 – Week of October 17 (two classes)

10/17, Class 13: Extrinsic Sources – Legislative History

Text: Chapter 11, pages 495-497, 499-505, 518-520 (#7)

10/19, Class 14: Extrinsic Sources – Legislative History con't

Text: Chapter 11, pages 520-532, 539-546

Prepare to discuss Problem 11B

DUE: Project #1 by 4 pm

9 – Week of October 24 (two classes)

10/24, Class 16: Purpose

Text: Chapter 12, pages 551-top of 553, 554-560 (top), 561-568

ASSIGNED: Short Assignment #2 – Problem 12A, page 561

Prepare to discuss Problem 12B, pages 566-568

10/26, Class 17: Extrinsic Sources – Post-Enactment Judicial and Legislative Context

Text: Chapter 13, pages 571-579, 584 (bottom)-593, 595-599, 600-602

ASSIGNED: Read *United States v. Lewis Eisenberg*, 496 F.Supp. 2d 578 (E.D. PA 2007). Group assignment – groups of 5 TBD. In no more than 3 pages, state: (1) whether you agree with the court and why or why not; (2) assuming that the federal government disagrees with the decision (the government filed a brief supporting application of the Alternative Fines Act), whether you think the government should have appealed and why or why not, and (3) given that the government did not appeal, but disagreed with the opinion, what could its position be in the Eastern District of Pennsylvania in future cases, and what could its position be elsewhere? Graded for completion.

10 – Week of October 31 (one class November 2; makeup class TBD)

10/31 – NO CLASS, MAKEUP CLASS 11/3

11/2, Class 18: Policy-Based Considerations - Constitutional

Text: Chapter 14, pages 609-615, 617-625, 631-638

Prepare to discuss #7 starting at the bottom of page 626

11/3, Class 19: Policy-Based Considerations - Constitutional

Text: Chapter 14, pages 640-649, 650-657, 659-661

Prepare to discuss Problem 14B

DUE: Eisenberg case analysis by 4 pm

11 – Week of November 7 (two classes)

11/7, Class 20: Policy-Based Considerations – Prudential

Text: Chapter 15, pages 663-670, 674-681, 683-685

DUE: Short Assignment #2 by 4 pm

ASSIGNED: Chart D, page 690, complete the actions and check the boxes. Graded for completion.

**ASSIGNED: Project #2 – Administrative law docket exercise in CANVAS
Prepare to discuss Problem 15B**

11/9, Class 21: Administrative Law – Regulations and Rulemaking

Text: Chapter 16, pages 691-718

Review the chart on CANVAS on The Reg Map, Informal Rulemaking

DUE: Chart D by 4 pm

12 – Week of November 14 (two classes)

11/14, Class 22: Delegation

Text: Chapter 17, pages 719-736, 743-750

Prepare to discuss Problem 17, pages 739-742

Discuss Project #2

11/16, Class 23: Oversight

Text: Chapter 18, pages 753-757, 758-767, 768-771, 772-781

ASSIGNED: Short Assignment #3 – Review

<https://www.aphis.usda.gov/aphis/ourfocus/planthealth/import-information/lacey-act/implementation-schedule> You work at APHIS.

Your supervisor has asked you for a memo assessing whether the agency must continue to expand its Lacey Act declaration implementation schedule to eventually cover all tariff codes and, if so, how much longer the agency can take to fully phase in the declaration requirement. Research and write this memo - in no more than 4 pages.

Bonus points for brevity and for including discussion of what record the agency should create to support your recommendation.

13 – Week of November 21 (two classes)

11/21, Class 24: *Skidmore* and *Chevron*

Text: Chapter 19, pages 787-797, 798-806, 813-822, bottom of 824-828

Come prepared to discuss *Zuni Public School District* and Problem 19B on page 811

11/23, Class 25: *Chevron* (con't)

Text: Chapter 20, pages 839-853, bottom of 856-866, 869-870, Section D on pages 873-874

Come prepared to discuss Problem 20 on page 870

DUE: Short Assignment #3 by 4 pm

14 – Week of November 28 (two classes)

11/28, Class 26: *Chevron* (con't) and standards of review

Text: Chapter 19, pages 829-836

***West Virginia et al v. Environmental Protection Agency*, No. 20-1530 (June 30, 2022)**

86 Fed. Reg. 54642 (October 4, 2021)

Come prepared to discuss the impact of *West Virginia* and *Chevron* and where that leaves U.S. Fish and Wildlife Service if it were to have to defend its current position regarding the scope of the Migratory Bird Treaty Act (recall *Apollo* and *Citgo* from Class 4 above).

11/30, Class 27: Brand X

Text: Chapter 21, pages 877-880, 888-895, 897-901

Come prepared to discuss “Test Your Understanding” on page 887, and Problem 21

15 – Week of December 5 (two classes)

12/5, Class 28: The Linear Approach

Text: Chapter 22

DUE: Project #2 by 4 pm

Come prepared to discuss Problems 22A and 22B

12/7, Class 29:

Review and final exam preparations