

# Legislation

Fall Term 2009  
Professor Kris W. Kobach

## Course Syllabus

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### Required texts:

William N. Eskridge, Jr., Phillip P. Frickey, and Elizabeth Garrett, *Legislation: Statutes and the Creation of Public Policy, 4th Ed.* (St. Paul: West, 2007) (“EF,” below).

Additional readings indicated below ([available on TWEN](#)) can be downloaded from the course website on Westlaw’s TWEN (The West Education Network) system. Please go to [www.lawschool.westlaw.com](http://www.lawschool.westlaw.com) and register yourself for the course, or it is available in Roo Prints in the law library.

### Recommended text:

Lawrence E. Filson, *The Legislative Drafter’s Desk Reference* (Washington: Congressional Quarterly, 1992).

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### Course objectives:

This course combines legislative theory, legislative procedure, caselaw about legislative issues, statutory interpretation, and legislative drafting. Students should come away from the course with an understanding of the complicated issues of legislative theory and statutory interpretation, and with the practical ability to draft legislation well.

### Grading and course requirements:

Grades will be partly based upon a legislative drafting projects completed in teams and partly based upon a short multiple-choice examination. Each drafting team will produce: a draft of a bill for submission in either the Kansas or the Missouri legislature, a comparison of the bill to similar legislation in other states, an analysis of the bill’s constitutionality, and a policy analysis of the bill.

### Disabled Student Services

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(The topic numbers indicated below will not correlate exactly with class sessions. Some class session will deal with more than one topic. In other instances, we will take two weeks to cover a topic.)

## **I. LEGISLATIVE THEORY AND PROCEDURE**

### **(1) Introduction; legislative theory**

Introduction to the art of statutory interpretation. Models of legislation, Madisonian theory and public choice theory.

- EF: 47-82.
- *North Carolina v. Fly*;
- *Federalist 10*.

### **(2) Legislative procedure and the Civil Rights Act of 1964**

How the Civil Rights Act proceeded through Congress and the basic stages of legislation. The judicial interpretation of the Act in *Griggs v. Duke Power Company*.

- EF: 1-47.
- LA Times, “Not Yes, Not No, Not Even a Maybe;”
- “How Congress Works;”
- “House Executes Deliberation With Special Rules”
- The Legislative Process in Missouri;
- Hearings before U.S. Senate Subcommittee on Immigration, Border Security, and Citizenship, April 22, 2004.

### **(3) Application of legislative theory and introduction to statutory interpretation**

The *United Steelworkers of America v. Weber* and *Johnson v. Transportation Agency* decisions and the interpretive approach used by the Supreme Court.

- EF: 82-120.

## **II. REPRESENTATION**

### **(4) Representation theory**

Concepts of representation, one person-one vote.

- EF: 123-35.

### **(5) Representation issues in the courts**

Racial gerrymandering, political gerrymandering, and term limits. The *U.S. Term Limits v. Thornton*, and *Vieth v. Jubelirer*.

- EF: 135-69, 177-91.

## **III. LEGISLATIVE DRAFTING**

### **(6) Basic principles of legislative drafting**

- William N. Eskridge, Jr. and Phillip P. Frickey, “Legislative Drafting;”
- The Onion, “Congress Passes Americans with No Abilities Act;”
- Steven M. Gillon, “Oops! Top 10 Laws that Lashed Back;”
- Neal McChristy, “Bills Aren’t Always Meant to Become Law;”
- Lawrence E. Filson, “General Considerations.”

For guidance in drafting projects:

- Missouri General Assembly Committee on Legislative Research, “The Essentials of Bill Drafting 1997;”
- Missouri General Assembly Committee on Legislative Research, “The Essentials of Bill Drafting 2002;”
- Final Checklist for Bill Drafters;
- Lawrence E. Filson, “Writing the Provisions of a Prototypical Bill.”

#### **IV. STATUTORY INTERPRETATION BY THE JUDICIARY**

**(7) Eclecticism, plain meaning and intentionalism**

- EF: 689-712.

**(8) Purposivism: legal process theory**

Legislative mistakes, dynamic interpretation.

- EF: 712-49.
- *Missouri v. McGirk*;
- *Bush v. Gore*;
- *Gore v. Harris*;
- *The New Jersey Democratic Party, Inc. v. Forrester*;
- Deroy Murdock, “When the law is only a suggestion;”
- Kobach, NY Post “To Misread a Statute: Is Florida’s high court focusing on the wrong issue?;”
- Kobach, NY Post “Al’s Supreme Doom: His lawyers have no real answer to Dubya’s best point.”

**(9) Revival of the plain meaning rule and the new textualism**

- EF: 749-75, 798-812.
- Justice Antonin Scalia, *A Matter of Interpretation*;
- *D.C. v. Heller*.

**(10) Canons of interpretation and their application by the courts**

Basic presumptions, *Bishop v. Linkway Stores*, *Muscarello v. United States*, the rule of lenity, and *U.S. v. Margiotta*.

- EF: 847-98, 941-52.
- *Muscarello v. United States*;
- *Holloway v. United States*;
- *Jones v. United States*.

**(11) Legislative history and intent**

Does it matter? If so, how should courts use it?

- EF: 971-98, 1020-22, 1047-61.

- *Robinson v. Wroblewski*;
- Briefs in *Day v. Sebelius*.

## V. DIRECT DEMOCRACY

### (12) **The referendum as a source of law**

Use of initiatives and referendums at home and abroad. *City of Eastlake v. Forest City Enterprises, Inc.*

- EF: 559-72
- Kris W. Kobach, *The Referendum: Direct Democracy in Switzerland*;
- David Magelby, “Direct Legislation in the American States.”