COURSE NAME: Legislation
COURSE NUMBER:  8641R

PROFESSOR: Kris Kobach

ESSENTIAL PREREQUISITE(S): None

DESIRABLE PREREQUISITE(S): None

METHOD OF GRADING AND APPRAISAL OF STUDENT FOR GRADE: Grades will be partly based upon legislative drafting projects completed in teams and partly based upon a short multiple-choice, examination.

SUMMARY DESCRIPTION OF COURSE: This course combines legislative theory, legislative procedure, caselaw about legislative issues, statutory interpretation and clinical work in legislative drafting. The topics covered will be: normative and descriptive theories of legislation, public choice theory, electoral and representational structures, canons of statutory interpretation, the deciphering of legislative history, and institutions of direct democracy. The clinical section of the course allows students to draft legislation for proposal in state legislatures across the country. Many legislation projects from Professor Kobach’s course have been enacted as law in Missouri and Kansas.

COURSE CONTENT:


COURSE MATERIALS: See attached syllabus.

RELEVANCY OF COURSE FOR CAREER PURPOSES: Interpreting statutes well is a skill that virtually every lawyer needs to develop at some point, regardless of the lawyer’s particular area of practice. This course teaches that essential skill. Students will also come away with the ability to draft legislation, which is critical in many public sector legal positions.

RELEVANCY OF COURSE FOR MO/MULTI-STATE BAR EXAMINATION: Students will gain a solid understanding of the complicated issues of legislative theory and statutory interpretation. Although these issues are not usually given a separate section on the bar exam, they are present in the background of many essay questions on the exam.
Legislation

Fall Term 2008
Professor Kris W. Kobach

Course Syllabus

Required texts:


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 and register yourself for the course, or it is available in Roo Prints in the law library.

Recommended text:


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.

(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: 47-81.
- North Carolina v. Fly;
- Federalist 10.
(2) **Legislative procedure and the Civil Rights Act of 1964**


- EF: 1-47.
- LA Times, “Not Yes, Not No, Not Even a Maybe;”
- “How Congress Works;”
- The Legislative Process in Missouri;

(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: 81-118.

II. REPRESENTATION

(4) **Representation theory**

Concepts of representation, one person-one vote.

- EF: 121-32.

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


- EF Supp.: 1-20.

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: 669-89.

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

Legislative mistakes, dynamic interpretation.

- EF: 690-727.
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

(10) Canons of interpretation and their application by the courts
- EF: 817-65, 909-17.
- 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: 937-63, 979-81, 1020-36.
- 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: 528-41.
- Kris W. Kobach, The Referendum: Direct Democracy in Switzerland;
- David Magelby, “Direct Legislation in the American States.”