

THE JOY OF TEACHING LEGISLATION

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I am going to talk about teaching legislation, a class I have taught several times at Georgetown University Law Center, as well as teaching a federal legislation clinic, which I founded ten years ago at the law school. Bill Eskridge has done a wonderful job laying out the different ways one can teach a course in legislation; you will see that my approach focuses on teaching the skills that, as Bill also correctly noted, all young lawyers will need when they start practicing.

I begin my legislation class by telling students the class will be fun, easy, and useful. In fact, I write those words in big, block letters on the board: “FUN. EASY. USEFUL.” From my perspective, a legislation class is fun for the same reason that being a lawyer is fun: you get to use your brain to figure out what words mean. Just think about how lucky law students are—they are training for a profession in which people will pay them to think. Of course, what a lawyer is paid to think about and what a lawyer does with those thoughts will depend on who the lawyer’s client is.¹ But in a class, students don’t have a client yet, so the thinking can be purely fun as students use their brains to figure out what words should and could mean.

I tell my legislation students that the class will be easy because I am not expecting them to master any one subject area of law. When a student takes a class in disability law, tax law, or securities law, there is a body of precedent the student is expected to master. By contrast, in a legislation class, there are a series of “moves” I expect the student to become familiar with. But I do not expect to teach them the intricacies of a particular subject area.²

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1. This is why I tell my students that their first decision as lawyers will be their most important decision: who will be their client? Once a lawyer makes that decision, everything else the lawyer does flows from that fact.

2. Because the legislation course draws on cases in many subject areas, I agree with Beth Garrett that teaching the class can sometimes seem intimidating. As a professor, one usually teaches within one’s subject area, and all the cases are thus very familiar and fit within a legal scheme that the professor understands well. By contrast, the perfect case to teach a particular “move” in a legislation course might be a case involving environmental law, securities law, communications law, or another area of law completely outside the professor’s ordinary area of expertise. For that

Finally, I tell my students that the class will be useful because almost all the work they will do as lawyers will require them to interpret statutes. In the materials for the first class, I include a list of the courses offered at the law school. I ask the students to highlight every class that they believe revolves around statutes. At the next class, I hand out my copy of the list, where I've highlighted those that revolve around statutes; usually, I've highlighted at least two-thirds of the classes in the upper-year curriculum.

I then put the following four words on the board: "TEXT. LAW. POLICY. POLITICS." My entire professional life over the past twenty years has revolved around these four components. My legislation class is all about the moves a court engages in as it translates text to law. What I mean by "text" is the words in a statute.³ What I mean by "law" is what a court concludes that those words mean.

By "policy," I mean the substantive policy result that a lawyer's client wishes to achieve. As I noted before, everything a lawyer does is driven by the client he or she has chosen to represent. The client may be a business whose goal is to enhance profits, or the client may be a social services organization representing service providers and consumers. In any case, a client usually wants the text to be construed to achieve a particular legal result, and so the lawyer must make those arguments to a court or to an administrative agency. Alternatively, the client may want new text to be created that will be construed to achieve a particular legal result, and so the lawyer must write the text that will achieve that result.

Finally, "politics" is the component that determines what new text—whether a statute or a regulation—will actually look like. There are many actors in any legislative game. They usually have different policies and goals in any particular area and, hence, a political process ultimately determines what language is enshrined in text.

I explain to my legislation students that because the class is about the moves a court makes in translating text to law, the class will be like studying piano: we are going to practice, practice, practice.⁴ I usually assign no more than one or two cases for each class session

reason, any casebook may include cases a professor may not feel completely comfortable teaching.

3. "Text" can also be the words in a regulation. Regulations are somewhat odd creatures. When they exist, they play a critical role in the moves a court makes in deciding what the text of a statute means. But the text of the regulation is itself also subject to interpretation—what do the words of the regulation mean?

4. Despite never having taken piano lessons, I have a dim understanding that learning to play the piano requires constant practice of various moves. Moreover, I experience legislation as two broad melodies of legal process and textualism with

and emphasize that the goal is not to learn a particular subject matter, but rather to become sensitive to, and ultimately proficient in, the statutory interpretation moves in which the court engages. Thus, during each class I have my students unpack the assigned cases to learn the moves the court has made in translating text to law.

Unpacking cases starts with identifying the relevant text. I explain to my students that they must be experts in the “blah blah” method of reading text—a very sophisticated term for a very sophisticated activity. That is, in any statute or regulation, one must identify the exact text that is relevant to the question at hand. Of course, in real life, there are often many other words in a piece of text that will not be relevant to the question at hand, and those words can fog up the picture. I want my students to focus on a piece of text, bring the relevant words to the foreground, and relegate the others to the background. Hence, the practice gets its name; I want the students to tell me the relevant text to write on the blackboard, ignoring the “blah, blah”—the words that are not relevant to the question at hand.

Picking up the piano metaphor again, teaching legislation is like teaching two melodies—legal process and textualism—and the riffs on those melodies. My students learn the moves of legal process and textualism, practice those moves by unpacking case after case, and then learn various potential riffs on each of those melodies.⁵

Here are some examples from my syllabus, which should give you an idea of how I structure and run the class. I start with the melody of legal process, and teach *Church of the Holy Trinity v. United States*,⁶ *Griggs v. Duke Power Co.*,⁷ and *United Steelworkers v. Weber*.⁸ With both the legal process and textualism melodies, I try to include a case where I believe the court has stretched the theory to its limit. Justice Brennan’s opinion in *Weber* is a perfect example; the Court comes up with a story of what Congress thought it was doing in passing the Civil Rights Act of 1964⁹ that would probably be quite a shock to that Congress.

everything else as riffs on one of these melodies. See *infra* text accompanying notes 5–13. Thus, the piano metaphor seems apt in that regard as well.

5. One challenge in teaching legislation this way is to keep it from getting boring, because students have to learn the moves a court may make. The best way to learn these skills is by practicing, but just practicing two melodies, even with a significant number of riffs, can get somewhat tedious.

6. 143 U.S. 457 (1892).

7. 401 U.S. 424 (1971).

8. 443 U.S. 193 (1979).

9. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.); see *Weber*, 443 U.S. at 201–07.

Then I do a number of textualism cases. With *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁰ we add a dose of administrative law to the mix. From my perspective, it is impossible to understand the import of textualism without understanding how the *Chevron* deference principle has changed the dynamics between courts and agencies. I teach *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,¹¹ which is a case where textualism really did get stretched—it's textualism's analog to *Weber*. In an opinion authored by Justice Scalia, the Court found that a word—"modify"—has a clear meaning, though most people would probably not agree that the meaning of that word is particularly clear.¹² I try to demonstrate that courts can stretch both legal process and textualism to achieve certain results because I want my students to understand how extensive these moves can be if one persuades the court to apply them.

As for riffs on these two melodies, I teach dynamic statutory interpretation, which is a fascinating theory articulated by Bill Eskridge,¹³ as a riff on legal process. I also teach legislative history, congressional silence, and various canons of statutory interpretation.

As we discuss the theory behind legal process, textualism, and their riffs, and as the students discuss which theory they feel more comfortable with, I again remind my students that their first decision—who their client will be—will be their most critical decision. That is, once a lawyer has a client, it doesn't matter if the lawyer personally thinks textualism is a poor theory. If textualism is the melody that will get the text-to-law result the client needs, that lawyer needs to be very good at making textualist moves. I tell my students that I want them to leave my class as terrific textualists, just in case that's what their clients need; I also want them to be the best legal process players there are, in case that's the melody that will better serve their clients.

As you can see, most of my class is about teaching students how to make the moves from text to law. The goal is for students to be able to look at a piece of text and figure out exactly what moves to make if they want to achieve Result A, or, alternatively, what moves will help them achieve Result minus A.

10. 467 U.S. 837 (1984).

11. 512 U.S. 218 (1994).

12. *Id.* at 225–29.

13. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

Of course, it's often hard to understand why text looks so convoluted if one doesn't fully understand the political process that has shaped that text. One way to provide that understanding to students is to offer a class on the legislative process, which can be a useful analog to the type of skills-based legislation class that I teach. My method for giving students a glimpse of how politics affects text is to do a case study of a particular piece of legislation. In my most recent legislation class, I used the Civil Rights Act of 1991¹⁴ for this purpose. I had my students unpack excerpts from the bill's language, committee reports, news articles, and floor debates so that they could develop a sense of how law and politics intertwine to generate some strange forms of legislative drafting.

Finally, I put the game in play. Once my students have the skills to move from text to law, I have them observe those moves in action in a case currently before the courts. Each year, I choose a different case and have my students read the briefs and attend oral argument. This past year, I chose *Chevron U.S.A., Inc. v. Echazabal*¹⁵—a Supreme Court case dealing with the meaning of the “direct threat” provision of the Americans with Disabilities Act.¹⁶

Another way in which I put the game into play is to have my students work in small groups to draft a piece of legislative text. Two years ago, I based the exercise on the “charitable choice” bill that was then moving through Congress; I had some students represent religious groups that would receive federal funds, while others represented civil rights groups that wanted to prevent religious groups receiving federal funds from discriminating in their employment policies. My students read the relevant civil rights case law, talked about the politics of the issue, and finally analyzed and drafted various text possibilities to address the issue.

My legislation class is designed to teach students to understand and manipulate all the possible moves a court can make as it transforms text into law. By contrast, my federal legislation clinic presumes an understanding of and facility with those moves—the legislation class is a prerequisite for the clinic—and focuses instead on

14. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C.).

15. 536 U.S. 73 (2002). I chose the case partly because I was one of the co-counselors for Mario Echazabal, and thus was deeply immersed in the case. Other years, I have chosen several cases from the D.C. Circuit, required the students to choose one case in which they will read the briefs and attend oral argument, and then discussed those cases in class.

16. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

representing an actual organizational client with a particular policy goal. Thus, policy and politics come into play in the clinic on actual pieces of legislative and regulatory text. By immersing themselves in both law and politics, clinic students help their organizational clients achieve their legislative and regulatory goals.

The clinic is based on my “Six Circles Theory” of effective advocacy¹⁷ and the concept of “legislative lawyering.”¹⁸ Simply put, a “legislative lawyer” is someone who not only enjoys and understands the political legislative process, but also enjoys and understands the complex law that is the product of that process. Thus, the legislative lawyer has an excellent grasp of statutory interpretation moves, reads complicated statutory and regulatory text with ease, talks to legislative staff in simple and accessible language, and embraces the idea—rather than being repulsed by the fact—that politics necessarily shapes text.

The legislative lawyer is thus the conduit, telephone, and translator between the political world and the world of litigation lawyers and legal academics. While people in those two worlds often talk past each other, the legislative lawyer can gain the trust and respect of players in both worlds because of his or her dual competency in law and politics, and is thus well situated to generate creative solutions to difficult political and legal problems.¹⁹

The clients that the federal legislation clinic currently serves are Catholic Charities U.S.A., the Family Violence Prevention Fund, and the Health Privacy Project.²⁰ In spring 2004, we will begin to work on a new workplace flexibility project funded through the Alfred P. Sloan Foundation.

17. Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 35 McGEORGE L. REV. (forthcoming Spring 2004) [hereinafter *The Art of Legislative Lawyering*] (manuscript on file with *The New York University Journal of Legislation and Public Policy*). See also Chai R. Feldblum, *Five Circles of an Effective Coalition*, at http://www.law.georgetown.edu/clinics/flc/five_circles.html (revised June 26, 2003) (describing earlier version of theory with five, rather than six, circles) (on file with *The New York University Journal of Legislation and Public Policy*).

18. See Chai Feldblum, *What is Legislative Lawyering*, at http://www.law.georgetown.edu/clinics/flc/leg_lawyering.html (revised June 26, 2003) (on file with the *New York University Journal of Legislation and Public Policy*).

19. *The Art of Legislative Lawyering*, *supra* note 17.

20. We have been working on a health privacy bill for ten years. One of the things about a federal legislation clinic is that you can work on the same piece of legislation for ten years, and still not be done with it. On the other hand, because of the clinic's efforts on behalf of the Health Privacy Project, we were instrumental in the genesis and the development of the health privacy regulations promulgated by the Department of Health and Human Services.

At the beginning of each semester, I provide my clinic students with a chart of the substantive skills they will need to be good legislative lawyers. I tell them to evaluate themselves on those skills, and try to give them the type of work that will help them refine those skills. I lay the skills out in chronological order—that is, the order in which they will approach their work in the clinic. Their work begins with assessing the issue, which requires an understanding of the client's concern and the relevant legal text and politics. Their next task is to research and analyze the issue, which includes foremost comprehending and analyzing the text. Reading text carefully, understanding text, and ultimately, being creative in manipulating text are essential to good legislative lawyering. The legislative lawyer “delivers” on this research and analysis by proposing approaches that effectively merge the relevant law and politics to move the legislative or regulatory ball forward. And, of course, the legislative lawyer needs to be able to convey this information effectively and clearly in both written and oral formats.

Whether you've wanted to be a legislative lawyer from a very early age,²¹ or decided to pursue legislative lawyering later in your career,²² or you just want to be a regular lawyer, you will need to understand the moves from text to law that will best advance your client's interests. So a course in legislation can benefit all lawyers, I believe. But I do hope some of you will want to be legislative lawyers and will be involved with creating text in the first place. In that case, you will need to know how to merge law and politics in a way that will advance your client's interests. But whatever you do, please don't forget to take some time off, and maybe contemplate law or politics (or something completely different!) as you lay on a beach somewhere.²³

21. At this point in the talk, the PowerPoint presentation I had developed flashed a picture of a very cute two-year-old Michael Rubin.

22. And, at this point, a picture of one of my current Teaching Fellows in the Clinic, a very adult Eric Hallstrom, flashed on the screen.

23. And, for this, the PowerPoint flashed a lovely picture of a serene and peaceful beach.

