LAW 524, LEGISLATION (FALL 2021)
Mon. & Wed., 4:30 – 6:00 Rm. 201; Prof. Anthony Johnstone, Rm. 312 (x6711)

This course concerns how law is written and read by lawyers, judges, legislators, and the public, from campaign to capitol to court. It begins with an introduction to the system of representation, legislation, and interpretation. Then it takes each function in turn: first, the regulation of the electoral process including voting rights, campaign finance, and direct democracy; second, the structure of the legislative process including ethics, lobbying and deliberative rules; and third, the interpretation and implementation of resulting statutes. Students will synthesize the material in a paper or legislative project.

Learning outcomes. Law: Explain and apply the leading doctrines of election law, legislative procedure, and statutory interpretation with an emphasis on Montana law; distinguish legislative, executive, and judicial roles in law and policy-making. Skills: identify, research, and analyze issues under the doctrines above, persuasively argue those issues in writing and orally, draft basic legislation. Values: Demonstrate excellence in role as an advocate, an officer of the court, and a citizen; recognize the influence of representation, legislation, and interpretation on diversity and equality of opportunity; develop a practice of self-reflection.

Class preparation. The primary texts are Eskridge, Frickey, Garrett, & Brudney, Legislation & Regulation, 6th Ed. (West 2020) (“L”), the current Supplement (West 2021) (“S”), cited (*) or online readings (’), and classmates’ briefs.

Attendance. Class attendance is synchronous in-person with face masks. Attend remotely via Zoom (https://umontana.zoom.us/my/johnstone) if you have COVID-19 symptoms or exposure, any of the exigent circumstances in the student handbook, or my prior permission.

Assignments. Your grade has three components: discussion (15%), argument (30%), bill drafting (5%), and project (50%). Consult the rubric for details.

Discussion measures weekly constructive engagement in class discussion and classmates’ arguments.

Argument measures the research, analysis, and presentation of two briefs posted on Moodle (750 wds. max.) and argued in class (5 mins.): an opening brief arguing a case related to a day’s topic (15%, posted 72 hours before class), and a response to a classmate’s brief from a different day (15%, posted 24 hours before class); the case may be real (from Montana or other courts) or possible (e.g., from bills or other proposals). Selections are final unless a classmate will swap. Please post, rather than attach, your brief on Moodle.

Bill drafting measures the proposal of a policy and drafting of a classmate’s policy in a bill; your bill draft will be assessed for adherence to the bill drafting manual.

Project measures the legal research, analysis, and writing of a 3000-word (5000-word for AWR) paper, or a similarly substantial project, due on Moodle no later than 5pm Dec. 17.

Questions. Please post course questions on Moodle. You may make an appointment (Zoom or outdoors) by sending me a calendar invite via an iCalendar (.ics) compatible app.

Academic Honesty. All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the Student Conduct Code of the University of Montana. Law students should also be familiar with the Law School Honor Code.

Disabilities. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and the Office for Disability Equity. If a disability may be affecting your academic performance, you should contact ODE.
### Course Rubric

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<tr>
<th>Excellent:</th>
<th>Good: Fully satisfies course standards; normal.</th>
<th>Satisfactory:</th>
<th>Poor: Partially satisfies course standards.</th>
<th>No Credit: Does not satisfy course standards.</th>
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<tr>
<td>Substantially exceeds standards.</td>
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<td>Substantially satisfies standards.</td>
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**Discussion: 15 pts.** (15 engagements throughout semester*)
*Includes posted responses to relevant events during semester; contact me to nominate an event.*

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<tr>
<th>1. Insightful engagement.</th>
<th>0.5. Basic engagement. Makes basic effort to understand, respond to discussion.</th>
<th>0. Disengaged. Absent/disruptive.</th>
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<tr>
<td>Well-prepared, engaged in materials, advances discussion.</td>
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**Argument: 2 x 15 pts.** (5 pts. research, 5 pts. analysis, 5 pts. communication)

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<tr>
<th>5. Deep research.</th>
<th>4. Good research.</th>
<th>3. Basic research.</th>
<th>2. Poor research.</th>
<th>0-1. No research.</th>
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<tbody>
<tr>
<td>Applies law to novel issue; concise background; cites on-point cases beyond leading cases, and secondary sources where appropriate.</td>
<td>Applies law to relevant court case on issue; covers key background; cites leading cases, including cases outside the readings.</td>
<td>Applies law to relevant case; covers basic background; cites appropriate leading cases from the readings.</td>
<td>Applies law to obvious case without apparent research; cites few other cases; apparently no significant outside research.</td>
<td>Reiterates existing case; no original case citations; no indication of research beyond the readings.</td>
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**5. Compelling analysis.**
Synthesizes law persuasively: headings caption each step; engages strongest arguments and counter-arguments.

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<td>Applies law accurately; clearly structured with headings; fully-supported claims; addresses strongest arguments in support of position.</td>
<td>States law accurately; basically structured argument section; covers core argument but missing points.</td>
<td>Misstates law; lacks structure or basic headings; misses core argument or makes irrelevant argument.</td>
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**5. Lucid Writing.**
Winning intro; clear structure; nearly flawlessness prose.

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<th>4. Good writing.</th>
<th>3. Basic writing.</th>
<th>2. Poor writing.</th>
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<tr>
<td>Clear introduction, well-organized; minor errors, typos.</td>
<td>Basic introduction and organization; some errors.</td>
<td>Poorly organized throughout; many errors.</td>
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**& Argument.**
Confident delivery; well-paced, little reading; draws questions.

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<th>2. Poor argument.</th>
<th>1. No argument.</th>
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<td>Tentative delivery; too fast or too long; relying on brief; basic responses.</td>
<td>Unprepared; nonresponsive or distracting responses.</td>
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**Bill Drafting: 5 pts.** (see Bill Drafting Manual on Moodle)

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**Project: 50 pts.** (20 pts. research, 20 pts. analysis, 10 pts. writing)

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**AWR Planning Guide (see handbook; suggested for projects):**
(1) Topic selection, September; (2) Bibliographic Essay, October; (3) First Draft, November; (4) Classmate reviews draft, December; (5) Oral presentation, Lawlapalooza; (6) Final Draft, Dec. 17.
# Syllabus

The syllabus is subject to change depending on course and legal developments.

Note: readings are faster than they appear due to commentary and problems (which you may skim); we will focus on **bolded materials**; page counts (XX) are “casebook equivalent.”


## INTRODUCTION

<table>
<thead>
<tr>
<th>1.</th>
<th>Introduction to Legislation: The Legislature</th>
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<tbody>
<tr>
<td><strong>Mon 8/23</strong></td>
<td>Ch. 1, § 1: The Civil Rights Act of 1964</td>
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<tr>
<td>(39)</td>
<td>A. How a Bill Becomes a Law: A Classic Story (L 1-39)</td>
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<tr>
<td>Q.1.1: How can the legislative and political process inform statutory interpretation?</td>
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<td></td>
<td><em>Consider disparate impact and affirmative action under Title VII, § 703(a)</em></td>
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<th>2.</th>
<th>Introduction to Legislation: Enter the Executive &amp; Judiciary</th>
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<tr>
<td><strong>Wed 8/25</strong></td>
<td>Ch. 1, § 2-3: The Affordable Care Act</td>
</tr>
<tr>
<td>(34)</td>
<td>B. An Introduction to Statutory Implementation and Interpretation (L 40-42)</td>
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<tr>
<td>1. <strong>King v. Burwell</strong> (2015) (NB: full case is at Ch. 7, § 2)</td>
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<tr>
<td>Q.2.1: Should unorthodox lawmaking change what laws mean to agencies or courts?</td>
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## PART I: REPRESENTATION

<table>
<thead>
<tr>
<th>3.</th>
<th>Voting &amp; Equality</th>
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<tr>
<td><strong>Mon 8/30</strong></td>
<td>Ch. 2, § 1: Electoral Structures and Equality Values</td>
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<tr>
<td>(39)</td>
<td>A. One Person, One Vote: Formal Equality in Representation (L 105-17)</td>
</tr>
<tr>
<td>1. [NB: <em>United States Dept. of Commerce v. Montana</em> (1992)]</td>
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<tr>
<td>Q.3.1: What are the limits to electoral equality under “one person, one vote”?</td>
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<tr>
<td>B. Race and Electoral Structures (L 117-18, S 5-33)</td>
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<tr>
<td>1. <em>United States v. Blaine County</em>, 363 F.3d 897 (9th Cir. 2004) [8 pp]</td>
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<tr>
<td>Q.3.2: Does VRA cover voting barriers beyond denial &amp; dilution (e.g. ballot collection)?</td>
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<td>Q.3.3: Can the law disentangle partisan laws from their racial impacts? Should it?</td>
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<th>4.</th>
<th>[FACULTY RETREAT]</th>
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<td><strong>9/1</strong></td>
<td>Assignment: Watch One Montana Districting &amp; Reapportionment CommissionMtg.</td>
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<td>(If you can’t decide, watch one of the most recent meetings or the August 2020 panel)</td>
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<td>Meetings available here: <a href="https://leg.mt.gov/districting/2020-commission/">https://leg.mt.gov/districting/2020-commission/</a></td>
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<td>You may post responses for discussion credit on the Legislative Events Forum.</td>
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<p>| 9/6 | [LABOR DAY] |</p>
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<thead>
<tr>
<th>Week</th>
<th>Topic</th>
<th>Reading/Questions</th>
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</table>
| Wed 9/8 | Voting & Partisanship | Ch. 2, § 1: Electoral Structures and Equality Values  
C. Political Gerrymandering (L 149-76)  
Q4.1: Can courts police entrenchment by incumbents?  
Q4.2: How would you draw a second congressional district in Montana? Why?  
Ch. 2, § 2.C: Political Parties  
C. Ballot Access [& the Two-Party System] (L 189-197)  
Q4.3: What (or Who) determines what is a political party? |
| Mon 9/13 | Campaign Regulation: Candidates & Contributions | Ch. 2, § 3: Structures of Campaign Finance  
A. The Constitutional Foundation for Regulating Campaigns (L 197-222)  
2. [Bipartisan Campaign Reform Act of 2002]  
Q5.1: What are permissible ends (interests) for limiting campaign contributions?  
Q5.2: What are permissible means (levels) of limiting campaign contributions?  
C. State Reforms & Public Financing (L 2244-48)  
Q5.3: What other means permissibly serve anti-corruption ends? |
| Wed 9/15 | Campaign Regulation: Independent Expenditures & Disclosure | Ch. 2, § 3: Structures of Campaign Finance  
B. The Roberts Court’s Change of Course (L 223-44, S 33-34)  
Q6.1: How does “money, like water, always find an outlet” in campaigns?  
Q6.2: What is Citizens United’s primary holding?  
2. *Nat’l Ass’n for Gun Rights v. Mangan, 933 F. 3d 1102 (9th Cir. 2019) [8]  
Q6.3: Which actors and actions permissibly trigger disclosure after Citizens United? |
| Mon 9/20 | Ethics: Bribery, Gifts, & Conflicts | Ch. 3, § 1: Regulating Deliberation to Combat “Corruption”  
A. Bribery and Extortion (L 249-272)  
1. People ex rel. Dickinson v. Van De Carr (N.Y. 1st Dept. 1903)  
Q7.1: (How) Can criminal law draw a line between corruption and politics as usual?  
B. Conflicts of Interest: Gift Bans & Other Ethics Laws (L 272-77)  
Q7.2: What other preventative measures can protect against corruption? |

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**PART II: LEGISLATION**
### 9.
**Lobbying**

**Ch. 3, § 1: Regulating Deliberation to Combat “Corruption”**

- **C. Lobbying (L 277-97)**

**Q8.1:** How does lobbying regulation work?

**Q8.2:** How far should lobbying regulation expand beyond the legislative lobby?

**Special Practice Panel on Lobbying: Aimee Grmoljez & SK Rossi**

### 10.
**Legislative Deliberation & Structural Due Process**

**Ch. 3, § 3: Rules Facilitating Legislative Deliberation**

- **A. Substantive Limitations on the Legislative Process (L 297-305)**
  2. **Department of Education v. Lewis** (Fla. 1982)
- **B. Substantive Limitations on the Legislative Process (L 305-15)**
  2. The Enrolled Bill Rule in State Constitutional Practice (343-45)
- **C. McLaughlin v. Legislature (Mont. 2021) [15 pp]**

**Q9.1:** Should courts police the process rather than substance of legislation?

**Q9.2:** How can courts police the process rather than substance of legislation?

### 11.
**Direct Democracy**

**Ch. 4, § 1: An Overview of Direct Democracy**

- **A. The Importance of Money in Direct Democracy (L 353-61)**

**Q7.1:** Can initiatives solve problems of money in politics?

- **B. Voter Competence, Voter Confusion, and Voting Cues (L 361-70)**

**Q7.2:** How can laws make the initiative process more democratic?

- **C. Interaction Between Direct & Representative Democracy (L 370-77)**

**Ch. 4, § 2: Statutory Interpretation of Initiatives (L 377-81)**


**Q7.3:** How can the initiative process make the legislative process more democratic?

### 12.
**Legislative Drafting Workshop I**

- **You will play the roles of a bill sponsor (a legislator), a legislative drafter (a staff lawyer), and committee member (another legislator), in sequence. First read:**
  1. *Mont. Leg., Bill Drafting Manual, Ch. 4 (2020)*
  2. *How a Bill Becomes a Law in Montana*

*By Sunday, October 3, assume the role of a bill sponsor and imagine a simple policy that a federal, tribal, state, or local legislature or agency might adopt and post a one-paragraph “bill request” summarizing it on the Moodle forum.*
### Legislative Drafting Workshop II

By Tuesday, October 5, assume the role of a legislative drafter and post a bill draft as a reply to the policy it implements. (Your assigned policy will be the post subsequent to the policy you posted, or the first policy posted if your policy was the last posted.)

For Class on Wednesday, October 6, prepare to assume the role of a legislative committee member and bring a question you have about how the bill draft works, with a focus on the technical aspects of implementing the policy rather than the policy itself. (Your assigned bill draft will be the post subsequent to the bill draft you posted, or the first bill draft posted if your bill draft was the last posted.)

### PART III: INTERPRETATION

#### 14. Theories of Statutory Interpretation

**Ch. 5, § 1: From Eclecticism to Systematic Theory, 1789-1938** *(L 405-24)*

[A.] Classical Approaches
2. Lieber, *Legal and Political Hermeneutics* (1880)

[B.] The Emergence of Eclecticism
2. *(Caminetti v. United States* (1917))
3. *(Fishgold v. Sullivan Drydock & Repair Corp.* (2d. Cir. 1946))

[C.] Critiques of Intentionalist Approaches
1. Radin, *Statutory Interpretation*

**Q13:** Which interpretative methods are traditional? What are their limitations?

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**A.** The Legal Process Classics, 1940s-50s *(L 424-31)*
1. *(International News Service v. Associated Press* (1918))
2. *(Fuller, The Case of the Speluncean Explorers (4299!))*

B.1 Implications of Legal Process Theory, 1950s-1980s: Role of Precedent *(L 432-46)*
1. *Flood v. Kuhn* *(1972)*

1. *United States v. Locke* *(1985)*

**Q14:** What does it mean for a court to be a “faithful agent” of the Legislature?

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#### 16. Ch. 5, § 2: Legal Process [Purposive] Theories (Complications)

1. Eskridge, Dynamic Statutory Interpretation (1994)
2. *In the Matter of Jacob / Dana* *(N.Y. 1995)*

1. *Bob Jones University v. United States* *(1983)*
3. Fuller, *Law in Quest of Itself* (1940)

**Q15:** Are judges agents of / partners with the Legislature, or their own principals?
## 17. **Ch. 5, § 2-3: The Emergence of New Textualism**

**Wed 10/20**

A. Legal Process Critiques, 1970s-80s: Revival of Plain Meaning (L 483-90, 96-99)

   - [SKIP Griffin v. Oceanic Contractors (1982)]

B. The New Textualism (L 499-525)

   - [SKIP West Virginia University Hospitals v. Casey (1991)]

Q16: What problems does New Textualism solve? What problems does it create?

## 18. **Ch. 5, § 3.B: Economic [Institutionalist] Theories of Statutory Interpretation**

**Mon 10/25**

B.1 Ex Ante Approaches to Textualism v. Contextualism (L 525-38)

1. **United States v. Marshall (7th Cir. 1990)**

B.2 Economic Theories of Interpretation: Minimizing Rent-Seeking (L 538-39)

B.3 Institutional Cost-Benefit Analysis (L 539-50)


Q17: How are economic methods similar to new textualism? How do they differ?

## 19. **Ch. 5, § 3.C: Pragmatic Theories of Statutory Interpretation**

**Wed 10/27**

3.C.a Pragmatic Theories: Funnel of Abstraction / State Laboratories (L 551-65)


3.C.b Pragmatic Theories: Textualism, Revisited (S 35-60)

1. **Bostock v. Clayton County (2020)**

Q18.1: How should courts assume the other branches work? Do they work that way?

Q18.2: How should a judge (or law student) choose an interpretative method?

## 20. **Tools of Statutory Interpretation: Intrinsic Doctrines (Canons)**

**Mon 11/1**

A. Ordinary Meaning and Dictionaries (L 581-95)

2. **United States v. Costello (7th Cir. 2012)**

B. Maxims of Word Association (L 595-606)

1. **Ali v. Federal Bureau of Prisons**

C. Grammar Cannons (L 607-617, S 61-62)

1. **Lockhart v. United States (2016)**
2. **Facebook v. Duguid (2021)**

Q19: How should dictionaries and grammar inform statutory interpretation?

## 21. **Ch. 6, § 2: Structural Canons**

**Wed 11/3**

A. The Whole Act Rule and its Corollaries (L 617-21)

B. The Rule Against Redundancy (Against Surplusage) (L 621-22)

C. Presumptions of Consistent Usage, and Meaningful Variation (L 623-48)

1. **West Virginia University Hospitals v. Casey (1991)**

Q20: How should statutory structure inform statutory interpretation?
22. Ch. 6, § 3: Substantive Canons
   A. The Rule of Lenity in Criminal Cases (L 648-64)
         [SKIP *McNally v. United States* (1987)]
         [SKIP *Skilling v. United States* (2010)]
   B. Constitutional Avoidance (L 670-81, 690-700)
      1. *NLRB v. Catholic Bishop of Chicago (1979)*
         [SKIP *Gregory v. Ashcroft* (1991)]
         A. Debunking and Defending the Canons (Skim L 700-12)
            2. Skim *Mont. Code Ann. § 1-3-201, et seq.* (Maxims of Jurisprudence)
   Q21.1: Where (who) do the policies underlying substantive canons come from?
   Q21.2: What do canons add to statutory interpretation?

23. Ch. 9, §§ 1-2, 4(C): Agency Deference Canons and Administrative Law
   1. The Basic Framework (1041-50, 1065-74)
      1. [Skidmore v. Swift & Co. (1944)]
         [SKIP *MCI Telecommunications Corp. v. AT&T*
         [SKIP *United States v. Mead Corp.*]
      3. Quo Vadis the “Chevron Revolution”? (1122-29, S99-108)
         A. Sharpen *Chevron* and *Skidmore* Within the *Mead* Framework
         B. Reject *Mead* in Favor of Greater Deference to Agency Interpretations
         C. Overrule *Chevron*? Universal *Skidmore*?
   Q26.1: (When or Why) Does agency deference make sense?

24. Tools of Statutory Interpretation: Extrinsic Doctrines (Canons)
   Ch. 7, § 1-2A: Common Law and Other Circumstances
      B.1 Circumstances Surrounding Introduction and Consideration (727-49)
      1. *Leo Sheep Co. v. United States* (1979)
      *. History and Substantive Canons, revisited: The Indian Canon (*)
   Q22: What extra-statutory sources are “fair game” in statutory interpretation?

25. Ch. 7, § 2B-C: Legislative History
   A. Committee Reports (the Legislative History Debate) (749-51, 755-72)
      [SKIP *Blanchard v. Bergeron* (1989)]
   B. In re Sinclair (7th Cir. 1989)
   C Statements by Sponsors or Drafters (L 772-73, 785-87)
      [SKIP *Pepper v. Hart* (House of Lords 1992)]
   D. Legislative Deliberation (L 787-98)
      1. Review *FDA v. Brown & Williamson*
   E. Post-Enactment Legislative ‘History’ (L 798-806)
   F. Legislative Inaction (L 811-16)
   Q23: What problems does legislative history solve? What problems does it create?
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<th>Ch. 7, § 3: Interpretation in Light of Other Statutes</th>
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<td>11/22</td>
<td>C.1 Similar Statutes (The In Pari Materia Rule) (L 816-24)</td>
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<td>C.2 The Borrowed Statute Rule (824-25)</td>
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<td>C.3 Statutory Clashes—The Rule Against Implied Repeals (825-35)</td>
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<td>Review: <em>Babbitt v. Sweet Home Chapter</em> (L 835-47)</td>
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<td>Q25:</td>
<td>(How) Can a judge (or law student) make sense of inter-statutory complexity?</td>
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<td>Q26.2:</td>
<td>What interpretive method(s) should someone you disagree with use?</td>
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**11/24**

**[THANKSGIVING BREAK]**

**FALL 2021 LAWLAPALOOZA**

TBA  Discussion credit for each student AWR presentation attended with a response posted on Moodle (or a question asked at the presentation and posted on Moodle).