SUGGESTIONS FOR A FOUNDATION COURSE IN LEGISLATION

*By Robert J. Araujo, S.J.**

I. Introduction

Like the weather, the law school curriculum seems to be a topic of continuous discussion among those people interested in or affected by it. Unlike the mercurial nature of the climate, however, the law school curriculum is slow to change its general standardization that seemed well-established by the 1970's.[1] Legal education in the United States has undergone a metamorphosis since its inception in colonial days.[2] However, change that is often recognized by legal educators, students, lawyers and judges as essential and long overdue takes time to materialize.[3]

This article presents a modest proposal for a foundation course in legislation and the legislative process for today's law student. This proposal is empirically based on and adapted from my experience teaching a comprehensive course in the legislative process.[4]

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1 ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850' TO THE 1980's at 211, 231, 278-9 (1983) [hereinafter STEVENS].

2 Professor Stevens has identified four stages in the evolution of American legal education. The first began in the 1870's with the requirement for a period of law study followed by a bar examination. The second phase acknowledged formal law school studies as an alternative to apprenticeship. The third phase replaced law apprenticeship with formal law school studies. The final stage came into being after World War II and imposed two major requirements: (1) attending a college followed by (2) attending a law school accredited by the American Bar Association. STEVENS, *supra* note 1, at 205.

3 STEVENS, *supra* note 1, at ch. 12-14. *See also* DEREK BOK, HIGHER EDUCATION at 99-101, 123-4 (1986).

4 The course was taught at Boston College Law School during the spring semester of 1988. The course concentrated on Congress's law-making function and the legislature's relationship with the executive and judicial branches, particularly in regard to the latter two branches' roles in interpreting statutes. The course also included a legislative research and drafting component. Through this segment, the students became acquainted with statutory drafting by writing a brief amendment

There is little need to argue the case for a mandatory course on legislation and the legislative process in the U.S. law school curriculum. That has already been done quite persuasively by others.[5] The list of those advocating the desirability and urgency of including mandatory training about statutory law as an analytical component of legal education has included teachers,[6] judges[7] and members of the bar.[8] Unfortunately, only a few schools have addressed this need by including a foundation course in legislation in their curriculum; most have not yet taken this necessary action. Moreover, available statistics demonstrate that only a handful of schools offer at least one course in the legislative process.

In 1969, Joseph Dolan revealed that barely ten percent of American law schools required courses in legislation or the legis-

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to an actual statute, a witness statement (hearing testimony), and either a segment of a committee report or a legal memorandum interpreting the amendment.

[5] An in-depth examination of the status of legislation as a subject in the U.S. law school curriculum is that done by Professor Robert Williams. *See* Robert Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 MERCER L. REV. 803 (1984) [hereinafter Williams]. *See also* Johnston, *Some Thoughts On Legislation In Legal Education*, 35 MERCER L. REV. 845 (1984); McConnell, *Statutory Law in Legal Education: A Response To Professor Williams*, 35 MERCER L. REV. 855 (1984); Grad, *Legislation In The Law School*, 8 SETON HALL LEGIS. J. 1 (1984) [hereinafter Grad, *Law School*]; Posner, *Statutory Interpretation—In The Classroom And In The Courtroom*, 50 U. CHI. L. REV. 800 (1983) [hereinafter Posner]; Dickerson, *Legislative Process And Drafting In U.S. Law Schools: A Close Look At The Lammers Report*, 31 J. LEGAL. EDUC. 30 (1981) [hereinafter Dickerson, *Drafting*]; Dolan, *Law School Teaching Of Legislation: A Report To The Ford Foundation*, 22 J. LEGAL. EDUC. 63 (1969) [hereinafter Dolan]; Kelso, *Law School Developments: New Ideas In Legislation*, 10 J. LEGAL. EDUC. 347 (1958); Fulda, *Objectives In The Field of Legislation*, 6 J. LEGAL. EDUC. 11 (1953); Jones, *A Case Study In Neglected Opportunity: Law Schools And The Legislative Development Of The Law*, 2 J. LEGAL. EDUC. 137 (1949); Cohen, *On The Teaching Of "Legislation,"* 47 COLUM. L. REV. 1301 (1947) [hereinafter Cohen]; Hurst, *The Content Of Courses In Legislation*, 8 U. CHI. L. REV. 280 (1941) [hereinafter Hurst]; Lee & O'Brien, *Content Of A Course On Statutory Law*, 25 GEO. L.J. 67 (1936); Dodd, *Statute Law And The Law School*, 1 N.C.L. REV. 1 (1922).

[6] *See, e.g.*, Williams, *supra* note 5, at 828; Eskridge & Frickey, *Legislation Scholarship And Pedagogy In The Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) [hereinafter E & F, *Pedagogy*].

[7] *See, e.g.*, Posner, *supra* note 5, at 800; Wald, *Some Observations On The Use Of Legislative History In The 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214-15 (1983) [hereinafter Wald].

[8] *See, e.g.*, Griswold, *The Explosive Growth Of Law Through Legislation And The Need For Legislative Scholarship*, 20 HARV. J. LEGIS. 267 (1983); *Legislation As A Law School Course*, 39 A.B.A.J. 506 (1953).

lative process.[9] By 1982, Professor Robert Williams stated "82 law professors identif[ied] themselves as Legislation teachers."[10] Professor Frank Grad has also indicated that in 1984 "[a] casual survey of fairly recent law school bulletins which are available in the Columbia law library indicates that the status of legislation in the law school curriculum is not great, but it may be improving."[11] During the academic year of 1987-88, 115 (76%) of the 152 member schools of the Association of American Law Schools [AALS] indicated that they had legislation teachers. Of the schools having legislation teachers, 79 (52%) offered at least one course in legislation during the academic year. The statistics were similar for 22 AALS fee-paid law schools; during the same period, 16 (73%) of them had listed legislation teachers among their faculty, but only 12 (55%) actually offered courses.[12]

This deficiency does not demonstrate that students are not exposed to legal studies based on statutory law. Virtually all U.S. law schools offer a variety of popular courses that are based on particular statutes. Almost every law school offers courses in taxation (the Internal Revenue Code), commercial law (the Uniform Commercial Code), administrative law (the Administrative Procedure Act), antitrust (the Sherman Act), corporations and business associations (the Securities and Exchange Acts of 1933 and 1934, the Delaware General Corporation Law and the New York Business Corporation Act), elections (the Federal Election Campaign Act) and the regulation of banking (the Glass-Steagall Act). Nevertheless, these courses do not, for the most part, analyze the legislative process nor do they examine the different methods of interpreting statutes currently discussed by legal scholars and used by courts.

Columbia Law School has been one of the few institutions to develop and improve a foundation course in legislation. It took steps to implement a mandatory course in 1944. At that time, the Columbia Law Faculty incorporated the study of legislation in their first year Legal Method course. Not only did the course introduce first year students to the case law method, the course

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9 Dolan, *supra* note 5, at 74.

10 Williams, *supra* note 5, at 820 n.93.

11 Grad, *Law School*, *supra* note 5, at 6.

12 *See* DIRECTORY OF LAW TEACHERS (West) prepared by the Association of American Law Schools for the academic year 1987-88.

spent considerable time investigating statutes. The legislation element of the course concentrated on statutory interpretation with side explorations of the legislative process and the problems of drafting. The materials "[used were] devised to insure that all law students gain initial skills and insights in the use of statutes equal in degree to those traditionally taught by use of the case law method. The classroom work . . . [was] supplemented by research and writing exercises performed under the guidance of the Associates in Law."[13]

In the fall of 1989, the Columbia faculty adopted a new Foundation Curriculum to replace the previous first year program. At that time a pilot course entitled *Foundations of the Regulatory State* was approved and subsequently introduced to the school. It was designed to "provide students with an overview of the role of the lawyer in dealing with government and its agencies. It will include such topics as: the evolution of legislation, administrative rules and review procedures and the resolution of issues which involve competing public and private interests."[14]

Columbia has also been the long-time home of the Legislative Drafting Research Fund (Fund) which was founded in 1911. The Fund has two basic missions. The first is to improve legislative drafting and related research. Through this objective, the Fund has performed a number of important public service projects for Congress and state legislatures. The second objective of the Fund has been directed toward the training of law students in the field of legislation. This objective has two facets: "first, to insure that a basic minimum in instruction in legislation was given to *all* law students and, second, to provide intensive drafting and research experience for a small number of selected legal researchers."[15] On the contrary, the Columbia programs, according to some professors, remain the exception rather than the norm. Professor Dickerson has called Columbia's Legislative

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[13] *See* THE LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK, 1911-1971: A BRIEF HISTORY OF THE FIRST SIXTY YEARS at 6 (1972) [hereinafter BRIEF HISTORY]. The roots of the legislative drafting and research program, along with a mandatory first year legislation course, go back to 1971. *Id.* at 5. The Associates in Law are recent law school graduates who serve as part-time instructors while working on either of the graduate law degrees (LL.M. or J.S.D.) offered by Columbia Law School.

[14] COLUMBIA UNIVERSITY BULLETIN: SCHOOL OF LAW 1988-90 at 45.

[15] *See* BRIEF HISTORY, *supra* note 13, at 5 (emphasis supplied).

Drafting Research Fund program enviable but "atypical" of American law school programs, which focus on the study of statutes and legislative process.[16] Like Professor Williams,[17] I, too, am concerned with the need to expose more, if not all, law students to the methodology of interpreting, constructing, and applying statutes.

By sharing my experience, I hope to assist other teachers and their students in acquainting them with the study of legislation and the legislative process. The age of the common law is, in some ways, a relic of the past.[18] We now live in an "age of statutes."[19] My model for an American law school introductory course in statutes emphasizes the basic skills which most practicing lawyers will need in the statutory years ahead. These skills concentrate on the interpretation, construction and implementation of public law statutes.[20]

By way of introduction, let me briefly describe the fundamentals of my comprehensive course, which can be modified to serve as the nucleus of a foundation course. The core of the comprehensive course (which met for three hours per week) consisted of two principal components. The first was the use of a

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16 *See* Dickerson, *Drafting*, *supra* note 5, at 34.

17 *See* Williams, *supra* note 5, at 813-19.

18 Since legislation has become particularly pervasive at the federal level, statutes have had a considerable impact on the practice of law. For some discussion of the history of this development, *see* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) [hereinafter CALABRESI] at 183-84 n.1. *See also* E&F, *Pedagogy*, *supra* note 6, at 691-93, for a discussion of the effects this historical development has had and may be having on the study of American law and legal institutions.

19 *See* CALABRESI, *supra* note 18, at 1. Several current or former federal judges have remarked how the "age of statutes" has transformed the American courts from common law courts to statute courts. *See* Starr, *Observations About The Use Of Legislative History*, 1987 DUKE L.J. 371 [hereinafter Starr]; Mikva, *A Reply To Judge Starr's Observations*, 1987 DUKE L.J. 380 [hereinafter Mikva, *Reply*].

20 By public law, I generally mean the sweeping and penetrating effect of the many government programs generated by the American legal system, particularly since the New Deal. *See* Grad, *The Ascendancy Of Legislation: Legal Problem Solving In Our Time*, 9 DALHOUSIE L.J. 228, 251-60 (1985) [hereinafter Grad, *Ascendancy*]. *See also* Sunstein, *Interpreting Statutes In The Regulatory State*, 103 HARV. L. REV. 405, 408-10 (1989) [hereinafter Sunstein]; Williams, *supra* note 5, at 820-22; ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988) [hereinafter ESKRIDGE & FRICKEY] at ch. 7; Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333 (1976) [hereinafter Kernochan, *Statutory Interpretation*].

standard casebook on the legislative process. There are currently available a number of cases-and-materials texts for the teaching of statutes and the legislative process.[21] As each text

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[21] In Hetzel, LEGISLATIVE LAW AND PROCESS (1980) [hereinafter HETZEL], Otto Hetzel looks at statutory law and the process surrounding it by investigating three principal areas within the context of the interrelationship among the branches of government: (1) legislation and the judiciary; (2) the legislative process within the legislature itself; and, (3) the relationship between the executive and the legislature. *Id.* at vii. Professor Hetzel also recommends that students taking a course using his text be required to research legislation and be given the opportunity to try their hand at drafting legislative documents. *Id.* at xii.

In their 1982 edition of MATERIALS ON LEGISLATION, Horace Read, John MacDonald, Jefferson Fordham, and William Pierce [hereinafter READ ET AL.] focus their academic inquiry on interpretation of statutes (with a particular emphasis on legislative history). READ ET AL at xviii. They also suggest that the classroom discussion of theory be accompanied by collateral work such as research and drafting. *Id.* at xix.

Hans Linde, George Bunn, Frederick Paff, and Lawrence Church take a novel approach in their LEGISLATIVE AND ADMINISTRATIVE PROCESSES (1981) [hereinafter LINDE ET AL]. They present the view, in which I concur, that the new law student should be given exposure to the processes of public (legislative and administrative) law "before they become wholly socialized into the prevailing preoccupation with appellate adjudication." *Id.* at xix. Their methodology integrates materials from traditional courses in legislation and administrative law and demonstrates the interrelationship of the legislative and executive branches in rule making and governance. *Id.* at xx-xxi.

In their LEGISLATION: CASES AND MATERIALS (1978), Charles Nutting and Reed Dickerson [hereinafter NUTTING & DICKERSON] also suggest that students study legislation early in their law school experience. NUTTING & DICKERSON at xiii. While these authors include nonjudicial materials, they focus their pedagogy on judicial opinions. *Id.* at xv.

The most recent addition to the commercially published legislation texts is ESKRIDGE & FRICKEY, *supra* note 20. These authors state that the processes of law making cannot be studied and understood solely through the methods of traditional legal scholarship. They propose that a meaningful course in legislation should "rigorously [address] the processes of law creation, interpretation, and evolution." ESKRIDGE & FRICKEY, *supra* note 20, at xvii. In addition to having students master the competing ways in which "statutory language and purpose, legislative intent, and considerations of public policy might interplay in statutory interpretation . . . [they ask their] students . . . to rely upon the broad insights that lie outside legal doctrine in attempting to construct a method of statutory construction that appreciates its normative and empirical components and avoids merely mechanical machinations." *Id.* at xviii.

See also JOHN KERNOCHAN, THE LEGISLATIVE PROCESS (Foundation Press 1981) [hereinafter KERNOCHAN] and JACK DAVIES, LEGISLATIVE LAW AND PROCESS (Nutshell Series 1986) [hereinafter DAVIES], for background information about the machinery and dynamics of statute-making. Kernochan distinguished himself as director of Columbia's Legislative Drafting Research Program for a number of years. *See* BRIEF HISTORY, *supra* note 13, at 16. Jack Davies, in addition to teaching

offers the instructor materials useful for building a curriculum for an advanced course in legislation, a more concise set of materials may be compiled to include cases and several law review articles which emphasize the legislative process. Indeed, these materials would be more manageable and better suited for an introductory course.[22]

The second component of my course required the students to prepare a series of brief legislative drafting exercises. Most of the students found the drafting exercises to be an important complement to the judge-playing role law teachers and students often assume in the conventional class room exercise.[23] By serving as legislative drafters, the students were able to place themselves in the *minds* of the authors of legislation. Similarly, students in a foundation course could profit from a drafting and research exercise, albeit a more limited one. Through participation in the drafting process, the students will undoubtedly obtain a firmer understanding of the meaning of the language selected for the statute, which will become subject to lawyer and judicial interpretation. From my observations of the class (which were again confirmed by the student evaluations), the students also developed a deeper appreciation of and sensitivity to the concepts of a statute's *plain meaning, intent* and *purpose*, and *contextual meaning* which are often discussed but not well understood by many interpreters. The methodology by which I propose to initiate students to the role of statutory interpreter uses two components: (1) an approach to the judicial and scholarly methods of interpreting and applying statutes in factual contexts; and, (2) a research and drafting exercise.

II. A Model For Teaching Legislation

A. *The Interpretation Exercise*

The task of interpreting statutes gives an interpreter an op-

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law school, was a member of the Minnesota legislature for twenty-four years. DAVIES at xix.

22 Cases which are useful tools (and provide interesting reading and discussion materials) are listed beginning at page 24. Important articles from which the teacher can select for reading and discussion by the students in the foundation course are referenced, *infra* at note 39 and note 40.

23 This conclusion is based on the end-of-the-semester Student evaluations which were turned in to me.

portunity to install meaning to the statute's words within a factual context.[24] A simple way for students to become familiar with interpretive skills and methods is to examine how other interpreters have carried out this task.

1. Interpretive Methods

Unlike a comprehensive elective course which relies on a commercially published text, a foundation course can be based on a relatively small group of cases, say for example, approximately fifteen. From within this group, statutes are interpreted within interesting factual contexts. The teacher of a foundation course may identify judicial decisions interpreting statutes which he or she would prefer to use. I recommended for their consideration the following U.S. Supreme Court cases. Each provides an in-depth analysis and discussion on a diversity of issues. Thus, I submit the use of the following cases: *Regents of University of California v. Bakke*,[25] *United Steelworkers of America v. Weber*,[26] *Rector, Etc. Of Holy Trinity Church v. United States*,[27] *United States v. Nixon*,[28] *United States v. Locke*,[29] *Bob Jones University v. United States*,[30] *Hirschey v. F.E.R.C.*,[31] *Monterey Coal Company v. Federal Mine Safety and Health Review Commission*,[32] *I.N.S. v. Cardoza-Fonseca*,[33] *Public Citizen v. United States Department of Justice*,[34] *National Labor Relations Board v. Catholic Bishop of Chicago*,[35] *Tennessee Valley Authority v. Hill*[36] and *Moragne v. States Marine Lines, Inc.*[37]

This sampling of judicial statutory interpretation provides students and teachers with absorbing, sometimes tragic, but al-

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[24] By emphasizing interpretation and construction of statutes in factual contexts, I hope to make the study of statutes less of the "backwater of legal theory" as they now seem to be according to one commentator. *See* Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. PUB. POL'Y. 59 (1988).

[25] 438 U.S. 265 (1978).

[26] 443 U.S. 193 (1979).

[27] 143 U.S. 457 (1892).

[28] 418 U.S. 683 (1974).

[29] 471 U.S. 84 (1985).

[30] 461 U.S. 574 (1983).

[31] 777 F.2d 1 (D.C. Cir. 1985).

[32] 743 F.2d 589 (7th Cir. 1984).

[33] 480 U.S. 421 (1987).

[34] — U.S. —, 109 S. Ct. 2558 (1989).

[35] 440 U.S. 490 (1979).

[36] 437 U.S. 153 (1978).

[37] 398 U.S. 375 (1970).

ways illuminating stories about people and the application of statutes that have dramatically affected their lives. These cases, moreover, provide stimuli which provoke the legal *and* human sensitivities of the students, thereby increasing the probability that they become proficient and perceptive interpreters. In many ways, the stories which most of these cases relate are simply "great fun" to read.[38]

The reading and discussion of cases will be supplemented by a selection of articles that examine both traditional[39] and contemporary[40] methods of interpreting statutes. A selection of approximately six articles will complement the cases assigned for analysis and discussion. Reading cases and articles would be co-

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[38] Eskridge and Frickey have offered the thought that by:

> attempting to construct a methodology of statutory construction that appreciates . . . normative and empirical components, . . . students encounter legal uncertainty at every turn, and their grapples with it help prepare them for the challenges that follow law school. Moreover, these confrontations with legal uncertainty can be—dare we say?—*great fun.*

ESKRIDGE & FRICKEY *supra* note 20, at xviii. (Emphasis supplied).

[39] *See* Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Landis, *A Note On "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930); Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" And Statutory Interpretation In The "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975) [hereinafter, Murphy, *Plain Meaning*]; Dickerson, *Statutory Interpretation: A Peek Into The Mind and Will Of a Legislature*, 50 IND. L.J. 206 (1975) [hereinafter Dickerson, *Statutory Interpretation*]; Llewellyn, *Remarks On The Theory Of Appellate Decision And The Rules Or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950) [hereinafter Llewellyn]; Frankfurter, *Some Reflections On The Reading Of Statutes*, 47 COLUM. L. REV. 527 (1947).

[40] *See, e.g.*, Maltz, *Statutory Interpretation And Legislative Power: The Case For A Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Sinclair, *Law and Language: The Role of Pragmatics In Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985); Diver, *Statutory Interpretation In The Administrative State*, 133 U. PA. L. REV. 549 (1985); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic*]; Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988) [hereinafter Aleinikoff]; Note, *Intent, Clear Statements, And The Common Law: Statutory Interpretation In The Supreme Court*, 95 HARV. L. REV. 892 (1982) (authored by Richard Pildes) [hereinafter Pildes]; Eskridge & Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Farber, *Statutory Interpretation And Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989); Dworkin, *A Matter of Principle, Ch. 16—How To Read The Civil Rights Act* (1985) [hereinafter Dworkin]. The instructor might also consider two short works that introduce the novice to legislative history. *See* Schanck, *An Essay On The Role Of Legislative Histories In Statutory Interpretation*, 80 L. LIBR. J. 391 (1988) [hereinafter Schanck]; Lang, *Reading Between the Lines: Legislative History For Law Students*, 79 L. LIBR. J. 203 (1987) [hereinafter Lang].

ordinated so that the students cover the substantive issues of the articles, as well as the interpretive method(s) analyzed.

One way of coordinating between cases and articles is through the following approach, which centers on various methods of interpreting statutes:

(a) *Plain-Meaning.*

The "plain-meaning" rule of interpreting statutes requires that only the language of the statute be consulted. The wisdom supporting this method is this: the best way to understand the meaning of the statute is to look at the statute and nothing else. *United States v. Locke*[41] and Professor Murphy's article[42] would be paired for this segment of the interpretive exercise. In *Locke*, the Supreme Court interpreted Section 314(a) of the Federal Land Policy Management Act (FLPMA), which mandated that holders of unpatented mining claims must annually reregister claims "prior to December 31."[43] If the holder of the claim did not comply with the reregistration provision, the claim would be forfeited. The respondent reregistered the claim in issue on December 31. Nevertheless, the Court upheld the forfeiture imposed by the Interior Department because the plain-meaning of the statute required claims to be reregistered *prior to*, not *on*, December 31.

Other cases like *Cardoza-Fonseca*[44] (which presents a conflict between two approaches using the statute's plain-meaning, one of which also relies on legislative history) and *Public Citizen*[45] (where Justice Kennedy's concurring opinion offers a forceful argument for a plain-meaning interpretation of the Federal Advisory Committee Act that is devoid of the influence of "unauthorized materials" of legislative history) illustrate the continuing attractiveness of the plain-meaning method for some in-

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41 471 U.S. 84 (1985).

42 Professor Murphy's article is a critical analysis rather than an endorsement of the plain-meaning method. Nevertheless, his article presents an objective investigation of the plain-meaning approach to statutory interpretation. *See* Murphy, *Plain Meaning*, *supra* note 39.

43 43 U.S.C. § 1744(a).

44 107 S. Ct. 1207 at 1222 (Brennan, J.) and at 1223-4 (Scalia, J., concurring).

45 Public Citizen v. United States Dep't of Justice, — U.S. —, 109 S. Ct. 1207, 1274-80 (Kennedy, J., concurring).

terpreters.[46] In addition *Hirschey*[47] reaffirms the effectiveness of plain meaning.

(b) *Intent and Purpose.*

Although Legislative intent and purpose are distinct concepts, at least according to Professor Dickerson,[48] they are often encountered together in the interpretive enterprise. Intent involves ascertaining what was in the minds of legislators at the time the statute was enacted. To discern intent is to search for and examine the consciousness of legislators regarding the meaning of the statute when it was promulgated. On the other hand, purpose is often regarded as the goals which the statute is designed to achieve. Professor Dickerson's article[49] provides a broad introduction to these two distinct, yet overlapping interpretive methods.

There are several good cases for examining intent and purpose. For example *Bakke*[50] (an examination of the intent and purpose of Title VI of the Civil Rights act of 1964) and *T.V.A. v. Hill*[51] (a look at the competition between the intent and purpose of the Endangered Species Act versus those of the congressional appropriations of the Tellico Dam project) illustrate how each concept complements the other. In addition the *Holy Trinity*[52] decision and the *Bob Jones University*[53] case disclose to the reader

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46 For one commentator, the concept of the plain-meaning of the statute presupposes:

> that statutory words normally have an obvious or plain meaning . . . [T]here are no doubt grounds why judges should approach the application of enactments with some presumption in favour of applying whatever is the more "obvious" of the meanings appealed to by litigants . . . And the ordinary citizen will be able to take statutes at their face value.

NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY at 204 (1978).

47 Hirshey v. F.E.R.C., 777 F.2d 1 (D.C. Cir. 1985).

48 *See* Dickerson, *Statutory Interpretation, supra* note 39, at 208-9, 223-4, 236-7.

49 *See generally id.*

50 438 U.S. 265 (1978).

51 437 U.S. 153 (1978).

52 143 U.S. 457 (1892) (demonstrating the intent and purpose of a statute which prohibited pre-immigration contracts with aliens for labor to be performed in the U.S.).

53 461 U.S. 574 (1983) (demonstrating the interrelationship between the intents and purposes of different federal policies concerning non-discrimination and the

how intent and purpose sometimes govern the rights, privileges and expectations of society.

Each of these cases emphasizes the role of facts in interpreting statutes. For example, in *Holy Trinity*, where the court held that the statute did not prohibit the contract made between an American church congregation and an English clergyman, the fact that the contract of employment was for a clergyman, rather than a common laborer, was significant to the Court in reaching its conclusion.[54]

(c) *Contextualism.*

Contextualism is a method of interpretation which examines the meaning of statutes not at the time they are enacted, but rather at the time they are applied. Inextricably related to the contextual method of interpretation is determining how the statute can address the conditions and circumstances at the time of its application. The articles of Professors Eskridge[55] and Aleinikoff[56] offer some of the best investigation and discussion on the manner in which interpreters can make a statute assist society in addressing issues not foreseen by the statute's drafters.

As with the intent and purpose methods of interpretation, facts often play an important role in the contextual approach to statutory interpretation. The *Weber*[57] court's application of Title VII of the Civil Rights Act of 1964 to a voluntary affirmative action training program nicely complements the Eskridge and Aleinikoff articles. The majority opinion written by Justice Brennan also demonstrates the importance of facts in interpreting the statute. In construing Title VII, the majority concluded that the voluntary affirmative action training program did not discriminate against white employees rejected from the program on account of racial considerations because *de facto* discrimination still existed against African-Americans. This point was reinforced by statistics that revealed a disproportionately small number of black workers were employed as skilled craftworkers when com-

tax exempt status of institutions of higher education under the Internal Revenue Code).

54 143 U.S. at 463.

55 Eskridge, *Dynamic*, *supra* note 40.

56 *See Aleinkoff, Updating supra* note 40.

57 443 U.S. 193 (1979).

pared with the number of blacks in the relevant general labor force.[58]

(d) *Canons of Construction.*

A traditional method of interpretation and construction which the foundation course should briefly raise is the use of the "canons of construction." The canons theoretically give the interpreter hard and fast rules offering guidance in interpreting and constructing statutory texts.[59] One major problem with the canons, however, is that when applied to cases, they are often neutralized by other, conflicting canons.[60] Because of this conflict, the canons might be in need of their own canons to help the interpreter use them. For many of the reasons asserted by Professor Llewellyn,[61] the canons are generally of questionable use.[62] However, at least one commentator, who readily acknowledges the cannons' deficiencies as tools of interpretation, has

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58 *Id.* at 198-9.

59 *E.g. Noscitur a sociis*: It is known from its associates, i.e., the meaning of a word may be enlightened by looking at words ordinarily associated with it. *Expressio unius est exclusio alterius*: the inclusion of certain things in the statutory text presumes that the legislature did not intend for the law to apply to those things that could have been, but were not, listed. Another canon is the "plain meaning" rule examined earlier.

At least one federal judge has acknowledged that, barring evidence to the contrary, no assumption should be made about the legislature being aware of judicial opinions pertinent to the bill:

> These cases suggest that the old cannon—Congress is assumed to know the state of the law when it legislates—is certainly open to dispute . . . As statutes proliferate and agency interpretations increase exponentially, the assumption becomes even more tenuous. Anyone who has worked in and around the Hill [as did Judge Wald] knows that neither members . . . nor staffs can be on top of everything.

Wald, *supra* note 7, at 213.

However, some courts have adopted a maxim which can conflict with "plain meaning": remedial statutes are to be liberally construed.

60 *See generally* Llewellyn, *supra* note 39.

61 *Id.* H.L.A. Hart corroborated some of Llewellyn's concern by suggesting that canons or rules of construction are themselves rules that are not entirely understandable by merely relying on their own provisions. In other words, the canons may need other rules to help interpret and apply their general terms. H.L.A. HART, THE CONCEPT OF LAW at 123 (1961).

62 The last salvo in the discussion about the "canons of construction" has not been fired. Professor Cass Sunstein has recently developed a contemporary thesis of canons for construing modern regulatory statutes. *See* Sunstein, *supra* note 20, Parts III and IV.

suggested that they might serve as useful guidelines for drafters by providing "discipline and a firm logical base for drafting."[63] An interesting case for examining and discussing the use of and competition between canons of construction is *Catholic Bishop*.[64] Examination of this case can be complemented with Professor Sunstein's article.[65]

(e) *Common Law of Statutes*.

The *Moragne*[66] decision addressed the wrongful death of a longshoreman. If the decedent had died in some place other than where he did, his widow would have been compensated under one of several state or federal wrongful death or workers' compensation statutes. Since he died at a place not covered by any of the statutes that normally applied to his employment, the surviving spouse was denied recovery. However, the *Moragne* court fashioned a judicial remedy by relying on common law principles. In other words, the court reasoned *from* statutes rather than from judicial decisions to provide Mrs. Moragne with a recovery. The note written by Richard Pildes provides helpful insight into the common-law-of-statutes approach to interpretation.[67]

(f) *Principles*.

The heart of this method of statutory interpretation is neither the language of nor the intent and purpose basic to the statutory text, but the underlying principles of the statute. Again, *Weber*[68] supplies a solid case to study this approach to statutory interpretation. It should be complemented by reading Ronald Dworkin's chapter on the *Weber* case in the text entitled A MATTER OF PRINCIPLE.[69] As Professor Dworkin suggests, "a statute should be interpreted to advance the policies or principles that furnish the best political justification for the statute."[70] In-

63 *See* DAVIES, supra note 21, at 54-1.
64 440 U.S. 490 (1979).
65 *See generally* Sunstein, *supra* note 20.
66 398 U.S. 375 (1970).
67 *See* Pildes, *supra* note 40.
68 443 U.S. 193 (1979).
69 *See* Dworkin, *supra* note 40.
70 *Id.* at 327.

terestingly, this method allowed the majority of the court to avoid condemning a voluntary affirmative action plan that excluded a white worker on racial grounds in order to promote a black worker into the training program. The Court examined the underlying principles of Title VII and acknowledged that they permitted voluntary affirmative action programs which would promote an important principle of the Civil Rights Act; namely, the economic equality of minorities.[71]

2. Consideration of Interpretive Resources

As the teacher and students progress through the foundation course, they will regularly encounter a number of subjects which I have listed below as interpretive resources. These resources are often referred to by commentators and courts in their respective discussions concerning the interpretation of statutes. Although the foundation course is not a vehicle to examine these resources in depth, both the interpretive and drafting components of the course will periodically raise questions about the relevance and roles of these subjects. My intention for discussing these issues here is to raise the teacher's consciousness about their existence and their function in the interpretive and drafting exercises of the foundation course.

(a). *Debate*

Legislative debates contribute to the foundations of many statutes. Most American legislatures will, at some point in their operations, conduct hearings on specific legislative proposals as well as on general topics where fact-finding and other investigative techniques are pursued. Legislators will also discuss the meaning of a bill's language with their colleagues on the chamber floor or in committee.

Reading, analyzing, and discussing cases like *Bakke*,[72] *Weber*,[73] *Holy Trinity*,[74] and *Public Citizen*[75] (along with an article like Dworkin's) will supply the student with an engaging and informative means of experiencing legislative debate. Supplemen-

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[71] *Id.* at 173.
[72] 438 U.S. 265 (1978).
[73] 443 U.S. 193 (1979).
[74] 143 U.S. 457 (1892).
[75] — U.S. —, 109 S. Ct. 2558 (1989).

tal reading from a text like Whalen's[76] also exposes students to the multiplicity of views which legislators can have about the bills that are considered by a legislature in enacting a statute.

Often, the student interpreter concludes that a legislator's remarks about a bill serve as an attractive tool for determining a law's meaning. Floor or committee remarks frequently *seem* to clarify the meaning of language in a bill. On the negative side, such remarks can be used to manipulate the record by placing a statement in the legislative history which could not be a part of the bill, or of a committee report, because it really does not represent any consensus among a group of legislators. Simply put, the remarks only reflect the view of a single legislator. An interesting case about a court diluting the weight of remarks of a key drafter and sponsor of proposed legislation is *Monterey Coal.*[77] In that case, the Seventh Circuit determined that the weight to be accorded remarks made by a principal in the legislative debate had to be granted less weight, because no other member of Congress voiced agreement or any other view concerning the substance and impact of these remarks.[78]

Judge Abner Mikva of the D.C. Circuit has written an enjoyable and informative article that highlights the problems with remarks and colloquys made by key legislators.[79] Although the

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[76] Depending on time and other constraints, the instructor could refer interested students to a work like CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) [hereinafter WHALEN] for an abundance of materials about the debate in and the evolution of the Civil Rights Act. Discussion of this book would be relevant to class discussions held on the *Bakke* and *Weber* cases.

[77] 743 F.2d 589 (7th Cir. 1984).

[78] *Id.* at 598.

[79] Judge Abner Mikva of the U.S. Court of Appeals for the District of Columbia Circuit, who was previously a member of Congress and of the Illinois State Legislature, acknowledges how some of his legislative colleagues would take the opportunity to manipulate a record when they could not succeed in placing desirable language in the bill under consideration or in a committee report:

> Above all else, I wish a way could be found to tell both Congress and the courts what is *not* legislative history. I used to wince when I would hear a Member of Congress get up and say "Now for the purpose of creating legislative history, I want to utter the following remarks." It happens all the time, and unfortunately some judges treat those remarks with special deference.

Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 631 (1987) [hereinafter Mikva, *Reading and Writing*]. (Quotation marks in original)

Judge Mikva also points out that remarks can be taken out of context and used

remarks made by Judge Mikva are subject to disagreement, he offers insights into the issues related to legislators' remarks and colloquys from the helpful perspective of a person who has served as a state legislator, a member of Congress, and a Federal appeals judge.

(b) *Committee Reports*

In the interpretation segment of the foundation course, the student will encounter the development and use of legislative committee reports. These reports can help to establish the context in which legislation is enacted by including references to the purposes the statute is to achieve.[80] A useful case for exploring and discussing the impact of committee reports is *Hirschey v. F.E.R.C.*[81]

(c) *Investigations*

Related to the hearing and debate issues of statutory interpretation is the examination of the broad investigative powers of

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as "legislative history" supporting interpretations that were never contemplated by the legislator making the remarks. *Id.* at 632.

[80] Students should be aware that committee reports can be used to justify items on personal and political agendas without producing a substantive product which can be relied upon by interpreters of legislation. A former veteran member of the staff of Senator Robert Dole has indicated that "[w]riting long, duplicative, and *largely unread* reports is one time-honored way" of justifying committee staff activity. Bisnow, *Congress: An Insider's Look At The Mess On Capitol Hill—Confessions Of A Veteran*, NEWSWEEK, January 4, 1988, at 24 [hereinafter Bisnow]. (Emphasis supplied) One might expect opposition from members of Congress about this former staff member's confession. However, Senator Dole corroborated some of his former employee's contentions about committee reports. When asked by another member of the Senate if he had written a particular committee report, Senator Dole responded in the negative. When asked if any senator had written the report, he said he would have to check. Senator Dole then suggested that the committee staff may have written the report. When another senator asked if Senator Dole had read the report, he replied, "I am working on it. It is not a best seller, but I am working on it." Quoted in Hirshey v. F.E.R.C., 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring). One author has recognized potential dangers in the use of committee (or staff) reports which are used to manipulate legislative materials. *See* Strauss, *One Hundred Fifty Cases Per Year: Some Implications Of The Supreme Court's Limited Resources For Judicial Review Of Agency Action*, 87 COLUM. L. REV. 1093, 1123 and n.124 (1987), Professor Strauss has also suggested that committee reports may take on a greater degree of importance at the agency level, rather than on the judicial level. *See* Strauss, *Legislative Theory And The Rule Of Law: Some Comments On Rubin*, 89 COLUM. L. REV. 427, 438 (1989).

[81] 777 F.2d 1 (D.C. Cir. 1985).

legislatures.[82] I recommend *United States v. Nixon*[83] as a good case for studying interpretive issues grounded in fact-finding and investigation.[84] As the background drama of a Presidential impeachment unfolds, the student can examine the extent and limitations of Congress's ability to conduct fact-finding and hold investigative hearings that are a part of the legislative process.

(d) *General Legislative History*

Legislative history has often played a key role in statutory interpretation. While commentators recognize that legislative history is often punctuated with attempts by lobbyists and legislators to manipulate prospective interpretation and application of statutes,[85] there are adherents[86] who still assert its general usefulness and integrity.[87] By reading and evaluating cases like *Cardoza-Fonseca*,[88] *Public Citizen*,[89] *Bakke*,[90] and *Weber*[91] and articles,

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82 The practical effect of fact finding may be minimal. However, Senator Dole's staff aide, Mr. Bisnow, *see, supra* note 79, indicated how fact finding can be mooted or neutralized by earlier action taken by Congress. In 1988

> the Senate Finance Committee summoned a parade of present and former senior government officials and [business executives] to testify on how to restore America's competitive edge. No one bothered to tell these busy executives that the trade bill had already been written by the committee staff; the hearings were merely to "build a record." In fact, the testimony actually contradicted central portions of the bill.

Bisnow, *supra* note 79, at 24.

83 418 U.S. 683 (1974).

84 A useful text about which teachers and students should be aware is JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS (1976).

85 *See, e.g.*, Starr, *supra* note 19, at 378-79; Mikva, *Reading & Writing*, *supra* note 78, at 631.

86 Mikva, *Reply*, *supra* note 19, at 383.

87 To appreciate how members of the *same court* can simultaneously use the *same legislative history* (or portions of it) and arrive at dramatically different results in the *same case*, *see* Regents of the University of California v. Bakke, 438 U.S. 265, 328-41 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in part, dissenting in part), 414-21 (Stevens, J., concurring in part, and dissenting in part). For another interesting comparison and contrast, *see* United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 202-7 (1978), 226-55 (Rehnquist, J., dissenting). One reason for this phenomenon is that the legislative history of a statute can contain a diversity of conflicting opinions and positions. For a discussion about major conflicts between elements of legislative history, particularly hearing testimony, *see* Cohen, *Towards Realism In Legisprudence*, 59 YALE L.J. 886, 891 n.21, 895 (1950).

88 480 U.S. 421 (1987).

89 — U.S. —, 109 S. Ct. 2558 (1989).

90 438 U.S. 265 (1978).

such as Schanck or Lang,[92] the student will recognize how critics of legislative history can persuasively argue that it is an unreliable interpretive tool that is far too risky to be used in an enterprise as important as discerning the meaning of statutory law.[93]

(e) *Constitutional Considerations*

A final topic for consideration in the foundation course, are judicial opinions, especially ones addressing constitutional issues. They are often vital to the interpretation and construction of statutes. The principal guideline is that the judiciary, particularly the U.S. Supreme Court, is the final arbiter of Federal Constitutional issues.[94] The lesson here is to assure that students do not give legislative terms an interpretation and construction which conflict with judicially-established constitutional principles.

B. *The Research and Drafting Exercise*

All students would benefit from a legislative drafting and research exercise undertaken early on in their law studies.[95] A research and drafting activity in the foundation course would complement the theoretical and analytic work of the interpretive exercise of the course. The synthesis of theory and practice might be achieved in the following way: at the beginning of the term, the instructor would ask each student to identify an actual statute in which the student has an interest. The interest may

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91 443 U.S. 193 (1979).

92 *See supra* note 40.

93 Professor Dickerson has commented on both the humorous and dangerous sides of using legislative history:

> The derision that American reliance on the shabby materials of legislative history has prompted in some quarters reached its peak in the Canadian gibe that in the United States whenever the legislative history is ambiguous it is permissible to refer to the statute. But even those who have become inured to American excesses were recently jolted when the Supreme Court came close to turning a piece of Canadian ridicule into a principle of American jurisprudence.

Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); *see also supra* note 86.

94 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

95 *See* text *supra* discussion beginning at page 20 regarding the Columbia Law School mandatory instruction in legislation.

have been acquired through other course work.[96] The student will then specify a small segment of the statute which could be or actually is the focus of amendment by the enacting legislature. The amendment proposed by the student would be a modest one in the sense that the revision to the existing statute might simply be the alteration of punctuation which clarifies the meaning or scope of the statute, or the change of a sentence or even a phrase which adds to or subtracts from the subject matter covered by the existing statute. By keeping the proposed amendment short and relatively simple, the law student avoids becoming overwhelmed by the complexities and time-consuming work that might otherwise be associated with a more lengthy statutory drafting exercise.

Once the student has identified the proposal and discussed it with the instructor (who will approve or disapprove of its suitability for the writing portion of the course), the student will have a specific series of tasks to complete.[97] As the course develops further, the student would submit a proposed witness statement and testimony in support of, or in opposition to, the bill previously submitted. Or, she might subsequently prepare a brief committee report (minority or majority view).[98] Depending on the size of the class and whether or not a seminar approach is used for the foundation course, the students' written assignments could periodically be critiqued by the class during time set aside by the instructor. During these sessions, the entire class can serve as the committee to which the different bills have been submitted. The instructor should chair the committee and formally appoint students to make short presentations on their bills or reports as it actually happens in a real committee meeting. The remaining

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96 An alternative approach is for the instructor to assign one statute that is to be the subject of the amendments offered by all the students. Since each student would work with the same statute, there would be greater opportunity for the students to interact substantively with one another during the in-class discussions.

97 The student could select either a local ordinance or a state or federal statute for the drafting exercise of the course. As a practical matter, I suggest that the student select a federal statute for the writing portion of the course. A major reason for this recommendation is that legislative history materials are generally more available for federal rather than local or state statutes.

98 Several students could form teams and work together on the same subject matter. The teams would submit a variety of bills amending the same statute. Each team, in turn, would write different witness statements and committee reports reflecting potentially conflicting views on the proposals.

students might assume roles consistent with the particular written assignment being presented.

Since a major emphasis of the course would be devoted to issues concerning interpretation and construction, a more detailed writing assignment would consist of an interpretation memo. While the writing assignments should not be so burdensome as to keep each student continuously writing throughout the course (and the instructor deluged with papers to review and critique), each student will be expected to produce three short written assignments, one of which must be the bill and another of which would be the interpretive memorandum.[99] Each bill would be due fairly early in the course. However, the due dates for the other assignments concerning the legislative debate and the interpretation and construction of the bill would be staggered so as to allow for variety of work products (e.g., different examples of debates such as planned colloquys, floor remarks, witness testimony, individual remarks inserted into the official record, etc.) that can be discussed periodically by the class. These assignments would also correspond to the subject matter being examined in the cases and articles being read by the students at those particular times.

In lieu of a final written exam, the instructor can have the students draft a major paper consisting of either a conference committee report (including the final statutory text to be voted on by the legislature and accompanying arguments and explanations of statutory text); an interpretive memorandum prepared by "counsel" to brief clients on the potential effects of the amendment on a client's interest; or a judicial opinion interpreting and constructing the amendment which is at the heart of the dispute in a hypothetical lawsuit.

The underlying principle of the writing assignments is to afford flexibility. This flexibility will enable the students to experi-

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99 I found this series of three relatively short writing assignments (i.e., no more than five type-written pages for the two longer assignments) for each student to be manageable both for the students and the instructor (assuming a class consisting of approximately twenty-five students). The major complaint I received from the student evaluations about the written assignments was not about the assignments themselves. The principal complaint was that the papers were not marked with either numerical or letter grades. I did make written, substantive comments on each assignment and returned them to the students.

ence the diversity of legislative and related drafting assignments and allow them to incorporate and digest in their own work the theory and analysis derived from the study of statutes and the legislative process.

III. Conclusion

This paper represents one view on how the important subject matter of statutory law and the legislative process may be introduced in a foundation course. Since there are a variety of ways to accomplish the goals of such a course, my suggestions afford flexibility to meet the needs of many instructors and their students. The heart of my model contains the essentials of legislative law and process that are critical to the legal education of the contemporary law student of today who will become the practicing lawyer of tomorrow. I hope that my proposal can make some small contribution to eliminate the "statutory illiteracy" of both.