

THE REGULATORY STATE  
Spring 2013  
Professor Pasachoff  
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**Class Hours:** We meet Mondays and Wednesdays from 11:10 am to 12:35 pm in McDonough 110.

**Office Hours:** Wednesdays 1:30-3:30 pm or by appointment. To sign up during regular office hours, please use the Sign-Up Sheets on our TWEN site. For an appointment, please email me.

**Course Materials:** The textbook is BRESSMAN, RUBIN, & STACK, *THE REGULATORY STATE* (2010) (“BRS”). In addition, I may distribute handouts in class or on TWEN from time to time.

**Course Webpage:** I will use TWEN to post course materials and to email the class. The password for our class is “federal” (no quotation marks).

**Class Attendance and Participation:** I will both call on students and solicit volunteers. We will also do some small-group activities in class. I will consider the quality of class participation in determining final grades. Class attendance is required. If you must miss a class, please mention it to me prior to your absence in person or via e-mail. Please remember to bring the textbook and other assigned materials to class.

**Reading Assignments:** The reading assignments typically cover 15-30 pages. As you will see, the reading assignments contain fewer judicial decisions than in many other courses. To study the regulatory state, you will need factual information (e.g., descriptions of agency functions) and other sources of law (e.g., statutes and regulations). When you read factual information in the book, whether presented in narrative form, news clips, or scholarly articles, I will assume that you understand the basics. Class discussion of factual information will explore issues similar to those in the *Notes and Questions* section of your book. When you read statutes, regulations, and other agency or legislative documents, I expect you to “brief” them as you would a judicial decision, *except* that your brief should reflect the distinctive features of the documents in question rather than judicial decisions. Here, I will not assume that you understand the basics. A main purpose of this course is to teach you those distinctive features so that you can handle any legislative or regulatory material that you may encounter in law school or law practice. Make your best effort to prepare a brief, and we will work through the parts in class discussion.

**Electronics:** You are allowed to bring laptops to class to take notes, but please do not use the Internet during class. Please also turn off cell phones or set them to vibrate while in class and do not look at them except for anticipated emergencies, the possibility of which I ask you to alert me to in advance. I take these policies very seriously; failure to abide by them may affect your grade and my ability to provide fully positive references to prospective employers.

**Final Exam:** The final exam will be an in-class, open-book exam held on Friday, May 10. We will discuss the substance of the exam and how to prepare for it towards the end of the semester.

*As of 1/10/13*

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## **Syllabus**

### **I. AGENCIES IN THE STRUCTURE OF MODERN FEDERAL GOVERNMENT**

*Assignment 1: Monday, January 14*

Agencies as Units of Government

BRS, pp. xxi-xxiii, 1-22

Preface

What Is an Agency?

Where Do Agencies Fit in the Constitutional Structure?

What Do Agencies Look Like?

*Assignment 2: Wednesday, January 16*

The People Who Shape Policy within Agencies

BRS, pp. 22-44

Political Appointees

Career Civil Servants

### **II. THE COMMON LAW AS A REGULATORY REGIME**

*No class on Monday, January 21 (Martin Luther King Day)*

*Assignment 3: Wednesday, January 23*

The Limitations of Tort and Common Law Adjudication

BRS, pp. 45-61

*MacPherson v. Buick Motor Co.* and Notes

*Rotche v. Buick Motor Co.* and Notes

**\*\*upload completed Student Information Sheet to TWEN by 5 pm\*\***

*Assignment 4: Monday, January 28*

The Limitations of Contract and Justifications for Regulation

BRS, pp. 61-87

Breyer on Economic Justifications and Notes

Sunstein on Social Justifications and Notes

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### **III. LEGISLATION**

*Assignment 5: Wednesday, January 30*

The Legislative Process

BRS, pp. 89-106

A General Description of the Legislative Process  
The Example of Auto Safety

*Assignment 6: Monday, February 4*

The Statute Itself: The 1966 Motor Vehicle Safety Act

BRS, pp. 106-122

*Assignment 7: Wednesday, February 6*

The Senate Report and the Structure of Modern Statutes

BRS, pp. 122-139

*Assignment 8: Monday, February 11*

The Centrality of Legislative Delegation

BRS, pp. 139-156

The Constitutional Limits on Delegation  
The Political Reasons for Delegation  
The Normative Views of Delegation

### **IV. STATUTORY INTERPRETATION BY COURTS**

#### **A. Introduction**

*Assignment 9: Wednesday, February 13*

Overview of Statutory Interpretation: Tools and Theories

BRS, pp. 175-188

*Holy Trinity Church v. United States*

Notes on Tools and Theories of Statutory Interpretation

*No class on Monday, February 18 (Presidents Day)*

*No class on Wednesday, February 20 (Faculty Retreat)*

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## B. Text-Based Tools

*Assignment 10: Thursday, February 21 (as rescheduled by Registrar's Office)*

Ordinary v. Technical Meaning

BRS, pp. 188-201

*Nix v. Hedden* and Notes

*Muscarello v. United States* and Notes

*Assignment 11: Monday, February 25*

Textual Canons of Construction: Linguistic, Whole Act, and Whole Code Canons

BRS, pp. 201 (middle ¶) and 213-239

Class discussion will focus on the material noted below; the remainder of the material is assigned for your background familiarity.

*Ejusdem generis*: Compare *Keffeler* to *Ali* (pp. 214-15)

*Noscitur a sociis*: Compare *Dolan* to *Warren* (pp. 216-217)

*Expressio unius*: Consider *Barnhart v. Peabody Coal* (p. 218)

Whole Act Rule: Compare *Lundy* to *Cline* (pp. 228-230)

*In pari materia* & Inferences Across Statutes: Compare *Stewart*, *Erlenbaugh*, and *Casey* (pp. 232-237)

*Assignment 12: Wednesday, February 27*

Substantive Canons, Part One: Rule of Lenity; Scrivener's Errors and Absurd Results

BRS, pp. 239-249 and 275-279

*United States v. Santos*

Note on Remedial Purposes

*United States v. Locke* and Notes

*No class on Monday, March 4, or Wednesday, March 6 (Spring Break)*

*Assignment 13: Monday, March 11*

Substantive Canons, Part Two: The Canon of Constitutional Avoidance

BRS, pp. 250-262

*Zadydas v. Davis*

*Almendarez-Torres v. United States*

Notes

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*Assignment 14: Wednesday, March 13*

Substantive Canons, Part Three: The Federalism Clear Statement Rule; The Presumptions  
BRS, pp. 262-275

*Gregory v. Ashcroft* and Notes

The Presumption Against Preemption

The Presumption Against Retroactivity

The Presumption Against Extraterritorial Application

### **C. Intent and Purpose-Based Tools**

*Assignment 15: Monday, March 18*

Statutory Context and Legislative History

BRS, pp. 285-303

Forms of Legislative History

*Moore v. Harris* and Notes

### **D. Changed Circumstances**

*Assignment 16: Wednesday, March 20*

Considering Evidence of Changed Circumstances

BRS, pp. 317-330

*Bob Jones Univ. v. United States* and Notes

### **E. Theories of Statutory Interpretation**

*Assignment 17: Monday, March 25*

The Points of Overlap and Departure

BRS, pp. 330-363

Intentionalism

Purposivism and Legal Process Purposivism

Imaginative Reconstruction

Textualism and New Textualism

Dynamic Interpretation

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## **V. STATUTORY IMPLEMENTATION BY AGENCIES**

### **A. Agency Process and Documents**

*Assignment 18: Wednesday, March 27*

Notice-and-Comment Rulemaking and the Example of Standard 208  
BRS, pp. 399-431

The Notice-and-Comment Rulemaking Process  
The History of Standard 208  
The NPRM: Rescinding Passive Restraints  
The Final Rule: Rescinding Passive Restraints  
The Standard Form of Regulations  
Note on the Formalization of the Agency Explanation

### **B. Tools of Statutory Implementation**

*Assignment 19: Monday, April 1*

Statutory Analysis  
BRS, pp. 431-460

Overview of the Tools of Statutory Implementation  
*Agency Example:* NHTSA Denial of Pet. for RM re: Fuel Economy  
*Chevron v. NRDC* and Notes  
Agency Practice: Mashaw on Agency Statutory Interpretation

*Assignment 20: Wednesday, April 3*

Scientific Analysis  
BRS, pp. 460-483

*Agency Example:* NHTSA Occupant Safety Rule  
Risk Assessment and Risk Management  
Scientific and Trans-Scientific Questions  
Scientific Uncertainty  
Intentional or Unintentional Abuse of Science

*Assignment 21: Monday, April 8*

Economic Analysis: Cost-Benefit Analysis and Statutory Variations  
BRS, pp. 483-509

The Mechanics of Cost-Benefit Analysis  
*Agency Example:* NHTSA Light Truck Final Rule  
The Controversy over Cost-Benefit Analysis  
Statutory Variations in Economic Analysis

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*Assignment 22: Wednesday, April 10*

Political Analysis and Other Descriptions of Agency Behavior

BRS, pp. 509-515 and 552-570

Public Attitudes, Distributional Effects, and Political Preferences

*Agency Example:* EPA New Highway Emissions Denial of Pet. for RM

Wilson on What Agencies Do and Why They Do It

Weingast on the Political Foundations of Agency-Clientele Relationships

Seidenfeld on Why Agencies Act

**VI. CONTROL OF AGENCY ACTION**

**A. Presidential Control**

*Assignment 23: Monday, April 15*

Tools

BRS, pp. 571-617

Control of Agency Personnel

Control of Appropriations

Regulatory Planning and Review

Executive Order 12,866

Return Letter to DOT

Prompt Letter to EPA and Reply

Return Letter to NHTSA

Prompt Letter to NHTSA

Presidential Directives

Other White House and Agency Involvement

**B. Congressional Control**

*Assignment 24: Wednesday, April 17*

Tools

BRS, pp. 617-638

New Legislation

Appropriations Legislation

Oversight Hearings

Fire Alarms

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### **C. Judicial Control**

*Assignment 25: Monday, April 22*

Agency Policymaking and Agency Statutory Interpretation

BRS, pp. 666-681, 438-450 (re-read *Chevron*)

*Motor Vehicle Mfrs. Ass'n v. State Farm* and Notes

*Chevron v. NRDC* and Notes

### **VII. WRAPPING UP**

*Assignment 26: Wednesday, April 24*

Final Class: No New Reading