Course Description

Almost every course in the first year of law school teaches students about courts. This course teaches about Congress, the President, and agencies, as well as courts. Using case studies, the course introduces students to the government as a whole—Congress, the President, and the Supreme Court—and how each institution fits into the constitutional scheme of government and the practice of making law in the regulatory state. Much of the course’s focus is statutory interpretation, teaching interpretive skills applicable to all statutes, whether civil rights or tax or securities law. This course also introduces students to the rules governing Congress (e.g., the filibuster) and how and whether these rules should affect how legislation is passed and how courts interpret statutes. Finally, because much statutory implementation and interpretation occurs in executive branch administrative agencies, the course introduces students to rules governing agencies and explains how courts apply special rules of statutory construction to agency regulations.

Many of the class sessions will include participatory exercises, in which students and the instructor will be public actors resolving difficult issues of public lawmaking. Thus, we shall imagine how lobbyists, legislators, administrators, and judges approach issues in their distinctive ways—and how the constitutional structure of public lawmaking influences and constrains these actors. The exercises are designed to teach practical skills as well as public law reasoning and substantive knowledge.

Materials

The text for this course will be draft materials by Professors Abbe Gluck, Victoria Nourse, and Bill Eskridge, for a forthcoming textbook called Introduction to the Regulatory State. The materials for this course will be available on-line.

Student Learning Outcomes

After completing this course, students will be able to:

- Read and apply a complex statute and administrative regulations to a particular set of facts
- Describe the legislative process by which statutes are crafted
- Describe the process by which administrative agencies administer statutes
- Read a Notice of Proposed Rulemaking and understand the key issues it raises
- Draft and submit comments on a proposed agency rule
- Describe and apply the law relating to judicial review of administrative agency actions, including the doctrines of judicial deference to administrative action
• Explain the respective roles of Congress, the President, the judiciary, and administrative agencies in the creation of statutory law
• Evaluate the relative competence and legitimacy of the different branches as lawmaking institutions
• Articulate theories of statutory interpretation, including purposivism and textualism
• Apply tools of statutory interpretation, including textual analysis, canons of construction, and the use of legislative history, to make persuasive statutory interpretations

Evaluation

The final examination in the course will be an eight-hour take-home examination. The take-home exam will be designed much like an in-class exam (in other words, it could be taken in a 3-4 hour in-class window). The additional time is allotted to allow you to think through, organize and polish your answers. Page limits will be provided in the exam instructions. The exam is completely open-book. You may consult any written materials you desire, but your exam grade will be based solely on your facility with the course materials and the concepts developed in this class. Your answers must be entirely your own. You may not collaborate with anyone on the exam.

In calculating the final course grade, I reserve the right to adjust the examination grade up or down by half a letter-grade (i.e. from B+ to A- or from B+ to B) based on exceptionally outstanding or exceptionally poor classroom performance. For instance, if a student’s performance on the written examination is significantly lower than his or her consistent, outstanding performance in class discussion and exercises, I reserve the right to raise that student’s final grade up to one-half a letter grade. Please note that I measure “outstanding performance” by the quality, relevance, and insightfulness of your contributions to the ongoing discussion and not by the frequency. Exceptionally poor classroom performance, by which I mean repeated absences from class or persistent failures to participate when called on, may result in half a letter-grade reduction from the grade earned on the written exam. It is exceedingly rare to lower a grade on these grounds, and no one will be penalized for giving incorrect answers in class, as long as they have made an effort to participate.

Instructions and grading criteria for the Rulemaking Assignment will be announced when the assignment is introduced.
SYLLABUS
The Regulatory State:
Introduction to Legislation, Statutory Interpretation, and Administration
Spring 2013
Professor Jodi Short

Class:  Topic and Assignment:

1  Introduction to the Modern Administrative State (Friday, 1/11)

Read:  Introduction [pp. 1-29]

“No Vehicles in the Park Statute and Materials”

Class exercise:  Is a tricycle a “vehicle” covered by the statute?

2  Congress and Its Rules (Tuesday, 1/15)

Read:  Chapter 1, § 1 [pp. 1-24, 27-40]

Introduction to Congress, the President, and the Supreme Court
Story of the Civil Rights Act of 1964
Notes on the Rules of the House and Senate

3  Vetogates, Interest Groups, and the Difficulty of Passing Statutes (Friday, 1/18)

Read:  Chapter 1, § 1 [pp. 24-27, 40-48]

Note on Title VII of the 1964 Act
Notes on Legislative Vetogates
Notes on Interest Groups and Political Parties
Problem 1-1: Pregnancy Discrimination Bill

Class exercise:  Problem 1-1: Bring to class draft language for amending the Civil Rights Act to achieve the Chamber’s goal of outlawing pregnancy discrimination claims. In class we will role-play legislative strategies for passing this legislation.

4  Structural Limits on Congressional Authority (Tuesday, 1/22)

Read:  Chapter 1, § 2 [pp. 49-72]

Introduction and Notes on Separation of Powers
Note on the Nondelegation Doctrine
Notes on Legislative Mechanisms to Control Agencies
INS v. Chadha

5  Structural Limits on Congressional Authority (Friday, 1/25)
Read: Chapter 1, §§ 2-3 [pp. 74-94]

*Boswher v. Synar*

Are the Congressional Vetogates Constitutional?
Problems 1-3, 1-4

**Class exercises:** How far can Congress go in structuring statutory enforcement? Is the Senate filibuster unconstitutional?

6 **The President** (Tuesday, 1/29)

Read: Chapter 2, § 1 [pp. 1-10]

*Myers v. United States*

*Humphrey’s Executor v. United States*

Note on Theories of the Unitary Executive

7 **The President** (Friday, 2/1)

Read: Chapter 2, § 1 [pp. 10-29]

*Morrison v. Olson*

*Free Enterprise Fund, Inc. v. PCAOB*

Problem 2-5

**Class exercise:** Can the President remove EEOC Commissioners without good cause? Should *Humphrey’s Executor* be overruled? *Morrison v. Olson*?

8 **Agencies** (Tuesday, 2/5)

Read: Chapter 2, § 3 [pp. 61-67]

Introduction

Note on Agency Policymaking Tools for Implementing Statutes

Problem 2-5


**Class exercise:** How can the EEOC use its policymaking tools to extend Title VII’s protections to transgendered employees? What are the advantages and disadvantages of the different tools?

➔ **ASSIGNMENT:** Submit Comments in a Federal Rulemaking [Due Friday, 3/29]

9 **Statutory Authority for Agency Action** (Friday, 2/8)

Read: Chapter 2, § 3 [pp. 68-91]
Problem 2-7

*FDA v. Brown & Williamson Tobacco Co.*

**Class exercise:** Did the FDA act *ultra vires* in regulating tobacco products?

10  **Presidential Control of Agency Action: Regulatory Review** (Tuesday, 2/12)

**Read:** Chapter 2, § 3 [pp. 92-108]

- White House Cost-Benefit Review of Agency Rules
- Executive Order 12,291
- Problem 2-9: OIRA Review of Pilot Fatigue Regulations
- Heinzerling, “Cost-Benefit Jumps the Shark...” (embedded link on p. 107)

**Class Exercise:** What legal and policy arguments can IPA raise to challenge the FAA’s decision to grant broad exemptions from the pilot fatigue regulations? How would the FAA respond to these arguments? How does cost-benefit analysis aid the President’s ability to control agency action? Was its use appropriate in this case? What about in the Prison Rape Elimination case discussed by Professor Heinzerling in her blog post?

11  **The Supreme Court: Judicial Competencies and the Policymaking Process** (Friday, 2/15)

**Read:** Chapter 3, § 1 [pp. 1-25]

- The Judicial Power over Cases and Controversies
- Problem 3-1: Justicability of Challenges to the Senate Filibuster
- Prison Litigation Reform Act
- *Brown v. Plata*

12  **The Supreme Court: Stare Decisis** (Tuesday, 2/19)

**Read:** Chapter 3, § 2 [pp. 26-45]

- *Stare Decisis*, the Rule of Law, and Institutional Competence
- Note on Overruling Precedent
- *Flood v. Kuhn*
- Elaboration of Public Policy through Judicial-Legislative-Executive Interactions

**Class exercise:** Was *Flood v. Kuhn* correctly decided?

13  **Introduction to Statutory Interpretation: Holy Trinity** (Friday, 2/22)

**Read:** Chapter 4, § 1 [pp. 1-19]

- Introductory to Statutory Interpretation
- *Heydon’s Case*
- Lieber, Legal and Political Hermeneutics
14 **Theories of Statutory Interpretation** (Tuesday, 2/26)

Read: Chapter 4, § 2 [pp. 20-30, 74-75]
- Purposivism [pp. 20-30]
  - Statutory Purpose and the Legal Process
  - Fuller, *Speluncean Explorers*
  - Hart & Sacks, *The Legal Process*
- Textualist Theories of Statutory Interpretation [pp. 74-45]

15 **Applying a Purposive Approach?** (Friday, 3/1)

Read: Chapter 4, § 2 [pp. 30-46]
- *Marshall v. United States*
  - Note on the LSD Case and Purposivism
  - Problem 4-2: Applying a Purposive Approach to Statutory Interpretation

Class exercise: Was the opinion in *Marshall* defensible? How would a purposive approach be applied in some of the prior cases we have studied?

16 **Dynamic Statutory Interpretation** (Tuesday, 3/5)

Read: Chapter 4, § 2 [pp. 46-57]
- Dynamic Statutory Interpretation
- Introductory Note on New York Adoption Law
  - *In the Matter of Jacob*

17 **The Plain Meaning Rule** (Friday, 3/8)

Read: Chapter 4, § 3 [pp. 74-89]
- Textualist Theories of Statutory Interpretation
- The Revival of the Plain Meaning Rule
- Introduction to the Endangered Species Act
  - *TVA v. Hill*
  - *United States v. Locke*
- Note on the Plain Meaning Rule in State Courts

Class exercise: What is a “plain meaning”? Was there a plain meaning in *TVA*? Could *Locke* have been decided the same way using a purposivist analysis?
18  The New Textualism (Tuesday, 3/19)

Read:  Chapter 4, § 3 [pp. 89-109]
       Note on the Rise of the New Textualism
       Green v. Bock Laundry Machine
       Scalia, Matter of Interpretation

Class exercise: Do textualists ever find statutory meaning ambiguous? How do they resolve ambiguities? Does textualism permit any uses of legislative history?

19  Canons of Statutory Construction (Friday, 3/22)

Read:  Chapter 5, § 1 [pp. 1-23]
       Textual Canons
       Maxims of Word Meaning and Association
       Grammar Canons
       The Whole Act Rule
       Problem 5-1

Class exercise: What canonical arguments can the FWS make to support its interpretation of the Endangered Species Act? Are these arguments likely to persuade the Solicitor General to authorize an appeal to the Supreme Court? How is the 1979 Supreme Court likely to rule?

20  The Proper Use of Legislative Materials in Statutory Interpretation (Tuesday, 3/26)

Read:  Chapter 6, § 1 [pp. TBD]
       Pepper v. Hart
       Cline v. General Dynamics
       Rules for Reading Legislative History
       Reread Bock Laundry

Class exercise: Under what circumstances should legislative materials be considered?

21  Statutory Interpretation by Agencies (Friday, 3/29)

Read:  [Casebook pp. TBD]
       Chevron v. NRDC
       Mead Corp. v. United States
       Mashaw on Agency Statutory Interpretation [pp. 521-31]

Class exercise: Should the Supreme Court have applied Chevron deference to the FDA’s interpretation of its statutory authority in Brown & Williamson? Should a court apply
Chevron deference under the facts described in Problem 2-5, in which the Chair of the EEOC interpreted Title VII to protect transgendered employees from discrimination?

22 **Statutory Interpretation by Agencies** (Tuesday, 4/2)

*Read:* [Casebook pp. TBD]
- *MCI v. AT&T* (Chapter 7, § 1)
- *Brand X* (Chapter 7, § 1)
- Note on the Supreme Court’s Continuum of Deference

23 **Substantive Judicial Review of Agency Rules: “Arbitrary and Capricious” Standard** (Friday, 4/5)

*Read:* Chapter 7, § 1 [pp. 1-19, 22-33]
- Agencies and Implementation
- Administrative Law
- Legislative Rulemaking
- Procedural Requirements for Legislative Rulemaking
- Substantive Review by the Executive
- Substantive Judicial Review of Agency Rules
- *Motor Vehicle Manufacturers’ Association v. State Farm*

24 **Applying “Arbitrary and Capricious” Review of Changes in Agency Policy** (Tuesday, 4/9)

*Read:* Chapter 7, § 2 [pp. 49-65]
- In the Matter of Complaints Against Various Broadcast Licensees...
- Judicial Review of Agency Adjudications
- *FCC v. FOX Television Stations*
- Note on When Agency Policy Shifts are Arbitrary

25 **CLASS PRESENTATIONS: RULEMAKING COMMENTS** (Friday, 4/12)

*Class Exercise:* Identify the legal issues presented by the proposed rules. How might each rule be challenged? What has the agency done to insulate itself from such a challenge?

26 **Review Session** (Tuesday, 4/16)