Class Hours: Mondays and Wednesdays from 11:10 am to 12:35 pm in McDonough 206.

Office Hours: To sign up for office hours, which are typically Monday afternoons between 3:30 and 5:30 in my office, please go to Canvas and use the Calendar link. There are a few Monday afternoons when I have a conflict with that time. On those weeks, you will not see online sign-ups available; instead, I will stay after class on both Monday and Wednesday that week and talk as long as people want to. For an appointment at another time, please email me. Everyone must attend office hours at least one time before the end of classes in April.

Course Materials: The textbook is BRESSMAN, RUBIN, & STACK, THE REGULATORY STATE (2d ed. 2013) (“BRS”), with occasional additional readings or handouts posted on Canvas.

Class Attendance and Participation: I will both call on students and solicit volunteers. We will also do some small-group activities in class. 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 20 to 30 pages and 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. When you read statutes, regulations, and other agency or legislative documents, I will not assume that you understand the basics. A main purpose of this course is to teach you the distinctive features of legislative and regulatory material so that you can handle any such material you may encounter in law school or law practice. Read these materials carefully, 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 unless I ask you to. Please also turn off cell phones or set them to silent 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 13. We will discuss the substance of the exam and how to prepare for it towards the end of the semester.

Final Grade: Your final grade will be based on your exam performance, but I may make adjustments, either upward or downward, to reflect either exemplary or egregious class attendance and participation. You must also attend office hours at least once.
THE REGULATORY STATE
Spring 2016
Professor Pasachoff

Syllabus

I. AGENCIES IN THE STRUCTURE OF MODERN FEDERAL GOVERNMENT

Assignment 1: Wednesday, January 20

Introduction to Agencies: Structure, Substance, and People
BRS, pp. 1-15
   What Is an Agency?
   Where Do Agencies Fit in the Constitutional Structure?
   What Do Agencies Look Like? – Executive-Branch and Independent Agencies

   BRS, pp. 48-51
   The Practical Significance of Agency Independence (skip Notes and Questions)

   BRS, pp. 54-57
   Organizational Charts (and Notes and Questions)

   BRS, pp. 57-65
   Who Shapes Policy in an Agency?
   Political Appointees: (a) Getting the Job (including Note 1 and 4 only on p. 65)

   BRS, pp. 66-74
   Political Appointees: (b) Keeping the Job (and Notes and Questions)

   BRS, pp. 75-79
   Career Civil Servants (and Notes and Questions)

II. THE COMMON LAW AS A REGULATORY REGIME

Assignment 2: Monday, January 25

The Limitations of Tort and Common Law Adjudication
BRS, pp. 81-97
   Introduction and the Limitations of Tort Law
   MacPherson v. Buick Motor Co. (and Notes and Questions)
   Rotche v. Buick Motor Co. (and Notes and Questions)
   Note on the Limitations of Common Law Adjudication More Generally

2
Assignment 3: Wednesday, January 27

The Limitations of Contract and Justifications for Regulation
BRS, pp. 98-123
  Breyer on Economic Justifications (and Notes and Questions)
  Airbags 101 (and Notes and Questions)
  Sunstein on Social Justifications (and Notes and Questions)
  From Justification to Legislation: A Note on the Role of Politics

**upload completed Four Things About Me document by 5 pm**

III. LEGISLATION

Assignment 4: Monday, February 1

The Legislative Process
BRS, pp. 125-142
  A General Description of the Legislative Process (and Notes and Questions)
  Note on Theories of the Legislative Process
  A Specific Example: Auto Safety Legislation (and Notes and Questions)

Assignment 5: Wednesday, February 3

The Statute Itself: The 1966 Motor Vehicle Safety Act
BRS, pp. 142-158
  Pub. L. 89-563, 80 Stat. 718 (Sept. 9, 1966) (skip Notes and Questions)

Assignment 6: Monday, February 8

The Senate Report and the Structure of Modern Statutes
BRS, pp. 158-176
  Commerce Committee Report (and Notes and Questions)
  The Structure of a Modern Statute
  Note on the Relationship Between Operative and Implementation Provisions
  Note on Preemption Provisions, Savings Clauses, and Federalism Issues (skip Notes and Questions)
  Squibs from the Sherman Antitrust Act, the Mann Act, the Truth in Lending Act, The Clean Air Act, and the Telephone Consumer Protection Act (skip squibs from Dodd-Frank)

No class on Wednesday, February 10
Assignment 7: **Thursday, February 18** (rescheduled by the Registrar for a legislative Monday)

The Centrality of Legislative Delegation  
BRS, pp. 183-200  
The Constitutional Limits on Delegation (and Notes and Questions)  
The Political Reasons for Delegation (and Notes and Questions)  
The Normative Implications of Delegation (and Notes and Questions)

Assignment 8: **Monday, February 22**

Unorthodox Lawmaking and the 21st Century Congress  
Guest speaker: Janel George, Senior Education Policy Counsel at the NAACP Legal Defense and Educational Fund, former legislative counsel in Congress

Readings to be announced

**IV. STATUTORY INTERPRETATION BY COURTS**

A. **Introduction**

Assignment 9: **Wednesday, February 24**

Overview of Statutory Interpretation: Tools and Theories  
BRS, pp. 223-237  
*Holy Trinity Church v. United States*  
Notes and Questions on Tools and Theories of Statutory Interpretation

B. **Text-Based Tools**

Assignment 10: **Monday, February 29**

Ordinary v. Technical Meaning  
BRS, pp. 237-250  
*Nix v. Hedden* (and Notes and Questions)  
*Muscarello v. United States* (and Notes and Questions)
Assignment 11: Wednesday, March 2

Textual Canons of Construction
BRS, pp. 250-251 (carry-over ¶ only) and 265-292
Linguistic Canons, Whole Act Canons, and Whole Code Canons

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

Ejusdem generis: Compare Keffeler with Ali (pp. 266-267)
Noscitur a sociis: Compare Dolan (p. 267) with Warren (pp. 269)
Expressio unius: Consider Barnhart v. Peabody Coal (p. 270)
Whole Act Rule: Compare Lundy with Cline (pp. 280-282)
In pari materia & Inferences Across Statutes: Compare Stewart, Erlenbaugh, and Casey (pp. 284-289)

No class on Monday, March 7, or Wednesday, March 9 (Spring Break)

Assignment 12: Monday, March 14

Substantive Canons, Part One: Rule of Lenity; Scrivener’s Errors and Absurd Results
BRS, pp. 292-304 and 330-334
United States v. Santos (and Notes and Questions)
Note on the Remedial Purposes Canon
United States v. Locke (and Notes and Questions)

Assignment 13: Wednesday, March 16

Substantive Canons, Part Two: The Constitutional Avoidance Canon
BRS, pp. 304-317
Zadvydas v. Davis
Almendarez-Torres v. United States
Notes and Questions

Assignment 14: Monday, March 21

Substantive Canons, Part Three: The Federalism Clear Statement Rule; The Presumptions
BRS, pp. 317-330
Gregory v. Ashcroft (and Notes and Questions)
The Presumption Against Preemption
The Presumption Against Retroactivity
The Presumption Against Extraterritorial Application
C. Intent and Purpose-Based Tools

Assignment 15: Wednesday, March 23

Statutory Context and Legislative History
BRS, pp. 341-359
  Forms of Legislative History
  Moore v. Harris (and Notes and Questions)
  Squibs from West Virginia Univ. Hospitals v. Casey and Gregory v. Ashcroft

D. Tools for Considering Changed Circumstances

Assignment 16: Monday, March 28

Statutory Updating Outside Congress
BRS, pp. 374-401
  Bob Jones Univ. v. United States (and Notes and Questions)
  Leegin Creative Leather Products v. PSKS (and Notes and Questions)

E. Theories of Statutory Interpretation

Assignment 17: Wednesday, March 30

Defenses and Challenges
BRS, pp. 401-436
  Intentionalism
  Purposivism and Legal Process
  Purposivism
  Imaginative Reconstruction
  Textualism and New Textualism
  Dynamic Interpretation

V. STATUTORY IMPLEMENTATION BY AGENCIES

A. Agency Process and Documents

Assignment 18: LISTEN TO RECORDED LECTURE BEFORE CLASS ON MONDAY 4/4

Notice-and-Comment Rulemaking and the Example of Standard 208
BRS, pp. 473-506
  The Notice-and-Comment Rulemaking Process
  The History of Standard 208
  The NPRM: Modifying or Rescinding the Passive Restraint Requirement
  The Final Rule: Rescinding the Passive Restraint Requirement
  The Standard Form of Regulations
B. Agency Statutory Implementation through Statutory Interpretation (and Judicial Review of Such Action)

Assignment 19: Monday, April 4

Agencies Statutory Interpretation and Judicial Review
BRS, pp. 524-553
  Overview of the Tools of Statutory Implementation
  Agency Example: NHTSA Denial of Petition for Rule-Making
  *Chevron v. NRDC* (and Notes and Questions)
  Mashaw on Agency Statutory Interpretation (and Notes and Questions)

C. Other Agency Statutory Implementation Tools (and Judicial Review of Such Action)

Assignment 20: Wednesday, April 6

Judicial Review of Agency Policy-Making
BRS, pp. 506-507, 810-821
  Note on the Formalization of the Agency Explanation
  *Motor Vehicle Mfrs. Ass’n v. State Farm* (and Notes and Questions 1-5 only)

Assignment 21: Monday, April 11

Scientific Analysis
BRS, pp. 553-576
  Agency Example: NHTSA Occupant Safety Rule
  Risk Assessment and Risk Management
  Scientific and Trans-Scientific Questions
  Scientific Uncertainty
  Intentional or Unintentional Abuse of Science
  Note on Other Technical Analysis

Assignment 22: Wednesday, April 13

Economic Analysis: Cost-Benefit Analysis and Statutory Variations
BRS, pp. 576-604
  The Mechanics of Cost-Benefit Analysis
  Agency Example: NHTSA Light Truck Final Rule
  The Controversy over Cost-Benefit Analysis
  Statutory Variations in Economic Analysis
Assignment 23: Monday, April 18

Political Analysis
BRS, pp. 604-610
Public Attitudes and Distributional Effects
Political Preferences
Agency Example: EPA Denial of Petition for Rule-Making

Online supplement
Massachusetts v. EPA

VI. MECHANISMS FOR POLITICAL CONTROL OF AGENCY ACTION

A. Presidential Control

Assignment 24: Wednesday, April 20

Tools
BRS, pp. 657-777
Control of Agency Personnel
Control of Appropriations
Regulatory Planning and Review: Executive Order 12,866 (and Notes and Questions) (skip material on return and prompt letters at pp. 677-700)

BRS, pp. 701-703
Presidential Directives
Other White House and Agency Involvement

Online supplement
Excerpt from Eloise Pasachoff, The President’s Budget as a Source of Agency Policy Control, 125 YALE L. J. (forthcoming 2016)

B. Congressional Control

Assignment 25: Monday, April 25

Tools
BRS, pp. 703-725
New Legislation, Appropriations Legislation, Oversight Hearings, Fire Alarms

VII. WRAPPING UP

Assignment 26: Wednesday, April 27

Final Class: No New Reading