LEGISLATION & REGULATION
FIRST YEAR ELECTIVE
Spring 2018
Prof. William W. Buzbee

Edited Syllabus of April 2, 2018

Course Materials

The required materials for the class are JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION (3rd ed. 2017), and occasional supplemental items that will be made available via Canvas.

Assignments

The assignment unit numbers correspond generally to subjects covered and roughly, but not exactly, to each class meeting. Some assignments may require less or more than one class, plus I adjust class coverage time in light of student interest and questions. I will keep you apprised of my expectations for each upcoming class. I will always welcome questions about earlier materials at the start of each class. Your utilization of this opportunity will influence our pace of coverage.

Exam

The course examination will be a three hour in-class limited open-book examination that will require you to provide legal advice or analysis about one or more regulatory problems, drawing on the sorts of materials studied in the course. You will have to use the interpretive and strategic skills you have developed, plus display knowledge of doctrinal developments relevant to creating, interpreting, and utilizing such materials. You will be allowed to use all class materials, your notes in hard copy, and other hard copy materials. Apart from typing your examination answer in Word, you will be prohibited access to your hard drive or the web.

Grading/Class Participation

Your course grade will be determined primarily by your final exam, but I may make adjustments, either upward or downward, in light of exemplary or problematic class attendance, behavior, and participation. You may use a notebook computer for taking notes and looking at materials assigned in class, but during class may not use it for emails, messaging, web searches, or anything else other than taking of notes or looking at assigned materials. You must close, not just minimize, all apps other than note-taking programs. Similarly, cell phones must be put away, ringers turned off, and not used in class at any time unless in an emergency setting with advance permission. Violations of these computer or cell phone restrictions will lead to a lowered grade or, if repeated, expulsion from the class. It also might result in a class ban on computers in the
class.

Office Hours

I tend to work with my McDonough 574 office door open and will be around and available most afternoons. Still, I suggest that you email to make an appointment just to be sure I’m not occupied with another appointment, meeting, or possible obligation away from the office. I will especially aim to be in my office for student meetings, whether scheduled or not, Mondays between 3:45 and 5:45. I also will generally be in my office Thursdays during the same hours, but I suggest you email to confirm that I’ll be in.

Contact Information
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INTRODUCTION

WHY REGULATE? STATUTES AND THE COMMON LAW

1. The relationship of statutory interventions and common law regimes.
   For the first class meeting: Read the lower court and Supreme Court Johnson Railway decisions, posted on Canvas. Be prepared to discuss a) why Congress might have chosen to legislate here, b) what is the most important language requiring interpretation, c) why might there be difficulties in legislating successfully and with clarity both in this dispute and more generally, and d) what frames, presumptions, and interpretive moves and norms are wielded by judges (and advocates before them) in these two decisions.

I. STATUTORY INTERPRETATION

   A. Statutory Interpretation: Practice and Theory in a Time of Ferment

2. Introduction to statutory interpretation (TVA v. Hill)
   M&S 2-22
   More on the inevitability of difficult interpretive questions

3. Legislative process and theories of statutory interpretation (Riggs v. Palmer)
   M&S 22-40 (by lecture)
   Purposes and “absurd results” in statutory interpretation (Holy Trinity)
   M&S 41-55 (for discussion)

4. The New Textualism (West Virginia University Hospitals v. Casey)
   M&S 55-79
   text, context, intent and purpose; statutory stare decisis
5. Integrative functional statutory interpretation (the new new textualism?) (*King v. Burwell*, possible Canvas supplement)  
M&S 94-110
Dynamic statutory interpretation  
M&S 110-16 (lecture)

M&S 116-46

M&S 146-79

**B. Legislative History**

M&S 179-81,191-203 (venues generating legislative history materials), 203-28, 237-41 (focus on 240-41), 246-52

**C. Canons of Construction**

M&S 272-310

10. **Ejusdem generis** (*People v. Smith*, *Circuit City*; possible Canvas excerpts of *Bond*); substantive canons: clear statement doctrine; constitutional avoidance (*NLRB v. Catholic Bishop of Chicago*)  
M&S 310-53 (in addition to principal cases, pay close attention to text discussion at 315-17 of *Yates* decision and Supreme Court divisions)

M&S 353-99, 406-10

**II. ADMINISTRATIVE AGENCIES AND THE REGULATORY PROCESS**

**A. Delegation and the Rise of Regulation**

12. The pervasive administrative state; delegation of legislative power; *Whitman v. American Trucking*  
M&S 434-38 top, 454-58 top, 458-64, 491-502, 508, 517-19
B. Basics of the Regulatory Process

13. Overview of the regulatory process; the APA (U.S. v. Florida East Coast Railway) M&S 702-18, 723-26 top
Notice-and-comment rulemaking (U.S. v. Nova Scotia Food Products Corp.) M&S 728-53, 760 (top two paragraphs), 761-65 (notes 1-3)

14. Other agency procedural choices; adjudication; retroactivity (SEC v. Chenery; Bell Aerospace) M&S 770-806

15. Less than notice-and-comment rules (guidance and policy documents) M&S 806-35 (through first paragraph of section c. on 835) M&S 844-49 (Hoctor v. U.S. Dep’t of Agriculture)

16. Executive control of agencies: cost-benefit analysis requirements and debates M&S 662-700; other regulatory reform proposals; Trump EO 13771 (as Canvas supplement)

C. Judicial Review of Agency Procedure Choices Under the Administrative Procedure Act; Review of Agency Factual Determinations and Responsiveness

17. Constraining judicial regulation of agency procedures (Vermont Yankee v. NRDC) M&S 883-99;
Modern judicial review roles; possible start of Overton Park (excerpts on Canvas)

18. Judicial review of agency factual determinations and responsiveness; “arbitrary and capricious” review;
Canvas excerpts of Overton Park modern hard look review (State Farm) M&S 899-937
The consistency question (drawing on M&S 905, 932-34, lecture re Encino Motorcars and recent deregulatory proposals)

III. STATUTORY INTERPRETATION IN THE ADMINISTRATIVE STATE

A. Judicial Review of Agency Statutory Interpretation; Chevron

Modern approach: Chevron (Chevron v. NRDC) M&S 963-91

20. Chevron and textualist interpretation (MCI v. ATT, Babbitt v. Sweet Home)
B. Chevron’s Changing Domain

21. *Chevron* and substantive canons; preemption and federalism
   *(Edward J. DeBartolo, Rust v. Sullivan, SWANCC)*
   M&S 1054-79

22. The limits of *Chevron’s* domain (*U.S. v. Mead, Brand X*)
   M&S 1087-1115
   Deference and the agency’s interpretation of its own regulations
   M&S 856-57

   M&S 1026-44

24. *Brown & Williamson* and the “major question” (“deep political and economic significance”) precedents
   M&S 1044 note 2-1047
   Agency jurisdictional questions and deference
   M&S 1047-50
   *Michigan v. EPA* and a new presumption of cost-sensitive regulation (Canvas materials)

IV. REGULATORY INNOVATIONS AND DEVELOPMENTS; REVIEW CASES, REGULATORY MATERIALS, OR PROBLEMS