**Legislation and the Regulatory State
Course Requirements and Syllabus – Fall 2024**

NOTES:

* Classes on Wednesday and Thursday, November 13 and 14 will occur in an alternative format because I need to be away at the Fall Leadership meeting of the ABA Section on Real Property/Trust and Estates. I will provide specific information on this well in advance of those dates.
* The dates and readings on this syllabus are subject to change.

**Required Texts**

The primary text for this course will be The Regulatory State, 4rd Edition, by Lisa Schultz Bressman, Edward L. Rubin, and Kevin M. Stack (Wolters Kluwer). It is available at the CSU Bookstore, or at:[https://www.amazon.com/Regulatory-State-Connected-Center-Casebook-dp-B0CJHJWMYC/dp /B0CJHJWMYC/ref=dp\_ob\_title\_bk](https://www.amazon.com/Regulatory-State-Connected-Center-Casebook-dp-B0CJHJWMYC/dp/B0CJHJWMYC/ref%3Ddp_ob_title_bk)



Writing skills will be important for this course. They are vital to your law school performance and ultimately to your law practice. Please buy or borrow a copy of Plain English for Lawyers, by Richard C. Wydick (Carolina Academic Press). Any edition of Plain English is fine. Read it carefully and do the exercises before you write anything for this class and certainly before any examination. If you’ve tried the exercises and found them difficult or confusing, please don’t panic. Just make an appointment with me so I can help. Don’t worry – no judgment! I know that you probably haven’t see this stuff since middle school and a refresher may be in order. It is available from the CSU Bookstore, or online for as little as about $5 at[**https://www.amazon.com/gp/offer-listing/0890899940/ref=dp\_olp\_used?ie=UTF8&condition=used**](https://www.amazon.com/gp/offer-listing/0890899940/ref%3Ddp_olp_used?ie=UTF8&condition=used)



 **In-Class Expectations (whether in person or on Zoom)**

Always come to class **on time** and **well-prepared** to participate fully in class discussions. This means that you have read the assigned material, have thought about it, and are ready to engage actively in a discussion about it. Often this requires reading the material several times. I base a meaningful portion of your course grade (the “attendance, participation and preparedness” portion) on the quality of your class participation. Please let me know immediately before class if you are not prepared for class on a given day. If you do not alert me in advance, I will assume you are well prepared and willing/able to participate when called upon to do so.

Once seated, please do your very best not to come and go from the classroom. Entries and exits from the classroom during class are distracting to me and to your classmates. If you are ill, of course, do what you need to do.

If we are on Zoom, cameras must be turned ON. I like to keep Zoom classes as similar to being in person as possible. This means if you want to see me, I need to see you. I don’t mind if you’re sitting in front of an unmade bed or dirty laundry – you can blur your background. Cats, dogs, children, and others are welcome to say ‘hello!’

**Class Attendance**

Please attend all scheduled class sessions unless it is imperative that you miss a class. Your consistent presence and participation are critical components of the course both for you and your classmates. Per ABA rules, I keep track of daily class attendance -- and it is a meaningful factor in my calculation of your final grade. NOTE: *If you miss 4 classes – for any reason -- I will reduce your score in the “attendance, participation and preparedness” portion of your grade.*

There are no excused or unexcused absences in my courses. Any absence is an absence for whatever reason. So, please do not squander an absence you may end up needing later in the semester due to illness or other emergency. Because all absences are the same, I don’t need explanations or notes if you’re sick – just feel better and come on back to class! Please make every effort to get class notes and other relevant information *from your classmates*.

**Policy on Tape Recording Class**

Generally, I do *not* allow students to record my classes. If you believe I should make an exception for you, please contact me to discuss. If I agree, we’ll arrange to have it recorded for your use only.

**Policy on Laptop Computers and other Electronic Devices**

You may use laptop computers or other electronic devices to take notes unless I find that there are too many violations of the following rule:

You may not have *any* websites open or active during class time that are not directly related to class.

This means: no email, no Twitter, no Facebook, no Itunes, no Amazon, and no browsing whatever else you browse, etc. The reason for this prohibition has more to do with your neighbors than it has to do with you. It is distracting for those around you when your computer screen shows things unrelated to class, and that is not fair to those around you. Importantly, I consider it a violation of the law school Honor Code to disregard the above prohibition because violation constitutes an interference with the educational process of your classmates. Violation of this rule will lead to Honor Code referral to the Dean’s office.

Also, although this is not a rule, please try not to type into your notes everything I (or your classmates) say. There are two reasons for this. First, you will not be able to keep up and will therefore miss too much of what is being said. Second, you will find yourself unable to participate in class in a meaningful way. You will learn more by listening, participating, and taking handwritten notes. You can put a thoughtful synthesis of those note into your computer later, supplementing them with information from the book, my posted slides, and other sources.

Here’s a radio news story describing some research on this topic. Please read or listen to it and decide for yourself.[**http://www.npr.org/2016/04/17/474525392/attention-students-put-your-laptops-away?utm\_source=facebook.com&utm\_medium=social&utm\_campaign=npr&utm\_term=nprnews&utm\_content=20170819**](http://www.npr.org/2016/04/17/474525392/attention-students-put-your-laptops-away?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=20170819)

**Questions and Office Hours**

Office hours are available immediately *after* our class. Please don’t stop by my office immediately *before* class because I will be prepping for class. If you would like to set up a specific appointment, you’re welcome to do that. Please use the Booking link to set it up. It is always available in the signature line of my email:
**CSU|Law students may schedule a meeting with me here**:
[Book time with Heidi G Robertson](https://outlook.office.com/bookwithme/user/c7b5a1e8a3ce4a859d661d05eb0504d5%40csuohio.edu?anonymous&ep=pcard)

**Email**

If you’ve missed a class, please check with your classmates to get notes and other information.

For other questions, you may send me an email at any time. If you do not hear back from me within 24 hours, please try again! Also, be aware that I may forward your email (including your name and my answer to your question) to the entire class. So, *do not* send me emails asking questions you can answer on your own or with the help of your classmates. If yours is a question that will require a lengthy explanation, please make an appointment with me. The link is always available in the signature line of my email – and here:  **CSU|Law students may schedule a meeting with me here**:
[Book time with Heidi G Robertson](https://outlook.office.com/bookwithme/user/c7b5a1e8a3ce4a859d661d05eb0504d5%40csuohio.edu?anonymous&ep=pcard)

 **Grading and Exams**

**All exams in this course will be “closed book.”**

I will grade this course according to the law school’s grading guidelines and will make a copy of that policy available for students later in the semester. I plan to weight your scores as follows**:**

**Attendance, Participation & Preparedness 10%
Midterm 15%
Final Exam 75%
 100%**

**Syllabus (tentative and subject to change with notice)**

**Class 1 Wednesday, August 14, 2024**

**Bressman, Preface xxi-xxiii**

**Introduction to Leg/Reg
No Vehicles in the Park
Newspaper project**

Read the Course Requirements carefully and get a sense of the Syllabus structure and contents. Come to class prepared with questions.
Read and think about the Table of Contents of the Bressman casebook. Think about why I asked you to do this and how it will be useful to you in the course.

# Class 2, Monday, August 19, 2024

**I. From Common Law to Regulation**

**A. The Limitations of Tort Law, pgs. 1-15, 24-27**

*MacPherson v. Buick Motor Co.*Notes and Questions
*Rotche v. Buick Motor Co.*Notes and Questions
Note on the Limitations of Common Law Adjudication More Generally

**B. The Limitations of Contract Law, pgs. 27-29**

Notes and Questions

# Class 3, Wednesday, August 21, 2024

**C. The Justifications for Regulation, pgs. 29-39**

Economic Justifications for Regulation

OMB, Circular A-4 (see added materials)
Notes and Questions

Social Justifications for Regulation

Sunstein, After the Rights Revolution: Reconceiving the Regulatory State
Notes and Questions

**D. What is an Agency? pages 41-43**

**Class 4, Monday, August 26, 2024**

**II. Legislation**

**A. The Legislative Process, pgs. 45-58**

Overview of the Legislative Process

Gluck, Unorthodox Lawmaking, Unorthodox Rulemaking
Notes and Questions

**B. Legislative Drafting, pgs. 61-74**

The Basic Steps of Legislative Drafting

Legislative Drafting Manual, U.S. Senate
House Legislative Counsel’s Manual on Drafting
Notes and Questions

The Political Realities of Legislative Drafting

Nourse and Schacter, The Politics of Legislative Drafting
Notes and Questions

**Class 5, Wednesday, August 28**

**C. A Statute: The 1966 Motor Vehicle Safety Act, pgs. 74-100**

The Story of Auto Safety Legislation
Notes and Questions
The National Traffic and Motor Vehicle Safety Act of 1966
Notes and Questions
Senate Report 1301 (Commerce Committee)
Notes and Questions

**D. The Structure of a Modern Statute, pgs. 100-119**

Note on the Relationship Between Operative and Implementation Provisions
Note on Preemption Provisions, Savings Clauses, and Federalism Issues
Notes and Questions
The Sherman Antitrust Act (1880)
The FTC Act (1914)
The Civil Rights Act of 1964
The OSHA Act of 1970
The Telephone Consumer Protection Act (1994)
The Homeland Security Act of 2002
The Dodd-Frank Wall Street Reform and Consumer Protection Act (2010)
Notes and Questions

Legislative Drafting Exercise, part 1

**No Class on Monday, September 2, 2024, Labor Day**



**Class 6, Wednesday, September 4, 2024**

**E. Specificity and Delegation, pgs. 119-130**

The Political Reasons for Delegation

Epstein and O’Halloran, The Nondelegation Doctrine and the Separation of Powers: A Political Science ApproachNotes and Questions

The Normative Implications of Delegation

Schoenbrod, Power Without Responsibility, How Congress Abuses the People through Delegation
Mashaw, Greed, Chaos and Governance
Rubin, Law and Legislation in the Administrative StateNotes and Questions

Legislative Drafting Exercise, part 2

**Class 7, Monday, September 9, 2024**

**V. Statutory Interpretation by Courts, pgs. 131-160**

### A. A Classic of Statutory Interpretation

*Holy Trinity Church v. United States*Notes and Questions

### B. Text-Based Tools

#### 1. Ordinary v. Technical Meaning

*Nix v. Hedden*

Notes and Questions

*Barber v. Gonzalez*

Notes and Questions

*Muscarello v. United States*

Notes and Questions

**Class 8, Wednesday, September 11, 2024**

#### 2. Textual Canons of Construction, pages 160-175

##### a. A Classic Example of Textual Canons

*Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*
Notes and Questions

##### b. Linguistic Canons, pages 175-218

##### Ejusdem generis:

##### Noscitur a sociis:

##### Expressio unius:

##### Other Linguistic Canons

##### Notes and Questions

##### Whole Act Canons

##### Whole Code Canons

##### The Court’s Most Recent Word on Text

*Bostock v Clayton County*

Notes and Questions

**Class 9, Monday, September 16, 2024**

#### Substantive Canons, pages 218-243

##### Rule of Lenity

*United States v. Santos*

Notes and Questions

##### The Canon of Constitutional Avoidance

*Zadvydas v. Davis*

*Almendarez-Torres v. United States*

Notes and Questions

**Class 10, Wednesday, September 23, 2024**

**Pages 243-277 but** (don’t read 255-263)

##### The Federalism Clear Statement Rule

*Gregory v. Ashcroft*

Notes and Questions

##### The Presumption Against Preemption (don’t read 255-263)

##### The Presumption Against Retroactivity

##### The Presumption Against Extraterritorial Application

#### Scrivener’s Errors and Absurd Results

*United States v. Locke*

Notes and Questions

1. Criticisms of Canons of Construction
	1. Mendelson, Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade
	2. Gluck and Bressman, Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons, Part 1.

**Class 11, Monday, September 30, 2024**

### C. Intent and Purpose-Based Tools, pages 277-314

#### 1. Forms of Legislative History

#### 2. Judicial Reliance on Legislative History

*Moore v. Harris*

Notes and Questions

#### Principles for Reliance on Legislative History

### Nourse, A Decision Theory of Statutory Interpretation: Legislative History by the RulesNotes and Questions

### D. Tools for Considering Changed Circumstances

*Bob Jones Univ. v. United States*

Notes and Questions

**Class 12, Wednesday, October 2, 2024**

1. **Theories of Statutory Interpretation, pgs. 314-343**
2. Intentionalism
3. Purposivism and Legal Process Purposivism
4. Imaginative Reconstruction
5. Textualism and New Textualism
6. Dynamic Interpretation

**Class 13, Monday, October 7, 2024**

**Do the Leg/Reg practice exam and submit it on BB.
Do this alone.
Do it CLOSED BOOK.
Take no more than 90 minutes to read the question and write and submit your response.
DUE on Blackboard by Friday, October 11, 2024, at 5 p.m.**

**Class 14, Wednesday, October 9, 2024**

**IV. Policy Making by Rule: A Case Study, pgs. 349-391**

1. **NHTSA Gets Organized**

Lemov, Car Safety Wars
Notes and Questions

1. **Standard 208 Takes Shape: 1967-1971**

Initial Federal Motor Vehicle Safety Standards
Notes and Questions
NHTSA, Final Rule, Occupant Crash Protection (1971)
Notes and Questions

1. **Standard 208 Hits a Wall: 1971-1976**

Transcript of Public Record, April 27, 1971
Transcript of Public Record, April 30, 1971
Notes and Questions
*Chrysler v DOT*
Notes and Questions
NHTSA, MVSB Safety Amendments 1974
Gerald R. Ford, Signing Statement
Notes and Questions
Seat Belt Interlock Option
Notes and Questions

**Class 15 Monday, October 14, 2024**

**Pages, 391-414**

1. **Standard 208’s Death and Resurrection: 1976-1989**

Standard 208 Final Rule 1977
Notes and Questions
*Motor Vehicle Manufacturers Ass’n v. State Farm*. .
NPRM
Notes and Questions
Final Rule
Notes and Questions
Concluding Questions

**Read and carefully review my grading template for the practice exam.
Score your own exam.
Switch with a classmate (you score theirs and they score yours.)
Meet with the classmate to discuss how you each could have done better.
Re-write your answer.
Submit the new answer, along with a paragraph on what you learned from your classmate, to BB by Friday, October 18. 2024.**

**Class 16, Wednesday, October 16, 2024**

1. **Statutory Implementation by Agencies, pgs. 415-451**
2. **The Notice and Comment Rule-making Process**
Notes and Questions
3. **An Example of Notice and Comment Rulemaking: NHTSA Standard 208**NPRM 1981
Notes and Questions
Final Rule 1981
Notes and Questions
4. **The Standard Form of Notice and Comment Rules,**

[**https://www.brookings.edu/research/examining-some-of-trumps-deregulation-efforts-lessons-from-the-brookings-regulatory-tracker/**](https://www.brookings.edu/research/examining-some-of-trumps-deregulation-efforts-lessons-from-the-brookings-regulatory-tracker/)

**NPRM and Final Rule Research Project**

**Class 17, Monday, October 21, 2024**

1. **The Tools of Statutory Implementation, pgs. 451-452**
2. Statutory Analysis, pgs. 453-465
	1. An Example of Statutory Analysis

	NHTSA, Denial of Petitions for Rulemaking, Passenger Automobile Average Fuel Economy Standards (1988)
	Notes and Questions
	2. The Practice of Agency Interpretation
	Mashaw, Agency Statutory Interpretation
	Notes and Questions
3. Scientific Analysis, pgs. 468-475, 480-488
	1. **Two examples of Scientific Analysis**
	NHTSA, Final Rule, Interim Final Rule, Occupant Crash Protection (2000)
	Notes and Questions
	NHTSA current regulation, bumper standard
	Notes and Questions
	2. **Assessing Risk**
	Ropeik & Gray, Risk!
	Notes and Questions

**Class 18, Wednesday, October 23, 2024**

1. Economic Analysis, pgs. 488-.510

Sunstein, Cost-Benefit Default Principles
Notes and Questions

**An Example of Cost-Benefit Analysis**OIRA Return Letter (2002)
Notes and Questions
NHTSA, Final Rule, (Part Two)
Notes and Questions

1. Political Analysis, pgs. 535-539

**An Example of Political Analysis**EPA notice of denial of petition for rulemaking (emissions)
Notes and Questions

**Class 19, Monday, October 28, 2024**

1. Other Policymaking Formats, pgs. 539-576
2. Adjudication
	1. Formal adjudication

*Boston Medical Center Corporation and House Officers’ Association/Committee of Interns and Residents*, Petitioner (NLRB)
Notes and Questions

* 1. Informal adjudication

NHTSA’s Proposed Procedures for Assessment of Civil Penalties
Notes and questions
Statement of David Friedman, Acting Administrator, NHTSA
Notes and Questions
Office of Inspector General, Audit Report
Notes and Questions

**Class 20, Wednesday, October 30, 2024**

1. Guidance, pgs. 576-598

OMB, Final Bulletin for Agency Good Guidance Practices
Notes and Questions
Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking
FCC, Policy Statement, Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency (2001)
Notes and Questions
NHTSA’s Interpretation Files Search
Hemmersbaugh letter
Notes and Questions

**Class 21, Monday, November 4, 2024**

Control of Agency Action

* + - 1. Presidential Control of Agency Action pages 599-622, 645-647, 651-667, 681-682
				1. The Constitutionality of Independent Agencies and Presidential Control Thereof
				*Myers v. U.S.*
				*Humphrey’s Executor*
				*Morrison v. Olsen*
				Notes and Questions
				2. Control of Agency Personnel
				3. Control of Appropriations
				4. Regulatory Planning and Review
				Notes and Questions
				5. Other White House and Agency Involvement

**Class 22, Wednesday, November 6, 2024**

* + - 1. Congressional Control of Agency Action, pages 682-696, 712-717
				1. New Legislation
				2. Appropriations Legislation
				3. Oversight Hearings
				Feinstein, Congress in the Administrative State
				4. Fire Alarms
				5. Legislative Vetoes
				6. Congressional Review Act
				Notes and Questions
				7. Congressional Control of Agency Officials
				Notes and Questions

**No Class, Monday, November 11, 2024 – Veterans’ Day**



**Class 23, Wednesday, November 13, 2024**

Judicial Control of Agency Action, pages 728 and 729, 786-814, 835-859

On-line modules on *Chevron, etc.*

The Major Questions Doctrine and the Movement Away from *Chevron*
*West Virginia v. EPA*

Judicial Control of Agency Statutory Implementation

*Citizens to Preserve Overton Park, Inc. v. Volpe*
Notes and Questions
*Motor Vehicle Manufacturers Ass’n v. State Farm*

**lass 24 Thursday, November 14, 2024)**

Judicial Control of Agency Procedure, pages 876-892

 *Vermont Yankee Nuclear Power Corp v. NRDC*
 Notes and Questions
 *United States v. Nova Scotia Food Products*
 Notes and Questions

**Class 25, Monday, November 18, 2024**

Catch-up as needed

**Class 26, Wednesday, November 20, 2024**

 Go over a past exam

