

## **Administrative Law**

Brooklyn Law School | Fall 2016 (3 credits)  
Mondays / Wednesdays 4:00pm – 5:50pm  
250 Joralemon Street, Room 501

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## **Syllabus**

[Last revised: August 30, 2016]

### Overview

This course provides an introduction to the nature and functioning of federal administrative agencies, and to the legal and policy issues that arise. The course covers such topics as: the Constitutional position and structure of administrative agencies; the Administrative Procedure Act and agency rulemaking and adjudication; judicial review of agency actions; access to judicial review. The goal of this course is to provide students a working knowledge of the major legal issues in administrative law, as well as a familiarity with the kinds of policy, advocacy, and political issues that arise when working with federal agencies, whether as a lawyer, policymaker, or advocate.

### Required sources:

- Breyer, Stewart, Sunstein, Vermeule, Herz, *Administrative Law and Regulatory Policy: Problems, Text, and Cases*, 7<sup>th</sup> Edition (Wolters Kluwer / Aspen Publishers) [BSSVH]
- Breyer, Stewart, Sunstein, Vermeule, Herz, 2015-2016 supplement
- Assorted additional readings, to be posted on course website

NB – Reading assignments may be adjusted from time to time based on our progress in the course (any changes will be announced in advance).

### Assessment:

Students will be assessed on the basis of an in-class final exam and in-class participation. Participation grades consist of attendance, preparedness, and quality (not necessarily quantity!) of contributions to in-class discussions.

## COURSE TIMELINE

1. Introduction – Conceptualizing inequality (Aug 29)

### UNIT I: Agencies and structure

2. Article I delegation of legislative functions (August 31)
3. Article III delegation of judicial functions (September 12)
4. Article II executive control (September 14)
5. Separation of powers problems (September 19)

### UNIT II: Procedure

6. APA, rulemaking, and adjudication (September 26)
7. The practice of rulemaking and regulatory analysis (September 28)
8. Rulemaking exceptions (October 5)
9. Adjudication (October 10)
10. Enforcement and other regulatory tools (October 19)
11. Regulatory reform and capture (October 24)

### UNIT III: Judicial control of agency practice

12. Review of agency legal interpretation I (October 31)
13. Review of agency legal interpretation II (November 2)
14. Review of agency policy I (November 7)
15. Review of agency policy II (November 9)
16. Access to judicial review I (November 14)
17. Access to judicial review II (November 16)

### UNIT IV: Modern developments

18. Agencies and policy change I: Social movements (November 21)
19. Agencies and policy change II: Presidential control (November 28)
20. Deference and delegation, revisited (November 30)
21. Privatization and administration (December 7)

Introduction to regulation:

- BSSVH, pp. 1-28 [On the history and purposes of regulation]

Case study: Department of Labor overtime rules

*Skim and bring to class for discussion*

- Department of Labor, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,” Notice of Proposed Rulemaking [“NPRM”], 80 FR 38516 (2015), pp. 38516-24 (Parts I-IV)

Regulation in the Obama Era:

- Binyamin Appelbaum and Michael Shear, “Once skeptical of executive power, Obama has come to embrace it,” *New York Times*, August 13, 2016
- Michael Shear, “Reshaping Lives, Without Congress,” August 13, 2016

Reading questions:

Begin with the introductory material in the casebook.

- What are the justifications (economic and non-economic) for regulations?
- “Regulation” is a catch-all term; what are the specific tools that regulatory agencies have at their disposal?
- Where did the modern regulatory state come from? What are the key periods in its historical emergence?

As an example, we will walk through the Department of Labor’s new “Overtime Rule.”

- What substantive policy changes is the agency proposing? Why does the agency think this is an important policy change? (see NPRM, Part I, IV)
- How does the agency justify its legal authority to promulgate this rule? What legal authorities does it cite? (see NPRM, Part II)
- What is the role of the President in shaping this proposal? (see NPRM Part III)
- How does the agency calculate the costs and benefits of this proposal? (see NPRM Part I)

For some contemporary political context surrounding the themes of the course, look at the recent New York Times coverage of President Obama’s use of regulatory agencies to make public policy (see NYT articles)

- What kinds of policies has the Obama administration implemented through Executive branch agencies? Why might this be legally troubling in light of Congressional inaction?
- Consider for yourself the tradeoffs raised by this article: should we trust regulatory agencies to make public policy without further Congressional action? Why or why not? What are the benefits? The dangers?

## Unit I: Agencies and structure

### 2. ARTICLE I DELEGATION OF LEGISLATIVE FUNCTIONS

WEDNESDAY, AUGUST 31

*What are the limits on agencies exercising legislative powers?*

The legislative function

- BSSVH, pp. 989-990 (US Constitution, Article I)
- BSSVH, pp. 37-39 (“Introductory note”)

The nondelegation doctrine: origins

- BSSVH, pp. 42-47 (“The Nondelegation Doctrine’s Short-Lived Triumphs”; *Panama Refining*; *Schechter Poultry*)
- BSSVH, pp. 39-41 (“Nondelegation Doctrine—Analytical and Textual Foundations”)
- BSSVH, pp. 47-49 (“Questions” following *Schechter Poultry*)

The modern nondelegation doctrine

- BSSVH, pp. 64-67 (“The Modern Nondelegation Doctrine”)
- BSSVH, pp. 67-71 (*American Trucking*; *Whitman*)
- BSSVH, pp. 71-2, 74-6 (Notes 1, 2, 3, 7, 8; “Note on nondelegation and statutory interpretation”)

[NO CLASS – FLEX SCHEDULE]

WEDNESDAY, SEPTEMBER 7

### 3. ARTICLE III DELEGATION OF JUDICIAL FUNCTIONS

MONDAY, SEPTEMBER 12

*What are the limits on agencies exercising judicial powers?*

- BSSVH, pp. 990-991 (US Constitution, Article III)
- BSSVH, pp. 168-177 (*Crowell*; *Northern Pipeline*; *Schor*)
- BSSVH, pp. 178-9 (Questions 1-6)

### 4. ARTICLE II EXECUTIVE CONTROL

WEDNESDAY, SEPTEMBER 14

*How does the President exercise control over agency officials?*

Executive control

- BSSVH, pp. 990 (US Constitution, Article II)
- BSSVH, pp. 89-91 (“Executive and the Agencies”)

Hiring and removal authority of the President

- BSSVH, pp. 91-97 (“Hiring”; *Buckley*; Notes; inferior officers and *Morrison*)
- BSSVH, pp. 105-111 (“Removal”; *Myers*, *Humphreys*; Notes 1-6)
- BSSVH, pp. 117-124 (*Free Enterprise Fund v. PCOAB*)

5. SEPARATION OF POWERS PROBLEMS

MONDAY, SEPTEMBER 19

*What are the limits of Congress' ability to shape and control agencies?*

The extent of Congressional control

- BSSVH, pp. 76-83 (*Chadha*)
- BSSVH, pp. 124-126 (*Bowshar*)
- BSSVH, pp. 73-4 (Note 6: *Clinton v. NY*)
- BSSVH 2015-2016 Supplement, pp. 7-23 (*Noel Canning v. NLRB*, plus notes 8, 10,11)
- BSSVH, pp. 83-89 (Other means of Congressional control)

Case study: Creating a new agency after the financial crisis

- Barack Obama, Remarks on Wall Street Reform, April 22, 2010

[NO CLASS]

WEDNESDAY, SEPTEMBER 21

## Unit 2: Procedure

### 6. APA, RULEMAKING, AND ADJUDICATION

MONDAY, SEPTEMBER 26

*What is the difference between rulemaking and adjudication? Why would an agency choose one procedure over another?*

Introduction to the APA [Skim]

- BSSVH, pp. 500-502 (Introduction to procedure)
- BSSVH, pp. 993-994, 1006-1007, 1008-1009 (APA §§ 551, 553, 554, 556)
- BSSVH, pp. 509-510 (basics of APA)

Rulemaking or adjudication?

- BSSVH, pp. 502-506 (*Londoner, Bimetallic*; rulemaking vs adjudication)
- BSSVH, pp. 445-55 (*Chenery I and II*)
- BSSVH, p. 537 (*Bell Aerospace*)

### 7. THE PRACTICE OF RULEMAKING AND REGULATORY ANALYSIS

WEDNESDAY, SEPTEMBER 28

*How does the process of rulemaking work in practice? What steps must agencies take? How does the President exercise control over the day-to-day process of rulemaking? How does cost-benefit analysis shape rulemaking?*

- BSSVH, pp. 136-65 (Supervisory authority – Presidential control; EOs; CBA method; etc.)
- OMB Circular A4, excerpts (Regulatory analysis for informal rulemaking)
- BSSVH, pp. 214-220 (Critique of cost-benefit analysis)

Case study: Read for discussion in-class

- “New DOT Consumer Rule Limits Airline Tarmac Delays, Provides Other Passenger Protections,” Department of Transportation press release, December 21, 2009
- Department of Transportation, “Enhancing Airline Passenger Protections” (Tarmac rule) – on course website and Regulations.gov
  - Regulatory impact analysis, Introduction and Executive Summary
  - Final rule
- Bill McGee “Tarmac delay rules: Consumer success or industry burden?” USA Today, February 4, 2015

### 8. RULEMAKING EXCEPTIONS

WEDNESDAY, OCTOBER 5

*When must an agency rule undergo notice-and-comment procedures? When is it exempt?*

- BSSVH, pp. 565-7 (“logical outgrowth”; *Long Island Care v. Coke*)
- BSSVH, pp. 576-581 (Exceptions to NC requirements; *Bowen*)
- BSSVH, pp. 581-583 (General statements of policy; *CNI v Young*)
- BSSVH, pp. 584-5 (interpretive rules)
- BSSVH, pp. 590-595 (reigning in guidance)

## 9. ADJUDICATION

MONDAY, OCTOBER 10

*How does the process of adjudication work in practice? What legal requirements apply?*

- BSSVH, pp. 510-9 (overview; *Dominion Energy*)
- Strauss et al, *Administrative Law*:
  - pp. 286-97 (*Castillo-Villagra v. INS*; role of evidence)
  - pp. 297-302 (*Envirocare*; *UCC v FCC*; participation in adjudication)
- BSSVH, 539-45 (rulemaking shapes adjudication – *Texaco*; *Heckler*)

[NO CLASS – FLEX SCHEDULE]

MONDAY, OCTOBER 17

## 10. ENFORCEMENT AND OTHER REGULATORY TOOLS

WEDNESDAY, OCTOBER 19

*Outside of rulemaking and adjudication, what are some other tools agencies can employ? How can agencies enforce the rules they make?*

- BSSVH, pp. 738-40 (information as a regulatory tool)
- BSSVH, pp. 211-14 (disclosure as a regulatory tool)

Case study: OSHA and enforcement

- Strauss et al, *Administrative Law*, pp. 67-80 (OSHA compliance and enforcement)

Case study: DOL and enforcement

- David Weil, “Enforcing Labour Standards in Fissured Workplaces: The US Experience,” *The Economic and Labour Relations Review* 22:2 (2008), pp. 33-54
- FLSA statutory excerpts

## 11. CASE STUDY: REGULATORY REFORM AND CAPTURE

MONDAY, OCTOBER 24

*Are the current procedural limits on agencies enough to protect against arbitrary action or interest group ‘capture’? How might we reform or improve the regulatory process?*

- BSSVH, pp. 558-565 (*Vermont Yankee* and additional procedural requirements)
- BSSVH, pp. 570-576 (E-rulemaking and participation in rulemaking)
- BSSVH, pp. 720-9 (FOIA, information, disclosure)
- BSSVH, pp. 734-7 (open government)
- Coglianesi et al, “Transparency and Public Participation in the Rulemaking Process”, Transition Task Force Report, 2008

Case study: Oil spill and regulatory reform

- Tim Dickenson, “The Spill, the Scandal and the President,” *Rolling Stone*, June 8, 2010. Available online at: <http://www.rollingstone.com/politics/news/the-spill-the-scandal-and-the-president-20100608>
- Noelle Straub, “Interior Probe Finds Fraternalizing, Porn and Drugs at MMS Office in LA,” *New York Times*, May 25, 2010. Available online at: <http://www.nytimes.com/gwire/2010/05/25/25greenwire-interior-probe-finds-fraternizing-porn-and-dru-45260.html?pagewanted=all>

[NO CLASS – FLEX SCHEDULE]

WEDNESDAY, OCTOBER 26

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## Unit 3: Judicial control of agency practice

\* Review p. 1013 (APA § 706)

### 12. REVIEW OF AGENCY LEGAL INTERPRETATION MONDAY, OCTOBER 31

*How should agencies interpret their statutory mandates? How should courts review the legal interpretations of agencies? What is “Chevron deference” and how does it work?*

- BSSVH, pp. 278-82 (*Skidmore* and Note 1)
- BSSVH, pp. 282-91 (*Chevron* and notes)
- BSSVH, pp. 317-324 (*Sweet Home*)
- BSSVH, pp. 359-65, 373-8 (*Entergy; Babbitt*)

### 13. REVIEW OF AGENCY LEGAL INTERPRETATION II WEDNESDAY, NOVEMBER 2

*When should “Chevron deference” apply? To what extent is (or should) Chevron deference be limited or cabined?*

- BSSVH, pp. 293-302 (*Mead*)
- BSSVH, pp. 304-11 (*Gonzales*)
- BSSVH, pp. 324-36 (*MCI; Brown & Williamson*)
- BSSVH, pp. 383-5 (“Agency interpretations of agency regulations”)

### 14. REVIEW OF AGENCY POLICY I MONDAY, NOVEMBER 7

*How should courts oversee the substantive policymaking activities of agencies? What is “hard look” and “arbitrary & capricious” review?*

Review of agency fact-finding and “substantial evidence”

- BSSVH, pp. 239-44 (*Universal Camera v NLRB*; Frankfurter opinion)
- BSSVH, pp. 247-53 (*Allentown Mack*)

Hard look / Arbitrary & Capricious review

- BSSVH, pp. 386-407 (*Overton Park, State Farm*)

## 15. REVIEW OF AGENCY POLICY II

WEDNESDAY, NOVEMBER 9

*How has arbitrary and capricious review doctrine evolved? What are the implications for agency policymaking and practice?*

Modern A&C review

- BSSVH, pp. 336-45 (*Massachusetts v. EPA*)
- BSSVH, pp. 412-424 (*FCC v Fox*)

Recent developments in A&C review

- *Business Roundtable v. SEC*, No. 10-1305 (D.C. Cir. Jul 22, 2011), excerpts
- *Investment Company Institute v. CFTC*, 720 F.3d 370 (D.C. Cir. 2013), excerpts
- BSSVH, 2015-2016 Supplement pp. 56-63 (*Michigan v. EPA*, 135 S. Ct 2699 (2015))
- *Zero Zone v. Department of Energy*, 7<sup>th</sup> Circuit, 2016, excerpts

## 16. ACCESS TO JUDICIAL REVIEW I

MONDAY, NOVEMBER 14

*Who has standing to bring suit against agencies?*

Introduction to standing

- BSSVH, pp. 852-854 (introduction to standing)
- BSSVH, pp. 856-857 (*FCC v. Sanders Brothers*; note on APA)
- BSSVH, pp. 859-860 (Note on difference between constitutional and statutory cases)

Statutory standing

- BSSVH, pp. 860-863 (*Data Processing*; “injury in fact”)
- BSSVH, pp. 864-866 (*Clarke v. SIA*; “arguably within the zone”)
- BSSVH, pp. 818-820 (*Block v. Community Nutrition Institute*)

Constitutional standing

- BSSVH, pp. 874-877 (*Sierra Club v. Morton*)
- BSSVH, pp. 880-888 (*Lujan*)

## 17. ACCESS TO JUDICIAL REVIEW II

WEDNESDAY, NOVEMBER 16

*Who has standing to bring suit against agencies? What other legal requirements apply?*

- BSSVH, pp. 908-914 (*Friends of the Earth*; causation and redressability)
- BSSVH, pp. 936-942 (*Abbott Labs* – ripeness; *Toilet Goods* and Fortas’ dissent; note 3 only)
- BSSVH, pp. 888-893 (*Massachusetts v. EPA* – standing for states)

## Unit 4: Modern developments

### 18. AGENCIES AND POLICY CHANGE I: SOCIAL MOVEMENTS MONDAY, NOVEMBER 21

*How do social movements and political climate shape agency actions?*

The case of Net Neutrality

- *Verizon v. FCC* (2014), excerpts
- FCC 2015 order, excerpts
- Ajit Pai, FCC 2015 order dissent, excerpts
- *US Telecom Assoc v. FCC* (2016), excerpts
- Walker, Miller, Rahman, and Weeks, “Fighting for Digital Democracy: The Net Neutrality Campaign,” Gettysburg Project on Civic Engagement, pp. 1-8

OPTIONAL:

- Gillian Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897 (2012)
- Sophia Lee, *The Workplace Constitution: From the New Deal to the New Right* (Cambridge University Press, 2014), pp. 97-114, 135-54

### 19. AGENCIES AND POLICY CHANGE II: PRESIDENTIAL CONTROL MONDAY, NOVEMBER 28

*How might the Executive drive agency action in response to judicial or Congressional restraint?*

The case of climate change regulation

Forcing a recalcitrant agency: 2008

- Review *Massachusetts v. EPA*, BSSVH pp. 335-46
- EPA, ANPRM, “Regulating Greenhouse Gas Emissions under the Clean Air Act,” 73 FR 44354, excerpts
  - Summary, intro, background; preface from administration; letters from other agencies

Approving an active agency 2010-14

- EPA, “Clean Air Act Permitting for Greenhouse Gases: Fact Sheet (2010), p. 1, 4-7
- *Utility Air v. EPA*, 573 U.S. \_\_\_\_ (2014), Scalia opinion only
- EPA Memo, “Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases,” (July 2014), esp. pp. 1-5, skim 3-6

Restraining an overreaching agency? 2014-16

- EPA, “Carbon Pollution Emissions Guidelines,” 80 FR 64662 (Oct 23, 2015), excerpts
- *West Virginia et. al. v. EPA* (2016), excerpts
- Adam Liptak and Coral Davenport, “Supreme Court deals a blow to Obama’s efforts to regulate coal emissions,” *New York Times*, February 9, 2016

OPTIONAL:

- Review – Appelbaum and Shear on Obama’s use of regulation [from Class 1]
- Jody Freeman and David Spence, “Old Statutes, New Problems,” 163 U. Pa. L. Rev. 1 (2014), pp. 20-42

20. DEFERENCE AND DELEGATION REVISITED

WEDNESDAY, NOVEMBER 30

*Given the expansions of agency authority in an era of Congressional gridlock, should we revisit (and curtail) administrative law principles of agency deference and restraint?*

- REVIEW CLASS 1 readings:
  - DOL “Overtime rule”
  - *New York Times* articles about Obama administration
- BSSVH, 2015-16 supplement, pp. 41-8 (*King v Burwell, City of Arlington*)
- *King v. Burwell*, additional excerpts
- *City of Arlington*, additional excerpts
- Separation of Powers Restoration Act, excerpt
- *Michigan v. EPA*, J. Thomas, dissenting, excerpt
- *US v Texas*, excerpt

OPTIONAL:

- Adrian Vermeule and Eric Posner, *Executive Unbound*, Introduction

[NO CLASS]

MONDAY, DECEMBER 5

21. PRIVATIZATION AND ADMINISTRATION

WEDNESDAY, DECEMBER 7

*Many governmental functions are increasingly delegated to private actors not bound by the dictates of administrative law or Due Process. Should administrative law models of accountability and procedure be extended to cover these actors?*

The problem of privatization

- David Hatcher, *The Poverty Industry*, excerpt
- Donna Murch, “Paying for Punishment,” *Boston Review*, August 2016
- Strauss et al, *Administrative Law*:
  - pp. 900-8 (*Rendell-Baker*)
  - pp. 624-8 (private delegations)
- Minow and Freeman eds., *Government by Contract*, excerpts
  - Nina Mendelsohn, “Six Simple Steps to Increase Contractor Accountability”
  - Gillian Metzger, “Private Delegations, Due Process, and the Duty to Supervise”
  - Laura Dickinson, “Public Values/Private Contract”

OPTIONAL

- Neal Katyal, “Internal separation of powers: Checking today’s most dangerous branch from within,” 115 *Yale L. J.* 2314, excerpt
- Jon Michaels, “An Enduring and Evolving Separation of Powers,” 115 *Colum. L. Rev.* 515 (2015)

