

## STATUTORY INTERPRETATION AND REGULATION

### Syllabus

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Prof. Bruhl (aabruhl@central.uh.edu)

Welcome to Statutory Interpretation and Regulation. Much of the 1L curriculum focuses on common-law doctrines extracted from judicial opinions. But most lawyers today spend more time dealing with statutes (i.e., laws enacted by legislatures) and regulations (i.e., rules promulgated by administrative agencies) than they spend dealing with common law. Judges and commentators who agree on little else agree on the centrality of legislation and regulation to the modern practice of law. Consider these comments, for example:

*We live in an age of legislation, and most new law is statutory law. By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers.* – Justice Antonin Scalia.

*[W]e have gone from a legal system dominated by the common law, designed by courts, to one in which statutes enacted by legislatures have become the primary source of law.* – Judge Guido Calabresi, U.S. Court of Appeals for the Second Circuit.

*I believe that it is important for all law students to be taught about the workings of the legislative process; this is so essential if they are to make sense of statutes. Law schools have made great strides in recent years in offering, indeed, requiring courses on legislation and the administrative state.* – Chief Judge Robert Katzmann, U.S. Court of Appeals for the Second Circuit.

This course will introduce you to the legislative and administrative processes that generate statutes and regulations, the theories and doctrines of statutory interpretation used in federal and state courts, and the methods of challenging agency action.

### COURSE MATERIALS

The primary text for this course is Eskridge, Gluck, and Nourse, *Statutes, Regulation, and Interpretation: Legislation and Administration in the Republic of Statutes* (West, 2014, ISBN: 9780314273567). That book will be supplemented from time to time by additional readings, such as recent court opinions or excerpts from other books; those supplemental materials will typically be distributed on TWEN.

### COURSE REQUIREMENTS AND OBJECTIVES

**Exam** – Your grade will be based primarily on a scheduled final exam. The test is open book/open notes in that you may use the required textbook, additional materials I distribute on TWEN, handouts from class, your class notes, and your outline (including one prepared as part of an outline group), all in hardcopy form. During the exam you will not be permitted to use commercial outlines, electronic resources, or other materials you did not help create. If you have questions about what materials are permitted, ask me well before the exam.

**Participation** – Participation in class discussion is necessary both for your own understanding of the material and for the benefit of your classmates. At my discretion, I may increase your grade by one notch (e.g., B+ to A-) for outstanding participation (judged primarily by quality, not quantity). Typically, a handful of students will earn this adjustment. In rare cases, I may lower a grade by one notch for failing to participate adequately or for consistently being unprepared for class.

There will be a few drafting exercises or other in-class activities. Those items are not graded, but they are considered an aspect of class participation. As noted above, your grade can be lowered for inadequate participation, and that includes failing to make a good-faith effort on these exercises.

**Practice exams and exam preparation** – Sample final exams and answers will be available (through TWEN) to help you prepare for the final exam. In addition, we will sometimes do practice questions in class or in your tutor sessions.

**Attendance policy** – Regular attendance (at least 80%) is required as a matter of law school and ABA policy. I treat the sign-in sheet that I circulate at the beginning of each class session as presumptive evidence that you were present (or not).

**Laptops and other electronics** – Students are permitted to use laptops, tablets, and the like for taking notes or for other class-related purposes, but such devices are not to be used for other purposes during class. Students are not permitted to record class sessions.

**Learning objectives** – The learning objectives for the course are for you to understand the theory and doctrine of statutory interpretation so that you can formulate persuasive and lawyerly statutory arguments; for you to understand the methods for controlling agency action; for you to understand the key aspects of the legislative and regulatory processes; and for you to be able to integrate the information you learn in this class with other practical and analytical skills necessary to the practice of law.

## **OFFICE HOURS**

You are welcome and indeed encouraged to come to my office (BLB, 1st floor) to discuss the material, especially if you are having difficulty. I have regular office hours, but you are welcome to come whenever I am here, which is most of the time.

## **COURSE TOPICS/READING ASSIGNMENTS**

The materials in this course are drawn from many different subject areas, including environmental law, employment discrimination, voting rights, and criminal law. The aim is not for you to learn the substantive law of those fields. Rather, you should read the cases and other materials with a focus on the reasoning and the principles they represent, not so much on the “bottom line” outcome.

Specific reading assignments will be distributed later. The readings will cover the following topics:

**I. Introduction to Statutes and the Regulatory State (1 class session).**

**II. The Legislative Process (several class sessions).**

**III. Theories and Doctrines of Statutory Interpretation (about 12 class sessions).**

- *Various approaches to interpretation (intentionalism, textualism, pragmatism, etc.)*
- *Textual analysis and textual canons*
- *Substantive canons*
- *Statutory context and legislative history*

**IV. Implementation of Statutes by Agencies (about 9 class sessions).**

- *Agency rulemaking*
- *Agency adjudication*
- *Informal agency action*
- *Control of agency action by the executive*
- *Judicial review of agency policymaking (“arbitrary and capricious” review)*
- *Judicial review of agency statutory interpretation (Chevron doctrine)*