

**The Ohio State University
Department of Political Science**

**Political Science H596: Regulation, Rulemaking, and Lawmaking by Other
Means**

Fall 2004
T, Th 3:30-5:18 (PM)
HN 0105

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Office Hours: Wed, 2:00-4:00

This course is aimed at providing students with an in-depth perspective of the manner in which laws are created, implemented, and enforced in the United States. As will be evident early in the course, contrary to popular perception, the sheer majority of lawmaking activity does not take place in the United States Congress, but rather in different executive agencies and branches of the bureaucracy. The extent to which these activities are constitutional and legitimate exercises of executive authority is a constant question in American jurisprudence. The fact that these activities have a huge impact on our day-to-day lives is without question. This course will dive headfirst into the often-neglected black box of bureaucratic and executive lawmaking in the United States to acquire a solid grasp of how the congress, the bureaucracy, citizens and the courts interact to produce the convoluted product of American law and rules.

The course will meet twice a week for lecture and discussion, and will have three required books and a coursepack with various readings. All texts should be available at the university bookstore, and the coursepack will be sold at SBX bookstore. In addition, readings that have an asterisk next to them (below), are easily available electronically online through university subscriptions, and hence, have not been assembled into the coursepack. Students are also expected to keep up to date with current political events that are relevant to the course by reading a major national newspaper (e.g., The New York Times, The Washington Post, etc.) Additional readings may be assigned across the course of the quarter and will be made available to all students promptly.

The course grade will be based on class participation, a group written project and presentation, and a take-home final exam. The class participation grade will consist of two components. First, students are generally expected to actively participate in class discussions and constructively contribute to class debate. Second, each session will consist of a collection of readings from the various textbooks as well as legal decisions, academic journal articles, and law review articles. Students will be required to lead discussions on at least one academic journal article (or section of the article, for longer articles) across the course of the quarter, and entertain questions from myself and other members of the class. The majority of the course grade will be determined by a comprehensive group project in which students will identify a public policy topic and a corresponding statute or law that has been created by the congress or the bureaucracy within the past five years that speaks to that topic. Students will then identify (in a written document no longer than 25 pages) how the policy evolved in the institution where it was created, as well as how it was affected by at least one other institutional arena (for example, how the law was created in congress, and then implemented by the bureaucracy, or alternatively, how the rule was created by the bureaucracy and then challenged by the courts). Besides being graded on their written work, students

will also be graded on a classroom presentation that will occur at the end of the quarter. More details about this assignment will be distributed in the first week of the quarter. There will also be a take-home final exam that will cover all topics covered in the course, focusing primarily on how they relate to the history of food and drug regulation in the United States.

More formally, final grades will be based on the following criteria:

Class participation: 25% of final grade, where participation is based on journal article presentation (50% of participation grade) and general classroom contribution (50% of participation grade).

Group Project: 50% of final grade, where the project evaluation is based on the quality of the written paper (33% of project grade), the oral presentation (33% of project grade), and how each individual is evaluated by his/her group (33% of project grade).

Final Exam: 25% of final grade.

Academic Honesty: I expect all of the work you do in this course to be your own. I will tolerate absolutely no cheating or plagiarism (using someone else's words or ideas without proper citation). I will report any cases of cheating or plagiarism to the university committee on academic misconduct, and they will be handled according to university policy.

Disability: If you need an accommodation based on the impact of a disability, you should contact me to arrange an appointment as soon as possible. At the appointment we can discuss the course format, anticipate your needs, and explore potential accommodations. I rely on the Office for Disability Services for assistance in verifying the need for accommodations and developing accommodation strategies. If you have not previously contacted the Office for Disability Services, I encourage you to do so.

Texts:

Required:

Daniel E. Hall. 2002. *Administrative Law: Bureaucracy in a Democracy*, 2nd Edition. Prentice Hall.

Hilts, Phillip J. 2004. *Protecting America's Health: The FDA, Business, and One Hundred Years of Regulation*. University of North Carolina Press.

Cornelius M. Kerwin. 2003. *Rulemaking*, 3rd Edition. CQ Press.

Course Schedule and Topics

September 23: Organizational Meeting

September 28: Development of Bureaucracy and What does it do?

Hall, Chapters 1-3.

Kerwin, Chapter 1.

Harris, Robert G. and C. Jeffrey Kraft. 1997. "Meddling Through: Regulating Local Telephone Competition in the United States." *Journal of Economic Perspectives*. 11 (4): 93-112. (*)

September 30: A Digression on the Spatial Model

Krehbiel, Keith. 1999. Pivotal Politics: A Refinement of Nonmarket Analysis for Voting Institutions." *Business and Politics*. 1 (1): 63-81. (*)

October 5: Origins and Purposes of APA

Kerwin, pp. 39-52.

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. 1987. "Administrative Procedures as Instruments of Political Control." *Journal of Law, Economics, and Organization*. 3(2): 243-277.

Sherwood, Foster H. 1947. "The Federal Administrative Procedure Act." *American Political Science Review*. 41 (2): 271-81. (*)

McNollgast. 1999. "The Political Origins of the Administrative Procedure Act." *Journal of Law, Economics, and Organization*. 15 (1): 180-217. (*)

October 7: Does APA fulfill its goals?

Balla, Steven J. 1998. "Administrative Procedures and Political Control of the Bureaucracy." *American Political Science Review*. 92 (3): 663-673. (*)

McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. 1989. "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review*. 75: 430-482.

October 12: Why Delegate?

Hall, Chapter 5.

Kerwin, Chapter 3.

Huber, John D., and Charles R. Shipan. 2000. "The Costs of Control: Legislators, Agencies, and Transaction Costs." *Legislative Studies Quarterly*. 25 (1): 25-52.

Volden, Craig. 2002. "Delegating Power to Bureaucracies: Evidence from the States." *Journal of Law, Economics, and Organization*. 18 (1): 187-220. (*)

October 14: Congressional Control of Bureaucracy

Kerwin, pp. 213-224.

McCubbins, Mathew D., and Thomas Schwartz. 1984. "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms." *American Journal of Political Science*. 28 (1): 165-179. (*)

Muris, Timothy J. 1985. "Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control." *Journal of Political Economy*. 94 (4): 884-894. (*)

Weingast, Barry R., and Mark J. Moran. "Bureaucratic Distortion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission." *Journal of Political Economy*. 91 (5): 765-800. (*)

October 19: Congressional (Lack of) Control of the Bureaucracy

Kerwin, pp. 224-238.

Moe, Terry M. 1987. "An Assessment of the Positive Theory of 'Congressional Dominance.'" *Legislative Studies Quarterly*. 12 (4): 475-520. (*)

Moe, Terry M. 1989. "The Politics of Bureaucratic Structure." In John E. Chubb and Paul E. Peterson (eds). *Can the Government Govern?* (pp. 267-329). Washington, DC: Brookings Institution Press.

October 21: Other views on Bureaucratic Control

Hamilton, James T, and Christopher H. Schroeder. 1994. "Strategic Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste." *Law and Contemporary Problems*. 57 (2): 111-160. (*)

Spence, David B. 1999. "Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies." *Journal of Legal Studies*. 28 (2): 413-461.

October 26: Rulemaking—Formal Process

Hall, Chapter 6.

Kerwin, pp. 52-84, Chapter 4.

Kim, Haeryon. 1995. "The Politics of Deregulation: Public Participation in the FCC Rulemaking Process for DBS." *Telecommunications Policy*. 19 (1): 51-60. (*)

Schmidt, Patrick. 2002. "Pursuing Regulatory Relief: Strategic Participation and Litigation in U.S. OSHA Rulemaking." *Business and Politics*. 4 (1): 71-89. (*)

October 28: Rulemaking—Negotiated Rulemaking and Other Matters

Kerwin, Chapter 5.

Balla, Steven J., and John R. Wright. 2003. "Consensual Rule Making and the Time it Takes to Develop Rules." In George A. Krause, and Kenneth J. Meier (eds.) *Politics, Policy, and Organizations: Frontiers in the Scientific Study of Bureaucracy*. (pp. 187-206). Ann Arbor: University of Michigan Press.

Coglianesse, Cary. 1997. "Assessing Consensus: The Promise and Performance of Negotiated Rulemaking." *Duke Law Journal*. 46 (6): 1255-1347.

Eisner, Neil. 1984. "Regulatory Negotiation: A Real World Experience." *Federal Bar News and Journal*. 31 (9): 371-376.

November 2: Other Participants: Advisory Committees

Petracca, Mark P. 1986. "Federal Advisory Committees, Interest Groups, and the Administrative State." *Congress and the Presidency*. 13 (1): 83-114.

November 4: Functions of Advisory Committees

Balla, Steven J., and John R. Wright. 2001. "Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy." *American Journal of Political Science*. 45 (4): 799-812.

Karty, Kevin D. 2002. "Closure and Capture in Federal Advisory Committees." *Business and Politics*. 4 (2): 213-238. (*)

November 9: Statutory Interpretation

Kerwin, pp. 238-285.

Horwitz, Robert B. 1994. "Judicial Review of Regulatory Decisions: The Changing Criteria." *Political Science Quarterly*. 109 (1): 133-169. (*)

November 11: Veterans Day—No Class

November 16: Legislative Overrides of Statutory Interpretation

Eskridge, William N. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal*. 101 (2): 331-455.

November 18: Models and Theories of Congressional, Bureaucratic, and Judicial Interaction

McNollGast. 1994. "Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation." *Law and Contemporary Problems*. 57 (1): 3-37. (*)

Eskridge, William N., Jr., and John Ferejohn. 1992. "Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State." *Journal of Law, Economics, and Organization*. 8 (1): 165-189.

November 23: An example of a contemporary regulatory debate

Readings: to be distributed

November 25: Happy Thanksgiving—No Class

November 30: Student Presentations (I)

December 2: Student Presentations (II)

Good luck on finals and happy holidays!