

<p>Course Syllabus: Legal Studies 391LE Law and the Regulatory State Fall 2015 - 4 credits</p>
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Class Meeting: Mon & Wed 2:30-3:45pm – Machmer Hall W-15  
Course Webpage: [moodle.umass.edu](http://moodle.umass.edu)

**Prof. Leila Kawar**

Office: Thompson 308

Email: [lkawar@bgsu.edu](mailto:lkawar@bgsu.edu)

Office Hours: M, W 1-2pm and by appointment

Course Description

Modern governance is carried out by specialized administrators who are invested with substantial discretion to implement legislative directives. Yet most constitutions say little about how rights-based limits on official power should co-exist with administrative mandates such as social-democratic consultation, promotion of effective public service, and cost-benefit analysis. In this course, we will explore the place of lawyers, legal institutions, and legal knowledge in regulatory governance, looking at national as well as international contexts. The course is organized (roughly) chronologically, beginning at the turn of the 20th century with debates about the legality of economic regulation and finishing with contemporary debates over rights-based and new governance approaches to regulation.

Learning Objectives

By the end of the semester, you will be able to do the following:

- learn to appreciate how the conceptual boundaries of public interest and private rights have developed over the 20th century
- become familiar with the workings of administrative discretion in rulemaking and adjudication
- identify and apply juridical frameworks for assessing whether regulatory policies violate substantive individual rights
- identify and apply juridical frameworks for assessing the formality of administrative procedures
- critically evaluate proposals for delegating regulatory functions to private groups

Texts

The readings for this course are available as a coursepack purchased from Campus Design and Copy (403 Student Union)

## Assessments and Evaluations

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### Summary:

Preparation and Participation (10%)

Online reading quizzes (10%)

Moodle posting (5%)

Short assignments (25%)

Essay midterm exam (25%)

Final exam/paper option (25%)

### **Class Preparation and Participation (10%)**

If you miss more than four classes unexcused your grade may be lowered. If you miss more than six classes unexcused you risk receiving a failing grade in the course. Absences will be excused only for documented illness, documented family crisis, religious observance, and the like.

I expect this classroom to be a participatory learning environment, with students listening and responding to one another respectfully. I will provide discussion questions for the readings for each class. They are meant to help you focus on the main points of the readings and to set up a productive discussion in class. I encourage you to think about issues in the readings in addition to these questions, but at a minimum, have thought about the discussion questions. These questions are fair game for me to ask any of you in class. If you are not actively speaking and participating in class discussions, you can also receive participation points by coming to my office hours or arranging something with me to discuss the readings.

At various points in the semester, you will do in-class work in small groups to provide you with hands-on experience in working through problems and questions. Part of your “preparation and participation” grade will be determined by how well your group functions, and how much you contribute to the group’s work.

It is expected that you will bring a copy of the readings with you to class since they are the foundation upon which our class discussions will be built. We will be referring to the readings often. Not having the readings with you will impact your “preparation and participation” grade.

### **Online Multiple-Choice Quizzes (10%)**

I will post a multiple-choice question on Moodle based on the assigned readings for each class. You are responsible for answering this question in advance of the class session for which the readings are assigned. Two low quiz grades will be dropped.

### **Moodle postings (5%)**

Students will be divided into 4 groups (A-D). Four class sessions are designated for Moodle discussion and are coded with one of these letters. By 10pm on the day

before the class that corresponds to your group, you will be expected to post on the Moodle discussion forum for that day. The post will include two things:

1. A question you have about the material for the day. These can be to clarify something you found unclear in the readings for that day OR pushing the arguments of the readings to make broader inquiries, thinking about implications, etc.
2. A comment on the material for the day. Something you found surprising, interesting, etc. Your comment can be a response to your own or another person's question, or to one of the discussion questions, but can also be an independent comment (this should be between 1-2 paragraphs)

Please use proper grammar, spelling and punctuation since this is a class assignment, not a forum posting on the internet. Moodle postings can only be made up in the case of an excused absence. All students in the course are expected to have read all posted questions/comments before class. Group members will be expected to play a leadership role in the class session for which they have posted comments.

### **Short Research Assignments for In-Class Debate (25%), five total**

Students will write five short research assignments (750-1000 words) on topics that are distributed. The assignments aim to help you synthesize and extend the concepts covered in the course readings. Assignment due dates are listed on the syllabus and are graded on a simple 0-3 scale, where 0 = failed to turn anything in, or what was turned in was patently not a serious attempt to carry out the assignment, 1 = an attempt to meet the goals of the assignment that fails in some significant way, 2 = a good to excellent performance on the assignment, and 3 = exceptional effort. You can get an A on the assignments if you get all 2s and also participate actively in class discussion and debate on the day the assignment is due (the 3 is offered as an option for those who wish to apply extra effort to recover from one or more 0s or 1s, it will not put you over 100% on this portion of your grade). **There are no make-ups for the assignments** but you can always shoot for a 3, to partially make up a 0. Those wishing to shoot for a 3 on a given assignment should tell the instructor one class in advance in order to receive the relevant instructions.

You should bring a hard-copy to class and should also upload your assignment to Moodle by the start of class.

### **Take-Home Midterm (25%)**

There will be one take-home midterm. The midterm will include short-answers and short essays, and will invite you to synthesize the readings and material covered in class up until that point. You will have five days to complete the midterm. A midterm must be submitted to pass the course.

### **Final Exam (25%)**

There will be a take-home final exam distributed on the last day of classes and due five days later on Moodle's Turnitin. The final exam will consist of two essays, each with word limits. While the exam will focus on the second half of the course, it will

be difficult to complete without reference to course materials from the first part of the course.

Absence from an exam will be excused only for serious and unavoidable causes, such as confining illness. Make-up exams may be given only if the student notifies the instructor prior to the scheduled time of the exam and then provides some form of documentation from a professional (e.g., physician, psychologist, etc.) explaining why the exam had to be missed. Please note that you must attempt to contact your instructor by email in advance of the exam. Make ups for exams will be scheduled at her convenience.

**Late Policy:** The grade on an exam will be reduced 1/3 of a grade for every 24 hours it is late. Late work will be accepted only with the prior approval of Prof. Kavar. Requests for late submission must be made at least 48 hours in advance of the due date/time.

**A Word on Grammar:** Students often ask whether they will be “graded on grammar.” The answer is both no and yes. “No” in the sense that grammar alone is not a grading criterion. But “yes” in the sense that bad grammar and awkward style detract from the argument and presentation. Errors in grammar make it difficult for a reader to follow an argument and go through the text. You are responsible for understanding the rules governing Standard Written English.

**A Note on Grades:** Please come to me with any questions or problems you may have with the class material. If you have concerns regarding your grade at any point, please see me as soon as possible to help find ways to improve. The sooner you contact me regarding concerns, the more I can do for you. We will not be able to accommodate students who contact us at the end of the semester with concerns about their grades. **Extra credit is not offered for grade improvement**

#### Classroom Policies and Procedures

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##### **Cell Phones/Texting/Computers**

All cell phones must be turned off before entering the class. As a reminder: texting is distracting to your instructors and fellow classmates, not to mention impolite. If there is some reason that you need to have your phone out during the class period (i.e. expecting a call from a doctor or about an emergency situation), please speak to me about it before class begins.

Use of computers is discouraged in this course. Studies demonstrate that hand writing notes leads to better comprehension and retention of material. Computers are also distracting to the professor and other students. If you’d like to take notes on your computer, please let me know via email.

**Academic Integrity**

Plagiarism and cheating are violations of academic integrity and they will automatically result in failure in the course.

Scholastic dishonesty includes, but is not limited to, the submission of a piece of work that is, in part or whole, not one's own. Dishonesty also includes submitting work in this course that you have submitted in another course. When writing papers, sources must be cited! Quotation marks must be used! As a general rule, scholastic dishonesty involves one of the following acts: cheating, plagiarism, collusion and/or falsifying academic records. Plagiarism – from the web or from any other source – and all other acts of scholastic dishonesty will be reported to the university.

Students are responsible for familiarizing themselves with what counts as plagiarism and academic dishonesty. To learn more about UMass policies regarding scholarly dishonesty and its consequences, go to [http://umass.edu/dean\\_students/codeofconduct/acadhonesty](http://umass.edu/dean_students/codeofconduct/acadhonesty)

If students have any questions about what plagiarism means, they should consult a plagiarism tutorial found at <http://www.ctlw.duke.edu>. Students with any questions or concerns are encouraged to contact the professor.

**Barrier-Free Campus**

If you need an accommodation for a disability, please let Prof. Kavar know at least two weeks prior to the time when the accommodation will be needed. Some aspects of this course, the assignments, the in-class activities, and the way the course is usually taught may be modified to facilitate your participation and progress. As soon as you make me aware of your needs, we can work with the Office of Disability Services (tel. 413-545-0892 Voice/TTY; <http://www.umass.edu/disability>) to help us determine appropriate academic accommodations. Disability Services typically recommends accommodations through a Verified Individualized Services and Accommodations (VISA) form. Any information you provide is private and confidential and will be treated as such.

**Email**

I will use the class list to communicate with the class and I expect that you will check your school email address regularly. E-mail is also the best way to get in touch with me. Please be aware that it may take me up to 24 hours to respond to your e-mail and that I check email less frequently on weekends. On the night before exams or other assignments are due, I can guarantee that I will answer any questions that I receive by email before 10pm. After that, I may or may not be able to answer the question before assignment/exam is due.

## Calendar of Major Assessments

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September 16 - Assignment 1  
Oct. 5 - Assignment 2  
Oct. 19 - Assignment 3  
October 26 - Essay Midterm Exam Due  
Nov. 16 - Assignment 4  
Dec. 7 - Assignment 5  
December 17 - Final Essay Exam

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## SCHEDULE

(subject to change upon reasonable notice)

### Why do we need regulation?

9/9 Harrington and Carter, "The broad reach of administrative action"

### Formalism and Functionalism as modes of reasoning

Themes: What does it mean to reason from precedent? How does positive law distinguish itself from morality? How is analytical jurisprudence different from instrumental law-making?

9/14: Schauer, *Thinking Like a Lawyer*, Chapters 1-2

9/16: \*Assignment #1 Due, Moodle. Please bring hard copy to class.

### Analytical Jurisprudence and the Critique of Social Regulation

Themes: What were the main characteristics of the analytical jurisprudence that developed at the end of the 19th Century?

9/21: \*Moodle Discussion Group A

Brewer, "The Nation's Safeguard" Proceedings of the NY State Bar Association (1893)

Debs, "Competition versus Cooperation" Speech at Central Music Hall, Chicago (1900)

9/23: *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U.S. 479 (1897)

### Analytical Jurisprudence (cont.)

Themes: What was the relation of analytical jurisprudence to laissez-faire political-economy? How did courts in the United States involve themselves in political debates between laissez-faire and social regulation?

9/28: "The Story of *Lochner*" in *Constitutional Law Stories*  
*Lochner v. NY* (1905)

9/30: Muller v. Oregon (1908); Adkins v. Children's Hospital (1923)

### The Idea of "Social Law"

Themes: How did proponents of social regulation rethink classical legal categories? How did they use concepts such as "public service" and "administrative justice"?

10/5: \*Assignment #2 Due, Moodle. Please bring hardcopy to class.  
West Coast Hotel v. Parrish (1937)

10/7: Duguit, Law in the Modern State, 44-54  
Landis, The Administrative Process, 1-12  
The Constitution of the International Labour Organization (1946)

### Social Law in the United States

Themes: What was the role of "experts" in the modern regulatory state? How did administrative experts aim to make governance more responsive to the conditions of industrial society?

10/12: Columbus Day - No Classes

10/13: National Labor Relations Board v. Jones and Laughlin (1937)  
Wickard v. Filburn (1942)

10/14: Katzmann, Regulatory Bureaucracy chapters 4-5.

### Social Law (cont.)

Themes: How did proponents of modernization see the role of courts? What concerns did leaders of the legal profession have about expert-driven

10/19: \*Assignment #3 Due, Moodle, 10:00am.  
FTC v. Google, Inc.

10/21: \*Moodle Discussion Group B  
St. Joseph Stockyards v. U.S. (1936)  
Pound, "The Individualization of Justice," Fordham Law Rev. (1938)

### Judicial Review of Bureaucratic Government

Themes: How did public interest reformers in the 1960s and 1970s aim to make the administrative state more accountable, transparent, and participatory? What reforms took place during this period in the way that courts reviewed agency policymaking?

10/26: Midterm Exam Due in Class  
Film: An Unreasonable Man

10/28: \*Moodle Discussion Group C  
Jasanoff, Science at the Bar, Ch. 4

Judicial Review of Bureaucratic Government (cont)

Themes: How might courts supervise the individualized justice of administrative officials in a context of information uncertainty?

11/2: NRDC v. Nuclear Regulatory Commission (1976)

11/4: Farina, "Due Process at Rashomon Gate: The Stories of Mathews v. Eldridge" in *Administrative Law Stories*  
Mathews v. Eldridge (1976)

Judicial Review of Bureaucratic Government (cont.)

11/9: Assignment #4 Due, Moodle, 10:00am. Please bring hardcopy to class.

11/11: Veteran's Day - No Classes

Collaborative and Reflexive Governance Approaches

Themes: What did reformers in the 1990s see as the advantages of reflexive and negotiated systems of accountability?

11/16: Stewart, "Madison's Nightmare," U. Chicago Law Rev. (1990)

11/18: \*Moodle Discussion Group D  
Freeman, "Collaborative Governance," UCLA Law Rev. (1997)

Collaborative and Reflexive Governance Approaches (cont.)

Themes: Are there non-judicial and non-market routes to make government decision-making more inclusive? What are the dangers of government agents collaborating with market actors?

11/23: Frug, "Administrative Democracy," Toronto Law Journal (1990)

11/25: Minow, "Outsourcing Power" (online discussion rather than class)

Rights and Regulation in the 21st Century

Themes: How have neoliberal regulatory approaches impacted workers? What are the tensions between rights-based vs. outcome-based arguments for reform? Which types of rights are judges in the 21st century willing to enforce? How might rights be realized, outside of courts?

11/30: McCartin and Compa, "Democratizing the Demand for Workers' Rights," *Dissent*, Winter 2005.



12/2: Liptak, "Supreme Court to Hear Challenge to Union Fees," New York Times (web version), 6/30/15

Center for Individual Rights, "Twenty-Five Amicus Briefs Urge Supreme Court to Side with Friedrichs," 11/23/15

### Judicialization of Human Rights (cont.)

12/7: Assignment #5 Due, Moodle, 10:00am.

Moberg, "Labor Strikes Back: The AFL-CIO Has Filed a Formal Complaint with the International Labor Organization over the State of Labor Law in the United States," *The American Prospect* (web version), 11/1/07

AFL-CIO, Complaint to the ILO Committee on Freedom of Association  
10/25/07

12/9: Wrap-up and synthesis

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Additional resources for further optional reading on the topic of the course:

- Lisa Heinzerling and Mark V. Tushnet. *The Regulatory and Administrative State* (Oxford U Press, 2006)
- Peter H. Schuck. *Foundations of Administrative Law, Second Edition* (Foundation Press, 2004)
- Christine B. Harrington and Lief H. Carter. *Administrative Law and Politics, Fourth Edition* (CQ Press, 2008)
- Morton J. Horowitz. *The Transformation of American Law 1870-1960*. (Oxford U Press, 1992)
- Joanna L. Grisinger. *The Unwieldy American State: Administrative Politics Since the New Deal* (Cambridge U Press, 2012)
- David M. Trubek and Alvaro Santos. *The New Law and Economic Development: A Critical Appraisal* (Cambridge U Press, 2006)
- Robert A. Katzmann. *Regulatory Bureaucracy: The Federal Trade Commission and Antitrust Policy* (MIT Press, 1980)
- James M. Landis. *The Administrative Process* (Yale University Press, 1938)