Session 1 1/10/05
What Is Regulation?

READINGS:

Breyer & Stewart, ADMINISTRATIVE LAW AND REGULATORY POLICY (Breyer & Stewart.) 4 - 13.

CLASS PREPARATION ASSIGNMENT:

In deciding cases or otherwise resolving problems, lawyers and judges rely on norms derived from common law, statutes, administrative regulations, constitutional provisions and social custom. As you read International News Service, make note of the sources of the norms the court applies in deciding the case.

Consider the relative advantages and disadvantages of having the matters that led to the dispute in International News Service regulated by common law, by statute, or by other means.

Session 2 1/13/05
Comparing Common Law and Enacted Rules

READINGS:


CLASS PREPARATION ASSIGNMENTS:

Consider the relative merits of regulating lead paint removal through an enacted, public law scheme and through private actions to enforce common law principles.

Describe what you would regard as an optimal regulatory scheme for controlling lead paint in New York City. Your optimal scheme may consist of common law principles, enacted rules, or a mix. Be prepared to defend your scheme in class.

Consider and critique the way the New York Court of Appeals modified, and
declined to modify, common law principles to take account of enacted rules concerning lead paint.

Taking the role of a Judge of the New York Court of Appeals, outline the rule you would announce to establish a landlord’s responsibility when a child lawfully residing in the landlord’s rental property suffers lead poisoning as a result of exposure to lead-based paint. Be prepared to justify your rule in class.

Session 3  1/20/05  
U.S. Regulation before 1930

READINGS:

The Slaughter-House Cases, 83 U.S. 130 (1872)  
Bradwell v. Illinois, 83 U.S. 36 (1872)

CLASS PREPARATION ASSIGNMENTS:

Think about The Slaughter-House Cases in the context of what you know about Reconstruction and the aftermath of the Civil War.

Consider whether the outcomes of the assigned cases were driven by ideology – by beliefs about, e.g., markets or human nature or human entitlements. If ideologies were at work, how would you describe them?

Session 4  1/24/05  
U.S. Regulation before 1930

READINGS:

Lochner v. New York, 198 U.S. 45 (1905)  
Muller v. Oregon, 208 U.S. 412 (1908)

WRITING ASSIGNMENT:

It is 1915. You are an associate at a law firm that represents a New York City bakery, Patisserie Claude. The New York City Council has recently passed a law regulating labor practices in bakeries. The law requires, among other things, that bakery employees be 17 years of age or older, have annual physical examinations at their employer’s expense, and work no more than 50 hours per week in the case of male employees and no more than 35 hours a week in the case of female employees. Patisserie Claude would be adversely affected by these regulations and would like to challenge them. Draft a memo of no more than a page as background for a meeting to discuss the feasibility of such a challenge with the
supervising attorney for Patisserie Claude matters.

**Session 5**  1/27/05
**The New Deal**

**READINGS:**

*United States v. Carolene Products*, 304 U.S. 144 (1937)

**CLASS PREPARATION ASSIGNMENTS:**

Consider the *Carolene Products* result in light of what you know about the Great Depression and the New Deal.

**Session 6**  1/31/05
**Substantive Due Process Constraints on Regulation after Carolene Products**

**READINGS:**

*Meyer v. Nebraska*, 262 U.S. 390 (1923)
*DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)

**CLASS PREPARATION ASSIGNMENTS:**

It is 1940. You are an associate at a law firm that represents the New York Society for the Prevention of Cruelty to Children (the Society), a private charitable organization. The Society’s agents patrol certain neighborhoods of New York City in search of abandoned, neglected or abused children. (The Society runs a congregate home, Sheltering Arms, to which agents take children who are abandoned or in danger.) Society agents frequently observe that parents require their children to accompany them when they peddle goods on the street or when they panhandle. The Society believes that this practice is unwholesome for children and would like to propose state legislation banning it. The supervising attorney for Society matters has asked you to join a meeting to discuss the drafting of the proposed legislation and of a position paper in support of it. In preparation for that meeting, outline (1) the risk that the legislation will be deemed unconstitutional and (2) the kind of arguments and evidence that should be assembled in support of the legislation.

**Session 7**  2/3/05
**Procedural Due Process Constraints on Regulation (Part One)**
READINGS:

Lassiter v. Dept. of Social Services, 452 U.S. 18 (1972)

CLASS PREPARATION ASSIGNMENT:

Imagine that you were assigned to represent Ms. Lassiter when proceedings were brought to terminate her parental rights. Outline a preliminary strategy for defending her against the termination. Then, prepare a strategy for your first interview with your client.

Session 8  2/7/05
Structural Limits on Regulatory Authority

READINGS:

U.S. Const., Articles I, II & III
The Federalist, Nos. 47 and 48 (James Madison)

WRITING ASSIGNMENT:

Draft a one page analysis of the question posed by Justice Thomas in his opinion in American Trucking: “whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.”

Session 9  2/10/05
The People’s Role in Regulatory Schemes I

READINGS:

Laurence E. Lynn, Jr. & Anthony Bertelli, A Precept of Managerial Responsibility: Securing Collective Justice in Institutional Reform Litigation
Peggy Farber, The Unfinished Story of Foster Care Outrage, THE CHRISTIAN SCIENCE MONITOR, March 1, 2002

CLASS PREPARATION ASSIGNMENTS:

Consider, and be prepared to discuss in class, whether Joseph A. was correctly
decided.

Session 10  2/14/05
The People’s Role in Regulatory Schemes II

READINGS:


CLASS PREPARATION ASSIGNMENT:

In the wake of Judge Dimitrioulius’s decision on Defendants’ motion to dismiss Kervin Occean’s claim, the parties are discussing settlement. You are a junior attorney in the Florida Attorney General’s office. The state attorneys would like to assess their leverage before commencing settlement talks. You have been asked to outline the arguments that Judge Dimitrioulius should and will be reversed on appeal of the question whether a 1983 action is available to Occean to enforce the provisions of the Child Welfare Act. Be prepared to discuss those arguments in class.

Session 11  2/17/05
Theories and Obligations of Legislation

READINGS:

LAWYERING BY THE BOOK 24 - 31 (review).
The Federalist, No.10 (James Madison)
Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1512 (1992)
CLASS PREPARATION ASSIGNMENTS:

Group A: Drawing on your experience of the Voyageurs Park exercise, describe interactions in the negotiated regulation process that can be best explained by a public choice analysis. If there were no such moments in the process as you experienced it, explain why you think the theory lacks explanatory power in the situation you experienced.

Group B: Drawing on your experience of the Voyageurs Park exercise, describe interactions in the negotiated regulation process that can be best explained by a pluralist analysis. If there were no such moments in the process as you experienced it, explain why you think the theory lacks explanatory power in the situation you experienced.

Group C: Drawing on your experience of the Voyageurs Park exercise, describe interactions in the negotiated regulation process that can be best explained by a civic republican analysis. If there were no such moments in the process as you experienced it, explain why you think the theory lacks explanatory power in the situation you experienced.

Session 12 TUESDAY 2/22/05 (Legislative Monday)
Theories and Obligations of Legislation
Legislative Interpretation I

READINGS


WRITING ASSIGNMENTS

CHOOSE ONE:

You are an assistant attorney general in a state much like New Jersey. You have been advised that a special interest group (or is it public interest group?) is planning to sue the state, alleging that its school funding system unconstitutionally deprives poor children of an adequate education. You have also been advised that the group will rely on Gerber's public choice
You are part of a litigation team that is planning to sue a state rather like New Jersey to challenge what you regard as inadequate funding to school districts populated by poor and working class people. Your assignment is to assess the feasibility of relying on Gerber's public choice analysis in support of your claim. Prepare a one page memo for distribution in advance of a meeting at which this strategy, among others, will be discussed.

Imagine that you are a lawyer in a jurisdiction that has passed the following statute:

“In view of severe shortages of low income housing, rents in this jurisdiction are stabilized for tenants over the age of 65 and for tenants residing with dependant children under the age of 18, provided a) that said tenants have incomes below $30,000 per year net of taxes and b) that said tenants have assets, not including pension or other retirement benefits, of less than $75,000. Rents stabilized under the terms of this statute may not be increased by more than the amount annually set by the local Rent Stabilization Board.”

Consider whether this statute should be interpreted to cover tenants who are not the biological or adoptive parents of children with whom they reside. Identify as many arguments as you can on both sides of this question.
Session 14  2/28/05
Legislative Interpretation III

READINGS:

ESKRIDGE, et al., 410-417, 947-49, 979-80, 997
William Morehead, *A Congressman Looks at the Planned Colloquy and Its Effect on Statutory Interpretation*, 45 ABA JOURNAL 1314 (1959)
Nicholas Scoppetta, *Beyond Ideology: Protecting Children and Preserving Families*
Legislative History of the Adoption and Safe Families’ Act (ON BLACKBOARD)

CLASS PREPARATION ASSIGNMENTS:

For purposes of these assignments, group A should search the committee reports concerning ASFA, group B should search the floor debates, and group C should search the committee hearings.

Consider the quality of the information and knowledge relied upon to support the policy choices that ASFA represents. To what extent, for example, was it anecdotal? Scientific? Empirical? Theoretical? Objective? Speculative?

Make a list of the constituencies to which ASFA might be relevant.

Indicate which of the constituencies that you have listed were represented and the extent to which their perspectives were voiced or considered.

Session 15  3/3/05
Using Interpretive Sources

READINGS:

Legislative History of the Adoption and Safe Families’ Act (ON BLACKBOARD)

CLASS PREPARATION ASSIGNMENT:

You are a research assistant for a law guardian assigned to represent Ruth Adams, a child in foster care. The law guardian is the child’s lawyer, but s/he also has an obligation to act in the child’s interests when the child is unable or incompetent to determine or express her interests.

Ruth was placed in care when her mother, Lydia Adams, was arrested for vehicular
assault and for driving while under the influence of alcohol. Ruth’s father abandoned
the family when Ruth was an infant; his whereabouts are unknown. The mother
remained incarcerated for 8 months pending disposition of her case and ultimately
pleaded to driving while intoxicated and was sentenced to time served. While Ms.
Adams was in jail, she joined a program for alcohol abusers, but she lost her
apartment. Ms. Adams is now living in a shelter, searching for a job, and hoping to
earn enough to secure an apartment. She visits Ruth regularly and regularly attends a
Twelve Step Program to address what she now understands to be her alcoholism.
Ruth is 9 years old, and she wants to return home to her mother. Ruth insists that her
mother’s drinking did not prevent her from being a good parent. There are no
extended family members who are able to care for Ruth. Ruth’s caseworker has
recommended that Ruth remain in care until Ms. Adams can establish a home for her.
The caseworker has also recommended that an adoptive home be sought for Ruth, for,
consistently with local regulations enacted in the wake of the Adoption and Safe
Families Act (ASFA), the caseworker realizes that if the mother is unable to assume
custody of Ruth within a year the plan for Ruth will be converted from “return to
mother” to “adoption.”

In two weeks, there will be a foster care review hearing to review Ruth’s case. The
law guardian is trying to assess the likelihood that Ruth will be able to return home
and to determine what position s/he should take at the foster care review hearing.
S/he would like to be able to argue that under the terms of ASFA the government
(acting through the placement agency) is required to give Ms. Adams housing
assistance and assistance in finding a job. S/he has asked that you help in searching
the legislative history of ASFA for support for that argument.

First, search the documents to which you were assigned last week and identify
statements that support and statements that weaken the argument the law guardian
wants to make. Then, considering each statement’s source, content and context,
assess the value and legitimacy of using it in supporting or defending against the law
guardian’s argument.

Session 16 3/7/05
Theories and Obligations of Administrative Rulemaking

READINGS:

LAWYERING BY THE BOOK 31-36 (review)

Selected provisions of the Administrative Procedure Act (APA)
Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105
Harv. L. Rev. 1512 (1992)

WRITING ASSIGNMENT:
The Seidenfeld excerpt suggests that administrative rulemaking is a context within which civic republicanism might flourish if certain changes were made in administrative law. Students of public choice and interest group theory can also argue that these theories have implications for the administrative rulemaking process. Similarly, students and advocates of pluralism might suggest ways in which administrative rulemaking can facilitate interest group bargaining.

Sections 553, 556 and 557 of the Administrative Procedure Act set out basic requirements for rulemaking by federal agencies. Taking the perspective of a civic republican (group A), a student of public choice and interest group theory (group B), or a pluralist (group C), first describe amendments to sections 553, 556 and 557 that you would recommend, and then describe the effect you would expect (or hope) the amendments would have (working always from your assigned perspective).

Session 17 3/10/05
How are adjudication and rulemaking distinguished?

READINGS:

Londoner v. Denver, 210 U.S. 373 (1908)
Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915)
Southern Railway v. Virginia, 290 U.S. 190 (1933)
United States v. Florida East Coast Railway, 410 U.S. 224 (1973)

CLASS PREPARATION ASSIGNMENTS:

Critique the Court’s reasoning in distinguishing Londoner and Bi-Metallic.

Imagine that after the decision in Southern Railway, a child on a tricycle is killed at a grade crossing. People are up in arms about the dangers of grade crossings. The governor and the legislature are under great pressure to respond. Editorials have bemoaned the Supreme Court’s decision, saying that it imposed an unreasonable federal standard on the Commonwealth of Virginia. Railroads have lots of money and lots of lawyers. If there is a hearing with respect to every grade crossing that is potentially dangerous, there will be inordinate delay. Consider what the Virginia government might do.
Session 18   3/21/05
Administrative Rulemaking Process

Readings:

Selected provisions of the Administrative Procedure Act (APA)
(See Session 16 Materials)

Class Preparation Assignments:

Consider the differences in the issues raised in the cases assigned for sessions 17
and 18.

Identify safeguards, e.g. proposed agency rules of procedure or amendments to
the APA, that would protect against the hearing practices complained of in the
Heckler concurrences.

Session 19   3/24/05
The Scope of Agency Authority (Delegation Revisited)

Readings:

Review cases assigned for Session 8.
American Textile Manufacturers’ Institute v. Donovan (The Cotton Dust Case),
452 U.S. 490 (1981)

Class Preparation Assignments:

Consider the uses of legislative history in the American Textile opinions.

Consider whether the American Textile result gives the agency an appropriate
amount of authority in light of the agency’s expertise. Consider the same
question in light of the agency’s accountability.

Session 20   3/28/05
Interpreting Agency Rules (Authority and Delegation Revisited)

Readings:

Antonin Scalia, Judicial Deference to Agency Interpretations of Law, 1989 Duke
Writing Assignment:

Prepare an analysis of *Brown & Williamson* in relation to *Chevron*.

**Session 21  3/31/05**

**An Exercise in Interpreting Agency Rules**

**Readings:**

*Zarr v. Barlow*, 800 F.2d 1484 (9th Cir. 1986)

**Class Preparation Assignment:**

The Bureau of Indian Affairs has used a variety of guides to determine who is eligible for benefits such as the mental health services at issue in *Vigil*. The most commonly used eligibility criteria have been membership in a federally recognized tribe or having some quantum of “Indian blood.” The head of the BIA has determined that the Bureau should adopt a uniform eligibility standard, to be used with respect to all benefits, except those for which Congress has specified eligibility criteria. There are a substantial number of pending, individual benefit applications that involve applicants whose claim to Indian status is tenuous. As counsel to the Bureau, you have been asked to answer the following questions:

- What procedures, if any, are required in the establishment of new eligibility criteria?

- What is the most efficient way to go about devising and implementing a new rule?

Outline your answers.

**Session 22  4/4/05**

**Procedural Due Process in Agency Adjudications I**

**Readings:**

Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964)
CLASS PREPARATION ASSIGNMENTS:

Design a system for reviewing, at the behest of a foster parent who has not been designated as a pre-adoptive parent, decisions to remove a child from the foster parent's home. Your system should meet the constitutional requirements of due process and the needs of the group or entity whom you represent. It should also be feasible, in the sense that it would not unreasonably prejudice the interests of any entity or group or be prohibitively costly or time-consuming.

Representation assignments are listed below.

Group A1: the Department of Family & Children's Services.
Groups A2: foster parents
Group B: children in foster care
Group C: parents whose children have been removed to foster care

Session 23  4/7/05
Procedural Due Process in Agency Adjudications II

READINGS:


CLASS PREPARATION ASSIGNMENT:

The Personal Responsibility and Work Opportunity Reconciliation Act (PRA) restructured what had been known as “welfare” administration by eliminating the country's main assistance program for poor families, Aid to Families with Dependent Children (AFDC), and by giving states fixed block grants for "temporary assistance for needy families" (TANF). The Act also devolves significant control over welfare administration from the federal government to the states, and it gives the states the option of further devolving welfare operations to the county and city level, and to private organizations. Congress states unequivocally in the statute that benefits are not entitlements, and that the law "shall not be interpreted to entitle any individual or family to assistance under any State program funded under [the Act]." Several states enacted statutes with similar language, although some states used contrary language
expressly preserving the entitlement status of welfare benefits. (This description is adapted from Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 Calif. L. Rev. 569 (2001).

Consider whether the statutory language quoted above removes or reduces states’ legal obligation to afford procedural protections to people who receive or apply for TANF benefits. Outline arguments on both sides of the question.

**Session 24  4/11/05**

**Forms of Regulation**

**READINGS:**

*Breyer & Stewart, Administrative Law and Regulatory Policy (Breyer & Stewart.)* 13 - 15, 294 - 98

**ESTABLISHING PREFERENCES AMONG FORMS OF REGULATION**

**IN CLASS WRITING ASSIGNMENT (PRACTICE EXAM):**

**Session 25  4/14/05**

**An Exercise in Forms of Regulation**

**READINGS:**

Margaret R. Burchinal, *Child Care Experiences and Developmental Outcomes*, 563 ANNALS 73 (1999)
William Gormley, Jr., *Regulating Child Care Quality*, 563 ANNALS 116 (1999)

**CLASS PREPARATION ASSIGNMENTS:**

Prepare the strongest possible arguments in support of the following governmental approaches to day care:

- **Group A**: Prohibition and Punishment and/or Command and Control
- **Groups B**: Government Ownership and Management
- **Groups C**: Private Subsidies, Incentives and Disincentives.

**Session 26  4/18/05**
Assessing the Costs and Benefits of Regulation

READINGS:

Breyer & Stewart, 380 - 87.

CLASS PREPARATION ASSIGNMENTS:

Assume that ASFA is pending but has not yet been passed. You are to work in role as a lawyer for an organization that wishes to take a position on proposed provisions that would a) shorten the time families of origin have to regain custody before steps are taken to terminate their parental rights and place their children for adoption and b) increase states’ discretion to deny, or cease to provide, support for the efforts of families of origin to regain custody of their children.

The assignment has two parts. First, you are to make a comprehensive list of the costs and benefits of the proposed provisions. The list should include things that you think are quantifiable and things that you think are unquantifiable. The goal is to make the list as comprehensive as possible.

Next, adopting the positions assigned below, outline an advocacy strategy based on projected costs and benefits of the time limit changes. This should be a preliminary outline; you are not expected to research or calculate actual costs. What you are expected to do is 1) speculate reasonably about various costs and benefits associated with the changes, and 2) outline arguments based on what you expect a more informed projection of costs and benefits would show.

Groups A: You are counsel for an organization of foster parents that supports the changes. You have been asked to develop an argument that the benefits of the changes would outweigh the costs.

Groups B: You are counsel for an organization of families of origin that opposes the changes. You have been asked to develop an argument that the costs of the changes would outweigh the benefits.

Group C: You are counsel for a child welfare organization that is just beginning to study the issue and has not taken a position. You have been asked to develop an argument that projections of the costs and benefits of the changes can be manipulated to support any position with respect to them and are therefore meaningless.
Nicholson Case Study

**READINGS:**


**CLASS PREPARATION ASSIGNMENTS:**

TBA

Session 28  4/25/05
Nicholson Case Study

**READINGS:**

*Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003)

**CLASS PREPARATION ASSIGNMENTS:**

TBA