Summary of Contents

Contents **xi**

Preface **xxv**

Acknowledgments **xxxi**

PART 1 INSTITUTIONAL FRAMEWORK **1**

Chapter 1. The Nature and Functions of Administrative Agencies 3
Chapter 2. Judicial Review of Administrative Decisions 139
Chapter 3. Availability of Judicial Review 323

PART 2 ADMINISTRATIVE FUNCTIONS **463**

Chapter 4. Choice of Policymaking Instruments 465
Chapter 5. Rulemaking 529
Chapter 6. Adjudication 673
Chapter 7. Enforcement and Liability 797
Chapter 8. Licensing 901

PART 3 INDIRECT CONTROLS **945**

Chapter 9. Public Access 947

APPENDIX **1007**

The Constitution of the United States of America (Selected Provisions) **1007**
The Administrative Procedure Act and Related Provisions **1016**

Table of Cases **1033**
Table of Secondary Authorities **1049**
Index **1061**

ALCM_FM_pi-xxxiv_proof2.indd 9 12/01/24 11:48 AM

CONTENTS

Preface xxv

Acknowledgments xxxi

PART 1 INSTITUTIONAL FRAMEWORK 1

Chapter 1 The Nature and Functions of Administrative Agencies 3

A. The Origin and Mandate of Administrative Agencies 6
1. Theories of the Origin of Administrative Agencies 6
2. A Case Study: The Occupational Safety and Health Act 9
Questions 13
3. Introduction to Separation of Powers and the Administrative State 15
B. Legislative Control of Administrative Agencies 17
1. Authorization: The Problem of Delegation 18
a. The Traditional Understanding of the Nondelegation Doctrine 19
A.L.A. Schechter Poultry Corp. v. United States 20
Notes and Questions 22
Industrial Union Dept., AFL-CIO v. American Petroleum Institute (The *Benzene* Case) 24
Mistretta v. United States 26
Notes and Questions 27
Whitman v. American Trucking Assns., Inc. *30*
Notes and Questions 34
b. Nondelegation Revival? 35
Gundy v. United States *35*
Notes and Questions 39
C. Alternative Methods of Legislative Control 40
1. Revision: The Legislative Veto 40
Immigration and Naturalization Service v. Chadha *41*
Notes and Questions 54
2. Appropriations: Riders and the Line-Item Veto 57
Robertson v. Seattle Audubon Society 58
Notes and Questions 60

ALCM_FM_pi-xxxiv_proof2.indd 11 12/01/24 11:48 AM

Clinton v. City of New York 62
Notes and Questions 65
3. Legislative Oversight 66
D. Executive Control of Administrative Agencies 69
1. Government by Presidential Command and Initiative 71
Youngstown Sheet & Tube Co. v. Sawyer 71
Notes and Questions 73
"Presidential Administration": The Use and Abuse of Presidential Executive Orders and Presidential Directives 74
Tobacco Marketing 74
"Sanctuary City" Funding 75
President Trump's Immigration Restrictions 77
Prosecutorial Discretion and Deferred Action in Immigration 77
Student Loan Debt Forgiveness 79
Notes and Questions 80
2. Appointment Powers 82
Buckley v. Valeo 83
Notes and Questions 86
Morrison v. Olson *93*
Notes and Questions 96
3. Removal Power 100
Myers v. United States 100
Humphrey's Executor v. United States 101
Notes and Questions 103
Morrison v. Olson *104*
Notes and Questions 109
Free Enterprise Fund v. Public Company Accounting Oversight Board *110*
Notes and Questions 116
Seila Law LLC v. Consumer Financial Protection Bureau *119*
Notes and Questions 135

Chapter 2 Judicial Review of Administrative Decisions 139

A. Standards of Judicial Review Under the Administrative Procedure Act 141
1. Standards of Review and the *Overton Park* Saga 141
Citizens to Preserve Overton Park v. Volpe *145*
Notes and Questions 150
2. The Basis for Judicial Review: Records and Reasons 152
SEC v. Chenery Corp. 153

United States v. Morgan 153
Notes and Questions 154
B. Arbitrary and Capricious Review of Questions of Fact or Policy 156
1. The Evolving Understanding: From "No Reasonable Ground" to "Hard Look" Review 157
Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co. *160*
Notes and Questions 166
Department of Commerce v. New York *170*
Notes and Questions 180
2. Arbitrary and Capricious Review of Agency Changes of Policy 181
Federal Communications Commission v. Fox Television Stations, Inc. *181*
Notes and Questions 187
Encino Motorcars, LLC v. Navarro 187
Department of Homeland Security v. Regents of the University of California 191
3. Arbitrary and Capricious Review of Agency Decisions Not to Act 193
Massachusetts v. Environmental Protection Agency *195*
Notes and Questions 200
C. Judicial Review of Questions of Law 201
1. The Early Years 202
National Labor Relations Board v. Hearst Publications, Inc. 203
Skidmore v. Swift & Co. 204
Notes and Questions 206
2. The *Chevron* Decision 206
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. *208*
Notes and Questions 214
3. *Chevron* Step One 215
a. Modes of Statutory Interpretation 215
MCI Telecommunications Corp. v. American Telephone & Telegraph Co. *216*
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon 216
Notes and Questions 218
b. "Extraordinary Cases" and "Major Questions" 219
Food and Drug Administration v. Brown & Williamson Tobacco Corp. *219*
Notes and Questions 222
West Virginia v. Environmental Protection Agency *225*
Notes and Questions 235

4. *Chevron* Step Two: "Permissible" or "Reasonable" Constructions 237
Utility Air Regulatory Group v. Environmental Protection Agency *237*
Notes and Questions 241
5. *Chevron* Deference to Conflicting or Changing Interpretations? 244
National Cable & Telecommunications Assn. v. Brand X Internet Servs. 245
Notes and Questions 247
6. *Chevron* "Step Zero": Interpretations Having the "Force of Law" and "Jurisdictional" Questions 248
a. Interpretations Not Having the "Force of Law" 249
United States v. Mead Corp. *250*
Notes and Questions 257
b. Agency Interpretations of "Jurisdictional" Statutes 259
City of Arlington v. Federal Communications Commission *260*
Notes and Questions 265
7. Judicial Deference to an Agency's Interpretations of Its Own Rules 266
Kisor v. Wilkie *267*
Notes and Questions 278
8. *Chevron* Reconsidered: Its Impact, Its Future 279
NFIB v. OSHA 284
Sackett v. EPA 287
American Hospital Association v. Becerra 288
Notes and Questions 289
D. Judicial Review of Questions of Fact or Policy Under the Substantial Evidence Test 289
1. Formal Adjudication 290
In the Matter of Universal Camera Corporation *293*
National Labor Relations Board v. Universal Camera Corp. *294*
Universal Camera Corp. v. National Labor Relations Board *296*
National Labor Relations Board v. Universal Camera Corp. *300*
Notes and Questions 302
Biestek v. Berryhill *304*
Notes and Questions 308
2. Informal Rulemaking 309
*Industrial Union Dept., AFL-CIO v. American Petroleum Institute (*The Benzene Case*)* *310*
Notes and Questions 316
E. Judicial Remedies for Unlawful Agency Action 318

Chapter 3 Availability of Judicial Review 323

A. Jurisdiction 324
B. Reviewability 327
1. "Agency Action" 328
Norton v. Southern Utah Wilderness Alliance *329*
Notes and Questions 335
Public Citizen Health Research Group v. Chao 338
Notes and Questions 339
2. Statutory Preclusion of Review 340
Johnson v. Robison *341*
Notes and Questions 343
Cuozzo Speed Technologies, LLC v. Lee *344*
Notes and Questions 350
McNary v. Haitian Refugee Center, Inc. *351*
Notes and Questions 358
3. Committed to Agency Discretion by Law 360
a. General Principles 361
Webster v. Doe *361*
Notes and Questions 370
Department of Commerce v. New York *372*
Notes and Questions 375
b. Prosecutorial Discretion 375
Heckler v. Chaney *377*
Notes and Questions 385
Texas v. United States *385*
Notes and Questions 390
c. Resource Allocation and Appropriations 392
Lincoln v. Vigil *392*
Notes and Questions 395
C. Standing to Secure Judicial Review 396
1. The Legal Right Test 397
2. Standing Under the Administrative Procedure Act 400
Association of Data Processing Service Organizations, Inc. v. Camp *400*
Notes and Questions 402
3. Constitutional Standing Requirements: Injury, Causation, Redressability 404
Lujan v. Defenders of Wildlife *407*
Notes and Questions 419
Massachusetts v. Environmental Protection Agency *425*
Notes and Questions 432

D. The Timing of Judicial Review 436
1. Pre-Enforcement Challenges: Ripeness and Finality Requirements 437
Abbott Laboratories v. Gardner *438*
Notes 442
Gardner v. Toilet Goods Assn. *444*
Notes and Questions 446
2. Exhaustion of Administrative Remedies Prior to Seeking Judicial Review 453
a. Exhaustion Outside the APA 454
b. Exhaustion Under the APA 459

PART 2 ADMINISTRATIVE FUNCTIONS 463

Chapter 4 Choice of Policymaking Instruments 465

A. Legal Constraints on Choice of Policymaking Instruments 466
1. Due Process Constraints 466
Londoner v. Denver 467
Bi-Metallic Investment Co. v. State Board of Equalization 468
Notes and Questions 468
2. Statutory Constraints 469
B. Agency Authority and Discretion to Make Policy by Rule 472
United States v. Storer Broadcasting Co. *475*
Notes and Questions 478
National Petroleum Refiners Assn. v. Federal Trade Commission *483*
Notes and Questions 489
Chamber of Commerce of the United States v. National Labor Relations Board 491
Questions 492
Heckler v. Campbell *494*
Notes and Questions 497
C. Agency Discretion to Make Policy by Order After Adjudication 498
SEC v. Chenery Corp. 499
Excelsior Underwear, Inc. *501*
Notes and Questions 504
National Labor Relations Board v. Wyman-Gordon Co. *504*
Notes and Questions 511
National Labor Relations Board v. Bell Aerospace Co. 514
Notes and Questions 515

D. Agency Discretion to Make Policy by Manual or Informal Guidance 516
Morton v. Ruiz *516*
Notes and Questions 521
Note on Policymaking via Guidance Documents and the Like 522
Note on Agencies' Obligation to Follow Their Own Procedural Rules 524

Chapter 5 Rulemaking 529

A. Formal and Informal Models of Rulemaking Under the Administrative Procedure Act 529
United States v. Allegheny-Ludlum Steel Corp. 530
United States v. Florida East Coast Ry. Co. 531
B. Rulemaking Procedure Under APA §553 and Related Statutes 532
1. Notice 533
Chocolate Manufacturers Assn. v. Block *534*
Notes and Questions 539
Long Island Care at Home, Ltd. v. Coke 539
2. Explanation of the Decision: The Concise General Statement 541
United States v. Nova Scotia Food Prods. Corp. 541
Notes and Questions 543
3. Protecting the Integrity of the Rulemaking "Record": Ex Parte Contacts, Political Influence, and Prejudgment 545
a. Exclusivity of the Rulemaking Record and Ex Parte Contacts 545
Home Box Office v. Federal Communications Commission *548*
Notes and Questions 552
b. Political Influence on Administrative Policy, Late Comments, and Ex Parte Contacts 554
Sierra Club v. Costle *557*
Notes and Questions 564
District of Columbia Federation of Civic Assns. v. Volpe 565
c. Impartiality of the Rulemaker 567
Association of National Advertisers, Inc. v. Federal Trade Commission *573*
Notes and Questions 579
4. Embellishing the APA Model of Informal Rulemaking Through "Hybrid" Procedures 581
a. Statutory Hybrids 581
b. Judicially Fashioned Hybrids 582
Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission *585*

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. *589*
Notes and Questions 593
American Radio Relay League, Inc. v. Federal Communications Commission 595
5. Exemptions from APA §553 598
National Family Planning & Reproductive Health Assn., Inc. v. Sullivan *599*
Notes and Questions 604
Hoctor v. United States Department of Agriculture *605*
Notes and Questions 609
Texas v. United States *610*
Notes and Questions 612
Lincoln v. Vigil 613
Notes and Questions 614
6. Agency Authority to Stay Promulgated Rules 620
Natural Resources Defense Council v. National Highway Traffic Safety Administration *621*
Notes and Questions 623
7. Alternative Rulemaking Models 625
a. Negotiated Rulemaking 625
Notes and Questions 627
USA Group Loan Services, Inc. v. Riley *628*
Notes and Questions 630
b. Alternatives to Negotiated Rulemaking 631
C. Strengthening the Analytic Basis of Policymaking 634
1. Cost-Benefit Analysis 634
American Textile Manufacturers Institute v. Donovan 639
Notes and Questions 640
Whitman v. American Trucking Associations, Inc. *641*
Notes and Questions 646
Entergy Corp. v. Riverkeeper, Inc. *646*
Notes and Questions 652
2. Presidential Oversight of Rulemaking 654
Notes and Questions 659
3. Impact Statements: The Case of the National Environmental Policy Act 662
Calvert Cliffs Coordinating Committee v. Atomic Energy Commission 664
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council 665

Notes and Questions 666
Robertson v. Methow Valley Citizens Council *667*
Notes and Questions 669

Chapter 6 Adjudication 673

A. Agency Constitutional Authority to Adjudicate 674
Commodity Futures Trading Commission v. Schor *677*
Notes and Questions 684
Stern v. Marshall 684
Notes and Questions 686
B. Due Process Hearing Rights 689
1. The Interests Protected by Due Process 690
Goldberg v. Kelly *693*
Notes and Questions 701
Board of Regents v. Roth *703*
Notes and Questions 708
Arnett v. Kennedy 711
Bishop v. Wood 713
Cleveland Board of Education v. Loudermill 715
Notes and Questions 716
2. The Requirements of Due Process 721
a. The *Eldridge* Calculus 722
Mathews v. Eldridge *723*
Notes and Questions 728
b. The Right to a Neutral Decisionmaker: Protection Against Bias and Self-Interest 732
Tumey v. Ohio 732
Ward v. Village of Monroeville 733
Notes and Questions 734
Gibson v. Berryhill *735*
Notes and Questions 738
c. The Right to a Neutral Decisionmaker: Protection Against Prejudgment 739
Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission *740*
Notes and Questions 743
Withrow v. Larkin 745
d. Combination of Functions Under the APA 746

C. Statutory Hearing Requirements 748
1. "Triggering" the APA's Formal Adjudication Requirements 749
Seacoast Anti-Pollution League v. Costle *750*
Notes and Questions 752
Dominion Energy Brayton Point, LLC v. Johnson 753
Notes and Questions 754
2. Procedural Issues in Formal Adjudication 755
a. Discovery and Cross-Examination 755
Citizens Awareness Network, Inc. v. United States *755*
Notes and Questions 759
b. Official Notice 761
Southern California Edison Co. v. Federal Energy Regulatory Commission *761*
Notes and Questions 763
c. Statement of Findings 766
Armstrong v. Commodity Futures Trading Commission *766*
Notes and Questions 768
d. Intervention 769
Envirocare of Utah, Inc. v. Nuclear Regulatory Commission *769*
Notes and Questions 773
e. Restrictions on Ex Parte Communications in Adjudication 773
Portland Audubon Society v. Endangered Species Committee *775*
Notes and Questions 780
3. Appointment and Oversight of Administrative Hearing Officers and ALJ Impartiality: Achieving Consistency in a Regime of Mass Administrative Justice 782
Association of Administrative Law Judges v. Heckler *785*
Notes and Questions 787
4. Informal Adjudication 792
Pension Benefit Guaranty Corp. v. LTV Corp. *793*
Notes and Questions 794

Chapter 7 Enforcement and Liability 797

A. Government Enforcement 797
1. Monitoring and Investigation 799
a. Physical Inspections 800
Marshall v. Barlow's, Inc. *803*
Notes and Questions 810

b. Compulsory Production of Information 812
c. Record-Keeping Requirements 815
Ruckelshaus v. Monsanto Co. *817*
Notes and Questions 825
2. Prosecution and Selective Enforcement 825
a. Prosecutorial Incentives 825
b. Remedies for Selective Enforcement 827
Moog Industries, Inc. v. Federal Trade Commission *829*
Federal Trade Commission v. Universal-Rundle Corp. *830*
Notes and Questions 833
c. Agency Enforcement Orders 835
General Electric Co. v. Jackson *836*
Notes and Questions 841
B. Private Litigation and Regulatory Enforcement 844
1. Citizen Suits to Compel Public Enforcement 845
Bennett v. Spear *845*
Notes and Questions 849
Scott v. City of Hammond 850
2. Implied Private Rights of Action to Enforce Public Laws 851
a. Expansion: Policy-Based Justifications for Implying Private Rights of Action 852
J.I. Case Co. v. Borak 853
Notes and Questions 853
b. Retrenchment: Reading Legislative Intent to Exclude Private Rights of Action 855
Cort v. Ash *855*
Notes and Questions 859
Cannon v. University of Chicago 860
Karahalios v. National Federation of Federal Employees, Local 1263 *862*
Notes and Questions 864
3. Public-Law Preclusion of Existing Private Remedies: Primary Jurisdiction and Pre-emption 865
a. Primary Jurisdiction 866
b. Regulatory Pre-emption 868
Geier v. American Honda Motor Co., Inc. *871*
Notes and Questions 878
C. Liability of Public Entities and Officers 884
1. Suits Against Sovereigns: Sovereign Immunity and the Federal Tort Claims Act 884

United States v. S.A. Empresa de Viação Aérea Rio-Grandense (VARIG Airlines) 887
Berkovitz v. United States *888*
Notes and Questions 893
United States v. Gaubert 894
Notes and Questions 895
2. Suits Against Individual Government Officers 898

Chapter 8 Licensing 901

A. Occupational Licensing 902
1. Due Process, Equal Protection, and the Problem of Self-Interest 902
Gibson v. Berryhill *905*
Friedman v. Rogers 905
Notes and Questions 906
2. Anticompetitive Behavior and Antitrust Restraints 907
North Carolina State Board of Dental Examiners v. Federal Trade Commission *908*
Notes and Questions 914
3. Other Constraints on Occupational Licensing 914
B. Business Licensing 916
1. Entry Regulation: The Case of Broadcasting 916
a. Comparative Hearing Procedure 917
Ashbacker Radio Corp. v. Federal Communications Commission *917*
Notes and Questions 921
b. Licensing Standards 922
c. License Removal 924
d. Licensee Supervision: The Problem of "Jawboning" 925
Writers Guild of America, West, Inc. v. American Broadcasting Cos. 925
Notes and Questions 927
e. "The Regulatory Ratchet": Expansion of Regulatory Jurisdiction to Ancillary Activities 928
United States v. Southwestern Cable Co. *929*
Notes and Questions 932
2. Rate Regulation: The Case of Telephone 936
MCI Telecommunications Corp. v. American Telephone & Telegraph Co. *938*
Notes and Questions 942

PART 3 INDIRECT CONTROLS 945

Chapter 9 Public Access 947

A. Public Access to Government Records 947
1. Agency Records Under the Freedom of Information Act 949
Kissinger v. Reporters Committee for Freedom of the Press *949*
Notes and Questions 957
2. Exemptions from FOIA's Disclosure Requirement 959
a. Personnel Matters 960
Milner v. Department of the Navy *960*
Notes and Questions 965
b. Deliberation 965
United States Fish and Wildlife Service v. Sierra Club, Inc. *965*
Notes and Questions 970
c. Law Enforcement 975
Federal Bureau of Investigation v. Abramson *975*
Notes and Questions 980
d. Privacy 983
Department of Justice v. Reporters Committee for Freedom of the Press *983*
Notes and Questions 988
B. Public Access to Administrative Deliberations 991
1. "Meetings of an Agency" 992
Federal Communications Commission v. ITT World Communications, Inc. *993*
Notes and Questions 995
2. Exemptions 996
Common Cause v. Nuclear Regulatory Commission *996*
Notes and Questions 1002

APPENDIX 1007

The Constitution of the United States of America (Selected Provisions) 1007

The Administrative Procedure Act and Related Provisions 1016

Table of Cases 1033

Table of Secondary Authorities 1049

Index 1061

PREFACE

These are truly momentous times in the field of administrative law. Powerful forces of globalization, technological change, economic dislocation, social unrest, and political conflict all seem to be converging on the administrative state. Mechanisms designed primarily to fill statutory interstices and administer stable policies are now called upon to address problems such as climate change, illegal immigration, financial instability, economic inequality, and dissatisfaction with the established health care system. With the political branches often immobilized by partisan gridlock and the judiciary constrained by institutional limitations, these issues increasingly have appeared to be the province of our nation's vast array of administrative agencies.

Administrators' responses to these contemporary challenges, however, place increasing strains on the system of legal principles that have evolved over the past century and a half to legitimize and control our "fourth branch of government." The challenge of administrative law always has been to balance the need for efficiency, flexibility, and discretion in the exercise of administrative authority against the need for due process, rationality, and accountability, along with fidelity to the Constitution. The task of an introductory course in Administrative Law is not only to acquaint law students with those historic principles, but to equip future lawyers to apply those principles to the rapidly changing environment of administrative practice that they will soon confront. This casebook seeks to provide the platform for achieving both of those goals. Further, with the movement in many law schools to include a regulatory component in the first-year curriculum, such as a course on Legislation and Regulation, this casebook is also designed to contain sufficient advanced materials to be used in an intermediate or advanced course on Administrative Law.

As a field of academic study, administrative law is forever in search of itself, hovering uneasily between vacuous platitudes about the place of administrative government in a constitutional democracy (pro and con) and the numbing detail of daily bureaucratic life in the regulatory state. Those who teach and write about administrative law constantly are challenged to strike the appropriate balance between abstraction and concreteness. In the formative era of administrative law, when administrative agencies were fewer in number and less complex in operation, textbook and casebook authors tended to favor concreteness. Materials were often grouped by particular agency or substantive topic. Since the watershed period of the New Deal, when the number of agencies multiplied, many of which were given broad powers to address a host of social problems, however, the emphasis has shifted toward the abstract. Administrative lawyers have attempted to capture the growing profusion and complexity of administrative life in a handful of universal legal principles, such as a uniform (*State Farm*) formulation of the "arbitrary and capricious" review standard, *Chevron* deference to agencies' interpretations of laws

ALCM_FM_pi-xxxiv_proof2.indd 25 12/01/24 11:48 AM

they administer, resistance to "formalizing" informal rulemaking, and the presumption of reviewability. While these efforts at constructing overarching principles have given coherence to discussion of some administrative law problems, they also are often a source of confusion and dissatisfaction when they seemingly fail to produce determinate results or to fit particular situations.

The attempt to filter the rich and changing variety of administrative life through a handful of doctrinal categories can have three unfortunate consequences. One is the sense of redundancy, or worse, superfluity that so often characterizes students' perceptions of administrative law. A second ill effect is the distorted view of administrative agencies when seen exclusively through the prism of appellate review. And, finally, formal doctrines frequently offer an incomplete or erroneous picture, causing many students to view administrative law "doctrines" as pedagogical abstractions, not genuinely explanatory constructs.

As a result, all too often students end a course in Administrative Law without understanding how administrative agencies behave, without appreciating the working of nonjudicial controls over agency behavior, and without understanding the judicial controls themselves. In preparing teaching materials for the course in Administrative Law, then, we have been guided by a determination to overcome these deficiencies.

At the same time, we recognize the essential importance of teaching traditional doctrine: courts and agencies approach issues in doctrinal terms and couch decisions in that language; students will need to be familiar with these doctrines, and skilled at deploying them, once they enter practice. We have tried here to retain the benefits of doctrinal discussion while avoiding the difficulties of relying exclusively on it. To that end, we have used case studies to put many important cases in a larger political and policy context, enabling students to see the gritty reality in which sometimes abstract doctrinal questions arise. And we have organized administrative action into certain useful categories, or grouped it according to certain functions agencies are seen to perform, as a way of enriching otherwise abstract doctrinal points.

Part 1 of the book introduces the institutional framework of the course. The first chapter acquaints students with the basic issues of social policymaking and governmental organization that underlie all of administrative law. After discussing the origin and nature of administrative agencies, the chapter focuses on their continuing relationships to the Legislative and Executive Branches, and the means by which these branches try to exert supervisory control. The next two chapters explore in greater depth the role of the courts in supervising administrative behavior. Although these chapters introduce students to the conventional rules and principles governing the scope and availability of judicial review, they serve more as vehicles to explore basic themes of comparative institutional competence that run throughout the succeeding chapters.

Part 2 is the heart of the book's emphasis on the *functions* agencies perform, where we examine legal problems and doctrinal responses by grouping them into four generic administrative activities: policy formation (covered in two chapters, one on choice of policymaking instruments, the second on rulemaking); adjudication; enforcement (including private alternatives to agency enforcement); and licensing. Although government activities are of almost infinite variety, most can be classified to fit within these four functional headings. Despite obvious differences

ALCM_FM_pi-xxxiv_proof2.indd 26 12/01/24 11:48 AM

from one agency to another, these functions tend, wherever they are used, to elicit similar patterns of behavior and to create similar relationships between governmental and non-governmental parties. It is these commonalities that the chapters in Part 2 seek to illuminate.

In Part 3, we shift the spotlight from direct judicial supervision to indirect legal control of administrative behavior. While modes of indirect controls are legion, this part focuses on one mechanism that has generated extensive litigation and controversy: public access rules. Chapter 9 focuses on the use of information and open meeting laws to increase public access to the decisionmaking process.

The other approach we use to compensate for the deficiencies of traditional administrative law materials is the case study method. Much of the book is divided into self-contained units centering around a particular episode, situation, or conflict. Most case studies focus on litigated disputes, including the controversies that have produced the leading modern judicial precedents in the field of administrative law. As in traditional treatments, we present sufficient excerpts from the appellate court decision to illuminate the issues presented and the doctrinal development for which the case stands. But we typically provide a much fuller presentation of background information on the political, legal, institutional, and technical context than is found in other texts.

In sum, our effort is not to abandon legal doctrine, but to infuse it with flesh and blood—to orient the course around what is peculiar to the formation and operation of administrative agencies, to place administrative law issues in the political and social contexts that are so critical to their resolution, to suggest alternative theoretical frameworks that can inform both positive and normative discussion of administrative behavior, and to facilitate the learning process by providing a fuller, less judicially biased group of materials drawn from a smaller number of disputes.

The need for a new edition at this time arises largely from changes in the breadth and form of agency action often taken outside the scope of standard rulemaking procedures or in an emergency posture and corresponding adjustments in the Supreme Court's separation-of-powers jurisprudence, reflected in the units on nondelegation and removal of agency officials and the Court's application of the major questions doctrine in the unit on judicial review of questions of law. While adhering to the basic architecture of previous editions, this ninth edition makes significant changes to several chapters. Many of these changes are designed, by highlighting contemporary developments, to convey a sense of the dynamism discussed in the opening paragraph of this Preface and to keep up with developments, especially those related to separation of powers and controversies over the power of agencies to meet new, and perhaps unforeseen, challenges. Other changes are designed simply to improve the flow, organization, and teachability of the book. In particular, we have tried in the current edition to highlight especially important secondary cases by presenting them in squib format and to streamline the notes and questions following leading cases. Highlights of changes made in this edition include the following:

Chapter 1. The basic structure of this chapter has been retained, but we have more clearly separated the material on appointment and removal of agency officials We have added an introductory note on separation of powers and the administrative state to prepare students better for what's coming. In the nondelegation unit, we have expanded coverage of *Gundy v. United States*, including Justice Gorsuch's

ALCM_FM_pi-xxxiv_proof2.indd 27 12/01/24 11:48 AM

dissent, and we have added a note on *Jarkesy v. SEC*, which as of this writing is pending at the Supreme Court. In the unit on presidential control, we have truncated the coverage of President Clinton's tobacco initiative in favor of attention to several more recent controversies, including immigration-related initiatives of the Obama and Trump Administrations and President Biden's student loan forgiveness plan. We have shortened the coverage of recess appointments and in the removal section we have added *Seila Law* as a principal case.

Chapter 2. In addition to tightening the overall presentation, we have added as major cases the Supreme Court's decision in *West Virginia v. EPA* and added notes on the major questions doctrine. We have also added, as squib cases, *Department of Homeland Security v. Regents of the University of California*, *NFIB v. OSHA*, *Sackett v. EPA*, and *American Hospital Association v. Becerra*, to illustrate the changes in standards of judicial review in recent years. We have also added notes on the Supreme Court's decision in *FCC v. Prometheus Radio Project* and on recent controversies over remedies, including the nationwide injunctions issue.

Chapter 3. We added discussion of some technical issues concerning the timing of judicial review and the proper understanding of the agency record that forms the basis of the review. In the standing unit, we added coverage of the recent *Transunion* decision and whether nominal damages are sufficient for standing, and we clarified some issues concerning procedural injury. In the timing unit, we added coverage of *Axon v. FTC*, which may be viewed as making it easier to bring a facial challenge to allegedly unconstitutional agency structure.

Chapter 4. In addition to general streamlining and updating, we added to the notes on agency use of guidance documents. Otherwise, this chapter remains essentially as it was in the eighth edition.

Chapter 5. We made relatively minor changes to this chapter. We added discussion of agency withdrawal of rules before publication in the Federal Register based on an interesting decision in the D.C. Circuit. We also updated the material on centralized regulatory review and reduced coverage of President Trump's executive order on that matter.

Chapter 6. We made only minor edits to this chapter, including more attention to the independence of administrative law judges and a clearer demarcation between bias and prejudgment.

Chapter 7. We added material on the issue of on-site agency monitors, that is, situations in which agency monitors are embedded into workplaces to ensure compliance with regulatory requirements. We also added notes on agency choice of whether to bring enforcement actions before agency ALJs or directly to federal court and on limits to the range of remedies an agency may impose. In the preemption unit, we added a note on the *Glacier Northwest* case, in which the Supreme Court decided that an employer's state law tort suit against a union for destruction of property during a strike is not pre-empted by the National Labor Relations Act.

Chapter 8. Except for some tightening and updating, this chapter is virtually unchanged from the eighth edition.

Chapter 9. We replaced *NLRB v. Sears, Roebuck and Co.* with the more recent and more interesting *U.S. Fish and Wildlife Service v. Sierra Club, Inc.* concerning the deliberative process exception to the Freedom of Information Act. We also added notes on the controversy surrounding disclosure of President Trump's financial records and on more general issues on executive privilege. The remainder of the chapter is unchanged.

No undertaking of this magnitude could possibly be completed, much less succeed, without the dedicated effort of many people. We first thank our former coauthor, Jody Freeman, Archibald Cox Professor of Law at Harvard Law School, for her contributions to the previous three editions of this casebook. At the unavoidable risk of slighting some by inadvertent omission, we would also like to acknowledge with gratitude the assistance of the following who contributed along the way: Susan Banks, Charles Bennett, Larry Boisvert, Briana Cardwell, Melissa Connell, Eric Dannenmaier, Henry Drembus, Rob Evans, Shirin Everett, Deborah Fawcett, Ethan Fitzgerald, Marcia Fleschel, Kristen Fontaine, Lydia French, Mike Fricklas, Maria Gonzalez, Alan Gordee, Howard Haas, Caroline Hayday, Ben Jones, Robert Kanapka, Erica Larence, Marie Martineau, Michelle Melton, Bruce Meyer, Carla Munroe, Ben Narodick, David Nirenberg, Scott Owens, David Palamé, Ken Parsigian, Christopher Parsons, Nina Pickering, Tom Pfeifle, Beth Pollack, James Pollack, Dee Price, John Re, Tal Ron, Adam Rowland, Susan Silberberg, Joshua Simon, Risa Sorkin, Daniel Suraci, Patricia Washienko, Courtney Worcester, and William Zolla II for their diligent research assistance; Holly Escott, Shantelle Evans, Charlotte Gliksman, William Kaleva, Susan Michals, and Lisa Vogel for their superb clerical and administrative assistance; Renée Barnow, Jeffrey Lubbers, and David Pritzker for help and guidance; Professors Robert Anthony, John Bonine, Jenny Breen, Betsy Foote, Gary Lawson, Ron Levin, Marc Poirier, Robert Rabin, and Adam White for advice, criticisms, and good counsel; and Professors Clark Byse and Glen Robinson for their general inspiration.

Ronald A. Cass
Colin S. Diver
Jack M. Beermann
Jennifer L. Mascott

October 2023