
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	18
A.L.A. Schechter Poultry Corp. v. United States	20
Notes and Questions	22
Industrial Union Dept., AFL-CIO v. American Petroleum	
Institute (The <i>Benzene</i> Case)	24
Mistretta v. United States	25
Notes and Questions	27
<i>Whitman v. American Trucking Assns., Inc.</i>	29
Notes and Questions	33
b. Nondelegation Revival?	35
<i>Gundy v. United States</i>	35
Notes and Questions	38
C. Alternative Methods of Legislative Control	39
1. Revision: The Legislative Veto	39
<i>Immigration and Naturalization Service v. Chadha</i>	41
Notes and Questions	53
2. Appropriations: Riders and the Line-Item Veto	56
Robertson v. Seattle Audubon Society	57
Notes and Questions	59
	xi

Clinton v. City of New York	61
Notes and Questions	65
3. Legislative Oversight	65
D. Executive Control of Administrative Agencies	68
1. Government by Presidential Command and Initiative	70
Youngstown Sheet & Tube Co. v. Sawyer	70
Notes and Questions	72
“Presidential Administration”: The Use and Abuse of Presidential Executive Orders and Presidential Directives	73
Tobacco Marketing	73
“Sanctuary City” Funding	75
President Trump’s Immigration Restrictions	76
Prosecutorial Discretion and Deferred Action in Immigration	76
Student Loan Debt Forgiveness	78
Notes and Questions	80
2. Appointment Powers	81
Buckley v. Valeo	82
Notes and Questions	85
<i>Morrison v. Olson</i>	92
Notes and Questions	95
3. Removal Power	99
Myers v. United States	99
Humphrey’s Executor v. United States	100
Notes and Questions	102
<i>Morrison v. Olson</i>	103
Notes and Questions	108
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i>	110
Notes and Questions	116
<i>Seila Law LLC v. Consumer Financial Protection Bureau</i>	119
Notes and Questions	134
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 <i>Overton Park</i> Saga	141
<i>Citizens to Preserve Overton Park v. Volpe</i>	145
Notes and Questions	150
2. The Basis for Judicial Review: Records and Reasons	152
SEC v. Chenery Corp., 318 U.S. 80 (1943) (<i>Chenery I</i>)	153

Contents	xiii
United States v. Morgan (<i>Morgan IV</i>)	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
<i>Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.</i>	160
Notes and Questions	166
<i>Department of Commerce v. New York</i>	170
Notes and Questions	180
2. Arbitrary and Capricious Review of Agency Changes of Policy	181
<i>Federal Communications Commission v. Fox Television Stations, Inc.</i>	182
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	194
<i>Massachusetts v. Environmental Protection Agency</i>	195
Notes and Questions	200
C. Judicial Review of Questions of Law	201
1. The Early Years	203
National Labor Relations Board v. Hearst Publications, Inc.	203
Skidmore v. Swift & Co.	205
Notes and Questions	206
2. The Rise and Fall of <i>Chevron</i>	207
a. The <i>Chevron</i> Decision	208
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i>	208
Notes and Questions	214
National Cable & Telecommunications Assn. v. Brand X Internet Servs.	216
b. <i>Chevron</i> ’s Demise	220
<i>Loper Bright Industries v. Raimondo</i>	221
Notes and Questions	232
3. Administrative Statutory Construction: Beyond <i>Chevron</i>	235
<i>Dole v. United Steelworkers of America et al.</i>	236
Notes and Questions	241
Note on Canons of Statutory Construction	241
<i>MCI Telecommunications Corp. v. American Telephone & Telegraph Co.</i>	243
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon	243

Notes and Questions	245
<i>Utility Air Regulatory Group v. Environmental Protection Agency</i>	246
Notes and Questions	250
<i>Sackett v. EPA</i>	250
<i>American Hospital Association v. Becerra</i>	251
Notes and Questions	252
<i>Garland v. Cargill</i>	253
Notes and Questions	259
<i>Mayfield v. Department of Labor</i>	260
Notes and Questions	263
4. The Major Questions Doctrine	264
<i>West Virginia v. Environmental Protection Agency</i>	265
Notes and Questions	275
<i>NFIB v. OSHA</i>	278
<i>North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC</i>	282
Questions	284
5. Judicial Deference to an Agency's Interpretations of Its Own Rules	285
<i>Kisor v. Wilkie</i>	285
Notes and Questions	297
D. Judicial Review of Questions of Fact or Policy Under the Substantial Evidence Test	298
1. Formal Adjudication	298
<i>In the Matter of Universal Camera Corporation</i>	301
<i>National Labor Relations Board v. Universal Camera Corp.</i>	302
<i>Universal Camera Corp. v. National Labor Relations Board</i>	304
<i>National Labor Relations Board v. Universal Camera Corp.</i>	308
Notes and Questions	310
<i>Biestek v. Berryhill</i>	312
Notes and Questions	316
2. Informal Rulemaking	317
<i>Industrial Union Dept., AFL-CIO v. American Petroleum Institute (The Benzene Case)</i>	318
Notes and Questions	324
E. Judicial Remedies for Unlawful Agency Action	326
 Chapter 3 Availability of Judicial Review	 331
A. Jurisdiction	332
B. Reviewability	335

Contents	xv
1. “Agency Action”	336
<i>Norton v. Southern Utah Wilderness Alliance</i>	337
Notes and Questions	343
Public Citizen Health Research Group v. Chao	345
Notes and Questions	347
2. Statutory Preclusion of Review	347
<i>Johnson v. Robison</i>	349
Notes and Questions	350
<i>Cuozzo Speed Technologies, LLC v. Lee</i>	351
Notes and Questions	357
<i>McNary v. Haitian Refugee Center, Inc.</i>	358
Notes and Questions	365
3. Committed to Agency Discretion by Law	367
a. General Principles	368
<i>Webster v. Doe</i>	368
Notes and Questions	377
<i>Department of Commerce v. New York</i>	379
Notes and Questions	382
b. Prosecutorial Discretion	382
<i>Heckler v. Chaney</i>	384
Notes and Questions	392
<i>Texas v. United States</i>	392
Notes and Questions	397
c. Resource Allocation and Appropriations	399
<i>Lincoln v. Vigil</i>	399
Notes and Questions	402
C. Standing to Secure Judicial Review	403
1. The Legal Right Test	404
2. Standing Under the Administrative Procedure Act	407
<i>Association of Data Processing Service Organizations, Inc. v. Camp</i>	407
Notes and Questions	409
3. Constitutional Standing Requirements: Injury, Causation, Redressability	411
<i>Lujan v. Defenders of Wildlife</i>	414
Notes and Questions	426
<i>Massachusetts v. Environmental Protection Agency</i>	432
Notes and Questions	439
D. The Timing of Judicial Review	443

1. Pre-Enforcement Challenges: Ripeness and Finality Requirements	444
<i>Abbott Laboratories v. Gardner</i>	445
Notes	449
<i>Gardner v. Toilet Goods Assn.</i>	451
Notes and Questions	453
2. Exhaustion of Administrative Remedies Prior to Seeking Judicial Review	461
a. Exhaustion Outside the APA	462
b. Exhaustion Under the APA	467
 PART 2 ADMINISTRATIVE FUNCTIONS	 471
 Chapter 4 Choice of Policymaking Instruments	 473
A. Legal Constraints on Choice of Policymaking Instruments	474
1. Due Process Constraints	474
<i>Londoner v. Denver</i>	475
<i>Bi-Metallic Investment Co. v. State Board of Equalization</i>	476
Notes and Questions	476
2. Statutory Constraints	477
B. Agency Authority and Discretion to Make Policy by Rule	480
<i>United States v. Storer Broadcasting Co.</i>	483
Notes and Questions	485
<i>National Petroleum Refiners Assn. v. Federal Trade Commission</i>	491
Notes and Questions	497
<i>Chamber of Commerce of the United States v. National Labor Relations Board</i>	499
Questions	500
<i>Heckler v. Campbell</i>	502
Notes and Questions	505
C. Agency Discretion to Make Policy by Order After Adjudication	506
<i>SEC v. Chenery Corp.</i>	506
<i>Excelsior Underwear, Inc.</i>	509
Notes and Questions	512
<i>National Labor Relations Board v. Wyman-Gordon Co.</i>	512
Notes and Questions	519
<i>National Labor Relations Board v. Bell Aerospace Co.</i>	522
Notes and Questions	523
D. Agency Discretion to Make Policy by Manual or Informal Guidance	524
<i>Morton v. Ruiz</i>	524

Contents	xvii
Notes and Questions	529
Note on Policymaking via Guidance Documents and the Like	530
Note on Agencies' Obligation to Follow Their Own Procedural Rules	532
Chapter 5 Rulemaking	537
A. Formal and Informal Models of Rulemaking Under the Administrative Procedure Act	537
United States v. Allegheny-Ludlum Steel Corp.	538
United States v. Florida East Coast Ry. Co.	539
B. Rulemaking Procedure Under APA §553 and Related Statutes	540
1. Notice	541
<i>Chocolate Manufacturers Assn. v. Block</i>	542
Notes and Questions	547
Long Island Care at Home, Ltd. v. Coke	547
2. Explanation of the Decision: The Concise General Statement	549
United States v. Nova Scotia Food Prods. Corp.	549
Notes and Questions	551
3. Protecting the Integrity of the Rulemaking "Record": Ex Parte Contacts, Political Influence, and Prejudgment	553
a. Exclusivity of the Rulemaking Record and Ex Parte Contacts	553
<i>Home Box Office v. Federal Communications Commission</i>	556
Notes and Questions	560
b. Political Influence on Administrative Policy, Late Comments, and Ex Parte Contacts	562
<i>Sierra Club v. Costle</i>	565
Notes and Questions	572
District of Columbia Federation of Civic Assns. v. Volpe	573
c. Impartiality of the Rulemaker	575
<i>Association of National Advertisers, Inc. v. Federal Trade Commission</i>	581
Notes and Questions	587
4. Embellishing the APA Model of Informal Rulemaking Through "Hybrid" Procedures	589
a. Statutory Hybrids	589
b. Judicially Fashioned Hybrids	590
<i>Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission</i>	593
<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.</i>	597

Notes and Questions	601
American Radio Relay League, Inc. v. Federal Communications Commission	603
5. Exemptions from APA §553	606
<i>National Family Planning & Reproductive Health Assn., Inc. v. Sullivan</i>	607
Notes and Questions	612
<i>Hector v. United States Department of Agriculture</i>	613
Notes and Questions	617
<i>Texas v. United States</i>	618
Notes and Questions	620
Lincoln v. Vigil	621
Notes and Questions	622
6. Agency Authority to Stay Promulgated Rules	628
<i>Natural Resources Defense Council v. National Highway Traffic Safety Administration</i>	629
Notes and Questions	631
7. Alternative Rulemaking Models	633
a. Negotiated Rulemaking	633
Notes and Questions	635
<i>USA Group Loan Services, Inc. v. Riley</i>	636
Notes and Questions	638
b. Alternatives to Negotiated Rulemaking	639
C. Strengthening the Analytic Basis of Policymaking	642
1. Cost-Benefit Analysis	642
American Textile Manufacturers Institute v. Donovan (The Cotton Dust Case)	647
Notes and Questions	648
<i>Whitman v. American Trucking Associations, Inc.</i>	649
Notes and Questions	654
<i>Entergy Corp. v. Riverkeeper, Inc.</i>	654
Notes and Questions	660
2. Presidential Oversight of Rulemaking	662
Notes and Questions	667
3. Impact Statements: The Case of the National Environmental Policy Act	670
Calvert Cliffs Coordinating Committee v. Atomic Energy Commission	672
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council	673

Contents	xix
Notes and Questions	674
<i>Robertson v. Methow Valley Citizens Council</i>	675
Notes and Questions	677
Chapter 6 Adjudication	681
A. Agency Constitutional Authority to Adjudicate	682
<i>Commodity Futures Trading Commission v. Schor</i>	685
Notes and Questions	692
Stern v. Marshall	692
Notes and Questions	694
<i>Securities and Exchange Commission v. Jarkesy</i>	697
Notes and Questions	706
B. Due Process Hearing Rights	706
1. The Interests Protected by Due Process	707
<i>Goldberg v. Kelly</i>	710
Notes and Questions	718
<i>Board of Regents v. Roth</i>	720
Notes and Questions	725
Arnett v. Kennedy	728
Bishop v. Wood	730
Cleveland Board of Education v. Loudermill	732
Notes and Questions	733
2. The Requirements of Due Process	738
a. The <i>Eldridge</i> Calculus	738
<i>Mathews v. Eldridge</i>	740
Notes and Questions	745
b. The Right to a Neutral Decisionmaker: Protection Against Bias and Self-Interest	748
Tumey v. Ohio	749
Ward v. Village of Monroeville	750
Notes and Questions	750
<i>Gibson v. Berryhill</i>	751
Notes and Questions	755
c. The Right to a Neutral Decisionmaker: Protection Against Prejudgment	756
<i>Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission</i>	756
Notes and Questions	760
Withrow v. Larkin	762

d. Combination of Functions Under the APA	763
C. Statutory Hearing Requirements	764
1. “Triggering” the APA’s Formal Adjudication Requirements	766
<i>Seacoast Anti-Pollution League v. Costle</i>	766
Notes and Questions	769
<i>Dominion Energy Brayton Point, LLC v. Johnson</i>	769
Notes and Questions	770
2. Procedural Issues in Formal Adjudication	771
a. Discovery and Cross-Examination	771
<i>Citizens Awareness Network, Inc. v. United States</i>	771
Notes and Questions	775
b. Official Notice	777
<i>Southern California Edison Co. v. Federal Energy</i>	
<i>Regulatory Commission</i>	777
Notes and Questions	779
c. Statement of Findings	781
<i>Armstrong v. Commodity Futures Trading Commission</i>	782
Notes and Questions	784
d. Intervention	785
<i>Envirocare of Utah, Inc. v. Nuclear Regulatory Commission</i>	785
Notes and Questions	788
e. Restrictions on Ex Parte Communications in Adjudication	789
<i>Portland Audubon Society v. Endangered Species Committee</i>	791
Notes and Questions	796
3. Appointment and Oversight of Administrative Hearing Officers and ALJ Impartiality: Achieving Consistency in a Regime of Mass Administrative Justice	798
<i>Association of Administrative Law Judges v. Heckler</i>	800
Notes and Questions	803
4. Informal Adjudication	808
<i>Pension Benefit Guaranty Corp. v. LTV Corp.</i>	808
Notes and Questions	810
Chapter 7 Enforcement and Liability	813
A. Government Enforcement	813
1. Monitoring and Investigation	815
a. Physical Inspections	816
<i>Marshall v. Barlow’s, Inc.</i>	819

Contents	xxi
Notes and Questions	826
b. Compulsory Production of Information	828
c. Record-Keeping Requirements	831
<i>Ruckelshaus v. Monsanto Co.</i>	833
Notes and Questions	841
2. Prosecution and Selective Enforcement	841
a. Prosecutorial Incentives	841
b. Remedies for Selective Enforcement	843
<i>Moog Industries, Inc. v. Federal Trade Commission</i>	844
<i>Federal Trade Commission v. Universal-Rundle Corp.</i>	846
Notes and Questions	849
c. Agency Enforcement Orders	851
<i>General Electric Co. v. Jackson</i>	852
Notes and Questions	857
B. Private Litigation and Regulatory Enforcement	860
1. Citizen Suits to Compel Public Enforcement	860
<i>Bennett v. Spear</i>	861
Notes and Questions	865
<i>Scott v. City of Hammond</i>	866
2. Implied Private Rights of Action to Enforce Public Laws	867
a. Expansion: Policy-Based Justifications for Implying Private Rights of Action	868
<i>J.I. Case Co. v. Borak</i>	868
Notes and Questions	869
b. Retrenchment: Reading Legislative Intent to Exclude Private Rights of Action	870
<i>Cort v. Ash</i>	871
Notes and Questions	875
<i>Cannon v. University of Chicago</i>	876
<i>Karahalios v. National Federation of Federal Employees, Local 1263</i>	878
Notes and Questions	880
3. Public-Law Preclusion of Existing Private Remedies: Primary Jurisdiction and Pre-emption	881
a. Primary Jurisdiction	882
b. Regulatory Pre-emption	884
<i>Geier v. American Honda Motor Co., Inc.</i>	887
Notes and Questions	894
C. Liability of Public Entities and Officers	899

1. Suits Against Sovereigns: Sovereign Immunity and the Federal Tort Claims Act	900
United States v. S.A. Empresa de Viação Aérea Rio-Grandense (VARIG Airlines)	903
<i>Berkovitz v. United States</i>	904
Notes and Questions	909
United States v. Gaubert	910
Notes and Questions	911
2. Suits Against Individual Government Officers	914
 Chapter 8 Licensing	 917
A. Occupational Licensing	918
1. Due Process, Equal Protection, and the Problem of Self-Interest	918
<i>Gibson v. Berryhill</i>	921
Friedman v. Rogers	921
Notes and Questions	922
2. Anticompetitive Behavior and Antitrust Restraints	923
<i>North Carolina State Board of Dental Examiners v. Federal Trade Commission</i>	924
Notes and Questions	930
3. Other Constraints on Occupational Licensing	930
B. Business Licensing	932
1. Entry Regulation: The Case of Broadcasting	932
a. Comparative Hearing Procedure	933
<i>Ashbacker Radio Corp. v. Federal Communications Commission</i>	933
Notes and Questions	937
b. Licensing Standards	938
c. License Removal	940
d. Licensee Supervision: The Problem of “Jawboning”	941
Writers Guild of America, West, Inc. v. American Broadcasting Cos.	941
Notes and Questions	943
e. “The Regulatory Ratchet”: Expansion of Regulatory Jurisdiction to Ancillary Activities	944
<i>United States v. Southwestern Cable Co.</i>	945
Notes and Questions	948
2. Rate Regulation: The Case of Telephone	952
<i>MCI Telecommunications Corp. v. American Telephone & Telegraph Co.</i>	954
Notes and Questions	958

Contents	xxiii
PART 3 INDIRECT CONTROLS	961
Chapter 9 Public Access	963
A. Public Access to Government Records	963
1. Agency Records Under the Freedom of Information Act	965
<i>Kissinger v. Reporters Committee for Freedom of the Press</i>	965
Notes and Questions	973
2. Exemptions from FOIA's Disclosure Requirement	975
a. Personnel Matters	976
<i>Milner v. Department of the Navy</i>	976
Notes and Questions	980
b. Deliberation	981
<i>United States Fish and Wildlife Service v. Sierra Club, Inc.</i>	981
Notes and Questions	986
c. Law Enforcement	990
<i>Federal Bureau of Investigation v. Abramson</i>	990
Notes and Questions	996
d. Privacy	998
<i>Department of Justice v. Reporters Committee for Freedom of the Press</i>	998
Notes and Questions	1003
B. Public Access to Administrative Deliberations	1006
1. "Meetings of an Agency"	1007
<i>Federal Communications Commission v. ITT World Communications, Inc.</i>	1007
Notes and Questions	1010
2. Exemptions	1010
<i>Common Cause v. Nuclear Regulatory Commission</i>	1011
Notes and Questions	1017
APPENDIX	1021
The Constitution of the United States of America (Selected Provisions)	1021
The Administrative Procedure Act and Related Provisions	1030
Table of Cases	1047
Table of Secondary Authorities	1063
Index	1075