



Preface	xxi
Acknowledgments	xxiii
Part I: Introduction	1
Chapter 1: History, Structure, and Principles	3
A. A Historical Overview of Administrative Law in the United States	4
1. English Origins Through the Founding Era	5
2. The Antebellum Period	10
3. The Civil War, Reconstruction, and the Gilded Age	11
4. The Progressive Era to the Great Depression	16
5. The New Deal Era	20
6. The Administrative Procedure Act	22
7. The Great Society and the Emergence of Social Regulation	25
8. The Modern Era and Deregulation	29
<i>Question Set 1.1</i>	34
B. Overview of the Modern Administrative State	36
1. Organization	36
2. Functions and Powers	40
<i>Environmental Protection Agency</i>	42
<i>National Labor Relations Board</i>	44
<i>Question Set 1.2</i>	45
C. The Administrative State and the Separation of Powers	47
<i>M.J.C. Vile, The Doctrine of the Separation of Powers and Institutional Theory</i>	48
<i>The Federalist Papers: No. 47</i>	52
<i>The Federalist Papers: No. 48</i>	55
<i>The Federalist Papers: No. 51</i>	57
<i>Question Set 1.3</i>	59

Part II: Agency Creation by Congress	63
Chapter 2: Agency Creation and Delegation of Powers by Congress	67
A. Delegations of Legislative Power: The Nondelegation Doctrine	68
1. The Early Cases	69
<i>Question Set 2.1</i>	77
2. The New Deal Cases	78
<i>Question Set 2.2</i>	85
3. The Modern Cases	87
<i>American Trucking Associations, Inc. v. Environmental Protection Agency</i>	90
<i>Whitman v. American Trucking Associations, Inc.</i>	95
<i>Question Set 2.3</i>	100
4. Nondelegation Extensions and Developments	104
a. Delegation to Private Entities	104
b. Substance-Driven Nondelegation	107
c. Recent Developments: The War over Delegation	109
<i>Question Set 2.4</i>	111
B. Delegations of Judicial Power: Article I Courts	112
1. Early Development: Public Rights and Private Rights	113
2. The Move Toward Agency Adjudication	115
3. Agency Adjudication of “Private Disputes”	118
<i>Commodity Futures Trading Commission v. Schor</i>	121
<i>Question Set 2.5</i>	135
Chapter 3: Agency Creation by the President	139
A. Unilateral Agency Creation	140
B. Agency Reorganizations	142
<i>Reorganization Plan No. 3 of 1970</i>	146
C. The President’s Reorganization Authority Today	151
<i>Question Set 3.1</i>	153

Part III: The Administrative Decision-Making Process	155
Chapter 4: Choosing a Decision-Making Process	159
A. Name That Process: Rulemaking or Adjudication?	159
<i>Londoner v. City and County of Denver</i>	160
<i>Bi-Metallic Investment Co. v. State Board of Equalization</i>	162
<i>Question Set 4.1</i>	163
B. Choice of Policymaking Tools	165
1. Policymaking by Rule	169
<i>National Petroleum Refiners Ass'n v. Federal Trade Commission</i>	172
<i>Question Set 4.2</i>	179
2. Policymaking by Order	182
<i>Excelsior Underwear, Inc.</i>	183
<i>National Labor Relations Board v. Wyman-Gordon Co.</i>	185
<i>Question Set 4.3</i>	192
<i>National Labor Relations Board v. Bell Aerospace Co.</i>	194
<i>Question Set 4.4</i>	196
3. Policymaking by Policy Statement	198
<i>Morton v. Ruiz</i>	201
<i>Question Set 4.5</i>	205
Chapter 5: Rulemaking	209
A. Rules Exempt from the APA's Requirements	211
1. Interpretive Rules	212
<i>National Family Planning and Reproductive Health Association, Inc. v. Sullivan</i>	213
<i>Hocfor v. United States Department of Agriculture</i>	222
<i>Question Set 5.1</i>	228
2. Changes to Interpretive Rules	232
<i>Perez v. Mortgage Bankers Association</i>	232
<i>Question Set 5.2</i>	239
3. Rules of Agency Organization, Procedure, or Practice	241
<i>Public Citizen v. Department of State</i>	241
<i>Question Set 5.3</i>	244
4. Good Cause Exemptions	246
<i>Mack Trucks, Inc. v. Environmental Protection Agency</i>	247
<i>Question Set 5.4</i>	253

B. Formal Rulemaking	254
<i>United States v. Florida East Coast Railway Company</i>	257
<i>Question Set 5.5</i>	265
C. Informal (Notice-and-Comment) Rulemaking	266
1. The Notice of Proposed Rulemaking	270
<i>Chocolate Manufacturers Association v. Block</i>	273
<i>Question Set 5.6</i>	280
2. The Rulemaking Record: <i>Ex Parte</i> Contacts	282
<i>Home Box Office, Inc. v. Federal Communications Commission</i>	284
<i>Sierra Club v. Costle</i>	290
<i>Question Set 5.7</i>	304
3. The Final Rule: Concise General Statements	306
<i>Reytblatt v. U.S. Nuclear Regulatory Commission</i>	308
<i>Question Set 5.8</i>	315
D. The President’s Role in Rulemaking	316
<i>Executive Order 12,866</i>	320
<i>Question Set 5.9</i>	327
E. “Judicial Hybrid” Rulemaking	328
<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources</i>	
<i>Defense Council, Inc.</i>	330
<i>Question Set 5.10</i>	337
F. Negotiated Rulemaking	338
<i>USA Loan Group Services, Inc. v. Riley</i>	340
<i>Question Set 5.11</i>	343
 Chapter 6: Adjudication	 345
A. Formal Adjudication	350
1. Required Use of Formal Adjudication	351
<i>Dominion Energy Brayton Point, LLC v. Johnson</i>	353
<i>Question Set 6.1</i>	358
2. The Hearing Officers: Administrative Law Judges	360
<i>Lucia v. Securities Exchange Commission</i>	363
<i>Executive Order 13,843: Excepting Administrative Law</i>	
<i>Judges from the Competitive Service</i>	369
<i>Question Set 6.2</i>	371
3. <i>Ex Parte</i> Contacts	373
<i>Portland Audubon Society v. Endangered Species Committee</i>	375
<i>Question Set 6.3</i>	383

4. Admissibility and Sufficiency of Evidence	384
<i>Steadman v. Securities and Exchange Commission</i>	386
Question Set 6.4	390
B. Informal Adjudication	391
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i>	393
<i>Pension Benefit Guaranty Corp. v. LTV Corp</i>	399
Question Set 6.5	404
Chapter 7: Due Process and Administrative Adjudication	407
A. Notice	408
<i>General Electric Co. v. U.S. Environmental Protection Agency</i>	411
Question Set 7.1	416
B. The Interests Protected by Due Process	417
<i>Goldberg v. Kelly</i>	419
Question Set 7.2	427
C. The Interests Protected: Property Interests	430
<i>Board of Regents of State Colleges v. Roth</i>	430
<i>Perry v. Sindermann</i>	436
Question Set 7.3	439
<i>O'Bannon v. Town Court Nursing Center</i>	441
Question Set 7.4	448
<i>Cleveland Board of Education v. Loudermill</i>	453
Question Set 7.5	457
D. The Interests Protected: Liberty Interests	459
1. The Concept-Based Approach	460
<i>Hill v. Borough of Kutztown</i>	462
<i>Kerry v. Din</i>	472
Question Set 7.6	480
2. The Positive Law Approach	484
<i>Sandin v. Conner</i>	486
<i>Wilkinson v. Austin</i>	491
Question Set 7.7	495
E. The Process Due	497
<i>Mathews v. Eldridge</i>	499
<i>Ingraham v. Wright</i>	511
Question Set 7.8	517

F. The Right to a Neutral Decision-Maker	520
1. The Problem of Pre-Judgment	522
<i>Withrow v. Larkin</i>	522
<i>Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission</i>	526
<i>Question Set 7.9</i>	531
2. The Problem of Self-Interest	533
<i>Gibson v. Berryhill</i>	533
<i>Question Set 7.10</i>	536
Part IV: Control of Administrative Decision-Making	539
Chapter 8: The President and Congress	541
A. The Legislative Veto	542
<i>Immigration and Naturalization Service v. Chadha</i>	544
<i>Question Set 8.1</i>	566
B. The Line-Item Veto	568
<i>Clinton v. City of New York</i>	571
<i>Question Set 8.2</i>	581
C. Appointments	582
<i>Buckley v. Valeo</i>	584
<i>Question Set 8.3</i>	591
<i>National Labor Relations Board v. Noel Canning</i>	594
<i>Question Set 8.4</i>	603
D. Removal	604
<i>Question Set 8.5</i>	615
<i>Morrison v. Olson</i>	618
<i>Question Set 8.6</i>	635
E. Generalized Separation of Powers Principles	637
<i>Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.</i>	638
<i>Question Set 8.7</i>	647
F. The President Without Congress: Inherent Executive Supervisory Authority	648
<i>Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)</i>	649
<i>Question Set 8.8</i>	653

Chapter 9: The Judiciary	655
A. Availability of Judicial Review	656
1. Defining “Agency Action”	659
<i>Norton v. Southern Utah Wilderness Alliance</i>	660
<i>Question Set 9.1</i>	666
2. Express Preclusion of Judicial Review	667
<i>Johnson v. Robison</i>	669
<i>Question Set 9.2</i>	673
3. Implied Preclusion of Judicial Review	675
<i>Block v. Community Nutrition Institute</i>	676
<i>Bowen v. Michigan Academy of Family Physicians</i>	682
<i>Question Set 9.3</i>	687
4. Decisions Committed to Agency Discretion by Law	689
a. Enforcement Discretion	690
<i>Heckler v. Chaney</i>	691
<i>Question Set 9.4</i>	701
b. Statutory vs. Constitutional Challenges to Discretionary Agency Decisions	702
<i>Webster v. Doe</i>	703
<i>Question Set 9.5</i>	713
c. Discretionary Use of Appropriations	714
<i>Lincoln v. Vigil</i>	715
<i>Question Set 9.6</i>	720
5. Standing to Challenge Agency Decision-Making	723
a. Standing from Early America to the Early Twentieth Century	724
<i>Federal Communications Commission v. Sanders</i>	
<i>Brothers Radio Station</i>	729
<i>Question Set 9.7</i>	733
b. Standing: From the New Deal to the Early 1970s	733
<i>Association of Data Processing Service Organizations, Inc. v. Camp</i>	737
<i>Question Set 9.8</i>	740
c. Standing in the Modern Era: The Constitution, Prudence, and Congress	740
<i>Lujan v. Defenders of Wildlife</i>	744
<i>Question Set 9.9</i>	754

6. Constitutional Standing Requirements	756
a. Injuries-in-Fact	756
<i>Federal Election Commission v. Akins</i>	760
<i>Question Set 9.10</i>	768
<i>Spokeo, Inc. v. Robins</i>	773
<i>Question Set 9.11</i>	779
b. Causation	780
<i>Simon v. Eastern Kentucky Welfare Rights</i> <i>Organization [“EKWRO”]</i>	784
<i>Question Set 9.12</i>	790
c. Redressability	792
<i>Friends of the Earth, Inc. v. Laidlaw Environmental</i> <i>Services (TOC), Inc.</i>	795
<i>Question Set 9.13</i>	805
7. Prudential Standing Requirements: The Zone of Interests Test	806
<i>National Credit Union Administration v. First National</i> <i>Bank & Trust Co.</i>	810
<i>Question Set 9.14</i>	819
a. Congressional Power and the Zone of Interests Test	820
<i>Bennett v. Spear</i>	820
<i>Question Set 9.15</i>	827
8. The Timing of Judicial Review	829
a. Ripeness	829
<i>Abbott Laboratories v. Gardner</i>	831
<i>Toilet Goods Association v. Gardner</i>	836
<i>Gardner v. Toilet Goods Association</i>	839
<i>Question Set 9.16</i>	845
<i>National Park Hospitality Association v. Department</i> <i>of Interior</i>	846
<i>Question Set 9.17</i>	852
b. Finality	852
<i>Soundboard Association v. Federal Trade Commission</i>	855
<i>Question Set 9.18</i>	865
c. Exhaustion of Administrative Remedies	867
<i>McCarthy v. Madigan</i>	869
<i>Darby v. Cisneros</i>	877
<i>Question Set 9.19</i>	882

9. Selecting a Remedial Forum: The Doctrine of Primary Jurisdiction	884
<i>Wagner & Brown v. ANR Pipeline Co.</i>	886
Question Set 9.20	892
B. Scope of Judicial Review	892
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i>	894
1. Review of Agency Findings of Fact and Judgments of Policy	898
a. Informal Decision-Making Processes: The “Arbitrary and Capricious” Test	898
<i>Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company</i>	901
Question Set 9.21	911
<i>Department of Commerce v. New York</i>	915
Question Set 9.22	930
<i>Federal Communications Commission v. Fox Television Stations, Inc.</i>	932
Question Set 9.23	941
<i>American Horse Protection Association, Inc. v. Lyng</i>	943
Question Set 9.24	949
b. Formal Decision-Making Processes: The Substantial Evidence Test	951
<i>In the Matter of Universal Camera Corporation and Imre Chairman</i>	953
<i>National Labor Relations Board v. Universal Camera Corp.</i>	956
<i>Universal Camera Corporation v. National Labor Relations Board</i>	960
<i>National Labor Relations Board v. Universal Camera Corp.</i>	965
Question Set 9.25	967
2. Review of Agency Statutory Interpretation	968
Question Set 9.26	972
3. The <i>Chevron</i> Doctrine	973
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i>	976
Question Set 9.27	986
a. <i>Chevron</i> : The “Major Questions” Doctrine	987
<i>Biden v. Nebraska</i>	993
Question Set 9.28	1009
b. <i>Chevron</i> Step “Zero”: Acting with the Force of Law	1010
<i>United States v. Mead Corp.</i>	1012
Question Set 9.29	1026

c.	<i>Chevron</i> Step One: Is the Statute Clear?	1028
	<i>MCI Telecommunications Corp. v. American Telephone and Telegraph Co.</i>	1031
	<i>Food and Drug Administration v. Brown & Williamson Tobacco Corp.</i>	1039
	Question Set 9.30	1046
d.	<i>Chevron</i> Step Two: Is the Agency's Interpretation Reasonable?	1048
	<i>Catskill Mountains Chapter of Trout Unlimited, Inc. v. Environmental Protection Agency</i>	1050
	Question Set 9.31	1057
e.	<i>Chevron</i> Extensions: Flexibility in Agency Interpretations	1058
	<i>National Cable & Telecommunications Association v. Brand X Internet Services</i>	1059
	Question Set 9.32	1068
f.	<i>Chevron</i> Extensions: Agency Interpretations of Their Own Ambiguous Regulations	1069
	<i>Kisor v. Wilkie</i>	1072
	Question Set 9.33	1085
g.	<i>Chevron</i> Extensions: Agency Interpretation of Its Own Jurisdiction	1087
	<i>City of Arlington, Texas v. Federal Communications Commission</i>	1088
	Question Set 9.34	1098
	Constitutional and Statutory Appendix	1099
	Table of Sources	1129
	Table of Cases	1137
	Index	1151