

Contents

Table of Abbreviations	xxix
Preface to Ninth Edition	xxx
Preface to First Edition	xxxiii
Acknowledgments	xxxv

1. Introduction	1
A. This Book's Content and Organization	1
B. What Is Administrative Law?	2
C. Regulation	3
1. Problems Thought to Call for (Administrative) Regulation	4
a. Market Failures, Economically Defined	5
(1) The Need to Correct for "Externalities" or "Transaction Costs"	5
(2) Collective Action Problems	6
(3) The Need to Compensate for Inadequate Information	6
(4) The Need to Control Monopoly Power	7
b. Less Secure Economic Grounds	8
(1) The Need to Control "Windfall" Profits	8
(2) The Need to Eliminate "Excessive" or "Destructive" Competition	9
(3) The Need to Alleviate Scarcity	9
(4) Agency Problems	10
c. Noneconomic Justifications	10
(1) Redistribution	10
(2) Nonmarket or Collective Values	11
(3) Disadvantage and Caste	12
(4) Planning	12
d. Paternalism and Behavioral Economics	12
2. Regulatory Tools	14
3. Regulatory Performance	17
Cass R. Sunstein, Free Markets and Social Justice	19
W. Kip Viscusi, Fatal Tradeoffs	21

	Tammy O. Tengs & John D. Graham, The Opportunity Costs of Haphazard Social Investments in Life-Saving	25
	Stephen Breyer, Breaking the Vicious Circle	26
D.	The Historical Development of Administrative Government and Administrative Law	29
	1. English Antecedents	29
	2. The American Experience to 1875	30
	3. 1875 to 1930: The Rise of Administrative Regulation and the Traditional Model of Administrative Law	31
	4. The New Deal and Beyond: 1932-1945	33
	5. 1945 to 1965: The Administrative Procedure Act and the Maturation of the Traditional Model of Administrative Law	35
	6. 1965 to 1980: The Rights Revolution, Critique of Administrative Process and Administrative Substance, and “Public Interest” Administrative Law	37
	7. 1980 to ?: Presidential Administration and the Cost-Benefit State	40
	8. The Future	42
2.	<i>The Constitutional Position of the Administrative Agency</i>	43
A.	Introductory Note: Separation of Powers and (or) Checks and Balances	43
B.	The Agency’s Power to Legislate	45
	1. The Nondelegation Doctrine – Analytic and Textual Foundations	45
	2. The Nondelegation Doctrine – Early History and Pre-1935 Supreme Court Decisions	46
	3. The Nondelegation Doctrine’s Short-Lived Triumphs	48
	<i>A.L.A. Schechter Poultry Corp. v. United States</i>	50
	Notes and Questions	53
	4. The Nondelegation Doctrine’s Return to Quiescence	53
	<i>Industrial Union Department, AFL-CIO v. American Petroleum Institute</i> (The Benzene Case)	54
	Notes and Questions	61
	Note on the Regulation of Carcinogens	63
	5. The Modern Nondelegation Doctrine	68
	<i>American Trucking Associations, Inc. v. Environmental Protection Agency</i>	68

	<i>Whitman v. American Trucking Associations, Inc.</i>	70
	Notes and Questions	72
	<i>Gundy v. United States</i>	75
	Notes and Questions	82
	Note on Nondelegation and Statutory Interpretation	86
6.	Delegation to Private Parties	87
7.	Tools of Congressional Control	90
	a. The Legislative Veto	90
	<i>Immigration & Naturalization Service v. Chadha</i>	91
	Notes and Questions	96
	b. Alternatives to the Legislative Veto	97
	c. Other Tools	101
C.	The President and the Agencies	106
	1. Hiring	108
	a. Appointment of Officers	109
	<i>Buckley v. Valeo</i>	109
	Notes and Questions	112
	<i>Lucia v. Securities & Exchange Commission</i>	113
	Notes and Questions	114
	b. “Inferior” Officers	115
	<i>Edmond v. United States</i>	117
	Notes and Questions	118
	<i>Free Enterprise Fund v. Public Company</i>	
	<i>Accounting Oversight Board</i>	120
	Notes	121
	c. Constraining Presidential Discretion in Appointments	122
	d. Senate Advice and Consent	124
	Note on the Vacancies Reform Act	126
	e. Recess Appointments	127
	2. Removal	129
	<i>Myers v. United States</i>	131
	<i>Humphrey’s Executor v. United States</i>	132
	Notes and Questions	134
	<i>Free Enterprise Fund v. Public Company</i>	
	<i>Accounting Oversight Board</i>	136
	Notes and Questions	142
	<i>Seila Law LLC v. Consumer Financial Protection</i>	
	<i>Bureau</i>	144
	Notes and Questions	154
	Note: “Independent” and “Executive” Agencies in Practice	156
	3. Directive Authority	157
	a. Constitutional Authority	158
	b. Statutory Authority	159

c.	Practical Considerations	160
	Michael Shear, Obama Extends Hospital Visitation Rights to Same-Sex Partners of Gays	161
	Presidential Memorandum—Hospital Visitation Questions	162
4.	Supervisory Authority—Presidential Control of the Regulatory State	163
	Executive Order 12,866: Regulatory Planning and Review	164
	Note on the History of Regulatory Review	171
	Executive Order 13,563: Improving Regulation and Regulatory Review	172
	Notes and Questions	174
	Note on Cost-Benefit Analysis	185
5.	Presidential Transitions and “Midnight Regulations”	193
	Regulatory Freeze Pending Review, Memorandum from Ronald A. Klain, Assistant to the President and Chief of Staff, to Heads of Executive Departments and Agencies	194
D.	The Agency’s Power to Adjudicate	196
	<i>Crowell v. Benson</i>	196
	Questions	200
1.	The “Private Right/Public Right” Distinction, Balancing, and the Role of Article III Courts	201
	Northern Pipeline Construction Co. v. Marathon Pipe Line Co.	202
	Commodity Futures Trading Commission v. Schor	204
	Thomas v. Union Carbide Agricultural Products Co.	206
	Stern v. Marshall	206
	<i>Oil States Energy Services, LLC v. Greene’s Energy Group, LLC</i>	207
	Notes and Questions	209
2.	The Seventh Amendment	211
	Notes and Questions	213
3.	The “Jurisdictional Fact” and “Constitutional Fact” Doctrines	214
	Concluding Note	214
3.	<i>The Scope of Judicial Review— Questions of Fact, Law, and Policy</i>	215
A.	Review of Questions of Fact	215
1.	<i>Universal Camera</i> : The Foundational Decision	215

	<i>Universal Camera Corp. v. NLRB</i>	215
	Notes and Questions	220
2.	<i>Allentown Mack: Facts, Politics, and Law</i>	221
	<i>Allentown Mack Sales and Service v. National Labor Relations Board</i>	221
	Notes and Questions	227
3.	Judicial Review of Agency Factfinding Generally	227
4.	The Relevance of Administrative Law Judge Findings	229
5.	Burdens of Persuasion and Burdens of Production	231
6.	Alternative Standards of Review	232
	Problems	234
B.	Review of Questions of Law	234
1.	The Basic “Statutory Interpretation” Problem: The Years Before <i>Chevron</i>	234
	<i>NLRB v. Hearst Publications</i>	236
	Notes and Questions	237
2.	“Persuasive” Agency Interpretations	238
	<i>Skidmore v. Swift & Co.</i>	238
	Notes and Questions	240
C.	<i>Chevron</i> : Synthesis or Revolution?	243
1.	The Decision	243
	<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council</i>	243
	Notes and Questions	248
	Note on Economic Incentives	252
2.	When Does <i>Chevron</i> Apply?—Herein of “Step Zero”	254
	<i>United States v. Mead Corp.</i>	254
	<i>Barnhart v. Walton</i>	261
	<i>Chevron’s Scope: Questions and Puzzles</i>	262
	<i>King v. Burwell</i>	264
	Notes and Questions	265
	<i>City of Arlington, Texas v. FCC</i>	266
	Notes and Questions	269
	Note: Can <i>Chevron</i> Be Waived?	270
3.	<i>Chevron</i> , Textualism, Literalism: Problems in Step One	272
	<i>Food and Drug Administration v. Brown & Williamson Tobacco Corp.</i>	272
	<i>Massachusetts v. EPA</i>	281
	Notes and Questions	290
	Notes on <i>Chevron</i> , Text, and the “Traditional Tools of Statutory Construction”	292
	Note on Regulating Risk	295
	Office of Management and Budget, Regulatory Program of the United States Government	296

	Richard Zeckhauser & Kip Viscusi, Risk Within Reason	298
4.	<i>Chevron</i> Step Two	299
	<i>Michigan v. EPA</i>	300
	Notes and Questions	305
5.	<i>Chevron</i> and Judicial Precedent	308
	<i>National Cable and Telecommunications Association v. Brand X Internet Services</i>	308
	Notes and Questions	310
	Note on <i>Chevron's</i> Impact	311
	Note: <i>Chevron</i> Under Attack	314
D.	Agency Interpretations of Agency Regulations	315
	<i>Kisor v. Wilkie</i>	315
	Notes and Questions	324
E.	The “Arbitrary and Capricious” Standard and the Hard Look Doctrine	326
1.	The Origins of “Hard Look” Review	327
	<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i>	328
	Notes and Questions	332
2.	The Relevant Factors	334
	<i>Massachusetts v. EPA</i>	334
	Notes and Questions	335
3.	Reasoned Decisionmaking, Predictions, Alternatives, Judgment	338
	<i>Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co.</i>	338
	Notes and Questions	345
	<i>Baltimore Gas & Electric Co. v. Natural Resources Defense Council</i>	351
	Notes and Questions	355
	<i>Federal Communications Commission v. Fox Television Stations, Inc.</i>	356
	Notes and Questions	365
4.	Agency Policy Change Across Administrations	367
	(1) Pretext	368
	(2) Reliance	370
	<i>Department of Homeland Security v. Regents of the University of California</i>	370
	Notes and Questions	380
5.	Recent Case Law and Commentary	382
	A Blackletter Statement of Federal Administrative Law, 2d ed. (2014)	384
	Concluding Note on Standards of Review	385

4. Clarity, Consistency, “Fairness”	387
A. Must Agencies Make Rules?	387
Kenneth Culp Davis, Administrative Law Treatise, vol. 1	388
Notes and Questions	390
Soglin v. Kauffman	391
Hornsby v. Allen	392
Holmes v. New York City Housing Authority	392
Fook Hong Mak v. Immigration & Naturalization Service	393
Asimakopoulos v. Immigration & Naturalization Service	394
Notes and Questions	394
Do Rules Work?	396
Disclosure and Simplification as Regulatory Tools	397
B. Requiring Consistent Explanation: The <i>Chenery</i> Litigation	399
<i>SEC v. Chenery Corp. (I)</i>	399
<i>Federal Water Service Corp. (The SEC Decision on Remand)</i>	404
<i>SEC v. Chenery Corp. (II)</i>	404
Notes and Questions: <i>Chenery</i> and Consistent Explanations	408
C. Consistency in Applying Regulations: “An Agency Must Follow Its Own Rules”	410
<i>United States v. Caceres</i>	412
Notes and Questions	414
D. Equitable Estoppel	415
<i>Schweiker v. Hansen</i>	415
Notes and Questions	416
<i>Office of Personnel Management v. Richmond</i>	417
Notes and Questions	421
E. Requiring Decisional Consistency to Safeguard Expectations	424
1. Adjudication	425
a. Inconsistent Decisions	425
Notes and Questions	426
b. Retroactivity	428
NLRB v. Guy F. Atkinson Co.	429
NLRB v. E & B Brewing Co.	430
Leedom v. IBEW	430
NLRB v. APW Products	430

	NLRB v. Majestic Weaving Co.	431
	H. & F. Binch Co. Plant of Native Laces & Textile Division of Indian Head, Inc. v. NLRB	431
	Problems	431
	Note on Retroactivity and the Void-for-Vagueness Doctrine	432
c.	Res Judicata and Issue Preclusion	433
	<i>United States v. Mendoza</i>	435
	Notes and Questions	436
	Note on Nonacquiescence	438
2.	Rulemaking	439
	<i>Bowen v. Georgetown University Hospital</i>	439
	Notes and Questions	442
5.	<i>Procedural Requirements in Agency Decisionmaking: Rulemaking and Adjudication</i>	445
A.	Rulemaking and Adjudication: The Constitutional Distinction	446
	<i>Londoner v. Denver</i>	446
	Questions	447
	<i>Bi-Metallic Investment Co. v. State Board of Equalization</i>	447
	Notes and Questions	448
	<i>Southern Railway v. Virginia</i>	450
	Notes and Questions	452
B.	The Procedural Requirements of the APA and the Interplay Between Rulemaking and Adjudication	453
1.	Introduction	453
2.	Adjudication	454
a.	Triggering Formal Adjudication	454
	<i>Dominion Energy Bayton Point, LLC v. Johnson</i>	455
	Notes and Questions	456
b.	Overview of Formal Adjudication	457
	(1) Prehearing	458
	(2) The Hearing	458
	(3) Post-Hearing	460
c.	Informal Adjudication	461
d.	Generally Applicable Provisions	462
3.	Rulemaking	463
a.	Informal (Notice-and-Comment) Rulemaking	463
b.	Formal (On-the-Record) Rulemaking	464

4.	The Scope of Agency Rulemaking Authority and the Choice Between Rulemaking and Adjudication as a Means for Developing Agency Policy	465
a.	Agency Rulemaking Authority	466
	<i>National Petroleum Refiners Association v. FTC</i>	466
	Notes and Questions	468
b.	Agency Choice Between Rulemaking and Adjudication	469
c.	Judicial Control of Agency Choice of Procedures	471
d.	The APA and Judicial Review of Agency Choice Between Rulemaking and Adjudication	472
	<i>NLRB v. Bell Aerospace Co.</i>	474
	Notes and Questions	475
e.	The Impact of Rulemaking on Adjudicatory Hearing Rights	476
	<i>Heckler v. Campbell</i>	476
	Notes and Questions	478
	Problem	479
5.	Formal Rulemaking	480
	<i>United States v. Florida East Coast Railway</i>	480
	Notes and Questions	483
6.	Notice-and-Comment Rulemaking Procedures	485
a.	Implications of the Shift to Rulemaking	485
b.	The Contemporary Rulemaking Process	486
	(1) Preproposal	486
	(2) The Proposed Rule and the Commenting Process	487
	<i>United States v. Nova Scotia Food Products Corp.</i>	488
	Notes and Questions	491
	Note on Statutory Requirements for Hybrid Procedures in Rulemaking	492
	<i>Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council</i>	495
	Notes and Questions	497
	<i>Perez v. Mortgage Bankers Association</i>	499
	Notes and Questions	502
	(3) The Final Rule	504
	<i>Long Island Care at Home, Ltd. v. Coke</i>	505
	Notes and Questions	506
	Note on Analytic Requirements in Rulemaking	508
	(4) After Publication of the Final Rule	509
	Note on “The Docket” and “The Record” in Informal Rulemaking	509
7.	Exceptions to Notice-and-Comment Requirements	511
a.	“General Statements of Policy”	513
	<i>United States v. Texas</i>	513

	<i>Community Nutrition Institute v. Young</i>	516
	Notes and Questions	518
b.	“Interpretative Rules”	521
	<i>American Mining Congress v. U.S. Department of Labor</i>	521
	Notes and Questions	522
c.	An Agency’s “Interpretation” of Its Own Regulations	523
	<i>Jerri’s Ceramic Arts v. Consumer Product Safety Commission</i>	524
	<i>Hector v. U.S. Department of Agriculture</i>	524
	Notes and Questions	525
	Note: Policing the Exceptions to Notice and Comment	526
d.	Reining in Guidance	527
	Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices (Bulletin No. 07-02)	528
	Notes and Questions	530
e.	Rules of “Procedure”	532
	<i>Air Transport Association of America v. Department of Transportation</i>	532
	<i>Chamber of Commerce v. Department of Labor</i>	534
	<i>Public Citizen v. Department of State</i>	534
	Notes and Questions	535
f.	The Good Cause Exception	536
	Notes and Questions	538
	Problems	538
8.	Publication Requirements	539
9.	Consequences of the Transformation of Notice-and-Comment Rulemaking	541
	a. “Ossification”	541
	b. Direct and Interim Final Rules	543
	<i>Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania</i>	544
	Notes and Questions	546
	c. Negotiated Rulemaking (“Reg Neg”)	546
	(1) The Process	546
	(2) Benefits	547
	(3) Drawbacks	548
	(4) Judicial Review	549
	<i>USA Group Loan Services v. U.S. Department of Education</i>	550
C.	The Right to Decision on the Record	551
	1. The Need for Facts to Be Found in the Record and the Official Notice Problem	551

	<i>Union Electric Co. v. FERC</i>	552
	Notes and Questions	553
2.	The Problem of Off-the-Record Communications	554
a.	“On-the-Record” Proceedings	554
	<i>Professional Air Traffic Controllers Organization</i>	
	<i>v. Federal Labor Relations Authority</i>	556
	Notes and Questions	559
b.	Informal Agency Action	560
	Problem	564
c.	Off-the-Record Communications with Other	
	Government Officials	564
	<i>Sierra Club v. Costle</i>	565
	Notes and Questions	568
d.	Off-the-Record White House Communications in	
	Formal Adjudications	569
D.	Due Process Hearing Rights and the “New Property”	570
1.	The Traditional Learning	570
a.	The Right-Privilege Distinction	571
b.	Summary Administrative Action: The Timing of and	
	Forum for a Hearing	573
	<i>North American Cold Storage Co. v. Chicago</i>	573
	Notes and Questions	574
	Problem	576
c.	Pre- <i>Goldberg</i> Due Process Decisions by the	
	Supreme Court	576
2.	The New Due Process: Protected Interests	576
a.	Entitlements and the “New Property”	577
	<i>Goldberg v. Kelly</i>	577
	Notes and Questions	582
	<i>Board of Regents of State College v. Roth</i>	583
	<i>Perry v. Sindermann</i>	586
	Notes and Questions	588
	Note: §1983 Due Process Litigation	589
b.	Assessing the Entitlements Doctrine	590
	Ridgely v. FEMA	590
(1)	“The Bitter with the Sweet”	591
	<i>Arnett v. Kennedy</i>	591
	Questions	593
(2)	State Control over Constitutional Limits	594
(3)	The Irrelevance of the Weight of Protected Interests	596
c.	“Liberty”	596
	<i>Meachum v. Fano</i>	598
	<i>Sandin v. Conner</i>	599
	Notes and Questions	600

d.	Alternatives	601
	Problem	602
3.	The Process Due	603
a.	Introduction	603
	Note on the Goals of Due Process	605
b.	The <i>Mathews v. Eldridge</i> Balancing Test	606
	<i>Mathews v. Eldridge</i>	606
	<i>Goss v. Lopez</i>	609
	<i>Winegar v. Des Moines Independent Community</i>	
	School District	609
	<i>University of Missouri v. Horowitz</i>	609
	<i>Schweiker v. McClure</i>	610
	<i>Gray Panthers v. Schweiker</i>	610
	<i>Cleveland Board of Education v. Loudermill</i>	611
	<i>Gilbert v. Homar</i>	611
	Notes and Questions	612
	<i>Walters v. National Association of Radiation</i>	
	Survivors	614
	Notes and Questions	617
c.	Postdeprivation Remedies as a Substitute for	
	Predeprivation Hearings	619
	<i>Ingraham v. Wright</i>	620
	<i>Memphis Light, Gas, & Water Division v. Craft</i>	621
	<i>Lujan v. G & G Fire Sprinklers, Inc.</i>	622
	<i>Club Misty v. Laski</i>	622
	Notes and Questions	623
d.	When Has a Protected Interest Been “Deprived”?	624
e.	The Regulatory Context	625
	<i>Brock v. Roadway Express, Inc.</i>	625
	Notes and Questions	626
	Problems	629
E.	Public Disclosure of Agency Information and Decisionmaking	631
1.	Disclosure upon Request — Freedom of Information Act Basics	631
a.	FOIA Requests	631
b.	The Exemptions from Disclosure	633
	(1) National Security	634
	(2) Internal Personnel Rules and Practices	634
	(3) Documents Governed by Statutes that Specifically	
	Direct Nondisclosure	635
	(4) Confidential Business Information	635
	(5) Privileged Agency Materials	636
	(6) Personal Privacy	637
	(7) Law Enforcement Records	638
	(8) Financial Institutions	640

(9) Geological Exploration Problem	641
c. FOIA Procedures and Policies	641
d. Reverse-FOIA Litigation	643
2. Transparency, Openness, and Disclosure as a Regulatory Tool	644
a. Statutory Requirements of Affirmative Disclosure	644
(1) Agency “Reading Rooms”	644
(2) Frequently Requested Records	645
(3) Federal Records Act	645
(4) E-Government Act	646
b. Open Government	646
Transparency and Open Government, Memorandum from the President for the Heads of Executive Departments and Agencies	647
c. The Information Quality Act	650
d. The Paperwork Reduction Act	651
e. Information as a Regulatory Tool	653
Disclosure and Simplification as Regulatory Tools	654
3. The Government in the Sunshine Act	658

6. Agency Decisionmaking Structure **661**

A. The Separations of Functions Within the Agency	663
1. Separation of Functions in Adjudication	663
<i>Wong Yang Sung v. McGrath</i>	663
Note: The Coverage of §554(d) and the Aftermath of <i>Wong Yang Sung</i>	667
Note: Separation of Functions Under the APA Problem	667
2. Separation of Functions in Rulemaking	669
<i>Hercules Inc. v. EPA</i>	669
Notes and Questions	672
3. The Independence of Administrative Law Judges	673
<i>Nash v. Bowen</i>	674
Notes and Questions	676
4. Appointment of Administrative Law Judges	679
Note on Non-ALJ “Administrative Judges”	680
B. Combination of Functions and Bias at the Agency Head Level	681
1. Combination of Functions in Adjudication	681
<i>Withrow v. Larkin</i>	682

	Note: Empirical Testing of Agency Bias	684
2.	Impermissible Prejudgment in Particular Circumstances	684
	FTC v. Cement Institute	685
	American Cyanamid Co. v. FTC	685
	Cinderella Career & Finishing Schools v. FTC	686
	Nuclear Information and Resource Service	
	v. Nuclear Regulatory Commission	687
	Notes and Questions	687
	In re Motion to Recuse Chair Lina M. Khan	
	from Involvement in Certain Antitrust Matters	
	Involving Amazon.com, Inc.	688
	Notes and Questions	689
3.	Policy “Bias” in Rulemaking	690
	<i>Association of National Advertisers v. FTC</i>	690
	Notes and Questions	693
	Problems	695
4.	Other Forms of Bias	695
	<i>Gibson v. Berryhill</i>	695
	Notes and Questions	696
	Problem	698
C.	Who Decides?	698
	<i>Morgan v. United States (Morgan I)</i>	699
	Notes and Questions	701
D.	Probing the Mental Processes of the Decisionmaker	702
	<i>National Nutritional Foods Association v. FDA</i>	704
	Notes and Questions	705

7. *The Availability and Timing of Judicial Review* 707

A.	Statutory Provisions for Judicial Review of Agency Action	707
1.	Special Statutory Review	708
2.	General Statutory Review	708
	a. Defense to Enforcement or Prosecution	709
3.	Venue	710
4.	Forum	711
B.	Damage Actions Against the Government and Government Officers	713
1.	Damages Actions Against the Government	714
	<i>Berkovitz v. United States</i>	715
	<i>United States v. Gaubert</i>	716
2.	Tort Actions Against Government Officers	716
3.	“Public Tort” Actions Against Government Officers	718
	a. §1983 Actions	718

b.	<i>Bivens</i> Actions	720
c.	Official Immunity	722
	Notes	723
C.	Reviewability	724
1.	The Presumption of Reviewability	724
2.	Two Exceptions, in Brief	726
3.	Preclusion by Statute	726
a.	Implicit Preclusion	726
	<i>Block v. Community Nutrition Institute</i>	727
	<i>Bowen v. Michigan Academy of Family Physicians</i>	729
	Notes and Questions	732
b.	Explicit Preclusion	733
	<i>Johnson v. Robison</i>	734
4.	“Committed to Agency Discretion”	737
a.	Early Lessons	737
b.	Modern Learning: “No Law to Apply”	738
	<i>Heckler v. Chaney</i>	739
	<i>Norton v. Southern Utah Wilderness Alliance</i>	743
	<i>Webster v. Doe</i>	747
	Notes and Questions	749
c.	Judicial Review of Agency Inaction	751
	<i>Massachusetts v. EPA</i>	753
	Notes and Questions	753
5.	The Constitutionality of Preclusion of Review	755
6.	Reviewability at War	758
	<i>Hamdi v. Rumsfeld</i>	758
D.	Standing	759
1.	Introduction	759
2.	The <i>Data Processing</i> Revolution and the Birth of “Injury in Fact” and “Zone of Interests”	762
	<i>Association of Data Processing Service Organizations v. Camp</i>	762
	Notes and Questions	764
3.	Contemporary Standing Doctrine in Brief	765
4.	“Arguably Within the Zone”	766
	<i>Clarke v. Securities Industry Association</i>	766
	<i>Air Courier Conference v. American Postal Workers Union</i>	768
	<i>National Credit Union Administration v. First National Bank & Trust Co.</i>	768
	Notes and Questions	773
5.	What’s an Injury, in Fact?	776
	<i>Lujan v. Defenders of Wildlife</i>	777
	<i>Massachusetts v. EPA</i>	785

	Allen v. Wright	788
	Notes and Questions	788
6.	Further Conundrums	794
	a. The Role of Congress	794
	b. Increased Risk as an Injury in Fact	795
	c. Standing to Protect Animals	797
7.	Nexus, Causation, Redressability	798
	<i>Simon v. Eastern Kentucky Welfare Rights</i> <i>Organization</i>	798
	Duke Power Co. v. Carolina Environmental Study Group	800
	Allen v. Wright	801
	<i>Massachusetts v. EPA</i>	802
	<i>Clapper v. Amnesty International USA</i>	804
	Notes and Questions	807
8.	Information	810
	<i>Federal Election Commission v. Akins</i>	811
	Notes and Questions	816
	Note on Congressional Standing	818
	Problems	820
E.	The Timing of Review: Ripeness, Finality, and Exhaustion	821
	1. Ripeness	822
	a. Ripeness Basics	822
	<i>Abbott Laboratories v. Gardner</i>	822
	Notes and Questions	827
	b. The Relationship Between Preenforcement and Postenforcement Judicial Review	828
	<i>NLRB Union v. FLRA</i>	829
	Notes and Questions	830
	c. Statutory Preclusion of Preenforcement Review	831
	d. Review of Interpretive Rules and Other Informal Statements	832
	<i>National Automatic Laundry & Cleaning Council</i> <i>v. Shultz</i>	832
	Notes and Questions	833
	Reno v. Catholic Social Services	834
	Notes and Questions	835
	Problems	836
	2. Finality	837
	Note: Special Issues of Reviewability of Actions Involving the President	840
	Problem	841
	3. Exhaustion	841
	a. The Classical Exhaustion Requirement	842

	<i>Myers v. Bethlehem Shipbuilding Corp.</i>	842
	Notes and Questions	843
b.	Interlocutory Review	845
	<i>FTC v. Standard Oil Co. of California</i>	845
	Notes and Questions	846
c.	Waiver of Unpresented or Unexhausted Claims	849
	<i>McKart v. United States</i>	850
	<i>Woodford v. Ngo</i>	852
	Notes and Questions	857
d.	Waiver in the Rulemaking Setting	859
	Problems	860
4.	Judicial Stay of Administrative Action Pending Review or Grants of Interim Relief	861
F.	Primary Jurisdiction	862
	<i>United States v. Western Pacific R.R.</i>	863
	Notes	865
	<i>Nader v. Allegheny Airlines</i>	866
	Notes and Questions	869
Appendix A:	<i>Selected Provisions of the Constitution of the United States</i>	873
Appendix B:	<i>The Administrative Procedure Act</i>	877
Appendix C:	<i>Selected Provisions of the Unfunded Mandates Reform Act (2 U.S.C. §§1501-1571)</i>	905
Appendix D:	<i>Negotiated Rulemaking Act (5 U.S.C. §§561-570)</i>	913
Appendix E:	<i>Congressional Review Act (5 U.S.C. §§801-808)</i>	919
Appendix F:	<i>Selected Provisions of the Clean Air Act (42 U.S.C. §7607)</i>	925
Appendix G:	<i>Rulemaking Provision from the Magnuson-Moss Act (15 U.S.C. §57a)</i>	929
Appendix H:	<i>Selected Provisions of the E-Government Act of 2002</i>	933
Table of Cases		937
Index		949