

---

# TABLE OF CONTENTS

PREFACE TO THE THIRD EDITION .....	V
TABLE OF CASES.....	XXIX
TABLE OF ACRONYMS .....	LV
<b>Chapter 1. The Administrative State .....</b>	<b>1</b>
Unit 1.1: Introduction to Administrative Law .....	2
A. Basic Doctrine .....	2
1. Administrative Agencies and Administrative Law .....	2
2. The Rise of the Administrative State.....	5
3. The Legitimacy of the Administrative State .....	6
4. Why Agencies?.....	8
B. Principal Case .....	9
<i>National Broadcasting Co. v. United States</i> .....	9
Questions .....	17
C. Related Matters.....	17
1. Economic Justifications for Regulation .....	18
2. Non-Economic Justifications for Regulation .....	22
3. Fundamental Questions.....	24
D. Problem.....	26
Unit 1.2: Agencies and Modes of Agency Action .....	28
A. The Environmental Protection Agency.....	30
1. History and Purpose.....	30
2. Composition and Structure.....	31
3. Statutes and Programs .....	32
4. Administrative Functions .....	33
B. The National Labor Relations Board.....	33
1. History and Purpose.....	34
2. Composition and Structure.....	35
3. Statutes and Programs .....	37
4. Administrative Functions .....	37
C. The Social Security Administration.....	39
1. History and Purpose.....	39
2. Composition and Structure.....	41
3. Statutes and Programs .....	42
4. Administrative Functions .....	43
D. The Internal Revenue Service .....	45
1. History and Purpose.....	45
2. Composition and Structure.....	46
3. Statutes and Programs .....	46
4. Administrative Functions .....	47
E. The Federal Communications Commission.....	48
1. History and Purpose.....	49
2. Composition and Structure.....	50
3. Regulatory Programs .....	51
4. Administrative Functions .....	52
F. Problem.....	53

Unit 1.3: The Administrative Procedure Act .....	53
A. Basic Doctrine .....	54
1. Key Concepts .....	55
2. Rulemaking.....	56
3. Adjudication.....	58
4. Enforcement Functions.....	61
5. Judicial Review.....	61
B. Principal Cases.....	66
<i>Richardson v. Perales</i> .....	66
Questions .....	69
<i>Robinette v. Commissioner of the IRS</i> .....	69
Questions .....	73
C. Related Matters.....	74
1. The APA and Other Laws.....	74
2. Subsequent Developments.....	75
D. Problem.....	76
Unit 1.4: Agencies and the Separation of Powers.....	78
A. Basic Doctrine .....	79
1. Overview .....	79
2. Administrative Agencies and the Separation of Powers .....	81
3. Control over Agencies .....	84
B. Principal Cases.....	86
<i>FCC v. Fox Television Stations, Inc.</i> .....	86
Questions .....	93
<i>Michigan v. EPA</i> .....	93
Questions .....	96
C. Related Matters.....	96
1. Legislative Power .....	96
2. Judicial Power .....	99
3. Executive Power .....	100
4. Reinvigoration of Separation of Powers Principles? .....	104
D. Problem.....	106
Unit 1.5: Separation of Powers and Administrative Law .....	107
A. Basic Doctrine .....	107
1. Executive Functions.....	107
2. Quasi-Legislative Functions.....	110
3. Quasi-Judicial Functions.....	116
B. Principal Cases.....	122
<i>Whitman v. American Trucking Associations</i> .....	122
Questions .....	126
<i>Kuretski v. Commissioner of Internal Revenue Service</i> .....	126
Questions .....	134
C. Related Matters.....	134
1. Variations on Bicameralism and Presentment .....	135
2. The Future of the Nondelegation Doctrine.....	137
3. The Public Rights Doctrine and the Seventh Amendment .....	139
4. Waiver of Separation of Powers Claims.....	141
5. Legislative and Judicial Agencies .....	142

D. Problem .....	145
Unit 1.6: Presidential Control of Agencies .....	146
A. Basic Doctrine .....	146
1. The Unitary Executive.....	147
2. Appointments .....	149
3. Direct Oversight .....	152
4. Removal.....	157
B. Principal Cases.....	159
<i>Freytag v. C.I.R.</i> .....	159
Questions .....	162
<i>Free Enterprise Fund v. Public Company Accounting Oversight Board</i> .....	162
Questions .....	169
<i>New York v. Reilly</i> .....	170
Reducing Regulation and Controlling Regulatory Costs.....	172
Questions .....	174
C. Related Matters.....	174
1. Filling Vacancies .....	174
2. Deregulation Under the Trump Administration.....	179
3. The Independence of ALJs.....	180
4. The Future of Independent Agencies.....	183
D. Problem.....	187
<b>Chapter 2. Judicial Review.....</b>	<b>189</b>
Unit 2.1: Introduction to Judicial Review .....	190
A. Basic Doctrine .....	190
1. How Much Deference?.....	190
2. § 706 .....	191
3. The Record for Judicial Review .....	195
4. The Reasons Requirement .....	198
B. Principal Cases.....	200
<i>Ethyl Corp. v. EPA</i> .....	200
Questions .....	205
<i>Allen v. Barnhart</i> .....	205
Questions .....	209
C. Related Matters.....	209
1. Constitutional Review Under § 706(2)(B).....	210
2. Procedural Review Under § 706(2)(D) .....	211
3. De Novo Review Under § 706(2)(F) .....	212
4. The Equal Access to Justice Act and Fee-Shifting.....	213
5. The Freedom of Information Act .....	217
D. Problem.....	220
Unit 2.2: Substantial Evidence Review .....	221
A. Basic Doctrine .....	222
1. Applicable Standards .....	222
2. Application of the Substantial Evidence Standard.....	223
3. The ALJ and the Agency.....	226
B. Principal Cases.....	228
<i>Biestek v. Berryhill</i> .....	228

Questions .....	235
<i>Center Construction Co. v. NLRB</i> .....	235
Questions .....	245
C. Related Matters.....	246
1. The Substantial Evidence Standard in Organic Statutes ...	246
2. Other Standards for Review of Agency Factual Determinations.....	247
3. Standard of Review and Burden of Proof .....	248
D. Problem.....	249
Unit 2.3: Review of Statutory Interpretation Under <i>Chevron</i> .....	251
A. Basic Doctrine .....	251
1. Is Judicial Deference to Agency Resolutions of Legal Questions Appropriate? .....	252
2. The <i>Chevron</i> Two-Step Process .....	255
3. Applying <i>Chevron</i> .....	257
4. Deference to Agency Interpretations of Their Own Regulations .....	260
B. Principal Cases.....	264
<i>Mayo Foundation for Medical Education and Research v.</i> <i>United States</i> .....	264
Questions .....	268
<i>Chamber of Commerce of the United States v. National Labor</i> <i>Relations Board</i> .....	268
Questions .....	275
<i>Good Fortune Shipping SA v. Commissioner of Internal</i> <i>Revenue Service</i> .....	275
Questions .....	282
<i>Amazon.com v. Commissioner of Internal Revenue</i> .....	282
Questions .....	288
C. Related Matters.....	288
1. Complications in Applying <i>Chevron</i> 's Two Steps.....	288
2. The Textualist-Intentionalist Debate .....	290
D. Problem.....	292
Unit 2.4: Review of Statutory Interpretation Under Alternatives to <i>Chevron</i> .....	294
A. Basic Doctrine .....	295
1. The Emergence of <i>Chevron</i> .....	295
2. The Scope of <i>Chevron</i> .....	297
3. Non- <i>Chevron</i> Issues .....	300
B. Principal Cases.....	301
<i>Hagens v. Commissioner of Social Security</i> .....	301
Questions .....	308
<i>City of Arlington, Texas v. Federal Communications</i> <i>Commission</i> .....	308
Questions .....	315
C. Related Matters.....	315
1. SSA Rulings and Step Zero.....	315
2. The Application of <i>Skidmore</i> .....	316
3. Other Non- <i>Chevron</i> Issues .....	318

4.	The Future of <i>Chevron</i> .....	325
D.	Problem .....	328
Unit 2.5:	Arbitrary and Capricious Review .....	330
A.	Basic Doctrine .....	330
1.	General Background .....	330
2.	Reasoned Decisionmaking .....	331
3.	<i>State Farm</i> Review .....	334
B.	Principal Cases .....	337
	<i>Bluewater Network v. EPA</i> .....	337
	Questions .....	343
	<i>New England Health Care Employees Union v. NLRB</i> .....	344
	Questions .....	350
C.	Related Matters .....	350
1.	Arbitrary and Capricious Review and the Administrative Record .....	350
2.	Arbitrary and Capricious Review and Questions of Fact ...	350
3.	The Relationship Between <i>Chevron</i> and Arbitrary and Capricious Review .....	352
4.	Judicial Review of Agency Policy Reversals Under the Arbitrary and Capricious Test .....	355
5.	Indeterminate Standards .....	357
D.	Problem .....	358
<b>Chapter 3.</b>	<b>Legislative Rules and Regulations .....</b>	<b>361</b>
Unit 3.1:	Rulemaking Authority .....	362
A.	Basic Doctrine .....	362
1.	Rulemaking and Adjudication .....	362
2.	Organic Statutes .....	364
3.	The APA .....	368
4.	Due Process .....	370
B.	Principal Cases .....	371
	<i>Hercules Inc. v. EPA</i> .....	371
	Questions .....	373
	<i>National Petrochemical &amp; Refiners Ass'n v. EPA</i> .....	374
	Questions .....	382
C.	Related Matters .....	383
1.	Implied Rulemaking Authority .....	383
2.	Retroactive Agency Action .....	385
3.	Individualized Relief from Agency Rules .....	388
4.	Congressional Review Act .....	390
D.	Problem .....	392
Unit 3.2:	Initiation of Rulemaking .....	393
A.	Basic Doctrine .....	393
1.	The Agency Agenda .....	393
2.	Regulatory Agendas and Impact Analysis .....	395
3.	Rulemaking Petitions .....	396
B.	Principal Case .....	400
	<i>Massachusetts v. EPA</i> .....	400
	Questions .....	408

C.	Related Matters.....	409
1.	Reviewability and Finality .....	409
2.	Remedies.....	412
3.	Statutory Responses to Agency Inaction .....	413
4.	Rulemaking vs. Adjudication .....	414
D.	Problem.....	415
Unit 3.3:	Types of Rulemaking Procedures.....	417
A.	Basic Doctrine .....	417
1.	Overview of § 553 .....	417
2.	Exceptions.....	419
3.	Notice and Comment vs. Formal Rulemaking .....	420
4.	Additional Non-APA Procedures.....	423
B.	Principal Cases.....	425
<i>Buckeye Power Co. v. EPA</i> .....		425
Questions .....		428
<i>Mack Trucks, Inc. v. EPA</i> .....		429
Questions .....		435
C.	Related Matters.....	435
1.	Good Cause Exception.....	435
2.	Postponement of Regulations .....	437
3.	Rulemaking Procedures and the Scope of Review .....	438
4.	Due Process and Rulemaking Procedures .....	440
D.	Problem.....	440
Unit 3.4:	Elements of Notice and Comment.....	443
A.	Basic Doctrine .....	443
1.	Section 553 and Paper Hearing Requirements .....	443
2.	New Notice and Opportunity for Comment.....	448
3.	<i>Ex Parte</i> Communications .....	450
B.	Principal Cases.....	452
<i>Solite Corp. v. EPA</i> .....		452
<i>Ober v. EPA</i> .....		454
Questions .....		457
<i>Sierra Club v. Costle</i> .....		457
Questions .....		466
<i>Northeast Maryland Waste Disposal Authority v. EPA</i> .....		466
Questions .....		469
C.	Related Matters.....	470
1.	Remedies for Violations of Notice and Comment Procedures .....	470
2.	Other Limits on <i>Ex Parte</i> Communications .....	472
3.	Hybrid Notice-and-Comment Procedures.....	473
D.	Problem.....	473
Unit 3.5:	Hybrid Rulemaking.....	475
A.	Basic Doctrine .....	475
1.	The Sources of Hybrid Rulemaking Requirements.....	475
2.	Forms of Hybrid Rulemaking Procedures .....	477
3.	The Relationship Between the APA and Hybrid Procedures in Organic Statutes .....	479

B.	Principal Cases.....	480
	<i>Small Refiner Lead Phase-Down Task Force v. EPA</i> .....	480
	<i>Union Oil Co. of California v. EPA</i> .....	486
	Questions.....	491
C.	Related Matters.....	491
	1. The Relationship Between Hybrid Procedures and Substantive Review.....	491
	2. The Impact of Hybrid Procedures on Agency Choice of Procedures.....	493
D.	Problem.....	494
Unit 3.6:	Regulatory Impact Analysis.....	496
A.	Basic Doctrine.....	496
	1. The Environmental Origins of Regulatory Impact Analysis.....	496
	2. Regulatory Impact Analysis to Promote Economic Efficiency and Reduce Regulatory Burdens.....	498
	3. Executive Orders Promoting Other Social Values.....	503
	4. The Characteristics of Regulatory Impact Analysis.....	504
B.	Principal Cases.....	508
	<i>Allied Local and Regional Manufacturers Caucus v. EPA</i> .....	508
	Questions.....	511
	<i>American Trucking Associations, Inc. v. EPA</i> .....	512
	Questions.....	516
C.	Related Matters.....	517
	1. Executive Branch Supervision of Regulatory Impact Analysis.....	517
	2. The Relationship Between Organic Statutes and Regulatory Impact Analysis.....	520
	3. Analyzing the Impact of Regulatory Impact Analysis.....	521
D.	Problem.....	521
<b>Chapter 4.</b>	<b>Policymaking by Adjudication.....</b>	<b>523</b>
Unit 4.1:	Constraints on Using Adjudication to Make Policy.....	524
A.	Basic Doctrine.....	524
	1. NLRB Adjudication.....	524
	2. Organic Statutes.....	528
	3. The APA.....	530
	4. Fairness, Retroactivity, and Due Process.....	532
B.	Principal Cases.....	534
	<i>NLRB v. Wyman-Gordon Co.</i> .....	534
	Questions.....	538
	<i>NLRB v. Bell Aerospace Co. Division of Textron, Inc.</i> .....	539
	Questions.....	542
	<i>Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB</i> .....	542
	Questions.....	547
	<i>United Food and Commercial Workers International Union,         AFL-CIO, Local No. 150-A v. NLRB</i> .....	547
	Questions.....	550

C.	Related Matters.....	551
1.	More on APA Constraints on Adjudication .....	551
2.	More on Retroactivity and the Choice of Adjudication .....	552
3.	More on Consistency .....	555
D.	Problem.....	556
Unit 4.2:	Agency Adjudication as Precedent.....	557
A.	Basic Doctrine .....	558
1.	Reported Decisions.....	558
2.	The Authority to Treat Agency Decisions as Precedential .....	559
3.	Distinguishing or Overruling Agency Precedents.....	561
4.	Following Precedents .....	564
B.	Principal Cases.....	566
	<i>International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB</i> .....	566
	Questions .....	569
	<i>LeMoyne-Owen College v. NLRB</i> .....	570
	Questions .....	576
C.	Related Matters.....	577
1.	Deference to Agency Adjudicatory Precedents.....	577
2.	Reversals of Precedent and Retroactivity.....	579
D.	Problem.....	582
Unit 4.3:	APA and Non-APA Adjudication Procedures .....	584
A.	Basic Doctrine .....	584
1.	What Procedures Apply to APA Adjudications?.....	584
2.	Triggering Formal APA Adjudication .....	586
3.	What Procedures Apply to Non-APA Adjudications?.....	589
B.	Principal Cases.....	592
	<i>International Brotherhood of Teamsters, Local 722, AFL-CIO</i> .....	592
	Questions .....	597
	<i>Drukker Communications, Inc. v. NLRB</i> .....	598
	Questions .....	602
	<i>Ozark Automotive Distributors, Inc. v. NLRB</i> .....	602
	Questions .....	609
	<i>Brentwood at Hobart v. NLRB</i> .....	610
	Questions .....	612
C.	Related Matters.....	612
1.	The Substantial Evidence Test and Adjudicatory Procedures .....	612
2.	Burden of Proof.....	613
3.	Preclusive Effect of Agency Decisions.....	614
D.	Problem.....	617
Unit 4.4:	The Agency and the Administrative Law Judge.....	619
A.	Basic Doctrine .....	619
1.	The ALJ's Authority to Manage Formal Adjudicatory Hearings.....	620
2.	ALJ Independence and Oversight.....	621
3.	Agency Review of ALJ Decisions.....	624



B.	Principal Cases.....	627
	<i>Aramark Corp. &amp; Hotel, Motel &amp; Restaurant Employees</i>	
	<i>International Union, Local Union No. 166, AFL-CIO.....</i>	627
	Questions.....	632
	<i>NLRB v. Permanent Label Corp.....</i>	632
	Questions.....	640
C.	Related Matters.....	641
	1. Remedial Authority.....	641
	2. Adjudicatory Independence in Non-APA Procedures.....	641
	3. Agency Oversight and the Decisional Independence of	
	ALJs.....	643
D.	Problem.....	644
Unit 4.5:	<i>Ex Parte</i> Communications.....	645
A.	Basic Doctrine.....	646
	1. The APA’s Treatment of <i>Ex Parte</i> Communications.....	646
	2. The Rationale for Banning <i>Ex Parte</i> Communications.....	647
	3. What Is an <i>Ex Parte</i> Communication and Who Is an	
	Interested Party?.....	648
	4. What Remedies Are Available for <i>Ex Parte</i>	
	Communication?.....	651
B.	Principal Cases.....	653
	<i>Pioneer Hotel, Inc. v. NLRB.....</i>	653
	Questions.....	657
	<i>Salem Hosp. Corp. v. NLRB.....</i>	657
	Questions.....	661
C.	Related Matters.....	662
	1. Exceptions to the Prohibition on <i>Ex Parte</i>	
	Communications.....	662
	2. <i>Ex Parte</i> Communications in Non-APA Adjudications.....	662
	3. The Executive Power and <i>Ex Parte</i> Communications.....	664
D.	Problem.....	665
<b>Chapter 5.</b>	<b>Problems of Mass Adjudication.....</b>	<b>669</b>
Unit 5.1:	Adjudicatory Bureaucracy.....	671
A.	Basic Doctrine.....	671
	1. The Problem of Mass Adjudication.....	672
	2. The Five-Step Sequential Evaluation Process.....	673
	3. Disability Determination Procedures.....	675
	4. Controversial SSA Policies.....	678
B.	Principal Case.....	679
	<i>Boatner v. Berryhill.....</i>	679
	Questions.....	687
C.	Related Matters.....	688
	1. Systemic Litigation.....	688
	2. Informal Guidance.....	690
	3. Cooperative Federalism and the Role of States.....	691
D.	Problem.....	691

Unit 5.2: Impact of Rules.....	692
A. Basic Doctrine .....	692
1. Resolving Issues by Regulation.....	692
2. The SSA's Use of Regulations .....	693
3. Individualized Consideration .....	694
B. Principal Cases.....	695
<i>Sykes v. Apfel</i> .....	695
Questions .....	704
<i>Allen v. Barnhart</i> .....	705
Questions .....	710
C. Related Matters.....	711
1. SSRs and Other Guidance .....	711
2. Overreliance on Step Three .....	712
3. Non-Acquiescence.....	713
D. Problem.....	714
Unit 5.3: Due Process and Agency Adjudication.....	715
A. Basic Doctrine .....	716
1. The Due Process "Revolution" .....	716
2. Protected Property Interests .....	718
3. Protected Liberty Interests.....	721
B. Principal Cases.....	725
<i>Flemming v. Nestor</i> .....	725
Questions .....	729
<i>Flatford v. Chater</i> .....	729
Questions .....	731
<i>Buchanan v. Apfel</i> .....	731
Questions .....	733
<i>Jackson v. United States</i> .....	733
Questions .....	736
C. Related Matters.....	736
1. Denial of Initial Applications vs. Termination of Benefits .....	736
2. Substantive and Procedural Due Process.....	737
D. Problem.....	739
Unit 5.4: Process Due .....	740
A. Basic Doctrine .....	740
1. Some Kind of Hearing.....	740
2. Notice .....	742
3. The Opportunity to Be Heard.....	744
4. Unbiased Decisionmaker .....	748
B. Principal Cases.....	753
<i>Mathews v. Eldridge</i> .....	753
Questions .....	759
<i>Grice v. Colvin</i> .....	760
Questions .....	761
<i>Hicks v. Commissioner of Social Security</i> .....	762
Questions .....	769
<i>Barrett v. Berryhill</i> .....	769
Questions .....	773

<i>Spicher v. Berryhill</i> .....	774
Questions.....	778
C. Related Matters.....	778
1. The Scope of the <i>Mathews</i> Test.....	778
2. Importance of the Interest.....	779
3. Increased Accuracy.....	781
4. Costs of Procedures.....	782
D. Problem.....	783
Unit 5.5: Agency Policy and Judicial Control in Mass Adjudication.....	785
A. Basic Doctrine.....	785
1. Who Controls Adjudicatory Policy?.....	785
2. Non-Acquiescence by the SSA.....	787
3. Current SSA Policy.....	790
B. Principal Cases.....	792
<i>Stieberger v. Bowen</i> .....	792
Questions.....	799
<i>Hines v. Barnhart</i> .....	799
Questions.....	803
C. Related Matters.....	804
1. Implications for ALJs.....	804
2. EAJA and Non-Acquiescence.....	805
3. Geographic Uniformity.....	806
4. Intracircuit Non-Acquiescence by Other Agencies.....	807
D. Problem.....	809
<b>Chapter 6. Informal Action.....</b>	<b>811</b>
Unit 6.1: Informal Agency Action.....	812
A. Basic Doctrine.....	812
1. Informal Action in Context.....	812
2. IRS Informal Rulemaking and Guidance.....	813
3. Adjudication by the IRS.....	816
B. Principal Case.....	819
<i>Boulez v. C.I.R.</i> .....	819
Questions.....	827
C. Related Matters.....	827
1. Adequacy of Procedures.....	827
2. Legal Effects of Informal Actions.....	828
3. Implications for Judicial Review.....	830
D. Problem.....	832
Unit 6.2: Nonlegislative Rules and Their Limits.....	833
A. Basic Doctrine.....	833
1. Legislative and Nonlegislative Rules.....	834
2. Interpretive Rules.....	838
3. Policy Statements.....	841
4. Rules of Agency Practice and Procedure.....	844
B. Principal Cases.....	845
<i>American Institute of Certified Public Accountants v. IRS</i> .....	845
Questions.....	852
<i>Estate of Shapiro v. Commissioner of Internal Revenue</i> .....	853

	Questions .....	858
C.	Related Matters.....	858
	1. Procedural Requirements for IRS Regulations .....	858
	2. The Impact of Nonlegislative Rules on Adjudication.....	860
	3. Judicial Deference to Nonlegislative Rules .....	861
	4. Minimum Procedural Guarantees and Nonlegislative Rules.....	862
D.	Problem.....	865
Unit 6.3:	Informal Adjudication.....	866
A.	Basic Doctrine .....	866
	1. IRS Reforms.....	866
	2. Informal Adjudication Procedures .....	868
	3. Judicial Review of Informal Adjudication .....	869
B.	Principal Cases.....	871
	<i>Living Care Alternatives of Utica, Inc. v. United States</i> .....	871
	Questions .....	877
	<i>Wilson v. C.I.R.</i> .....	877
	Questions .....	886
C.	Related Matters.....	886
	1. More on Notice.....	886
	2. More on Hearing Requirements .....	888
	3. More on Abuse of Discretion.....	889
D.	Problem.....	891
Unit 6.4:	Internal Guidance .....	893
A.	Basic Doctrine .....	893
	1. The APA, FOIA, and Public Access to Internal Guidance .....	893
	2. Legal Effects of Policy Manuals .....	896
	3. Implications for Judicial Review .....	897
B.	Principal Cases.....	899
	<i>Welch v. United States</i> .....	899
	Questions .....	901
	<i>United States v. Caceres</i> .....	902
	Questions .....	910
C.	Related Matters.....	910
	1. Exceptions to Publication and Availability Requirements .....	910
	2. Other Remedies for Violations of Internal Policies.....	912
D.	Problem.....	914
Unit 6.5:	Constraints on Change .....	916
A.	Basic Doctrine .....	916
	1. IRS Advice to Taxpayers.....	916
	2. Reliance and Estoppel.....	918
	3. Inconsistent Decisions .....	920
	4. APA Rulemaking Requirements .....	922
B.	Principal Cases.....	924
	<i>Fredericks v. C.I.R.</i> .....	924
	<i>Morgan v. Commissioner of Internal Revenue</i> .....	931
	Questions .....	934

<i>Estate of McLendon v. Commissioner of Internal Revenue</i> .....	934
Questions .....	940
<i>NetJets Large Aircraft, Inc. v. U.S.</i> .....	940
Questions .....	944
C. Related Matters.....	944
1. Invited Reliance.....	944
2. Retroactivity and Reliance.....	945
3. Scienter .....	949
D. Problem.....	950
<b>Chapter 7. Regulatory Enforcement .....</b>	<b>953</b>
Unit 7.1: Regulatory and Enforcement Tools.....	954
A. Basic Doctrine .....	954
1. Traditional Enforcement Tools.....	955
2. Enhanced Enforcement Structures .....	958
3. FCC Overview.....	960
B. Principal Cases.....	965
<i>FCC v. WNCN Listeners Guild</i> .....	965
Questions .....	971
<i>NetworkIP, LLC v. FCC</i> .....	971
Questions .....	976
C. Related Matters.....	977
1. Deregulation .....	977
2. Regulatory Reform .....	978
3. Technological Developments and the FCC Regime .....	981
4. Regulation of the Internet .....	983
D. Problem.....	985
Unit 7.2: Enforcement Actions .....	985
A. Basic Doctrine .....	986
1. Criminal Prosecutions.....	986
2. Civil Remedies .....	988
3. Prospective Relief.....	991
B. Principal Cases.....	993
<i>AT&amp;T Corp. v. FCC</i> .....	993
Questions .....	998
<i>United States v. Peninsula Communications, Inc.</i> .....	999
Questions .....	1004
<i>In the Matter of ABC Fulfillment Services LLC</i> .....	1005
Questions .....	1012
C. Related Matters.....	1013
1. “ <i>In Rem</i> ” Forfeiture .....	1013
2. Private Remedies.....	1014
3. Blocking Enforcement.....	1016
D. Problem.....	1018
Unit 7.3: Investigation.....	1019
A. Basic Doctrine .....	1019
1. FCC Investigations.....	1019
2. Complaints.....	1021
3. Investigatory Powers.....	1024

B.	Principal Cases.....	1026
	<i>Serafyn v. FCC</i> .....	1026
	Questions .....	1031
	<i>In the Matter of SBC Communications, Inc.</i> .....	1031
	Questions .....	1036
C.	Related Matters.....	1036
	1. Investigatory Costs .....	1037
	2. Constitutional Limits on Investigations.....	1040
	3. Disclosure and FOIA.....	1042
D.	Problem.....	1044
Unit 7.4:	Prosecution .....	1046
A.	Basic Doctrine .....	1046
	1. Allocation of Prosecutorial Responsibility .....	1046
	2. Initiating Prosecutions.....	1049
	3. Prosecutorial Discretion .....	1052
B.	Principal Cases.....	1054
	<i>American Telephone &amp; Telegraph Co. v. FCC</i> .....	1054
	Questions .....	1058
	<i>Ellis v. Tribune Television Co.</i> .....	1058
	Questions .....	1063
	<i>In the Matter of Adrian Abramovich, Marketing Strategy</i> <i>Leaders, Inc., and Marketing Leaders, Inc.</i> .....	1063
	Questions .....	1072
C.	Related Matters.....	1073
	1. Enforcement Policies.....	1073
	2. Waivers .....	1075
	3. Agency Prosecution and Private Remedies .....	1077
D.	Problem.....	1079
Unit 7.5:	Regulatory Structures That Enhance Enforcement .....	1081
A.	Basic Doctrine .....	1081
	1. Ratemaking .....	1081
	2. Licensing.....	1085
	3. Reporting and Disclosure Requirements .....	1088
B.	Principal Cases.....	1091
	<i>Virgin Islands Telephone Corp. v. FCC</i> .....	1091
	Questions .....	1094
	<i>In the Matter of Birach Broadcasting Corporation</i> .....	1094
	Questions .....	1098
	<i>Qwest Communications International, Inc. v. FCC</i> .....	1099
	Questions .....	1103
C.	Related Matters.....	1103
	1. Market-Based Regulation of Telecommunications .....	1103
	2. Licensing Reform.....	1106
	3. Regulatory Reform of Reporting and Disclosure.....	1109
D.	Problem.....	1112
<b>Chapter 8.</b>	<b>Availability of Judicial Review.....</b>	<b>1115</b>
Unit 8.1:	Preclusion of Review .....	1116
A.	Basic Doctrine .....	1116

1.	The Presumption of Reviewability .....	1116
2.	The Scope of Express Preclusion Provisions .....	1118
3.	Implied Preclusion .....	1120
B.	Principal Cases.....	1123
	<i>In the Matter for Benjamin v. United States, Social Security</i>	
	<i>Administration</i> .....	1123
	Questions .....	1129
	<i>NLRB v. United Food and Commercial Workers Union,</i>	
	<i>Local 23</i> .....	1130
	Questions .....	1136
C.	Related Matters.....	1136
1.	Total vs. Partial Preclusion .....	1136
2.	Constitutional Limits on Preclusion?.....	1138
3.	Preclusion and Cause of Action Issues .....	1139
D.	Problem.....	1141
Unit 8.2:	Unreviewable Agency Discretion .....	1143
A.	Basic Doctrine .....	1143
1.	Discretion and Reviewability.....	1144
2.	Identifying Unreviewable Agency Discretion.....	1146
3.	Unreviewable Agency Discretion and the Nondelegation	
	Doctrine.....	1148
B.	Principal Cases.....	1149
	<i>Gulf Restoration Network v. McCarthy</i> .....	1149
	Questions .....	1156
	<i>Newman v. Apfel</i> .....	1156
	Questions .....	1160
	<i>New York Racing Association, Inc. v. NLRB</i> .....	1160
	Questions .....	1168
C.	Related Matters.....	1168
1.	“Committed to Agency Discretion” and Constitutional	
	Challenges .....	1168
2.	The “Committed to Agency Discretion” Exception and	
	Political Questions .....	1169
3.	The “Committed to Agency Discretion” Exception and	
	Agency Inaction .....	1170
D.	Problem.....	1171
Unit 8.3:	Agency Action and Inaction.....	1172
A.	Basic Doctrine .....	1172
1.	The APA and “Agency Action” .....	1172
2.	Programmatic Decisions and “Agency Action” .....	1173
3.	Inaction as “Agency Action” .....	1175
B.	Principal Cases.....	1181
	<i>New York State Department of Law v. FCC</i> .....	1181
	Questions .....	1188
	<i>Benzman v. Whitman</i> .....	1188
	Questions .....	1193
C.	Related Matters.....	1193
1.	Inaction and Scope of Review Questions .....	1193
2.	Unreasonable Delay .....	1194

D. Problem.....	1195
Unit 8.4: Overview of Standing.....	1197
A. Basic Doctrine .....	1197
1. Constitutional and Additional Requirements for Standing.....	1197
2. Application of Constitutional Standing Requirements.....	1199
3. Application of Additional Standing Requirements .....	1204
B. Principal Cases.....	1207
<i>Byers v. Intuit, Inc.</i> .....	1207
Questions .....	1213
<i>Delta Construction Co. v. EPA</i> .....	1213
Questions .....	1219
<i>California Association of the Physically Handicapped, Inc. v.</i> <i>FCC</i> .....	1219
Questions .....	1225
C. Related Matters.....	1225
1. Associational Standing .....	1226
2. Standing for States .....	1227
3. Taxpayer Standing.....	1228
D. Problem.....	1229
Unit 8.5: Constitutional Standing Requirements.....	1230
A. Basic Doctrine .....	1230
1. The Constitutional Foundations of Standing .....	1231
2. The Injury in Fact Requirement .....	1233
3. Causation and Redressability .....	1237
B. Principal Cases.....	1240
<i>Friends of the Earth, Inc. v. Laidlaw Environmental</i> <i>Services (TOC), Inc.</i> .....	1240
Questions .....	1247
<i>Alvin Lou Media, Inc. v. FCC</i> .....	1248
Questions .....	1251
C. Related Matters.....	1251
1. Standing on an Unlevel Playing Field .....	1251
2. Pleading and Proof Issues in Standing.....	1252
3. Statutory Injury in Fact.....	1253
D. Problem.....	1255
Unit 8.6: Additional Standing Requirements .....	1256
A. Basic Doctrine .....	1257
1. The Sources of Additional Standing Requirements .....	1257
2. Generalized Grievances .....	1260
3. The Zone of Interest Test.....	1261
4. Third Party Standing.....	1266
B. Principal Cases.....	1268
<i>Apache Bend Apartments, Ltd. v. United States</i> .....	1268
Questions .....	1275
<i>Chem Service, Inc. v. Environmental Monitoring Systems</i> <i>Laboratory-Cincinnati of EPA</i> .....	1275
Questions .....	1282
<i>Bullock v. IRS</i> .....	1283



---

Questions .....	1286
C. Related Matters.....	1286
1. Associational and Third Party Standing .....	1286
2. More on Taxpayer Standing .....	1288
3. Representational Standing.....	1288
D. Problem.....	1289
Unit 8.7: Timing of Review.....	1290
A. Basic Doctrine .....	1291
1. Introduction to the Timing Requirements.....	1291
2. Finality.....	1293
3. Exhaustion.....	1295
4. Ripeness .....	1298
B. Principal Cases.....	1303
<i>Sackett v. EPA</i> .....	1303
Questions .....	1306
<i>Bowen v. City of New York</i> .....	1307
Questions .....	1313
<i>Clean Air Implementation Project v. EPA</i> .....	1313
Questions .....	1319
C. Related Matters.....	1319
1. Primary Jurisdiction .....	1319
2. Primary Jurisdiction and <i>Burford</i> Abstention .....	1322
3. Distinguishing Among Finality, Exhaustion, and Ripeness .....	1324
4. Agency Action and the Timing of Review .....	1325
D. Problem.....	1328
INDEX .....	1331