TABLE OF CONTENTS

Acknowledgments v
Introduction ix
Table of Cases xxiii
Table of Statutes xxix

Chapter 1. Why Study Administrative Law? 1

Agencies in the Structure of Government 2
How Agencies Are Organized 3
The Scope of Federal Agencies' Work 5
Tensions at the Core of Administrative Law 7

Chapter 2. The Nondelegation Doctrine 9

Delegation at the Founding 9
Delegation in Theory and Practice 10
The New Deal: FDR Clashes with the Supreme Court over Delegation 12
Delegation & Agency Power Post-*Schechter Poultry* 15
The Nondelegation Doctrine in State Courts 17
Case in Point: "The Sugary Drinks Portion Cap Rule" 19
Nondelegation Earthquake Warning 22
Giving Agencies Judge-Like Powers 24
Conclusion 25
What Should I Do? 26
Practice Problems 30

Chapter 3. The Legitimacy of U.S. Government Agency Power 33

The "Transmission Belt" Theory 33
Other Justifications for Agency Power: Expertise, Public Participation, Representative Bureaucracy 36
Bureaucrats' Oath and Agency Power 38
Impact of Constitutional Culture 38
Bureaucrats as Balance Wheel 40

People Create the Law They Need 41
Constitutional Values and Managerial Values 42
What Should I Do? 46
Practice Problem 51

Chapter 4. Separation of Powers—Legislative and Executive Control over Administrative Agencies 53
Introduction 53
Legislative Review of Agency Action 53
The Legislative Veto 56
Another Formalist Decision: The Supreme Court Invalidates the Graham-Rudman-Hollings Act 61
Morrison v. Olson: The Supreme Court's Functionalist Approach to Separation of Powers 63
The Political and Legal Decline of *Morrison* 65
Executive Control of Civil Service Personnel 67
Administrative Law Judges: Employees or Inferior Officers? 68
Senate Versus President on Appointments: The Scope of the Recess Appointments Clause 70
Congressional Appropriations for Agencies 73
When Is a Presidential Order Not Enforceable? 75
What Should I Do? 78
Practice Problems 82

Chapter 5. Discretionary and Informal Agency Action 85
Informal, "Executive," or Discretionary Agency Action 85
Informal Agency Action and Its Limits: The Arbitrary and Capricious Standard 87
5 U.S. Code Administrative Procedure Act—Section 702 88
5 U.S. Code Administrative Procedure Act—Section 706 89
5 U.S. Code Administrative Procedure Act—Section 701 90
Informal Agency Action and Judicial Review in the States 95
Oregon Administrative Procedures Act—Section 183.310 97
2010 Revised Model State Administrative Procedure Act 98

Discretion to Investigate, Prosecute, or Impose Penalties 98
Non-Public Policymaking and "Guidance" 101
What Should I Do? 103
Practice Problem 104

Chapter 6. Rulemaking 105

Keeping Track of Regulations. 105
Proposed Rules Federal Register: Vol. 80, No. 12, page 2614 106
Code of Federal Regulations (Annual Edition): Title 6—Domestic Security 107
FIGURE 6-1: Example of State Register. 109
Example of State Code of Regulations 110
FIGURE 6-2: Screenshot of South Carolina Code of Regulations. 110
FIGURE 6-3: Screenshot of Chapter 1 of South Carolina Code of Regulations. 110
The Administrative Procedure Act ("APA") 111
The Rulemaking Power 111
5 U.S. Code Administrative Procedure Act—Section 551. 113
The Process of Rulemaking 114
FIGURE 6-4: The Federal Rulemaking Process. 115
5 U.S. Code Administrative Procedure Act—Section 553. 116
Notice. 117
Public Input: Formal Hearings, Informal Comments, and Efficiencies. 120
Formal Rulemaking 121
Informal Rulemaking 122
Negotiated Rulemaking 124
Real Consideration of Public Input Before Rule Adoption 125
5 U.S. Code Administrative Procedure Act—Section 553(c) . . . 125
Exceptions to Rulemaking Procedures 125
Communication Between Rulemakers and Parties 127
Due Process and Other Fairness Considerations. 129
Estoppel: Fairness (?) in Implementation 131
Estoppel Against State Agencies 133
What Should I Do? 134

Practice Problems. 136

Chapter 7. Adjudication 139

The Seventh Amendment and Agency Adjudication 139
Seventh Amendment to the Constitution 139

Due Process and Agency Adjudication 142
The Right to a Hearing 142
Constitutional Due Process Provisions 143
Right Versus Privilege 144
Entitlements and the *Matthews* Balancing Test 146
2010 Model State Administrative Procedure Act—Section 403(d); Section 404 149
Hearsay and Substantial Evidence 150
Ex Parte Contacts in Formal Adjudication 152
Biased Hearing Officers? 154
Requirements for Consistency in Agency Adjudications 155
Due Process and Government Employment 156
The Outer Edge of Due Process: Agency Hearings and National Security 158
Agency Hearings and Domestic Prison Inmates in the United States 159

What Should I Do? 160
Title VII of the 1964 Civil Rights Act. 161

Practice Problem 163

Chapter 8. Choice of Rulemaking or Adjudication 165

Adjudication to the Exclusion of Rulemaking 165
SEC 165
NLRB. 169
FDA 170

Unusual State Responses to Agency Avoidance of Rulemaking. 172

Rulemaking to the Exclusion of Adjudication 173

What Should I Do? 176

Practice Problems. 177

Chapter 9. Availability of Judicial Review 179

Standing: Has Actual Harm Occurred? 180
The Early Cases on Taxpayer Standing 181

Modern Standing Doctrine 181
Environmental Cases 182
Mixed Signals on Standing 184
The 2010 MSAPA and Standing Under State Law 187
Primary Jurisdiction 188
"Ripeness" for Judicial Review 190
The Final Order Rule: Has the Agency Taken Its Final Step? 193
Exhaustion of Administration Remedies: Has the Private Party Sought Administrative Review Before Suing in Court? 194
Mootness: Has the Matter Been Resolved? 196
What Should I Do? 197
Practice Problem 199

Chapter 10. Scope of Judicial Review 201

Two 2024 Supreme Court Decisions Find New Ways to Limit Agency Powers 201
Ohio v. EPA 201
Corner Post v. Board of Governors 203
Preemption 206
Federal Regulations Preempting State Statutes: Airbags and Shoulder Belts 207
State Preemption and Local Law 209
Judicial Deference to Agency Interpretations 212
Deference to Agency Interpretations of Unclear Statutes 212
The Major Questions Doctrine 214
The Demise of *Chevron* Doctrine 218
Judicial Deference to Agency Interpretation of Regulations: *Auer* Deference 222
State Courts and *Chevron* Deference 223
Arbitrary and Capricious Review 224
What Should I Do? 225
Practice Problems 228

Chapter 11. Suing Government Agencies and Employees 231

Sovereign Immunity—the King (U.S. Government?) Can Do No Wrong? 231
Exceptions to Sovereign Immunity 232
Innocent Victims of Government Policy Cannot Win. 233
The Line Between Government Negligence and Government Policy. 234

Officer Tort Liability or Immunity. 236

Acting "Under Color of Law" 238
Other Considerations in Section 1983 Litigation 240
Bivens Actions. 241

Immunity Revisited 244
United States v. Trump (2024) 247

What Should I Do? 250

Practice Problems. 254

Chapter 12. Government Employment Rights and Due Process 257

Freedom of Speech. 258

Choice of Appearance 261

Political Affiliation 262

Residency Requirements 263

Sexual Discrimination 265

Protection Against Privatization 266

What Should I Do? 269

Practice Problem 271

Chapter 13. Transparency: Public Access to Government Information . . . 273

The Freedom of Information Act 273

Pre-FOIA Information Access Requirements of the Administrative Procedure Act 274

How FOIA Empowers Citizens to Obtain Government Documents 275
5 U.S. Code Administrative Procedure Act—Section 552(a)(3) 275

How FOIA Empowers Agencies to Withhold Information to Prevent Abuse 277
5 U.S. Code Administrative Procedure Act—Section 552(b)(3)–(6) 278

5 U.S. Code Administrative Procedure Act—Section 552(b)(8) and (9) 281
How FOIA Empowers Agencies to Withhold Information to Safeguard Other Substantive Interests 281
National Security 281
5 U.S. Code Administrative Procedure Act—Section 552(b)(1) 282
Law Enforcement 286
5 U.S. Code Administrative Procedure Act—Section 552(b)(7) 286
Individual Privacy 287
How FOIA Empowers Agencies to Withhold Information to Safeguard Procedural Interests 291
5 U.S. Code Administrative Procedure Act—Section 552(b)(2) and (5) 291
Open Meetings Laws 293
5 U.S. Code Sunshine Act—Section 552b 295
Electronic Transparency in Rulemaking 297
What Should I Do? 300
Practice Problems 301
Subject Index 303
Index of Names 307