

**ADMINISTRATIVE LAW**  
**FALL 2018 SYLLABUS**  
**VERSION 1.0**

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Class Times: Tues. and Thurs. 10:30 a.m. to 12:20 p.m. in Room 117

**1. COURSE DESCRIPTION**

In this course, we will cover two general topics: (1) the relationship and allocation of power between agencies and other governmental units, including the courts, Congress, and the President; and (2) the manner in which agencies create binding law through rulemaking and adjudication, as well as how agencies conduct other business that does not carry the force and effect of law. Specific questions to be explored include: the place of administrative agencies in our three-branch constitutional framework; statutory and constitutional requirements imposed on agencies when they make law through adjudication and rulemaking; and the availability and scope of judicial review of agency action.

The focus of this course will be federal, not state, administrative law, although the former certainly informs the latter. This course also will focus more heavily on doctrine than theory.

Administrative law is a complex subject. However, if you attend class regularly and do the assigned readings, you should find the subject to be entirely manageable, quite interesting, and very useful.

**2. LEARNING OBJECTIVES FOR THE COURSE**

The main learning objectives in this course are as follows:

- (a) Develop the ability to identify major legal issues in the administrative law field;
- (b) Gain a basic mastery of fundamental concepts of federal administrative law; and
- (c) Engage in analysis and reasoning needed for problem solving in the administrative law field.

**3. REQUIRED TEXT & ONLINE COURSE MATERIALS**

The required casebook for this course is the 7<sup>th</sup> Edition of *Federal Administrative Law* by Gary Lawson. I also will maintain a website for the course via Canvas. PowerPoint presentations will be made available via Canvas. In-class handouts, writing assignments, supplemental readings, and assigned videos also will be made available through Canvas.

#### 4. ACCESSING REQUIRED ONLINE ARTICLES

Occasionally I will require you to read articles from news services with paywalls. These include *The New York Times*, *The Wall Street Journal*, and *The Washington Post*. The UW Law Library has provided the following directions regarding how to access these articles if you do not have paid access. (That said, I would encourage you to pay for access to one or more of these services—which often offer discounted student rates—as they provide a wealth of information to any student, lawyer, professor, or other engaged member of society.)

I know that having to search down these sources can be more difficult than working out of a course packet. However, as a practical matter, copyright restrictions require that I either refrain from assigning current materials or assign them via these sorts of links.

**Accessing *The New York Times*.** Here is the link via ProQuest Global Newsstream:

<https://search.proquest.com/publication/2037333?OpenUrlRefId=info:xri/sid:primo>

This resource is available from the library catalog, and students can access it on and off campus using their UW Net ID. Full text articles are available in this database from 2015-current. Students can type in the article title within quotation marks in the search bar, or they can use keywords from the original article title to find the updated article (*i.e.*, if the title has been changed). Students can also search by year, month, and date of issue.

**Accessing *The Wall Street Journal*.** Here is the link via ProQuest Global Newsstream:

<https://search.proquest.com/publication/10482?OpenUrlRefId=info:xri/sid:primo>.

This resource also is available from the library catalog and can be accessed on and off campus using students' UW Net ID. Full text articles are available from 1984-current. Searching is the same as for *The New York Times* above.

**Accessing *The Washington Post*.** Here is the link via ProQuest Global Newsstream:

<https://search.proquest.com/publication/10327?OpenUrlRefId=info:xri/sid:primo>

This resource also is available from the library catalog and can be accessed on and off campus using students' UW Net ID. Full text articles are available from 1996-current. Searching is the same as for *The New York Times* above.

**5. OPTIONAL SUPPLEMENTAL RESOURCES**

In addition to the required readings, there are several optional materials in this area that you may find helpful as supplements. They include the following short, student-oriented guides:

- *Administrative Law* by Richard J. Pierce (Foundation Press)
- *Principles of Administrative Law* by Keith Werhan (Concise Hornbook Series by Thomson West)
- *Administrative Law Stories* edited by Peter Strauss

There are also various resources published by the ABA that are quite helpful. For example, the ABA has published *A Guide to Federal Agency Adjudication*, *A Guide to Federal Agency Rulemaking*, and *A Guide to Judicial and Political Review of Federal Agencies*.

I strongly encourage you to read the *New York Times*, the *Washington Post*, the *Wall Street Journal*, or some other national newspaper regularly throughout the quarter. If you do, you will see all sorts of connections between our class and the real world.

**6. OFFICE HOURS**

I encourage you to come see me when you have thoughts, questions or issues that you want to discuss relating to the course. I will have office hours on Tuesdays from 12:30 p.m. to 1:30 p.m. & Thursdays from 1:30 p.m. to 2:30 p.m. If my regular office hours do not work for your schedule, I am happy to set up alternative times to meet with you by appointment as necessary. Please email me to set up an appointment if you cannot make my regular weekly office hours.

In addition to discussing course-related matters during my office hours, I am happy to talk about other legal or career-related questions. I previously spent two years clerking (one year for Judge Randolph on the D.C. Circuit and another for Justice Stevens on the U.S. Supreme Court), and I also spent time in private practice in Chicago at a large law firm. In addition, I spent one summer clerking at a law firm in my hometown of Portland, Oregon. I'd be happy to offer my perspectives on judicial clerkships or working at law firms.

During your reading and exam period, I will be available to meet with you (by appointment) up until Monday, Dec. 10 at 2 p.m. I will not answer any course- or exam-related questions from students after 2 p.m. on Monday, Dec. 10.

**7. CLASS FORMAT**

Although I will sometimes teach using straight lectures, I frequently conduct class in a Q&A format using the "soft" Socratic method. When I use the soft Socratic method, I will call on students randomly by name without warning. I expect all

students to be prepared to answer my questions and to participate in class discussion. I emphasize class discussion and student participation because speaking skills are important in the practice of law whether those skills are used in court, in presenting to clients, or in negotiating with others. I also find that calling on students randomly helps to ensure that all students stay engaged and that we hear from a variety of viewpoints in class.

**8. CLASS ATTENDANCE**

I expect you to treat class like you would treat a job—meaning that I expect you to show up to class on time prepared to participate in a professional manner. If you will be absent from class on any given day, please email me to notify me of the absence (just as you would email your employer if you were going to be absent from work). Under ABA Accreditation Standard 304, a law school must require regular and punctual attendance. At any time after the fifth week of a course, a student who has been determined by the instructor to have attended fewer than 80 percent of the class sessions in any course will be required to drop the course from his or her registration.

**9. PODCASTS**

You are not allowed to make your own audio or video recordings of class sessions. However, I have authorized Law Media to audio Podcast all of my lectures subject to the following conditions: (1) students who access the audio Podcasts agree to use the recordings only for their studies in this class; and (2) students who access the Podcasts agree not to distribute the Podcasts to anyone outside of our Fall 2018 Administrative Law class. Listening to the audio Podcasts is not a substitute for class attendance and participation. As a result, if at any point during the quarter I feel that class participation or attendance has been low, I reserve the right to cancel Podcasting of additional classes.

**10. ACCESS & ACCOMMODATION**

Your experience in this class is important to me. If you have already established accommodations with Disability Resources for Students (DRS), please communicate your approved accommodations to me at your earliest convenience so we can discuss your needs.

If you have not yet established services through DRS, but have a temporary health condition or permanent disability that requires accommodations (conditions include but are not limited to: mental health, attention-related, learning, vision, hearing, physical or health impacts), you are welcome to contact DRS at 011 Mary Gates Hall or 206-543-8924 or uwdrs@uw.edu or disability.uw.edu. DRS offers resources and coordinates reasonable accommodations for students with disabilities or temporary health conditions. Reasonable accommodations are established through an interactive process between you, your instructors, and DRS.

It is the policy and practice of the University of Washington to create inclusive and accessible learning environments consistent with federal and state law.

## 11. **GRADING & FINAL EXAM**

Your grade will be based on a four-hour exam; however, as described below, class participation may be used in my discretion to bump up or down a student whose exam score falls on the bubble between two grades.

- a. **The exam:** The exam will be a four-hour exam and will be subject to the law school's rules and honor code. Computers may be used on the exam, and the exam will be OPEN book. There is no limit on what books, outlines, or written materials you may bring into the exam with you. There is also no limit on which online sources, such as Westlaw or other web-based sources, you may consult during the exam. You, however, may not consult with any other individuals during the exam (whether electronically, in writing, or in person).

For the exam, students may bring only one computer/electronic device with them, and all computers must have the requisite exam software designated by Academic Services installed. When taking the exam, you may use the Control "F" function to search materials that are on your computer or are accessible via the Internet. You, however, may not use the cut and paste functions to paste materials into your exam answer. All material that appears in your exam answer must be typed into your answer without the use of any pasting functions.

- b. **Class Participation:** I do not assign a particular percentage of your grade to class participation. Rather, your grade will be based on the exam, and then I will use class participation to decide whether, in my discretion, to bump up or to bump down any students whose exam scores place them on the bubble of two grades.

Class participation matters to me because speaking up is important in the practice of law—whether those skills are used in court, in presenting to clients, or in negotiating with others. Your class participation will be judged by its quality, not its quantity. I understand that some students may be reluctant to speak up in such a large class. As a result, there are a variety of factors that I may take into account in evaluating your class participation, such as: whether you are prepared when called on in class; whether you regularly attend class; whether you share your thoughts and questions during class discussions, after class, or during office hours; and whether you complete the ungraded out-of-class flow charting exercises assigned for Class #17 and Class #19.

If I see you checking email, texting, or surfing the Internet for reasons unrelated to class during class time, this will adversely impact your class

participation score. Using the Internet during class for tasks unrelated to the course is not only distracting to you but also to other students who sit near you.

- c. **Writing Assignments & Other Learning Exercises:** While learning doctrine is fun on its own, learning how to use it is even better. To help illustrate how administrative law is applied, you will be required to complete two significant out-of-class writing assignments. They are noted on the syllabus below and will be **due via Canvas by no later than 10:30 a.m. on Thursday, Oct. 25 and Tuesday, Dec. 4 respectively.** Both of these two writing assignments will require a fair amount of time and attention. As a result, you should mark these assignments on your calendar now and plan your schedule to account for them.

I will read and will provide general, class-wide feedback on both out-of-class writing assignments. I will also provide you with opportunities to meet with me to discuss your assignments. However, neither assignment will be individually graded. Nor will they be assigned point values or letter grades. In this sense, they are ungraded assignments. Please, however, be aware of the following three caveats to the statement that these assignments are ungraded:

- (1) Failure to timely submit either of the two required writing assignments will result in an automatic bump down of your final grade for the course (*e.g.*, if you earn an A on the exam but you fail to turn in one of the two writing assignments on time, then your final grade will be bumped down from an A to an A-). Failure to timely submit both of the two required assignments will result in a two-grade bump down (*e.g.*, from an A to a B+). Should an illness, unavoidable scheduling conflict, or emergency arise that will make it difficult for you to complete either of the two assignments on time, then you must reach out to me via email in advance of the original due date to request an extension. I will grant extensions where the circumstances warrant doing so (*e.g.*, in cases of illness, family emergencies, unavoidable scheduling conflicts, etc.). If I grant you an extension and if you meet your new deadline, then your assignment will be considered timely, and your grade will not be negatively impacted. As a result, it is in your best interest to reach out to me in advance to request a due date extension should one become necessary. I am much less likely to grant you an extension if you request an extension at the last minute based on foreseeable or avoidable circumstances.
- (2) Especially exceptional or particularly poor performance on your writing assignments may be taken into account when I assess your overall class participation (*i.e.*, to bump you up or down a grade if your exam score ends up falling on the bubble between two grades).

- (3) You will see significant overlap between the legal issues and/or fact patterns that arise in the writing problems and the types of legal issues and/or fact patterns that you are asked to analyze on the exam. In other words, the writing assignments will provide you with practice for the exam. This means that any effort you put into the writing assignments will directly benefit you on the exam. Conversely, a lack of effort on these writing assignments will hurt you when it comes to the final exam.

**12. CLASS CANCELLATIONS & MAKE-UP SESSIONS**

Class will not meet the week of Thanksgiving on Tues., Nov. 20 or Thurs., Nov. 22. However, as noted in the reading assignments listed below, there is some out-of-class work that I expect you to complete in lieu of class on Tues., Nov. 20.

If any additional class sessions are cancelled during the quarter, make-up classes will be scheduled.

**13. WAITING LIST**

If a waiting list still exists for this course when class begins, preference will be given to students on the waiting list who attend class beginning on the first day of class. As a result, if you would like to increase your odds of gaining admission into the course off of the waiting list, please attend class the first day and also please check in with me at the end of the first class.

**COURSE OUTLINE**  
(subject to modification)

**I. AN INTRODUCTION TO AGENCIES' STRUCTURES**

- Assignment 1:** An Introduction to Where Agencies Come From and How They Are Structured  
**Assignment 2:** Appointment: Who is an "Officer" within the Meaning of Art. II's Appointments Clause?  
**Assignment 3:** Appointment and Removal

**II. RULEMAKING**

- Assignments 4 & 5:** Notice-and-Comment Rulemaking ("Informal" Rulemaking)  
**Assignments 6 & 7:** Exemptions from Notice-and-Comment Rulemaking Procedures  
**Assignments 8 & 9:** Constitutional Issues Involving Rulemaking  
**Assignment 10:** Writing Assignment

**III. ADJUDICATION**

- Assignment 11:** Statutory Constraints on Adjudication  
**Assignment 12:** Constitutional Constraints on Adjudication

**IV. TIMING AND AVAILABILITY OF JUDICIAL REVIEW**

- Assignment 13:** An Introduction to Various Timing & Availability Doctrines

**V. STANDARDS OF REVIEW GOVERNING JUDICIAL REVIEW**

- Assignment 14:** Introduction; Judicial Review of Facts  
**Assignments 15-16:** Judicial Review of Legal Conclusions: Chevron, Skidmore, and Auer  
**Assignment 17:** Review via Flow Charting  
**Assignment 18:** The Reason Giving Requirement: State Farm  
**Assignment 19:** Review via Flow Charting

**VI. REVIEW**

- Assignment 20:** Discussion of Writing Assignment and Review

**READING ASSIGNMENTS**  
(subject to modification)

The following reading list provides the assigned readings. This reading list is annotated to give you a sense of where each day's readings fit within the class.

We will attempt to follow this reading list as closely as possible. However, we may fall behind at times or move more quickly at other times. As a result, some changes might be made to this reading list. If any major changes are made, I will revise this syllabus and will distribute a "Version 2.0."

**I. AN INTRODUCTION TO AGENCIES' STRUCTURES**

As we begin our study of administrative law, it is important to gain a sense of how agencies are structured, including where agencies come from and who has the power to both appoint and remove agency officials. The reading assignments in this introductory unit explore these foundational questions relating to agencies' structures.

As you will learn, administrative agencies, such as the Environmental Protection Agency (EPA) and the Department of Labor (DOL), are created and empowered by Congress. However, once they are formed by Congress, agencies operate as part of the Executive Branch. Indeed, the heads of many (but not all) agencies are appointed by the President and also are removable by the President.

***ASSIGNMENT # 1 FOR TUES., SEPT. 25:***

**An Introduction to Where Agencies Come From and How They Are Structured**

Today's readings provide an introduction to the course. They also explore the question of where agencies come from. As you will learn from today's readings, agencies come from Congress. It is Congress that creates, structures, and delineates the bounds of agencies' powers.

- Read the class syllabus in its entirety so that you are fully aware of class rules and class policies.
- Read the Preface to the Lawson casebook at Lawson pp. v-x.
- Fill out the online "Student Questionnaire" (available via Canvas on the "Assignments" page).
- Read Lawson pp. 1-9 (What is An Agency? Where Do Agencies Come From? The Structure of Federal Agencies).
- Read Lawson pp. 47-49 (Agency Functions: The Distinction between Rulemaking and Adjudication).
- Read Lawson pp. 72-77 (Theories of Agency Behavior).
- Read "Assignment 1: Napolitano Complaint" (available via Canvas). You can read the complaint at a very general level. My goal in assigning you the complaint is simply to give you some general exposure to various

administrative law doctrines that we will discuss in detail as the class progresses.

**ASSIGNMENT # 2 FOR THURS., SEPT. 27:**

**“Officers” and the Appointments Clause**

Today’s reading focuses on the question of who has the power to appoint agency officials. Specifically, today’s readings explore the question of how to define who counts as an “officer” within the meaning of the Appointments Clause, which is found in Article II of the U.S. Constitution.

- Read Lawson pp. 187-205 (Buckley & Landry). Pay particular attention to the language of the Appointments Clause excerpted at Lawson pp. 188-189.
- Read an excerpted version of Lucia (available via Canvas and labeled as “Assignment 2: Lucia.”). Lucia was just decided by the Supreme Court in June 2018.

**ASSIGNMENT # 3 FOR TUES., OCT. 2:**

**Appointment & Removal**

Today’s materials continue to explore the Appointments Clause, looking specifically at the question of how to draw the line between “principal” and “inferior” officers. Today’s readings also explore removal—meaning the question of who has the power to fire agency officials.

- Read Lawson pp. 205-215 (Morrison). These pages explore the difference between “inferior” officers and “principal” officers within the meaning of the Appointments Clause. Stop at the end of the first paragraph at the top of p. 215 right before the paragraph that begins with “The Copyright Royalty Board...”
- Read Lawson pp. 239-263 (Morrison & Free Enterprise). These pages explore the President’s authority to remove officials from office.
- Read Yuka Hayashi, *New York-Based Judge Rules CFPB’s Structure Is Unconstitutional*, Wall Street Journal, June 21, 2018, <https://www.wsj.com/articles/new-york-based-judge-rules-cfpbs-structure-is-unconstitutional-1529616526>
- Read Sarah Harrington, *Kavanaugh on the executive branch: PHH Corp. v. Consumer Financial Protection Bureau*, SCOTUSBLOG (Aug. 8, 2018, 10:25 AM), <http://www.scotusblog.com/2018/08/kavanaugh-on-the-executive-branch-phh-corp-v-consumer-financial-protection-bureau/>

## II. RULEMAKING

As you learned on the first day of this class when you read pp. 47-49 of Lawson, agencies engage in many different kinds of activities, including investigation, enforcement, rulemaking, and adjudication. In this particular unit, we will focus our time and attention on agency rulemaking. In doing so, we will dive into the text of the Administrative Procedure Act (APA), a statute enacted by Congress in 1946. The APA is an immensely important statute in the administrative law world. Indeed, in many ways, it serves as the Constitution of the administrative state. As we begin this unit, please put a sticky tab or book mark at Appendix B of your Lawson book to help you quickly locate the text of the APA. We will be referencing the APA a lot in this class moving forward!

### A. AN INTRODUCTION TO THE APA AND TO NOTICE-AND-COMMENT RULEMAKING

#### ***ASSIGNMENT # 4 FOR THURS., OCT. 4:***

#### **The Original Understanding of Section 553 of the APA and the Vermont Yankee Saga**

Today's materials introduce you to the APA and also to the procedural requirements that Section 553 of the APA imposes on what is known as informal, "notice-and-comment" rulemaking. Today's readings are on the longer side, so please allow yourself plenty of time to complete them prior to class.

- Quickly skim the APA found at App. B of Lawson, paying attention to the headings for each section of the APA. You do not need to digest all the details right now; just skim the APA quickly to get a sense of the APA's general structure.
- Read Lawson pp. 303-310. These pages provide an overview of the structure of the APA.
- Watch a short Panopto video that I created called "An Intro to the APA and to Rulemaking."
- After watching the short video, please carefully read Sections 551 and 553 of the APA (found in Appendix B of Lawson).
- Read Lawson pp. 351-388 (Vermont Yankee & Conn. Light). These materials will describe how the meaning of Section 553 has shifted over time, leading to a ratcheting up of the procedural requirements required in informal rulemaking proceedings.

**B. NOTICE & COMMENT (“N&C”) RULEMAKING PROCEDURES:  
THE NPRM AND THE SOBP**

***ASSIGNMENT # 5 FOR TUES., OCT. 9:***

***The NPRM and the SOBP***

Today’s assignment explores two key components of informal rulemaking: the notice of proposed rulemaking (NPRM); and the statement of basis and purpose (SOBP).

- Start by re-reading Section 553 of the APA.
- Read Lawson pp. 388-410 ([American Radio Relay League](#) and notes). Pay attention to the mention of Judge Kavanaugh at p. 393.
- Review the RegMap infographic found here:  
<https://www.reginfo.gov/public/reginfo/Regmap/index.jsp>
- Read and complete the supplemental packet labeled “Assignment 5: Informal N&C Rulemaking” (available via Canvas).

**C. EXEMPTIONS FROM RULEMAKING PROCEDURES**

Section 553 of the APA does not apply to all agency rulemaking proceedings. Instead, several important exemptions exist. The next two assignments explore some of the major exemptions from the APA’s notice-and-comment rulemaking procedures.

***ASSIGNMENT # 6 FOR THURS., OCT. 11:***

***The Procedural Exemption and the Interpretive/Policy Statement Exemption***

Today’s assignment will introduce you to various rulemaking exemptions: the “procedural rule” exemption; the “interpretive rule” exemption; and the “policy statement” exemption. We are not going to make it through all of these assigned materials in class today. Instead, some of today’s reading assignment will spill over into our next class, which has a very light reading load.

- Please re-read (yes, again!) Section 553 of the APA.
- Read Lawson pp. 410-441 ([Air Transport, United States Telephone, Professionals & Patients & American Mining](#)).

***ASSIGNMENT # 7 FOR TUES., OCT. 16:***

***Applying What We’ve Learned About Rulemaking to an Ongoing Controversy***

Today’s assignment will enable you to apply what you have learned about rulemaking and rulemaking exemptions to a current and ongoing controversy.

- Read packet labeled “Assignment 7: A Current Controversy Involving Rulemaking” (available via Canvas).

## D. CONSTITUTIONAL ISSUES INVOLVING RULEMAKING

### ***ASSIGNMENT # 8 FOR THURS., OCT. 18:***

#### ***Article I and the Nondelegation Doctrine***

As we have seen in this class, Congress frequently delegates broad rulemaking powers to Executive Branch agencies, enabling agencies to make legally binding rules that govern everything from air quality standards to overtime pay. These delegations have given rise to longstanding debates about whether and when it is constitutionally permissible for Congress to hand away such significant legislative-like powers to agencies. Today's reading assignment will expose you to these debates and in particular to what is known as the "nondelegation doctrine." The nondelegation doctrine speaks to when it is constitutional for Congress to delegate rulemaking powers to agencies.

- Read Art. I, sec. 1 of the U.S. Constitution at pp. 1153 of Lawson.
- Read Lawson pp. 97-99 (Agencies and Art. I).
- Read Lawson pp. 104-112 (Schechter & Panama Refining). These cases represent the high water mark of the nondelegation doctrine.
- Read Lawson pp. 112-123 (Mistretta).
- Read Lawson pp. 154-159 (stop before note 5 on p. 159). Pay particular attention to the American Trucking case mentioned in the notes.

### ***ASSIGNMENT # 9 FOR TUES., OCT. 23:***

#### ***Article II and Presidential Control over Agency Rulemaking***

Today's readings focus on the important role that modern Presidents—invoking their Article II powers—have played in influencing and controlling agencies' regulatory activities. Note that today's reading assignment is on the long side in terms of the number of pages assigned, so you should leave yourself plenty of time to complete it.

- Read Article II of the U.S. Constitution at Lawson pp. 1159-1161. Look for where you can find what is known as the "take care" clause. Also look for what is known as the "opinions clause."
- Read Elena Kagan, *Presidential Administration*, [114 Harv. L. Rev. 2245, 2272-2303 \(2001\)](#). Read only pages 2272-2303 of this article, which was written by then-Professor and now Justice Elena Kagan. The assigned pages focus on the rise of regulatory oversight under Presidents Reagan and Clinton. Pay particular attention to the article's discussion of EO 12866, which was issued by Clinton.
- Read Kathryn A. Watts, *Controlling Presidential Control*, [114 Mich. L. Rev. 683, 692-706 \(2016\)](#), available via SSRN at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2598850](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2598850) (click on "download" to access the article). You only need to read pages 692-706. These pages will give you a sense of how Presidents Bush and Obama sought to exercise control over the regulatory state.

- Read Elizabeth G. Porter & Kathryn A. Watts, *Visual Rulemaking*, Environmental Law Reporter (2018), available at <https://ssrn.com/abstract=3239547> (click on “download” to access and read the article).
- Read what is known as President Trump’s “two-out, one-in” order at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/>
- Read Simon Haeder & Susan Webb Yackee, *The Trump Administration Might Be Deregulating More than You Know (Or Could Know)*, Washington Post, Aug. 24, 2018, available at [https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/24/the-trump-administration-might-be-deregulating-more-than-you-know-or-could-know/?noredirect=on&utm\\_term=.3cded41b2cb1](https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/24/the-trump-administration-might-be-deregulating-more-than-you-know-or-could-know/?noredirect=on&utm_term=.3cded41b2cb1)

#### **E. REVIEW VIA A WRITING ASSIGNMENT**

##### ***ASSIGNMENT # 10 FOR THURS., OCT. 25:***

##### ***Out-of-Class Writing Assignment***

Prior to coming to class today, please work through and complete “Out-of-Class Writing Assignment 1,” which is available via Canvas on the “Assignments” page. Be sure to upload one electronic copy of your answer to the appropriate Canvas folder and also bring a copy (either an electronic or a hard copy) of your written answer to class today so that you can refer to your answer during class discussion. Note that your answer to the writing assignment must be submitted via Canvas by no later than 10:30 a.m. today when class begins.

#### **III. ADJUDICATION**

##### ***ASSIGNMENT # 11 FOR TUES., OCT. 30:***

##### ***Statutory Constraints on Agency Adjudication***

Today’s materials introduce you to agency adjudication, as well as to various statutory constraints found in the APA that govern informal and formal agency adjudication.

- Please watch a short Panopto video that I created called “Adjudication.” After watching the video, please read sections 554, 555, 556, 557 and 558 of the APA at Lawson Appendix B.
- Read the packet labeled “Assignment 11: Adjudication” (available via Canvas).
- Read Lawson pp. 460-466 (Overton Park). This case involves what is known as informal adjudication.

***ASSIGNMENT # 12 FOR THURS., NOV. 1:  
Constitutional Constraints on Agency Adjudication: Procedural Due Process***

Today's materials provide you with a general overview of how procedural due process—rooted in the U.S. Constitution—operates to constrain agency adjudication.

- Read the due process clauses found in the Fifth and Fourteenth Amendments to the U.S. Constitution (at Lawson pp. 1164 & 1166).
- Read Lawson pp. 51-59 (Londoner and Bi-Metallic). These cases have been read to stand for the proposition that procedural due process acts as a constraint on agency adjudication but not agency rulemaking.
- Read Lawson pp. 932-943 (Mathews).
- Read packet labeled “Assignment 12: Procedural Due Process” (available via Canvas).

**IV. TIMING AND AVAILABILITY OF JUDICIAL REVIEW: WHAT, WHERE, WHOM & WHEN**

***ASSIGNMENT #13 FOR TUES., NOV. 6:***

Once an agency engages in either rulemaking or adjudication and issues a rule or an order, affected parties may wish to challenge the agency's action in federal court. In other words, those who are unhappy with the agency's action may seek judicial review. When a litigant seeks judicial review of an agency action, a number of threshold issues often arise concerning when and whether the courts can review the agency's action. These issues turn on a variety of doctrines that speak to the timing and availability of judicial review—doctrines such as standing, ripeness, finality, and exhaustion. We could spend days discussing these complex doctrines, but we simply do not have the time! Instead, we will spend just one day on these doctrines. My goal in this one day is to give you a very high-level introduction to some of the many different doctrines that speak to when and whether courts can review agency decisions. At the end of today's class, I do not expect you to have mastered the doctrines in any detail. Instead, I simply want you to be aware that various timing and availability doctrines exist and that they are very important because they can limit judicial review.

- Read Lawson pp. 967-968 (general background on timing and availability doctrines).
- Read Lawson pp. 1002-1012 (Heckler involving review of non-enforcement decisions).
- Read Lawson pp. 1097-1103 on finality (Standard Oil).
- Read Lawson pp. 1121-1132 on ripeness (Abbott Labs & Toilet Goods).

## V. JUDICIAL REVIEW OF AGENCY ACTION

If a plaintiff can get over various threshold hurdles (such as standing, finality, and ripeness) and can convince a court that the case belongs in federal court, what standard of review is the court supposed to use to assess the legality of the agency's action? The answer to this question depends on whether the litigant is challenging an agency's *factual* findings, its *legal* conclusions, its *reasoning*, or the *procedures* it used.

As we will learn in this unit, when a litigant challenges an agency's *factual* findings, then one of two standards of review usually will apply: arbitrary and capricious review; or substantial evidence review. In contrast, when a litigant challenges an agency's *legal* conclusions, then a host of different deference doctrines might be relevant. These deference doctrines include: Chevron deference; Skidmore deference; Auer deference; and de novo review. If an agency challenges the procedures an agency used, then de novo review will generally apply. Finally, if a litigant is challenging an agency's reasoning, then what is known as arbitrary and capricious review is likely to apply. We will spend the rest of this class diving into these various standards of review that guide judicial review of agency action.

### A. INTRODUCTION & B. JUDICIAL REVIEW OF FACTS

#### ***ASSIGNMENT #14 FOR THURS., NOV. 8:***

##### ***Review of Factual Findings***

Today's reading explores two different standards of review used by courts to review agency factual findings: substantial evidence review; and arbitrary and capricious review.

- Read section 706 of the APA.
- Watch the short introductory video I created on Panopto called "An Introduction to Standards of Review."
- Read Lawson pp. pp. 501-526 & pp. 536-545 (Universal Camera, Kimm & ADAPSO).

### C. JUDICIAL REVIEW OF LEGAL CONCLUSIONS: CHEVRON

#### ***ASSIGNMENT #15 FOR TUES., NOV. 13:***

##### ***Review of Legal Conclusions***

Today's reading introduces you to three key doctrines involving judicial review of agency legal conclusions: Skidmore deference; Chevron deference; and Auer deference. Chevron comes into play when courts are reviewing agency interpretations of *statutes*, whereas Auer comes into play when courts are reviewing agency interpretations of their own *regulations*. Skidmore, in contrast, operates as a kind of fallback (or backstop) deference doctrine. Note

that today's reading assignment is on the longer side in terms of the number of pages assigned, so please plan accordingly.

- Read Lawson pp. 556-560 (Skidmore).
- Read Lawson pp. 560-570 (Chevron). Chevron stands as one of the most important administrative law cases you will read this quarter.
- Read Lawson pp. 579-596 (Christopher). This case will introduce you to the concept of Auer deference.
- Read *Judge Kavanaugh, Chevron Deference, and the Supreme Court*, at <https://www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/>.

**ASSIGNMENT #16 FOR THURS., NOV. 15:**

***Review of Legal Conclusions***

- Read Lawson pp. 601-621 (Christensen & Mead). The Christensen and Mead cases excerpted here led to the creation of what is now known as Chevron “Step Zero.” At Step Zero, courts ask whether Congress delegated to the agency the power to act with the force of law and whether the agency acted pursuant to that authority. Pay close attention to where you can find the roots of “Step Zero” in these cases.
- Read Lawson pp. 621-633. The Gonzales case excerpted here discusses Chevron, Auer and Skidmore deference. Pay close attention to how all three of these deference doctrines arise in the Gonzales case.

**ASSIGNMENT #17 FOR TUES., NOV. 20 (THANKSGIVING WEEK):**

***Flow Charting Review***

We will not meet for class on Tues., Nov. 20. However, you are required to complete the following assignment in lieu of class on Nov. 20:

- Watch a short Panopto video that I created on flow charting and read the short document that I have posted to Canvas titled “Flow Charting.”
- Create a flow chart that visually outlines and categorizes what we learned about procedural constraints on agency action during Unit II (Rulemaking) and III (Adjudication). Once your flow chart is done, please post a copy of your flow chart to Canvas in the Assignments folder.
- This exercise is designed to enable you to engage in review and is for your own benefit. As a result, I will not grade your flow charts. However, I may take the flow charts into account in assessing your overall class participation.

**D. JUDICIAL REVIEW OF AGENCY DISCRETION,  
POLICYMAKING & REASONING**

***ASSIGNMENT #18 FOR TUES., NOV. 27:***

***Arbitrary and Capricious Review***

Today's reading focuses on arbitrary and capricious review and what is known as the "reasoned decisionmaking" requirement. Note that today's assignment is on the longer side, so please plan accordingly.

- Read APA sec. 706(2)(A).
- Read Lawson pp. 734-737 and pp. 745-757 (State Farm). State Farm is an immensely important administrative law case; it applies a variant of "arbitrary and capricious" review that is known as "hard look" review.
- Read Lawson pp. 764-773 (Mass. v. EPA). After reading Lawson's excerpted version of Mass. v. EPA, please pull up and read the full, unedited version of the case online. When you do so, note the important role that Art. III standing played in the case. Also try to figure out: (a) what the "Chevron issue" was in the case; and (b) what the arbitrary/capricious issue was in the case.
- Read Lawson pp. 781-789. The Nova Scotia case excerpted here demonstrates how the requirement of reasoned decisionmaking imposed by Section 706(2)(A) of the APA can overlap with procedural requirements imposed by Section 553 of the APA.

***ASSIGNMENT #19 FOR THURS., NOV. 29:***

***Review via Flow Charting***

In class today, we will finish up any spillover materials that remain from the prior classes. Then we will do some review by creating a flow chart of the materials we studied on standards of review.

- Prior to class today, please create your own flow chart that summarizes what we have learned in this unit (Unit V) about different standards of review.
- Once your flow chart is done, please post it to Canvas in the Assignments folder.
- This flow charting exercise is for your own benefit. I will not grade your flow charts; however, I may take your flow chart into account in assessing your overall class participation.

**VI. REFLECTION AND REVIEW VIA WRITING ASSIGNMENT**

***ASSIGNMENT # 20 FOR TUES., DEC. 4:***

***Writing Assignment and Review***

Prior to coming to class today, please work through and complete "Out-of-Class Writing Assignment 2" (available via Canvas). Be sure to upload one electronic copy of your answer to the appropriate Canvas folder and also bring a copy (either an electronic or a hard copy) of your written answer to

class today so that you can refer to your answer during our class discussion. Note that your answer to the writing assignment must be submitted via Canvas by no later than 10:30 a.m. today when class begins.

***The End!***