Administrative Law

Law 116-R01

Fall Semester 2021

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Office Hours: Tues 10:30 – 12:00; or by appointment

Welcome

to Administrative Law. Our textbook is Kristin E. Hickman & Richard J. Pierce, Jr., Federal Administrative Law (3d ed. 2020; ISBN: 978-1-64242-258-0) All other materials are on TWEN.

This is a *very* demanding course, with tons of readings, rules to memorize, and traps and exceptions—all for three measly credits. This introductory note provides a rough overview.

Overview

Administrative Law isn't some exotic corner of the legal universe; it's about what government does. Its grim premise is that within very wide constitutional limits, government gets to do what it wants, provided it gives you some kind of "process." The way we teach this—through cases—screens out all the stuff that goes on within agencies, or between an agency and the Congress or OMB. Even so the material can seem overwhelming, and it's quite a challenge.

First, the administrative state is biggish and does an infinite number of things in many different ways. It grants business licenses; administers disability benefits; sets industry rates and standards; writes checks (*lots* of checks, lately); collects taxes; takes over small banks and subsidizes and then prosecutes large ones; collects your selfies (*kidding*); builds a border wall but then again, maybe not; etc. I have sacrificed breadth for depth. Major omissions include due process (you'll have to learn that in ConLaw II); internal agency proceedings; state (and local) administrative law; and statutes governing agency disclosures. There just isn't enough time.

Second, AdLaw isn't self-contained. It's about what government does and how it may do it; so it overlaps with ConLaw. It plays out in a statutory context, so it overlaps with Statutory Interpretation and with the specialized law of whatever playpen one happens to be in (Environmental Law, Food and Drug Law, Financial Services, etc.). Jurisdiction is a big deal, so there's quite a bit of Federal Courts material. The administrative state seeks to nudge private conduct into productive channels; hence, AdLaw has come to intersect with cost-benefit analysis and economics.

Third, the internal structure of AdLaw is quite complex. The doctrines on delegation, agency procedure, judicial review, etc. all hang together; and in a way, you can't understand any of them until you've understood all of them. Your textbook authors do a good job at taking this one step at a time, and the

course largely (not always) follows the book's organization. But you'll want to remember that the connections between and among the cases and doctrines matter big time.

Fourth, administrative law has a complicated history. It was squeezed awkwardly into the Constitution and has proven very unstable ever since. Sometimes it is sedimentary—layer upon historical layer. At other times, big chunks of doctrine simply disappear. Relatedly, AdLaw goes through periods of quiescence, when political compromises have been worked out and everyone knows what the rules are; and periods of social and ideological contest. That tends to happen every 40 years or so: around 1900, the 1930s, the 1970—and, right on schedule, now.

My mission is to give you a conceptual apparatus to comprehend and organize this *corpus juris*, all the while bearing in mind its multifarious, complex, mutable nature. Your mission is to absorb as much of this as you can. If you get lost or confused at any point, please avail yourself liberally of my offers of consultation (*see* below).

Learning Outcomes

Here's what you are supposed to take away from this course (and what not):

- Solid understanding of the principles, doctrines, and operation of general administrative law and the Administrative Procedure Act; ability to analyze cases and to apply the basic doctrines.
- Basic understanding of the history of Administrative Law.
- Firm grasp of the constitutional and institutional context within which Administrative Law operates.
- Exposure to, and comprehension of, the complexity and the various dimensions of Administrative Law: Political Control of Agency Action; Judicial Review of Agency Action; Statutory Interpretation and Common-Law Development; Jurisdiction.
- Introduction to the contemporary debate about "the administrative state."

Note what's conspicuously missing from this list: something like, "ability to handle an AdLaw case." This is *not* an ersatz or baby appellate lit course because that can't be done. Most of the "cases" you'll encounter—especially the ones of the modern era, meaning anything after the recording of *Night Fever*—are just high-light reels of long-running, never-ending ping-pong games between agencies, interest groups, courts, and occasionally Congress. And each of these little domains has its own rules, conventions, precedents, and path dependencies. I'll do my best to give you an intellectual and conceptual framework—a way to think about, approach, and organize recurring questions, should you choose to practice in this area. Bear in mind, however, that competent administrative law *practice* will demand quite a bit more.

Logistics

Readings. "Too much reading" has been a consistent complaint about this course in past years. My sympathy is zero. In real life, any serious AdLaw case will present you with a record spanning hundreds of pages. (Carefully edited textbook excerpts give a very misleading picture of what this is like.) The course is designed to give you at least a glimpse of the real world: way too much paper, way too little time. Welcome to my world.

Format. Alas, the course is entirely remote. Zoom it is, hopefully for the last time. You will be required to be on camera for the entire duration of each class. I'll explain further details at the beginning of the first session.

Teaching; Class Participation. This is a mix of lecture and more conventional, "Socratic" teaching. I'll cold-call to keep you on your feet; but I strongly encourage active class participation, and I will consider it for purposes of your grade. Active, constructive participation means a .33 upgrade; repeated lack of preparation etc, a commensurate downgrade.

Because it's hard to sustain a remote discussion among all participants, I will break up the class into two sections and, from session to session, call on one group and then the next. To encourage engagement and preparation, the second (not-on-call) group will prepare and submit questions pertaining to the readings for the upcoming class. (I'll retain the questions and consider them in my "class participation" evaluation. We'll work out the details in the first class.) So you'll be batting and should be expected to be called on every other class. If for some reason you have been unable to prepare for a class, send me an advance email. No harm if you do this once or twice; just don't make a habit of it. *Obviously*: even if your turn isn't up, you should still prepare for class (it'll be hard to follow the course without diligent preparation); and obviously, you may still volunteer questions and thoughts.

Consultation; Interim Assessment. I'm available for consultation and advice during regular office hours (**Tues 10:30 - 12:00**); or upon request.

It's a good idea to check on your progress during the semester (and the ABA requires it). I've experimented with mid-Terms and quizzes—only to have students rebel. Far preferable: at least one *mandatory, in person* consultation session roughly half-way through the semester. Details, scheduling to follow.

Repeat: you may request additional consultations at any time. That is a good idea especially if this or that topic or session leaves you confounded. I *strongly* prefer that we conduct those conversations on site and in person. The better I get to know you, the easier it will be to teach the materials in a useful fashion.

Exam. Three-hour exam: open-book, essay-style, internet-secure. Well in time before the actual exam I will distribute a sample exam, so you will have a good idea of what to expect. I will also provide an opportunity to discuss the sample exam upon individual request (not in class).

Syllabus appears below. For each Session, I've listed the readings as well as comments and questions to help you through this morass. ***Note: the Syllabus is subject to change***, depending on our pace. ***Please check the Syllabus regularly.*** The operative version at all times is the one on TWEN.

Syllabus

"Gallia," Julius Caesar famously explained, "est omnis divisa in partes tres." This course, after a two-session Introduction, is divided into *four* parts, roughly following the organization of your textbook: Political Control of Agency Action; Judicial Review of Agency Action; Statutory Interpretation; and Jurisdiction. You'll discover quickly that this is simply a matter of exposition. In any given case all these things go together: there's *always* a constitutional overhang; *always* a question of interpretation; *always* a question of judicial review and of jurisdiction.

Introduction

Session 1: Introduction and Overview

Administrative Procedure Act (Appendix B); pp. 1-8; pp. 1004-1011 (*Franklin v. Mass*); *FDA v. Brown & Williamson* (TWEN).

Read in that order, starting with the APA. (We'll take a first look at some of its provisions). *Franklin* has a bunch of stuff about final agency action. Ignore that for now—just ask: do we think the President is an "agency"? Why or why not? Similarly, ignore the *Chevron* and *State Farm* jazz in *Brown &Williamson*: you'll learn it later. We'll use the case to explore some basic AdLaw themes—*e.g*., what's an agency? Who controls our "Fourth Branch"?

Session 2: A Brief History of Administrative Law

Pp. 17-25; *Marbury v. Madison* (TWEN)

There are three reasons for teaching *Marbury*, yet again, in this course. (1) It is our first foundational Administrative Law case. (2) It is almost never taught that way. (3) The question of whether modern administrative law is consistent with *Marbury* is one of the central themes that will, and should, preoccupy you. For present purposes *ignore* the stuff about the judicial power to declare acts of Congress unconstitutional: that's ConLaw. Focus on what Marshall has to say about what we now call judicial review of *agency* action (*i.e*., the first parts of the opinion). We'll go through that first, in the hope that the history of AdLaw will make a bit more sense against that backdrop. Here are the kinds of questions you might ask: (1) in the actual opinion there's a whole lot more about the "delivery" issue. Why is that so important? (2) Why can't Jefferson just tell Madison to hand Marbury the commission—and then fire the circus clown? And so on. You may want to make a list.

Part I: Political Control(s) of Agency Action: Congress and the President

Administrative agencies do a ton of stuff that looks like lawmaking—which the Constitution seems to commit to Congress alone. They also do a ton of stuff that looks like it ought to be done by Article III courts (you'll be amazed). So: what exactly *are* the constitutional limits to the "delegation" of those tasks to administrative agencies? And, let's say we're not entirely happy with what remains of the formal constitutional rules: do any sub-constitutional administrative law doctrines or canons work?

Session 3: Congress and the President (herein of Self-Delegation; and Such

Pp. 161-181 (*INS v. Chadha, Bowsher v. Synar*); *Clinton v. New York* (TWEN); REINS Act (TWEN)

Congress can do all kinds of stuff in all kinds of way; but it can make law in only *one* way. Keep the hyper-formalism in these cases in mind when you read delegation cases, which follow.

Compare the oft-proposed REINS Act to the legislative veto in *Chadha*: any operational difference? If not, what follows?

Session 4: Delegating "Lawmaking" Authority (I): Basics and History

pp. 27-42 (*Panama Refining Co. v. Ryan; A.L.A. Schechter Poultry Corp. v. U.S.*)

Light reading, but heavy lifting. These are the only Supreme Court cases in our entire history to declare statutes unconstitutional on non-delegation grounds.

Suppose Congress creates the Goodness and Niceness Commission, authorized to make binding rules "for the promotion of goodness and niceness on all subjects within Congress' constitutional jurisdiction." Constitutional? A good idea?

If you think that there has to be a limit to delegation, what's the test—statutory language and "magic words"? Does *Schechter* provide a (plausible) alternative approach?

Session 5: Delegating "Lawmaking" Authority (II): Contemporary Approaches and Canons

Pp. 42-103 (*Benzene Case; Whitman v. ATA; Michigan v. EPA; Gundy v. U.S.; U.S. Telecom Ass'n v. FCC; AARR v. Dept of Transportation*)

The frantic modern search for *some* limits to delegation. Do any of the proposed approaches work? Read *Gundy* last: what exactly *is* Justice Gorsuch's approach in that case? And isn't Justice Kagan right: this all collapses into statutory interpretation?

Note: These aren't the only non-delegation canons out there. For example, you may recall the "major question" canon from Legislation. Some "clear statement rules" (*e.g.*, for implied private rights of action) function as non-delegation canons. And so on. I'll say a few words about that.

Session 6: Adjudication Outside Article III

Pp. 110-136 (*Crowell, Northern Pipeline, CFTC v. Schor*); *Oil States Energy* (TWEN)

Crowell v. Benson is the key case; read carefully. Does it provide a sensible formula for the scope of agency adjudication—or is it just schizophrenic?

In *Northern Pipeline*, this stuff takes a very strange turn into bankruptcy and state law claims over which federal courts barely have jurisdiction; read that case and let me explain the remainder of that puzzle.

Does *Oil States* suggest that there's now a majority to put *Schor* out of its misery?

Session 7: Agency Adjudication and its Limits

Pp. 345-354 (*Londoner; Bi-Metallic*); pp. 425-450 (*Dominion Energy v. Johnson; Citizens to Preserve Overton Park v. Volpe; PBGC v. LTV Corp.; Withrow v. Larkin*)

Once we know that agencies can and do perform most adjudicating in this country, several additional issues arise. (1) What exactly is the distinction between adjudication and rulemaking, and what follows from it? (2) What are the *statutory* (APA, or other) requirements for adjudication? (3) May agencies freely choose between adjudication and rulemaking? (4) What are the *constitutional* due process requirements for agency adjudication?

This Session tackles (1) and (2). I've parked (3) under Judicial Review, Session 12. I've spared you (4) entirely.

You'll encounter *Overton Park* again in a later session; read carefully.

Session 8: Presidential Control (I): Appointments

Pp. 183-233 (*Buckley v. Valeo; FEC v. NRA; Lucia; Morrison v. Olsen; Edmond; Freytag*)

Art II is pretty clear on appointments, don't you think? Still, they've found ways to mess this up. Count the ways.

Session 9: Presidential Control (II): Removal

Pp. 26—299 (*Myers; Humphrey's Executor; Weiner; Morrison v. Olson; Free Enterprise Fund v. PCAOB*); *Seila Law v. CFPB* (TWEN)

Much harder than appointments, text- and otherwise. Look at *FEF* and *Seila Law*: why don't the majority Justices just do the obvious and put *Humphrey's* and *Morrison* to rest? What's the best non-strategic, *legal* and *constitutional* argument for *not* doing that? (Hint: it's in one of the dissents in your readings.)

Session 10: Presidential Control (III): Supervision and Direction

Pp. 299-314 (*Youngstown*, Jackson opinion; Border Wall Controversy); 317-343 (Executive Orders)

I thought about omitting this stuff but concluded it's worth noodling over the increasingly urgent problem of presidential control and direction of administrative agencies. Think of the President's power to direct under "emergency" statutes, and then under ordinary enactments. Should (or does) the President have power to direct DoJ (non-)prosecutions? To tell independent agencies to crank up rules to combat industry concentration? Mind you: these aren't hypos; they're recurrent questions. Think of some more; see whether you can come up with a coherent answer.

Part II: Judicial Review of Agency Action

This is the hard core of Administrative Law as we have come to understand it. Begin by (re-)reading the APA judicial review provisions very closely. Understand that judicial review under the APA depends not on what's at stake for the litigants but rather on (1) the form of agency action (formal and informal *adjudication*; formal and informal *rulemaking*) and (2) whether you are dealing with questions of *fact*, *law*, or something in between—"mixed" questions of law or fact, or of *policy*. Keep those distinctions in mind as we navigate these turbulent seas.

Session 11: Judicial Review--Adjudication

Pp. 472-489 (*Universal Camera; Allentown Mack*); pp. 498-506 (*ADAPSO*)

Drum the various standards of review—and the agency actions to which they apply—into your heads. Whether they mean anything is a different question; we'll discuss.

Session 12: Judicial Review—Rulemaking; Choice Between Rulemaking and Adjudication

Pp. 507-517 (*NPRA v. FTC*); pp. 534-553 (*Chenery II; Bowen v. Georgetown Univ. Hospital*); *DHS v. Univ. of California* (TWEN)

Two issues: (1) Agencies *power* to issue rules a various kinds, under ambiguous statutes; (2) agencies' *choice* between rulemaking and adjudication. Assume (*contra Chenery*) that you'd like to constrain that choice in some way: what would a judicial rule or doctrine to that effect look like?

Several Supreme Court cases over the past few years raise the question of whether they are harbingers of pretty serious changes in AdminLaw—or just one-offs. The *DHS*/DACA case is among them.

Session 13: Judicial Review—Agency Procedures

Pp. 553-623 (*U.S. v. Fla. East Coast R'way; Vermont Yankee; Shell Oil v. EPA; Portland Cement; Am. Radio Relay League v. FCC; U.S. v. Nova Scotia Food; Home Box Office v. FCC; ACT v. FCC; Sierra Club v. Costle; Ass'n of Nat'l Advertisers v. FTC*)

Extensive readings. Give yourself enough time, and take copious notes.

Two broad sets of issues: (1) the procedural requirements that apply at the several stages of the rulemaking process; (2) the trajectory of administrative law over the past four-plus decades. These things hang together.

Basic story: *FECR* (first case in your readings) effectively abolished the APA category of *formal* rulemaking. (As Prof. Gary Lawson has observed, the case appears in the U.S. Reports right after *Roe v. Wade*. Maybe that was just a warm-up for *this* masterpiece.) In response, the D.C. Circuit imposed so-called "hybrid" rulemaking procedures, in excess of statutory requirements. That's what the SCt tried to stop in *Vermont Yankee*. You will learn in a later session how the D.C. Circuit managed to circumvent that ruling.

Session 14: Judicial Review—Exemptions

Pp. 623-667 (*Mack Trucks v. EPA; U.S. v. Johnson; Mendoza v. Perez; AMC v. MSHA; PG&E v. FPC; CNI v. Young*)

Administrative law (and APA review in particular) operates on a rather strong "presumption of judicial reviewability." No one knows where exactly that comes from (certainly not the APA), but it's out there. However, there are certain exceptions—some coming from the APA, others from judge-made doctrines.

Important Note: the most important of those exceptions appear in APA Sec 701(a)—no review when statutes preclude judicial review, or for agency action committed to agency discretion by law. Your textbook editors have parked those issues under "Jurisdiction," and I have followed them (*see* Session 24).

The biggest issue for this Session is the business about legislative versus "interpretative" rules. What do we make of the late Judge Williams's opinion in *AMC*?

Session 15: "Hard Look" Review

Pp. 667-702 (*Nat'l Tire Dealers v. Brinegar; State Farm; FCC v. Fox Telev*.); pp. 833-844 (*Encino Motors*); *New York v. Dept of Commerce* (TWEN)

"Hard look review" is technically a form of arbitrary and capricious review. Its focus isn't on facts or on law but on the agency's *reasoning process*. None of that, of course, appears in the APA, and there's really no teaching it—it's more a mood than a doctrine. You'll just have to get a feel for it.

Prof. Lawson conveys the judicial moods we call "standards of review" by playing music for his students, in class. His choice for hard look review is Twisted Sister, *We're Not Gonna Take It*. My own choice, having read way too many of these cases, is The Ramones, *I Wanna Be Sedated*. Take your pick.

Time permitting we'll walk through the *State Farm* saga. There's more to it than meets the eye.

Are *Chevron II* and arbitrary and capricious review the same, or not? Does it matter?

Part III: Statutory Interpretation in the Administrative State

For reasons I'll explain, much of Administrative Law has collapsed into Statutory Interpretation—the stuff you learned as 1-L's. Except, this is the grown-up version. Not that it's necessarily any better.

Session 16: Deference Canons

Pp. 711-745 (*NLRB v. Hearst; Skidmore; Chevron*)

At long last, the Holy Grail. (*Chevron* is the most-cited case in our history; it outscores even *Erie*.) On a heterodox note: observe how little *law* there is to be had in *Chevron*. What's a court supposed to do in that predicament?

Note that EPA here changed its interpretation of the CAA—very plainly, as a result of a change in administrations. Think back to Part I of this course: should that matter for purposes of review? If so, how?

Session 17: Parsing Statutes

Zuni Pub. Sch. Dist. v. DoEd (TWEN); pp. 746-781 (*Yellow Transp. v. Michigan; ABA v. FTC; HUD v. Rucker; General Dynamics v. Cline*)

Read *Zuni* first. I've added it to pose an obvious question: if even *that* isn't clear and the Justices can't agree, what's this entire enterprise really worth?

Session 18: Substantive Canons (Federalism, and Such)

Pp. 781-835 (*SWANCC; Sweet Home Chapter; Carter v. Welles-Bowen; AT&T v. Iowa Util. Bd; Rapanos*)

This shouldn't be difficult, right? We learned federalism and lenity canons in Statutory Interpretation, and maybe ConLaw I. We've now learned the *Chevron* canon(s). What can possibly go wrong?

Lots. You're looking at *foundational, quasi-constitutional, judge-made* canons. Turns out, countless "cooperative federalism" statutes have federal agencies act on states in countless ways—preemption, conditional preemption, funding, conditional funding, etc. Likewise, there are tons of "hybrid" statutes with both civil and criminal provisions. Sometimes, the canons cut in the same direction; far more often, they don't. Then, what?

Can you discern, in any of these opinions, any coherent theory to make this all fit?

Session 19: *Chevron*'s Domain

Pp. 844-874 (*Christensen; Mead; Barnhart*)

Isn't there something to be said for our namesake's across-the-board approach? Among other things, the Supreme Court is supposed to give appellate courts some guidance; and on that score, *Mead* seems (shall we say) less than satisfactory. (In fact, the lower courts have run screaming from its implications.) Then again: does it *really* make sense to extend the *Chevron* framework so far beyond its original "domain" or notice-and-comment rulemaking? Noodle over that question, and keep it in mind for the next session.

Session 20: The "Brand X Problem"; Agency Jurisdiction

Pp. 874-914 (*Brand X; Home Concrete Supply; City of Arlington*)

If *Chevron* is right, *Brand X* must be right—no? Why isn't that obvious?

Assume an agency changes a legal interpretation, previously upheld as "reasonable," in the course of an *adjudication*. Private party (asylum seeker, money manager) relies on that interpretation in the proceeding but the agency says guess what, sucker: we've changed our minds. *Brand X* and away we go and away *you* go, to El Salvador or to jail. That can't be right, can it? Is that a problem of *Chevron*'s domain? *Chevron* itself? *Brand X*?

Isn't *City of Arlington* reminiscent of *Crowell*'s "jurisdictional facts" debate? (Re-read!)

Session 21: Interpreting Agency Regulations

Pp. 914-942 (*Auer; Kisor*)

Don't waste your time on the high-falutin' debates as to whether the reasons that support *Chevron* also support *Auer*; that's water under the bridge. The *Kisor* majority saved the *Auer* village by burning it to the ground, don't you think?

Part IV: Jurisdiction

When exactly can you sue whom, when and over what? Those are usually the first questions for a competent lawyer, but your editors have wisely put them last: you have to know a fair bit about administrative law to understand the interplay between constitutional and administrative law doctrines.

Session 22: Standing to Sue, Constitutional

Pp. 1082-1091 (*Allen v. Wright; FEC v. Akins*); pp. 1102-1138 (*Lujan v. Defenders of Wildlife; Steel Co. v. CBE; Friends of the Earth v. Laidlaw; Massachusetts v. EPA*); *TransUnion LLC v. Ramirez* (TWEN)

If you conclude that none of this makes sense, you're in good company: *no one* thinks it does. I'll dictate, or maybe send in advance, a dozen or so standing "rules" that the courts regurgitate time and again. You'll have to cram them into your heads. However, how they get applied in any given context is anyone's guess (*Mass v. EPA*, anyone?).

Lately, there's been enormous turmoil in this area of the law. I've substituted the recent *TransUnion* decision for cases in your textbook not just because it is (for now) the SCt's latest word but also because it features a riveting debate between Justices Kavanaugh and Thomas. They're shadow-boxing over the late Justice Scalia's "standing" legacy, aren't they? Put those opinions next to *Lujan*, and see what you think of the "injury *in fact*" test.

Session 23: Statutory ("Prudential") Standing to Sue

Pp. 1078-1081 (*ADAPSO*); 1138-1150 (*NCUA; Match-E-Be-Nash*); *Lexmark* (TWEN)

I've added *Lexmark* because I think it's (even) more consequential than your book editors make it out to be; let's see if you agree (and why I might think so).

Is it just possible that *ADAPSO* is the source of a bunch of crazy stuff in AdLaw?

Session 24: Availability and Timing of Judicial Review (I)

Pp. 943-1003 (*Johnson v. Robison; Block v. CNI; Bowen v. Michigan Academy; Overton Park* [again]; *Webster v. Doe; Lincoln v. Vigil; Dunlop v. Bachowski; Heckler v. Chaney; AHPA v. Lyng*)

Close to the end of the course and to exam time, (the first of) two sessions with copious readings and a bunch of rules to remember. Sorry to do this to you but it can't be helped.

Bad news: there's quite a bit of stuff to digest, and you'll encounter it often in real life. Good news: it's not all that complicated in theory (and I'll help you); most of the difficulties have to do with the scope and application of all these rules and doctrines.

One way to organize this mess: there's a "law of not ever," and a (seriously under-developed, to my mind) "law of not now." Those aren't hermetically sealed boxes; but it may help to collect the various rules under those headings.

Session 25: Availability and Timing of Judicial Review (II)

Pp. 1003-1078 (*Franklin v. Mass; Bennett v. Spear; Hawkes; Abbott Labs; Gray; Reno; McKart; McCarthy v. Madigan; Darby v. Cisneros*)

See comment to Session 24.

Session 26: Concluding Thoughts

Content will depend on the progress we've made over the semester. If (as I suspect) we're a bit behind, we'll use this session to cover the remaining materials. If we're on track, I'll assign short readings (law review stuff, not cases) on the state of the administrative state.