

## Questions to Think About

As you read the material for each class, consider the questions below, as class discussion will likely address many of these questions:

**Class 1 - Introduction:** What are some examples of administrative agencies? What do administrative agencies do? Where do agencies get their powers? Are there Constitutional limits on the things that agencies can do? Why does Congress give administrative agencies authority and what are the disadvantages of delegating authority to agencies?

**Class 2 - Rulemaking v. Adjudication:** Why did the *Londoner* Court conclude that due process required a hearing before the City could charge property owners an assessment for re-paving their streets? In *Londoner*, was the Council required to hold a hearing before making the initial decision to re-pave the streets? In *Londoner*, if the Council held a hearing before deciding to re-pave the streets, would that have satisfied due process? How much process is required by due process before the City Council can impose an assessment on the property owners to cover the cost of re-paving their streets? Why did the *Bi-Metallic* Court find that due process did not require a hearing while the *Londoner* Court held that it did? What was different about the two cases? Is the significant difference the nature of the decision-making process? The number of people affected? The nature of facts to be found? What is the difference between adjudicative facts and legislative facts?

**Class 4 - Introduction to Rulemaking:** How is rulemaking different from adjudication? Do the APA procedures provide for efficient decision-making by agencies with sufficient accountability safeguards? How is a legislative rule different from a non-legislative rule? When do agencies have to use formal procedures to act, as opposed to informal procedures? What procedures are required for formal rulemaking? Informal rulemaking? Formal adjudication? Informal adjudication? What standards of review apply to agency decision-making?

**Class 5 - Formal Rulemaking:** Must Congress use the “on the record” language in a statute to trigger formal rulemaking procedures? How do courts determine whether other language in a statute triggers formal rulemaking procedures? Will a statute that requires an agency to make rules “after a hearing” trigger formal rulemaking procedures? Are there presumptions regarding whether formal or informal procedures are required for rulemaking? Can an agency be required to use formal rulemaking procedures if the statute the agency is acting under does not require formal rulemaking procedures?

**Class 6 - Notice and Comment Rulemaking:** What are the basic procedures required for notice and comment rulemaking? What are the advantages of adopting rules through notice and comment procedures? Is the notice and comment process significantly quicker than the legislative process? Why or why not? Can agencies make changes to rules

between the proposed rulemaking stage and final rulemaking, or must they start over to make changes? When is a final rule a “logical outgrowth” of a proposed rule? Why should courts require final rules to be “logical outgrowths” of proposed rules? If agencies decide to make significant changes to proposed rules after publishing the rules, what options do they have if they want to avoid challenges to the final rules? How might agencies have changed the manner in which they write proposed rules in light of the *Chocolate Milk* case and similar cases?

**Class 7 - Hard Look Arbitrary and Capricious Review** : What standard of judicial review applies to review of agency factual determinations made in the context of formal rulemaking or adjudication? Informal rulemaking or adjudication? What is the difference between the traditional arbitrary and capricious standard and the “hard look” arbitrary and capricious standard? Why did the *State Farm* Court decide that the Department of Transportation acted arbitrarily and capriciously when it rescinded Standard 208? How does a court determine what factors and alternatives are relevant for agencies to consider when making decisions? If a court finds that an agency’s decision is arbitrary and capricious, will the court make a new decision for the agency? What limits will courts place on agencies when they change positions that they have taken in the past? Can an agency change a policy based on the directions of the President? Note the shifting nature of the agency’s decision-making over time in *State Farm* and other cases throughout the semester. Can a court uphold an agency’s decision based on rationales provided by the court which were not provided by the agency? Will “hard look” review of agency decisions lead to more rational, better decision-making by agencies?

**Class 8 - Notice and Comment Rulemaking - Part 2**: Why did the *Nova Scotia* court conclude that the FDA violated the procedures of the APA when it failed to identify scientific studies that it relied upon in adopting its rules? Is there any other APA challenge that could be raised based on the agency’s failure to identify studies that it relies upon when adopting rules? Must an agency respond to all comments raised during the comment period on a rule adopted through notice and comment rulemaking? Must an agency change its rule based on the comments raised during the comment period? What constitutes an adequate response to a public comment? What APA challenges can be raised if an agency fails to identify or respond to significant public comments when it finalizes a rule adopted through notice and comment rulemaking? Why does the APA require agencies to provide a “concise general statement of the basis and purpose” for a rule when the agency finalizes it in notice and comment rulemaking?

**Class 10 - Judicial Review - Chevron v. NRDC**: What does Section 706 of Title 5 say about the court’s role in reviewing legal determinations made by agencies? Why should courts decide questions of statutory interpretation, as opposed to agencies? What procedure did EPA use to interpret the Clean Air Act in *Chevron*? From a policy standpoint, why did NRDC dislike EPA’s interpretation of the statute? Had EPA interpreted the term “stationary source” consistently over time? Did EPA’s history regarding its interpretation of the term affect the Court’s decision to defer or refuse to defer to EPA in

the case? What is the two part test established by the *Chevron* Court? Did the Court uphold EPA's decision in the case? Why or why not? What are the policy reasons for deferring to agencies statutory interpretation, according to the *Chevron* Court? When courts apply Step One of *Chevron*, do they adopt a "clear statement" test?

**Class 11 - Judicial Review - *Auer* and *Christensen*:** Does *Chevron* apply to judicial review of an agency's interpretation of its own regulations? When will courts uphold an agency's interpretation of its own regulations? Why should courts defer to agency interpretations of their own regulations? Why should courts not defer? Does the timing of an agency's interpretation of its own regulations affect whether a court defers to it under *Auer*? What are the exceptions to *Auer* deference? What procedure did the agency use in *Christensen* to interpret the statute? Did the *Christensen* Court apply *Chevron* to review the agency's statutory interpretation? What test did the Court use to determine whether *Chevron* applied? What test would Justice Scalia use to determine whether to apply *Chevron*?

**Class 13 - Judicial Review - *Brand X* and *NFIB v. Dept. of Labor*:** Why did *Brand X* Internet Services care about whether cable companies were providing telecommunications services under the Communications Act? If the Ninth Circuit previously decided the question, why wasn't the case decided based on *stare decisis*? When does the *Brand X* Court suggest an agency can adopt an interpretation of a statute that conflicts with an earlier judicial interpretation of the statute? Why does the Court determine that it is occasionally appropriate for a court to defer to an agency's interpretation of a statute that conflicts with an earlier judicial interpretation of the statute? Aren't courts the experts in statutory interpretation? Once the *Brand X* Court concluded that the Ninth Circuit, in the precedent case, had not found that the Communications Act clearly dictated a particular interpretation of the statute, what additional findings did the Court have to make in order to uphold the agency's interpretation of the statute? On what basis did the challengers argue that the agency acted arbitrarily and capriciously and how did the Court respond? What was the statutory interpretation question at issue in *NFIB v. Department of Labor*? Did the Court use the *Chevron* analysis to resolve the statutory interpretation question? Why did the dissent argue that the OSHA standard was valid? When does the "major questions doctrine" apply and how did it impact the majority's analysis of OSHA's statutory authority in the case? What is the rationale for the major questions doctrine, according to the concurring Justices? Which branch of government do the various Justices argue should decide whether a vaccine/mask mandate is necessary to reduce the risk of harm cause by COVID-19 to employees at work?

**Class 14 - Interpretive Rules, Policy Statements and Guidance:** What are the advantages and disadvantages to agencies of making decisions through non-legislative rulemaking? What are the differences between a general statement of policy and a substantive rule and how can courts determine whether a policy adopted by an agency is a general statement of policy or a substantive rule? How are general statements of policy applied differently than substantive rules in the context of adjudication? How is an

interpretive rule different from a policy statement? What are procedural rules and why did the *Bowen* court determine that the rules in the case were or were not procedural rules? If the Department of Agriculture, in *Hector*, adopted the eight foot fence requirement through notice and comment rulemaking, would the court have likely upheld the requirement? Why did the court invalidate the agency's eight foot fence requirement? Was the *Hector* court establishing a rule that interpretive rules must be general, rather than specific?

**Class 16 - Standing - Injury in Fact:** Can a harm to the environment or an aesthetic harm be an "injury in fact"? Can a person who has suffered an injury that is shared by many other persons establish standing to sue, despite the fact that many other persons are injured in the same way? Why did the *Sierra Club* Court find that the plaintiffs lacked standing to sue? Can a person who has not yet been injured, but will be injured in the future by a defendant's action, demonstrate an injury in fact for standing? Why did the *Lujan* Court conclude that the plaintiffs lacked standing to sue? What is the "ecosystem nexus" theory for standing that was rejected by the *Lujan* Court? Will a procedural injury be a sufficient "injury in fact" for purposes of standing?

**Class 17 - Standing: Causation and Redressability; Associational Standing:** How does the "causation" analysis for standing compare to the causation analysis in Tort law? Why did the *Simon* Court conclude that the IRS interpretation of the Tax Code did not cause the injuries suffered by the indigent patients? Did *Massachusetts v. EPA* make it easier for plaintiffs to prove causation for purposes of standing? Are there limits on the reach of the *Massachusetts* Court's opinion? Did the *Massachusetts* Court change the redressability analysis for standing purposes in any way? After *Massachusetts*, can a plaintiff who has suffered a procedural injury demonstrate an "injury in fact" based solely on the violation of the procedural right? When can an association sue based on injuries to its members?

**Class 19 - Preclusion of Judicial Review:** Why would courts be reluctant to interpret a statute to preclude judicial review of agency action? Does that raise any constitutional concerns? Will a court ever find that a statute implicitly precludes judicial review or must preclusion be explicit? Will a court imply that a statute precludes review of an agency action if the statute explicitly authorizes review of other agency actions, but is silent regarding review of the agency action to be challenged? In deciding whether a statute precludes judicial review, do courts rely on any clear statement rules? Will courts consider legislative history, the structure of a statute, or the purposes of the statute when deciding whether the statute precludes judicial review of an agency action? Why did the *Block* Court conclude that the Agricultural Marketing Agreement Act precluded judicial review of the consumers' challenges to milk marketing orders?

**Class 20 - Committed to Agency Discretion:** Does the "committed to agency discretion by law" exception to judicial review apply to all discretionary actions by agencies? When did the *Overton Park* Court suggest that the exception applies? Does the Court's

determination raise any constitutional concerns regarding delegation of authority to agencies? Why did the *Webster* Court find that the CIA Director's decision was committed to agency discretion by law? Do you agree with the Court? Was the decision based on statutory interpretation alone or did other concerns motivate the Court? Why did the *Webster* Court find that the challengers' constitutional claim was reviewable (not committed to agency discretion) if his other claims were not? Wasn't the action the same? How could it be committed to agency discretion for some purposes, but not for others? In *Heckler v. Chaney*, what enforcement actions did the challengers want the FDA to take and why did the agency refuse? Will a court ever review an agency's decision to not bring an enforcement action? Why or why not? Putting aside the question of whether the decision is committed to agency discretion by law, is an agency's refusal to take an enforcement action a "final agency action" that can be challenged in court?

**Class 22 - Non-Delegation Doctrine:** Are agencies legislating when they adopt rules? If so, does that violate Constitutional principles of separation of powers? How specific must a direction from Congress be to constitute an "intelligible principle" for agency rulemaking? Do courts use normal tools of statutory interpretation to find "intelligible principles"? Can they examine the structure of the statute, legislative history and the purposes of the statute to find an "intelligible principle"? Is delegation of legislative authority to an agency without standards appropriate if a court can review the agency's actions de novo? Can a broad delegation of legislative authority to an agency be saved by a narrowing interpretation of the authority by the agency? Why did the challenger in *Gundy* argue that SONRA violated the non-delegation doctrine? What is the difference between the *Gundy* plurality's articulation and application of the non-delegation doctrine and the dissent's? What tools does the *Gundy* dissent claim the Supreme Court has used to limit excessive delegations of legislative authority in light of the limited use of the non-delegation doctrine?

**Class 23 - Preemption:** What is the difference between express preemption and implied preemption? How did the Federal Railroad Safety Act of 1970, at issue in *Norfolk Southern Co. v. Shanklin*, address preemption of State laws? Can federal regulations, as opposed to federal laws, preempt state law? Did the *Norfolk Southern* Court conclude that the federal regulatory requirements that the Department of Transportation established preempted state tort law? Are there any presumptions regarding federal preemption of state law? Can federal laws implicitly preempt state laws? If so, when? Did the *Wyeth* Court conclude that it was impossible to comply with both federal and state laws? Did the Court find that compliance with state law would frustrate the purposes of federal law? Why did the *Medtronic* Court find that federal law preempted state regulation of medical devices while the *Wyeth* Court found that federal law did not preempt state regulation of drug labeling?

**Class 25 - Adjudication; Procedural Due Process:** What procedures does the APA require for informal adjudication? Why doesn't the APA provide more robust procedural requirements for informal adjudication? Are there any differences between the procedures

required by the APA for formal adjudication and the procedures required for a trial? What is the Constitutional basis for the due process limits on agencies? Does due process require notice and an opportunity for a hearing when agencies engage in rulemaking? Why or why not? What was the traditional distinction between rights and privileges for due process purposes? What was the precise interest that the challengers claimed was protected by due process in *Goldberg*? What was the source of the challengers' protected property interest in *Goldberg*? Did the government argue that the challengers' interest in *Goldberg* was not a protected property interest? What was the precise interest that the challenger claimed was protected by due process in *Roth*? What was the source of the challenger's protected property interest in that case? When will a statute create a protected property interest? What liberty interests are protected by the due process clause? Is there a protected liberty interest in a good reputation?

**Class 26 - Procedural Due Process - Part 2:** Can protected property interests derive from state statutory law? Common law? Can oral agreements form the basis for protected property interests? Can employee manuals or state guidelines form the basis for protected property interests? How did the *Goldberg* Court determine what procedures were required by due process before the government could terminate the challengers' AFDC benefits? What procedures did the Court determine were required by due process? How do those procedures compare to the list of procedures identified by Judge Friendly regarding the full range of procedures that could be alleged to be required by due process? How is the test used by the *Mathews* Court to determine the range of procedures required by due process different from the test used by the *Roth* Court? How is the interest of the challengers in *Mathews* different from the interest of the challengers in *Roth* and how does that affect the *Mathews* Court's due process analysis? Why does the *Roth* Court suggest that the government has an interest in ensuring that AFDC beneficiaries are not deprived of their benefits while the *Mathews* Court does not identify a similar government interest in ensuring that disability beneficiaries are not deprived of their benefits?

**Class 28 - Procedural Requirements for Informal Adjudication:** Are agencies required to make formal fact findings or support decisions made in informal adjudication with a record? Must they explain their decisions made through informal adjudication? Did the DOT make any fact-findings or explain why it decided to authorize construction of a federal highway through a city part in the *Overton Park* case? Can a court determine whether an agency has complied with statutory requirements or made a rational decision if the agency does not make fact findings to support its decision or explain the reasoning behind its decision? What standards of review did the Court reject in *Overton Park* and why? Did the *Overton Park* Court find that the DOT acted within its statutory authority? Was the agency authorized, under the statute, to consider the cost of alternatives in determining whether alternatives were feasible and prudent? Did the Court find that the DOT's action was arbitrary and capricious? Did the Court invalidate the agency's decision?

**Class 31 - Formal Adjudication - Review of Factual and Legal Determinations:** What standard of review applies when courts are reviewing an agency's fact-finding in formal

proceedings? Was the *Universal Camera* Court interpreting the substantial evidence standard from the APA? In determining whether there is “substantial evidence” to support an agency’s fact-finding, will courts limit their review to the evidence that supports the agency’s fact-finding or will they examine the evidence that supports and detracts from the agency’s conclusions? How much evidence is required to meet the “substantial evidence” requirement? How does the standard compare to the directed verdict standard or the standard appellate courts apply when reviewing trial court fact-finding? Does the fact that an ALJ reached a different factual conclusion than the agency impact whether the agency’s fact-finding is supported by “substantial evidence”? Does the nature of the facts being found by the agency impact the level of deference accorded to agencies under the “substantial evidence” test? What standard or test do courts use when reviewing an agency’s interpretation of a statute in the context of formal adjudication? In the *Cardozo-Fonseca* case, when does Justice Scalia suggest a court should defer to an agency’s statutory interpretation under *Chevron* Step One?

**Class 32 - Triggering Formal Adjudication / Procedural Violations:** What is the trigger for formal adjudication procedures? In *Seacoast*, why did the court conclude that formal adjudication procedures were required? Did the court identify any presumptions? Did the court accord any deference to the agency’s interpretation of the statute regarding the procedures required? Did EPA comply with the procedures required for formal adjudication in *Seacoast*? If not, did the court require EPA to comply? Why or why not? Did the D.C. Circuit, in the *Chemical Waste Management* case apply a presumption in favor of formal adjudication? If not, why not, and why did the court conclude that formal adjudication was not required for EPA’s action? Did the court find that due process required EPA to use additional procedures? Why did the 1<sup>st</sup> Circuit, in *Dominion Point*, find that EPA was not required to use formal adjudication procedures when issuing a permit and granting a variance when the Circuit interpreted the same statute to require formal adjudication for those actions in the precedent *Seacoast* case? Why didn’t the court apply *stare decisis*?

**Class 33 - Ex Parte Contacts in Adjudication / Estoppel:** How is an “ex parte communication” defined in the APA? What limits does the APA impose on ex parte communications in formal proceedings? Why should ex parte communications be limited in formal proceedings by agencies? How broad is the definition of “interested person” under the APA for purposes of the prohibition on ex parte communications? What is the remedy under the APA for a prohibited ex parte communication? Other than the procedural challenge under the APA, are there any other grounds upon which an agency’s decision could be invalidated if the agency made the decision based upon an undisclosed ex parte communication? What limits are imposed on ex parte communications in informal adjudication? What must a challenger prove in order to prevail on a claim of estoppel against the government? Why did the *Schweiker* Court conclude that the United States should not be estopped? Was the Court’s decision influenced by the fact that the challenger was seeking money from the government? How did that impact the Court’s analysis?

