2015 SUPPLEMENT TO

ADMINISTRATIVE LAW

A CONTEXT AND PRACTICE CASEBOOK

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Introduction to 2015 Supplement

This update covers the period June 2012, when the Course Book went to press, through June 2015, when this update went to press. In those three years, legislatures have enacted many statutes affecting administrative agencies; the President and Governors have issued many executive orders and other directives; agencies have generated many, many regulations and guidance documents; and courts have decided many, many administrative law cases. This update aims to be selective, rather than comprehensive. It discusses cases and other developments that significantly change or usefully illustrate something in the Course Book. I welcome your feedback on this update or the Course Book. Please send it to me at richard@uidaho.edu. Thank you.

Chapter 4

Administrative Procedure Acts (APAs)

D. The Fundamental Distinction Between Rulemaking and Adjudication

1. The Distinction under the Federal APA

pp. 83–84:

This new paragraph goes after the paragraph on the bottom of page 83, which begins, "You may wonder why the APA defines '**rule**' to include agency statements of '**general applicability**. . . . '":

Some federal ratemaking still occurs. For example, the Surface Transportation Board can set the rates that railroads charge for shipping freight. The Board has that ratemaking power under 49 U.S.C. §10501 (2012). Section 10501 authorizes ratemaking, however, only if the shipper complaining about a particular railroad's existing rates is "captive" to that railroad, meaning that the railroad doesn't have viable competition. *See BNSF Ry. v. Surface Transp. Bd.*, 748 F.3d 1295 (D.C. Cir. 2014). So ratemaking power exists under the statute only when market competition does not do the job of ensuring reasonable rates.

Chapter 7

The Distinction between Legislative Rules and Non-Legislative Rules

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E. The Distinction between "Legislative" Rules and "Substantive" Rules

p. 142:

This new Exercise goes after Diagram 7-3 ("Types of Rules").

Exercise

The U.S. Commission on International Religious Freedom has a statutory duty to review government reports on violations of religious freedom in other countries and, in light of its review, to make policy recommendations to the President and other federal officials. 22 U.S.C. §6432(a) (2012). Among its statutory powers is this one:

> **22 U.S.C. §6432a. Powers of the Commission**
>
> . . .
>
> (d) Administrative procedures
>
> The Commission may adopt such rules and regulations, relating to administrative procedure, as may be reasonably necessary to enable it to carry out the provisions of this subchapter.

Using Diagram 7-3, what type of rules does this statute authorize the Commission to make?

Chapter 8

Agency Rulemaking Power

B. The Nondelegation Doctrine as a Limit on Statutes Granting Federal Agencies Power to Make Legislative Rules

4. Delegations of Power to Private Entities

p. 161–162:

Pages 161–162 of the Course Book discuss delegation of governmental power to private entities. As discussed in the 2014 Supplement, a lower court held in 2013 that a federal statute was unconstitutional in delegating power to Amtrak, which the court held was a private entity. *Association of American Railroads v. U.S. Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), *cert. granted*, June 23, 2014 (U.S. No. 13-1080). The U.S. Supreme Court vacated that decision in its most recent Term, however, holding that Amtrak is a government entity for purposes of the plaintiff's delegation challenge. *Dep't of Transp. v. Ass'n of American Railroads*, 135 S.Ct. 1225, 1231–1234 (2015). The Court remanded the case for further consideration of the plaintiff's constitutional challenges, some of which the concurring Justices believe are substantial. *Id*. at 1240 (Alito, J., concurring) (stating that, from Court's conclusion that Amtrak is governmental, "it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution); *id* (Thomas, J., concurring) (writing separately "to highlight serious constitutional defects" in challenged statute that remain to be resolved). This case thus bears watching.

Chapter 9

Limits on Agency Rulemaking Power

A. Internal Limits on Agency Rulemaking Power

1. Internal Substantive Limits

a. Internal Substantive Limits on Agency Rulemaking Power—the "Ultra Vires" Concept

pp. 168–171:

The Course Book discusses the concept of "ultra vires" agency rules on pages 168-171. The discussion distinguishes cases holding that an agency has exceeded its authority from cases holding that an agency has acted within its authority but produced an action that is simply *wrong*, because, for example, it violates a specific statute. The U.S. Supreme Court cast some doubt on the validity of this distinction in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). Below we briefly discuss this aspect of *City of Arlington*, as well as three recent lower court cases on the scope of agency rulemaking power. (*City of Arlington* also pops up in several other places in this update.)

The Court explained in *City of Arlington* that there is no such thing as a discrete class of issues that can be labeled as involving "agency jurisdiction," when it comes to deciding whether a reviewing court should defer to an agency's interpretation of the statute that it administers:

> The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations—the big, important ones, presumably—define the agency's "jurisdiction." Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between "jurisdictional" and "nonjurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.

Id. at 1869 (emphasis supplied by the Court). Although *City of Arlington* focused on when courts should defer to agency statutory interpretations, this passage more broadly implies that anytime an agency violates the statute that it administers, it exceeds its authority, and that attempts to label some violations as implicating "jurisdiction"—or, presumably, as

"ultra vires"—are not helpful.

Yet the ultra vires concept and the related notion of agency jurisdiction may not die so easily. To begin with, the federal APA authorizes courts to set aside agency action "in excess of *statutory jurisdiction*, authority, or limitations." 5 U.S.C. §706(2)(C) (emphasis added). Furthermore, even after *City of Arlington*, you find cases holding that agency rules and other actions exceed the agency's "jurisdiction." Here is a recent example:

- *Electric Power Supply Ass'n v. Federal Energy Regulatory Comm'n*, 753 F.3d 216 (D.C. Cir. 2014), *cert. granted sub nom. EnerNOC, Inc. v. Elec. Power Supply Ass'n*, 135 S.Ct. 2049 (2015)

The Federal Power Act authorizes the Federal Energy Regulatory Commission (FERC) to regulate "the sale of electric energy at *wholesale* in interstate commerce." 16 U.S.C. §824(b)(1) (emphasis added). But the Act does not let FERC regulate *retail* electricity sales; that is left to the states. The D.C. Circuit held that a FERC rule exceeded FERC's "jurisdiction" under the Act, because the rule in effect regulated retail sales of electricity, thus invading the states' "jurisdiction." *Id.* at *1. A dissenting judge, however, emphasized that the FERC rule did not really regulate retail sales. Instead, the rule gave retail customers incentives to *refrain* from buying electricity—for example, during times of the day when electricity demand was high—as a conservation measure.

Another recent case distinguished between, on the one hand, an agency's general authority to promulgate rules and, on the other hand, specific statutory restrictions on the exercise of that authority.

- *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014)

In its "Open Internet Order," the FCC issued net neutrality rules to prevent "broadband" providers like Verizon from charging content providers like Netflix fees for faster, better internet service. Verizon challenged the net neutrality rules on the grounds "[1] that the Commission lacked affirmative statutory authority to promulgate the rules, [2] that its decision to impose the rules was arbitrary and capricious, and [3] that the rules contravene statutory provisions prohibiting the Commission from treating broadband providers as common carriers." *Id.* at 634 (bracketed numerals added by your author). The court rejected the first two grounds but vacated the main rules on the third ground. In the block quotation from the court's decision below, we have added bracketed numerals and paragraph breaks to show the court's conclusion on each ground:

> [1] "[T]he Commission has established that section 706 of the Telecommunications Act of 1996 vests it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure."
>
> [2] "The Commission, we further hold, has reasonably interpreted section 706 to promulgate rules governing broadband providers' treatment of Internet traffic,

> and its justification for the specific rules at issue here—that they will preserve and facilitate the 'virtuous circle' of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence."
>
> [3] "That said, even though the Commission has general authority to regulate in this arena, it may not impose requirements that contravene express statutory mandates. Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such. Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose per se common carrier obligations, we vacate those portions of the Open Internet Order."

Id. at 628. The basis for the court's decision is important in upholding the FCC's authority to regulate on the subject of net neutrality, including by classifying broadband providers as common carriers. The court's decision lets the FCC go back to the drawing board and exercise its "affirmative authority" in a way that doesn't violate specific statutory restrictions.

We summarize one last case. In this last case, the court holds that an agency exceeded its rulemaking authority but the court doesn't use the terminology of agency "jurisdiction."

- *Chamber of Commerce of United States v. NLRB*, 721 F.3d 152 (4th Cir. 2013)

The Fourth Circuit struck down a National Labor Relations Board rule that required employers to post a notice informing employees of their rights under the National Labor Relations Act (NLRA). The NLRA authorizes the Board to make "such rules and regulations as may be necessary to carry out the provisions of [the Act]." 29 U.S.C. §156. The Fourth Circuit interpreted this rulemaking authority to "only empower[] the Board to carry out its statutorily defined reactive roles in addressing unfair labor practice charges and conducting representation elections upon request." *Chamber of Commerce v. NLRB*, 721 F.3d at 154. In adopting this narrow interpretation, the court relied partly on evidence that Congress enacted and amended the NLRA at times when Congress "was [expressly] enabling sister agencies to promulgate notice requirements." *Id.* at 154. Congress's failure to give the Board similar, express authority implied a denial of that authority.

B. External Limits on Agency Rulemaking Power

1. Constitutional Law

a. Substantive Limits

p. 173:

The 2014 Supplement to the Course Book cited a 2014 lower-court decision holding that an agency rule violated a substantive constitutional (i.e., external) limit on agency action. That decision was *National Ass'n of Manufacturers v. SEC*, 748 F.3d 359 (D.C. Cir. 2014). More recently, however, the D.C. Circuit overruled that 2014 decision in part. *See American Meat Inst. v. U.S. Dep't of Agriculture*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (en banc). In this more recent decision, the court rejected a First Amendment challenge to a U.S. Department of Agriculture rule that required meat products and other foods to be labeled with their country of origin. This more recent case, like the earlier one, illustrates that the Constitution is an external source of substantive limits on agency rulemaking power.

2. Statutory Law

a. Substantive Limits

p. 174:

At the end of the last full paragraph on page 174, add this paragraph:

Another example of a cross-cutting federal statute that substantively limits some federal agency rules is the Religious Freedom Restoration Act (RFRA). RFRA prohibits the federal government from substantially burdening a person's exercise of religion unless necessary to further a compelling government interest. 42 U.S.C. § 2000bb–1(a), (b). The Court held that some federal rules violated RFRA in *Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014). The rules generally required employers to cover their employees with health insurance plans that provided free birth control devices. The rules were successfully challenged under RFRA by companies whose owners had religious objections to some of the birth control devices. *Hobby Lobby* illustrates a federal statute that puts external, substantive limits on agency rulemaking power.

Chapter 10

The APA as a Source of Procedural Requirements for Agency Rulemaking

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C. Step 2 of Analysis: If the APA Does Apply to the Agency, Do the APA's Rulemaking Requirements Apply to the Rule under Analysis?—Examining the APA Exemptions

1. Federal APA Rulemaking Exemptions

b. Subject-Matter Exemptions in Section 553(a)

(ii) Exemption for Agency Management or Personnel, Public Property, Etc.

p. 202:

A 2013 regulatory development requires a change to the third full paragraph on page 202, which begins, "The breadth of the proprietary functions exemption has been diminished in effect by agency-specific statutes, rules, and policy statements that subject rules otherwise covered by the exemption to the APA's rulemaking requirements. . . . "

This paragraph mentions the U.S. Department of Agriculture (USDA) as an agency that has a policy subjecting its rules to APA requirements even if those rules would otherwise fall within the APA exemption for proprietary functions. Recently, the USDA revoked that policy. *See* 78 Fed. Reg. 64194 (Oct. 28, 2013). A good article discussing the original policy and criticizing the revocation is William Funk, *U.S. Department of Agriculture's Revocation of 40+-Year-Old Policy on Engaging in Notice-and-Comment Rulemaking*, Admin. & Reg. Law News, Winter 2014, at 17.

C. Step 2 of Analysis: If the APA Does Apply to the Agency, Do the APA's Rulemaking Requirements Apply to the Rule under Analysis?—Examining the APA Exemptions

1. Federal APA Rulemaking Exemptions

c. Exemptions for Interpretative Rules, Policy Statements, and Procedural Rules

(iii) "[I]nterpretative [R]ules" (Also Known as "Interpretive" Rules)

pp. 208-209:

These pages discuss the situation in which an agency changes the way it interprets one of its regulations. As discussed, the D.C. Circuit has held that an agency must sometimes use notice-and-comment rulemaking to change its interpretation of a regulation, even if the prior interpretation was an interpretative rule that was exempt from notice-and-comment requirements. The U.S. Supreme Court rejected the D.C. Circuit's approach in *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1206–1210 (2015). The Court observed that the APA does not require an agency to use notice-and-comment procedures to issue an interpretive rule in the first place; therefore, the Court reasoned, the APA cannot be construed to require the agency to use notice-and-comment procedures when it changes an interpretive rule.

d. The Good Cause Exemption

p. 212:

The first full paragraph on page 212 discusses "interim final rulemaking." The paragraph concludes, "The validity of interim final rulemaking, like that of direct final rulemaking, depends on the rule at issue fall within the 'good cause' exemption or another exemption." A recent case supports that conclusion; it invalidated rules made through interim final rulemaking because the agency lacked good cause for using that procedure. *Sorenson Commc'ns, Inc. v. FCC*, 755 F.3d 702, 706–707 (D.C. Cir. 2014) (FCC did not submit evidence to show that interim rules were necessary to avoid "fiscal calamity" to government fund supporting telephone services for people with hearing impairments and other disabilities).

Chapter 12

Informal Rulemaking

C. The Federal Agency Considers Public Input on the Proposed Rule and Other Relevant Matters When Deciding on the Final Rule.

1. What Is "[R]elevant"?

p. 266:

This page explains that statutes control what is "relevant" for an agency to consider when making rules under the statute. To illustrate the point, this page discusses two U.S. Supreme Court cases. In one case, the Court held that a Clean Air Act provision *barred* the EPA from considering costs when devising air quality standards. In the other case, the Court held that a Clean Water Act provision *allowed* EPA to consider costs when making rules under that provision. The cases are reconcilable because they concerned different statutes.

The same issue—whether a statute allowed an agency to consider costs when making a rule—arose in two more recent Court decisions. The two cases further show that the issue of whether cost is a relevant factor, which the agency can accordingly consider when rulemaking, depends on the particular statute governing the rulemaking.

The first is *Environmental Protection Agency v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). In *Homer*, the Court reviewed an EPA rule implementing the Clean Air Act's "Good Neighbor Provision." That provision empowers EPA to make rules preventing upwind states from sending too much air pollution into downwind states. EPA used that power to issue a rule—known as the "Transport Rule"—that bases air pollution restrictions on how much it will cost upwind states to implement the restrictions. The U.S. Supreme Court held in *Homer* that the Good Neighbor Provision allows EPA to consider these costs and that EPA appropriately did so in issuing the Transport Rule.

The second recent case is *Michigan v. EPA*, 2015 WL 2473453 (U.S. June 29, 2015). There, the Court reviewed a Clean Air Act provision authorizing EPA to regulate hazardous air pollutants from power plans if the EPA concluded that "regulation is appropriate and necessary." 42 U.S.C. § 7412. EPA interpreted the statute's "appropriate and necessary" phrase to allow EPA to ignore costs when deciding whether to regulate. The Court rejected that interpretation as unreasonable. The Court concluded that, "in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost." 2015 WL

2473453 at *7.

pp. 266–267:

The paragraph that starts at the bottom of page 266 discusses how the incumbent Administration's policies can be "relevant" to agency rulemaking, within statutory constraints. A pair of cases illustrates the point.

- *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012).

This is the case on which the Chapter Problem for Chapter 12 is based, and this summary assumes you have read that problem. (*See* Course Book pp. 243-245.) The court upheld EPA's elimination of the "opt-out" provision from the Lead Renovation, Repair, and Painting Rule. It didn't bother the court that EPA changed its mind about the desirability of the opt-out provision without any new evidence or studies. The court quoted a U.S. Supreme Court case stating that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances." *Id*. at 1037 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 57 (1983)). Indeed, EPA's elimination of the opt-out provision likely reflected, in part, a change in administrations between April 2008, when EPA published the rule including an opt-out provision, and October 2009, when EPA proposed eliminating the opt-out provision.

* * *

An agency cannot change its mind in a way that violates limits on agency power, including limits imposed by the requirement of "reasoned decision making" typically applicable on judicial review. (*See* Course Book pp. 178-179 and 407-408.) The next case makes that point when invalidating agency action influenced by politics:

- *Tummino v. Hamburg*, 936 F. Supp.2d 162 (E.D.N.Y. 2013)

The FDA approved a drug company's application to allow people of all ages to buy an emergency contraceptive, "Plan B One-Step," over the counter. But the Secretary of Health and Human Services overruled the FDA's decision, apparently under political pressure. The federal district court held that the Secretary's decision was invalid because it departed from agency precedent and ignored scientific evidence supporting the FDA's decision. This holding shows that politics do not always prevail. Although the FDA initially appealed the district court's decision, it eventually decided to comply with the district court's order to make Plan P One-Step available over the counter and dismissed its appeal. *See* Recent Case, Tummino v. Hamburg, 936 F. Supp. 2d 162 (E.D.N.Y. 2013), 127 Harv. L. Rev. 1196, 1200 n.44 (2014).

C. The Federal Agency Considers Public Input on the Proposed Rule and Other Relevant Matters When Deciding on the Final Rule.

3. How Can You Tell If a Federal Agency Has "[C]onsider[red] . . . [R]elevant [M]atter Presented"?

p. 273:

The second full paragraph on page 273 says, "If a federal court concludes from a federal agency's failure to discuss an important issue that the agency indeed failed to consider that issue, the court will ordinarily set aside the rule as "arbitrary and capricious," which means the rule is substantively flawed. A recent case illustrating the point is *Sorenson Commc'ns Inc. v. FCC*. 755 F.3d 702, 709 (D.C. Cir. 2014) ("As the Commission failed to articulate a satisfactory explanation for its action, we deem the . . . [rule] arbitrary and capricious.") (internal quotation marks omitted).

D. The Federal Agency Publishes the Final Rule along with a Concise General Statement of Its Basis and Purpose.

2. Concise General Statement

c. The Agency Must Explain the Connection between Its Rule and the Relevant Data or Other Relevant Evidence

p. 279:

Here is a recent rulemaking case about the need for the agency to "offer a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 52:

- *Sorenson Communications Inc. v. FCC*, 755 F.3d 702 (D.C. Cir. 2014)

The FCC promulgated rules for captioned telephone services for people with hearing and speech impairments. The rules control when the private companies who provide these services can get reimbursement from a federal fund. One rule required the private companies, when distributing the phones capable of provides these specialized services, to distribute them with their captioning feature turned off. The FCC argued that this "Default-Off Rule" would prevent fraudulent use of the phones by people who aren't hearing- or speech-impaired. The evidence before the FCC, however, did not support the existence of a fraud problem or the effectiveness of the rule in combating any fraud problem. The court held that the Default-Off Rule was arbitrary and capricious because it was meant to defeat a fraud "bogeyman whose existence was never verified" and "there was contrary evidence questioning its efficacy and necessity." *Id*. at 710.

Chapter 16

Legal Effect of a Valid Legislative Rule When Published

C. Federal Regulatory Preemption

1. Express Preemption

p. 337:

At the top of page 337, at the end of the carryover paragraph, add this bullet point:

- After *Shanklin*, Congress clarified the preemptive effect of 49 U.S.C. §20106(a). *See* Pub. L. No. 110-53, §1528 ("Railroad Preemption Clarification"), 121 Stat. 453 (2007). As clarified in 2007, the express preemption provision says, "Nothing in [the FRSA] shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party . . . has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation." *Id.* §20106(b)(1)(A). If this provision had been on the books at the time of Ms. Shanklin's lawsuit, it would have allowed her to recover by showing, for example, that the train that killed her husband was violating federal regulations establishing a speed limit for the fatal intersection.

Chapter 19

Limits on Agency Adjudicatory Power

A. Internal Limits on Agency Adjudicatory Power

1. Internal Substantive Limits

a. Ultra Vires Agency Adjudications

pp. 394–396:

These pages discuss the concept of "ultra vires" agency adjudications, a concept that treats agencies as having "jurisdiction" (power) over certain matters. But as discussed above in this supplement, the Court cast doubt on the validity of agency "jurisdiction" in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). The Court explained in *City of Arlington* that the distinction between issues of agency "jurisdiction," on the one hand, and other issues of an agency's authority under the statute that it administers "is a mirage." *Id*. at 1869. Even so, as also discussed above, it is likely that courts will continue to use the term "jurisdiction" to describe some issues of agency authority. *See*, *e.g.*, *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1596 (2015) (discussing "jurisdiction" of Federal Energy Regulatory Commission under Natural Gas Act).

B. External Limits on Agency Adjudicatory Power

1. Constitutional Law

p. 399:

Add a citation at the end of the paragraph on page 399 that begins, "Of course, a federal agency order is invalid if it violates the U.S. Constitution":

> *see also Lane v. Franks*, 134 S.Ct. 2369, 2378–2381 (2014) (state community college violated First Amendment by firing an employee for testimony given under subpoena).

B. External Limits on Agency Adjudicatory Power

2. Statutory Law

p. 400:

a. Substantive Limits

The third full paragraph on page 400 says that cross-cutting statutes can substantively limit agency adjudicatory power, and illustrates the point using *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). A more recent case illustrating the point is *Department of Homeland Security v. MacLean*, 135 S.Ct. 913 (2015). That case arose when the Transportation Security Administration (TSA) fired Robert MacLean for disclosing a TSA cost-cutting measure that MacLean believed would threaten public safety. (TSA decided not to put air marshals on overnight flights to save hotel costs.) The Court held that MacLean's firing violated the Whistleblower Protection Act, which generally protects federal employees from being fired for disclosing information about dangers to public health or safety. The Whistleblower Protect Act is a cross-cutting statute that substantively limits the power of federal agencies to take adverse employment actions against their employees.

Chapter 20

The Due Process Clauses as Sources of Procedural Requirements for Agency Adjudications

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C. Question One: Does Due Process Apply?

4. The Deprivation Must Be a Deprivation of Life, Liberty, or Property

a. Property

p. 432:

Add a new paragraph after the second full paragraph on page 432, which begins, "The U.S. Supreme Court has not settled whether applicants for government benefits have property interests protected by the due process before the government has found them eligible for the benefits.":

Unlike the Supreme Court, lower federal courts have addressed whether applicants for—as distinguished from recipients of—government benefits have a property interest in those benefits. Most lower courts have held that applicants *do* have a property interest, as long as "the statutory scheme . . . mandates award of the benefit upon satisfaction of specified criteria." *Kapps v. Wing*, 404 F.3d 105, 116 (2nd Cir. 2005). A recent case so holding is *Barrows v. Burwell*, 777 F.3d 106 (2nd Cir. 2015). The plaintiffs were Medicare patients seeking inpatient hospital benefits under Medicare Part A. The court held that the plaintiffs could establish a property interest in those benefits by showing that the government has created "fixed and objective criteria" for doctors to apply when deciding whether to admit a Medicare patient into the hospital as an inpatient. *Id*. at 115. The key—consistently with the *Castle Rock* case discussed in the Course Book on page 433—is the existence of statutes and regulations that "meaningfully channel official discretion by mandating a defined administrative outcome." *Id*. (internal quotation marks and brackets omitted). By establishing fixed criteria for inpatient status, the plaintiffs could establish a property interest in receiving the benefits associated with that status.

D. Question Two: If Due Process Applies, What Process Is Due?

2. Due Process Principles

a. The Timing Principle: Generally Requiring a Pre-Deprivation Notice and Right to Be Heard

p. 447:

This material goes after the paragraph near the bottom of page 447 that begins, "Perhaps the best way to summarize the timing rule . . .":

A 2013 case illustrates the emergency exception to the timing rule, which holds that due process usually requires notice and a hearing *before* a deprivation occurs:

- *National Amusements, Inc. v. Borough of Palmyra*, 716 F.3d 57 (3rd Cir. 2013)

A company discovered a buried bomb while inspecting a site in the Borough of Palmyra, New Jersey, that had been chosen for a redevelopment project. The site had formerly been a weapons-testing facility for the U.S. Army, so the Borough suspected that more undiscovered munitions underlay the site. When the first bomb was unearthed, the site housed an open-air flea market owned by National Amusements, Inc. After National Amusements refused the Borough's request to close the flea market temporarily, the Borough ordered the flea market closed until munitions experts cleared the site. National Amusements was not amused; it sued, claiming that the Borough violated the Due Process Clause by not giving National Amusements notice and an opportunity to be heard before closing the flea market. The Third Circuit rejected that argument and held, "Given the imperative of an efficient response to the threat to public safety, due process did not require that [the Borough] provide pre-deprivation notice" or "a pre-deprivation hearing." 716 F.3d at 62-63. In support of that holding, the court cited the *North American Cold Storage* case summarized in the Course Book on pp. 446–447.

Chapter 25

Agency Choice between Rulemaking and Adjudication

C. Exceptions to the Choice of Means Principle

1. Abuse of Discretion

pp. 599–600:

On pages 599–600, we discuss the "abuse of discretion" exception to the usual rule that federal agencies have broad discretion to choose between rulemaking and adjudication. Under the abuse-of-discretion exception, for example, a court can refuse to let an agency announce a new principle in an agency adjudication if applying that new principle in the adjudication would have an unjustifiably harsh retroactive effect.

This 2012 Supreme Court case concerns retroactivity in a different context. It nonetheless sheds light on when retroactivity concerns might invalidate an agency adjudication in which the agency announced and applied a new principle:

- *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012)

Employees sued drug company SmithKline Beecham for overtime compensation under the federal Fair Labor Standards Act (FLSA). SmithKline had not been paying overtime to these employees—known in the industry as "pharmaceutical sales representatives"—because SmithKline believed that pharmaceutical sales representatives were exempt from the FLSA as "outside salesmen." In a separate lawsuit, the U.S. Department of Labor (DOL) had sided with a group of pharmaceutical sales representatives suing a different drug company for overtime. In that other lawsuit, DOL announced in an amicus brief that DOL interpreted its regulations not to exempt pharmaceutical sales representatives from the FLSA. The U.S. Supreme Court refused to defer to DOL's interpretation of its regulations, despite the general principle that an agency's interpretation of its regulations is entitled to deference. The Court withheld deference because of the retroactive impact on drug companies of accepting DOL's interpretation. The Court summed up:

> It is one thing to expect regulated parties to confirm their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an

enforcement proceeding and demands deference.

Id. at 2168. This case, unlike other "choice of means" cases, involved—not an agency adjudication—but an agency participating in a court suit by private plaintiffs who sought to enforce a statute against a private defendant. In addition, retroactivity concerns in *SmithKline Beecham* did not invalidate an agency action, but it did prevent the Court from giving its usual deference to an agency's regulatory interpretation. *See also Perez v. Loren Cook Co.*, 750 F.3d 1006, 1013 (8th Cir. 2014) (company might show that agency acted unreasonably in imposing $490,000 fine based on new interpretation of agency rule) (vacated on grant of rehearing en banc); *Elgin Nursing & Rehab. Ctr. v. U.S. Dep't of Health and Human Servs.*, 718 F.3d 488, 493 (5th Cir. 2013) (refusing—partly out of concern for fair notice—to defer to an agency's interpretation of an agency's guidance manual when the agency announced that interpretation for the first time in an agency enforcement proceeding).

p. 600:

Amend the citation at the end of the carryover paragraph on p. 600 to reflect subsequent history:

> "For a more recent case suggesting in dicta that an agency abused its discretion by using adjudication to adopt broadly applicable timetables, see *City of Arlington, Texas v. FCC*, 668 F.3d 229, 241-243 (5th Cir. 2012), *affirmed on other grounds*, 133 S. Ct. 1863 (2013)."

3. Constitutional Considerations—Due Process and Equal Protection

b. Due Process

p. 604:

In a case issued after the Course Book went to press, the U.S. Supreme Court relied on due process to invalidate agency adjudications announcing a change in agency policy:

- *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012)

Federal law bars "indecent" broadcasts. 18 U.S.C. §1464. The FCC has authority to enforce this law by administrative enforcement proceedings against broadcasters for fines and other sanctions. Through these proceedings, the FCC developed the "fleeting expletives" policy, under which it did not treat as "indecent" the odd swear word or two, or brief nudity, in broadcasts. In 2002, however, the FCC changed this policy by bringing enforcement proceedings based on two television episodes in which a character said the word "shit" or "fuck," and a third television episode with brief nudity. The Court held that the orders entered in these proceedings violated the Due Process Clause because the broadcasters lacked fair notice that these incidents would expose them to penalties.

Chapter 26

Effect of Valid Agency Adjudicatory Decisions

C. Administrative Res Judicata

2. Requirements for Administrative Res Judicata

c. Statutory Modification of Administrative Res Judicata

Page 625:

After the first full paragraph on page 625, add this new paragraph:

The Court applied the *Astoria* framework in *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293 (2015). *B & B Hardware* concerned adjudications by a federal agency called the Trademark Trial and Appeal Board (TTAB). The TTAB had authority under the Lanham Act to determine whether registration of a trademark should be denied because that trademark too closely resembles a previously registered trademark. In the adjudication under discussion, the TTAB refused to register Hargis Industries' "SEALTITE" trademark because of its similarity to B & B Hardware's previously registered "SEALTIGHT" trademark. The Court held that the TTAB's decision could have preclusive effect in a later federal-court lawsuit in which B & B sued Hargis for trademark infringement. The Court discerned no "evident" reason why Congress in the Lanham Act "would not want TTAB decisions to receive preclusive effect." *Id.* at 1305. Thus, nothing overcame the presumption that those decisions could indeed have preclusive effect.

D. Special Rules That Differ From, But Are Easy to Confuse With, Administrative Res Judicata; and Agency Non-Acquiescence

3. Agency Non-Acquiescence

Page 632:

This new Exercise goes after the second full paragraph on p. 632, at the end of the discussion of agency non-acquiescence. The Exercise helps you integrate current material with earlier material:

Exercise

The U.S. Environmental Protection Act (EPA) decided that several air-pollution-emitting facilities owned by Summit Petroleum Company should be treated as a single "source" that, collectively, constituted a "major source" of air pollution. Under that decision, Summit would have to get an EPA permit. But EPA's decision was rejected on review by the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit in the *Summit Petroleum* case rejected EPA's decision because the court believed that the decision rested on EPA's erroneous interpretation of an EPA regulation. The regulation addressed when multiple facilities with a common owner could be considered a single "source." Let us call this the EPA "single-source regulation." The Sixth Circuit invalidated EPA's interpretation of the single-source regulation, not the regulation itself.

EPA did not take this defeat lying down. Instead, EPA headquarters issued a Directive to its regional directors. The EPA Directive said that EPA officials should abide by the Sixth Circuit's decision in the *Summit Petroleum* case only for air-polluting companies located in states inside the Sixth Circuit—namely, Kentucky, Michigan, Ohio, and Tennessee. Outside the Sixth Circuit, the Directive decreed, EPA officials should continue to apply the interpretation of the EPA single-source regulation that the Sixth Circuit had rejected.

An industry association seeks judicial review of the EPA Directive. Assume that judicial review is available. The industry association argues that the EPA Directive conflicts with an EPA regulation that requires EPA, to the extent possible, to apply its regulations uniformly across the country. Let's call this the EPA "uniformity regulation." Now assume that the industry association correctly interprets the uniformity regulation to require nationwide uniformity in EPA's interpretation of the single-source regulation.

Is the EPA Directive invalid?

The D.C. Circuit said no: The Directive was invalid because it conflicted with the EPA uniformity regulation. *Nat'l Envt'l Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014). The D.C. Circuit agreed with the industry association that the EPA uniformity regulation barred the EPA's non-acquiescence in the Sixth Circuit's *Summit Petroleum* decision. The D.C. Circuit's decision invalidating the EPA Directive reflects that an agency must follow its own rules, a principle that is known as the "*Accardi* principle" and that is discussed in the Course Book at pp. 140–141. In this case, the *Accardi* principle prevented an agency from exercising inter-circuit non-acquiescence.

Chapter 28

Jurisdiction and Venue

A. Jurisdiction: The Requirement for a Statute Granting Jurisdiction

1. Specialized Statutory Grants of Jurisdiction

b. Exclusivity of Special Review Statutes

p. 648:

A decision by the U.S. Supreme Court relates to the first full paragraph on p. 648, which says in relevant part:

> "The case law interpreting 29 U.S.C. §655(f) to prescribe the exclusive means for judicial review of covered agency OSHA actions reflects a more general principle: If . . . there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies." (Quotation marks and citation omitted.)

- *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010)

A special review statute authorized review in the U.S. Court of Appeals of certain actions by the Public Company Accounting Oversight Board. The suit before the Court, however, did not challenge any particular Board action. Instead, the suit challenged the constitutionality of the *statutory* provision that governed removal of the members of the Board. The Court held that the special review statute did not preclude general jurisdiction over this constitutional challenge. The Court said, "[W]e presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion would foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Id.* at 3150 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–213 (1994)). The Court determined that all three conditions favored general jurisdiction over the constitutional challenge.

C. Jurisdiction: Standing Requirements in Federal Court

2. Constitutional Standing Requirements

a. Injury in Fact

(ii) Risk

pp. 660–661:

On pages 660–661, the Course Book discusses probability-based standing. This 2013 case relied on probability-based standing:

- *Natural Resources Defense Council v. EPA*, 735 F.3d 873 (9th Cir. 2013)

A federal statute requires pesticides to be registered with the EPA before they can be sold in the United States. The EPA conditionally registered two pesticides containing nanosilver, "AGS-20," a substance that limits microbial growth. A company wanted to apply the pesticides to textiles used in products including children's clothes and blankets. The Natural Resources Defense Council (NRDC) challenged EPA's conditional registration in court. The court upheld NRDC's standing, based on circuit precedent holding "that an injury is actual or imminent where there is a credible threat that a probabilistic harm will materialize":

> NRDC has carried its burden to demonstrate that there is a "credible threat" that its members' children will be exposed to AGS–20 as a consequence of the EPA's decision to conditionally register the product. The ubiquity of textiles and the lack of public information concerning the chemical treatments applied to them during the manufacturing process would combine to make it nearly impossible for NRDC members to eliminate AGS–20–treated textiles from their children's lives, particularly in light of the expansive scope of permissible applications of AGS–20 acknowledged by EPA. NRDC's members cannot reasonably assure that the carpets at the daycare center, the jackets worn by a caretaker, or the seats on the school bus have not been treated with AGS–20.

Id. at 878. You might be interested to know that, on the merits, the court vacated EPA's decision conditionally registering the pesticides with AGS-20. The microbes won.

C. Jurisdiction: Standing Requirements in Federal Court

2. Constitutional Standing Requirements

a. Injury in Fact

(iii) Fear

p. 662:

The Exercise on "Fear as Injury in Fact" on page 662 uses a case that the U.S. Supreme Court decided after the Course Book came out:

- *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013)

The Court held that plaintiffs lacked standing to challenge the constitutionality of a federal statute, 50 U.S.C. §1881a, that authorizes federal government surveillance. Section 1881a comes from the Foreign Intelligence Surveillance Act. It authorizes the government to use surveillance methods including phone taps to get "foreign intelligence information" from people who are "not U.S. persons" and are reasonably believed to be outside the United States. The plaintiffs were U.S. persons—including lawyers, journalists, and human rights advocates—who feared that the government would surveil them under §1881a because of their contacts with non-U.S. persons who could be targeted for surveillance under §1881a. The Court summarized its conclusion that these plaintiffs lack standing:

> [Plaintiffs] assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under §1881a at some point in the future. But [plaintiffs'] theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be "certainly impending." (Citation omitted.) And even if [plaintiffs] could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to §1881a. As an alternative argument, [plaintiffs] contend that they are suffering present injury because the risk of §1881a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But [plaintiffs] cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that [plaintiffs] lack Article III standing.

Id. at 1143. Despite the denial of standing in *Clapper v. Amnesty International*, the plaintiffs in a more recent case got standing to challenge federal government surveillance by showing that the government actually collected metadata of their phone calls. *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 801 (2nd Cir. 2015).

C. Jurisdiction: Standing Requirements in Federal Court

3. Prudential Standing Requirements

p. 667:

On page 667, in the first paragraph of the discussion of prudential standing requirements, we quote a Supreme Court case identifying three prudential standing rules about (1) generalized grievances, (2) the zone of interest test, and (3) third-party standing. But a 2014 Supreme Court case says that two of them aren't really prudential standing requirements after all, and the third one is dubious, as well:

- *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)

In *Lexmark*, the Court said in dicta that generalized grievances "are barred" from federal courts "for constitutional reasons, not 'prudential' ones." *Id.* at 1387 n.3. Further, the Court held that the zone of interest test "does not belong" on the list of prudential standing requirements. Instead, the issue of whether a plaintiff comes within the zone of interests requires a court to determine "whether a legislatively conferred cause of action encompasses [that] plaintiff's claim." *Id*. at 1387. Finally, the Court quoted a prior case in which it described the "third party standing" doctrine as "closely related" to—not the standing doctrine—but to the question of whether a plaintiff has a cause of action. The fate of third party standing remains uncertain, though: The Court ultimately left "consideration of that doctrine's proper place in the standing firmament" to "another day." *Id* at 1387 n.3.

c. Zone of Interests

p. 668:

In the last paragraph on page 668, the Course Book says that the zone of interest test "began life as a prudential standing requirement" but that "administrative lawyers today encounter the zone of interests requirement primarily as a restriction on statutory causes of action for judicial review of certain agency actions." The Court admitted in a 2014 case, "Although we . . . have placed [the zone of interest] test under the 'prudential' [standing] rubric in the past, it does not belong there. . . . " *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). Instead, the Court explained in *Lexmark*, "Whether a plaintiff comes within "the 'zone of interests' " is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id*. Thus, the Court has clarified that the zone of interest test does not concern standing; rather, it concerns the scope of a statutory cause of action.

C. Jurisdiction: Standing Requirements in Federal Court

4. Statutory "Standing" Requirements

p. 669:

The second paragraph on page 669 of the Course Book explains why the term "statutory standing" is arguably inaccurate. That paragraph introduces a discussion of two "statutory standing" requirements, one of which is the "zone of interests requirement."

The Court confirmed in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014), that the term "statutory standing" is "misleading" as a description of the zone of interest requirement. The Court explained that the issue of whether a plaintiff meets the zone of interest requirement requires a court to determine "whether a legislatively conferred cause of action encompasses [that] plaintiff's claim." *Id*. at 1387. Whereas "standing" implicates a federal court's subject matter jurisdiction to hear a case, "the absence of a valid . . . cause of action [generally] does not implicate subject-matter jurisdiction." *Id.* at 1387 n.4.

a. Zone of Interests Requirement

pp. 669–673:

Pages 669–673 discuss the origin and meaning of the "zone of interests requirement." The Court addressed that requirement extensively in a decision that was mentioned earlier in this update and is summarized here:

- *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)

Lexmark was not an administrative law case, because the case didn't involve an agency. It involved two private companies: Lexmark, a maker of toner cartridges for printers, sued Static Control, which made parts for refurbished toner cartridges. In the lawsuit, Static Control counterclaimed that Lexmark had violated the federal Lanham Act through its false advertising about Static Control's products. The Court granted certiorari "to decide 'the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act.'" *Id*. at 1385 (quoting cert petition).

The issue before the Court matters to administrative lawyers because lower courts had approached the issue of standing under the Lanham Act as one involving whether a plaintiff could satisfy the Lanham Act's "zone of interest" requirement, which was also called the Act's "statutory standing" requirement. The terms "zone of interest" and "statutory standing" arise not only in private suits under the Lanham Act cases but also in

suits seeking judicial review of federal agency action under the federal APA and special review statutes.

The *Lexmark* Court said that the zone of interest requirement does not implicate "standing" in the sense of a federal court's power to hear a case; it concerns the scope of a federal statutory cause of action—and, specifically, whether a particular statutory cause of action extends to a particular plaintiff's claim. The Court added that, in determining the scope of a statutory cause of action, courts should "presume that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked [by the plaintiff]." *Lexmark*, 134 S. Ct. at 1388. This presumption reflects that the zone of interest requirement is a "background principle[]" against which Congress legislates. *Id.* When a court analyzes statutes in light of that principle, the court may determine that some statutes "protect a more-than-usually expansive range of interests." *Id.*

The most important such statute for administrative lawyers is the federal APA. In *Lexmark*, the Court reminded readers that the Court has interpreted the federal APA to "foreclose[] suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute [underlying the APA claim] that it can't reasonably be asserted that Congress authorized that plaintiff to sue." *Id*. at 1389 (quoting, in part, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). In *Lexmark*, the Court determined that the Lanham Act's false advertising cause of action is less expansive than the APA's cause of action. The Court based that determination in large part on the Lanham Act's statement of purposes. The Court's statute-specific reasoning reflects that "the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes." *Id*. at 1389.

In short, the zone of interest requirement is a tool for interpreting the scope of a federal statutory cause of action. It's not about standing—either prudential or statutory.

C. Jurisdiction: Standing Requirements in Federal Court

p. 683:

The Exercise on page 683 lists standing requirements. We must revise the list in light of *Lexmark International, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377 (2014).

As discussed above in this supplement, the Court said in *Lexmark* that two of the three "prudential standing requirements"—listed in the Exercise on page 683 as "generalized grievance" and "zone of interests"—are not prudential standing requirements after all. *See Lexmark*, 134 S. Ct. at 1386–1387. In addition, the Court cast doubt on whether "third-party standing" is actually a prudential standing requirement. *Id.* at 1387 n.3. Thus, for now, you should remove two of the three prudential standing requirements from the list on page 683, and put a question mark next to the third.

Chapter 29

Cause of Action

B. Sources of a Cause of Action for Review of Federal Agency Action

3. "Nonstatutory" Review

pp. 701–703:

Here is a Supreme Court case illustrating "nonstatutory review":

- *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010)

A federal statute creates an agency, the Public Company Accounting Oversight Board, to regulate accounting firms that audit public companies. (A public company is, basically, one whose shares are publicly traded on a stock exchange.) The Board exists within another agency: the Securities and Exchange Commission (SEC). Under the statute, the Board has five members. They are appointed by the SEC and can be removed by the SEC only for "good cause." The SEC, in turn, is headed by a five-person commission whose members are appointed by the President and can be removed by the President only for good cause.

An accounting firm and a trade group sued the Board in federal district court, arguing that the statute violated the separation of powers doctrine by insulating the Board members too much from the President's control. Board members had a "double layer" of protection from the President, in the sense that they could be removed by the SEC only for good cause, and SEC members in turn could be removed by the President only for good cause. The Court agreed that two layers of job protection are too much. The Court invalidated the provision that required "good cause" for the Board members' removal. More importantly for present purposes, the Court recognized that the challengers had an implied private right of action directly under the Constitution to get equitable relief against enforcement of the unconstitutional statutory provision. 130 S. Ct. at 3151 n.2. In other words, they were entitled to nonstatutory review.

D. Preclusion of Review

2. Preclusion of Judicial Challenges to Agency Action

a. Federal Law

(ii) Agency Action Committed to Agency Discretion By Law (§701(a)(2))

p. 709:

The following material goes after the paragraph on page 709 that begins, "The Court emphasized that the presumption . . .":

This next case presented facts similar to those of *Heckler v. Chaney*, and an argument that, as in *Heckler v. Chaney*, agency action was committed to agency discretion by law:

- *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013)

The plaintiffs were prisoners on death row in three states. They sued the FDA for allowing their states to import sodium thiopental for use in killing them by lethal injection. The FDA had issued a policy statement announcing that out of deference to the states it would "exercise its enforcement discretion" by not stopping the importation of sodium thiopental, even when it came from a company that did not have the statutorily required approval of FDA to manufacture it. The court held that the FDA's policy was *not* committed to agency discretion by law under 5 U.S.C. §701(a)(2). Here, as in *Dunlop v. Bachowski*, 421 U.S. 560 (1975), a statute constrained the agency's enforcement discretion. The statute in this case required FDA to examine the drugs and to "refuse[] admission" to them if, as was undisputed, they were manufactured by an unapproved company. 21 U.S.C. §381(a) (2012). The D.C. Circuit affirmed a permanent injunction prohibiting the FDA from allowing the importation of unapproved sodium thiopental.

In light of the FDA's decision, plus a spate of botched lethal injections, states with the death penalty are considering bringing back the electric chair and firing squad. We mention this to highlight that the stakes are high: A federal agency, under federal court order, is regulating states' choice of their method of execution.

D. Preclusion of Review

2. Preclusion of Judicial Challenges to Agency Action

a. Federal Law

(ii) Agency Action Committed to Agency Discretion By Law (§701(a)(2))

p. 710:

Add a new paragraph after the first full paragraph on page 710, which begins, "This summary introduced you to § 701(a)(2).":

A recent, high-profile case discussing § 701(a)(2) is *Texas v. United States*, 2015 WL 3386436 (5th Cir. May 26, 2015). There, Texas and other states challenged a federal program called the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) Program. Under the Program, the federal government generally would not remove undocumented aliens who were parents of citizens or of lawful permanent residents. The federal government argued that judicial review of DAPA was precluded by § 701(a)(2). The federal government characterized DAPA as resting on a federal agency's discretion not to take enforcement action, and accordingly analogized DAPA to the action held unreviewable in *Heckler v. Chaney*, 470 U.S. 821 (1985). The 5th Circuit rejected the analogy because a decision under DAPA not to remove an undocumented alien has the effect of entitling that person to government benefits, such as authorization to work, for which they otherwise would not be eligible.

Chapter 30

Timing

A. Finality

2. How Do You Tell If an Agency Action Is Final?

b. Finality When Decision Making Involves Multiple Governmental Entities

pp. 721–722:

A 2013 case illustrates the points made in the paragraph on page 721, which says:

> In one recurring situation raising finality concerns, one agency makes a decision that another agency or government entity must act upon, and the question is whether the first agency's decision is final. The answer is "no," if the first decision is in the nature of a recommendation.

- *Paskar v. U.S. Department of Transportation*, 714 F.3d 90 (2nd Cir. 2013)

The U.S. Secretary of Transportation created a blue ribbon panel to study the flight risks of a trash dump attractive to birds near LaGuardia Airport. The panel made recommendations that the Federal Aviation Administration (FAA) sent to the New York City Department of Sanitation (the City). In a cover letter, the FAA urged the City to follow the panel's recommendations. The City said it would. The Second Circuit held that the FAA letter was not a "final order," as required for judicial review under the special review statute. The letter only urged recommendations that the City could follow or not.

Chapter 32

Questions of Law

B. Federal Agencies' Interpretation of Statutes They Administer

2. Modern Cases

e. The Significance of Mead

p. 803:

The first full paragraph on page 803 ends by saying that the Court's decision in *Barnhart v. Walton* "supports *Chevron* deference for some non-legislative rules." A recent lower-court decision illustrates this point; it relied on *Barnhart v. Walton* to give *Chevron* deference to certain portions of the Provider Reimbursement Manual, a lengthy guidance document published—without following notice-and-comment procedures—by the Centers for Medicare and Medicaid Services. *Atrium Med. Ctr. v. U.S. Dep't of Health & Human Servs.*, 766 F.3d 560 (6th Cir. 2014).

p. 805:

The Court discussed the *Chevron/Mead* doctrine in this important 2013 case:

- *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863 (2013)

City of Arlington addresses whether a federal agency's statutory interpretation deserves *Chevron* deference even when the interpretation concerns the scope of the agency's statutory authority—or, as it is sometimes called, the scope of the agency's "jurisdiction." The Court answered: yes, *Chevron* applies even to so-called agency jurisdictional issues.

The Court explained that there is no such thing as a discrete class of issues that can be labeled as involving agency "jurisdiction":

> The argument against [*Chevron*] deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations—the big, important ones, presumably—define the agency's "jurisdiction." Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between "jurisdictional" and

> "nonjurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.

Id. at 1869 (emphasis supplied by the Court). The Court thereby adopted, in an opinion written for the Court by Justice Scalia, a view that Justice Scalia had expressed in a prior concurring opinion. *See Miss. Power & Light Co. v. Miss ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in judgment) ("[T]here is no discernible line between an agency's exceeding its authority and an agency's exceeding authorized application of its authority.") (quoted in Course Book on p. 171).

The Course Book's discussion of the *Chevron*/*Mead* doctrine ends on page 805 with the statement, "Whatever its source, the *Chevron*/*Mead* doctrine has become deeply entrenched in the federal law of judicial review of federal agency action." Despite that statement, the doctrine has critics, and the doctrine has limits.

In a recent concurring opinion, Justice Thomas expressed "serious questions about the constitutionality" of the *Chevron*/*Mead* doctrine. *Michigan v. EPA*, 2015 WL 2473453, at *12. (U.S. June 29, 2015) (Thomas, J., concurring). Justice Thomas specified that the doctrine "raises serious separation-of-powers questions." *Id.* For one thing, it bars judges from exercising the "judicial power" of interpreting laws. For another thing, it gives executive-branch agencies the legislative power to make fundamental policy choices. Justice Thomas held open the possibility that "there is some unique historical justification for deferring to federal agencies." *Id*. at 13 (citing *United States v. Mead Corp.*, 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)). But by this concurring opinion Justice Thomas placed himself squarely in the skeptics-of-*Chevron*/*Mead* camp. *See also Whitman v. United States*, 135 S.Ct. 352 (2014) (statement of Scalia, J., joined by Thomas, respecting denial of certiorari) (expressing doubt whether *Chevron*/*Mead* doctrine justifies deference to agency interpretations of ambiguous statutes that, if violated, carry criminal penalties).

In another recent case, the Court declined to apply the *Chevron*/*Mead* doctrine to interpret an ambiguous statutory provision administered by the Internal Revenue Service. *King v. Burwell*, 2015 WL 2473448 (U.S. June 25, 2015). The provision was part of the Affordable Care Act, colloquially known as "Obamacare"; it authorizes federal subsidies to people of low and moderate income when buying health insurance. The Court found the provision ambiguous with respect to whether the subsidies are available only to people in states that have created their own health care exchanges, or is, instead, more broadly available, as well, to people in states for whom the federal government has created the exchanges. The Court adopted the broader interpretation, which agreed with the IRS's interpretation, but the Court didn't defer to the IRS's interpretation. The Court observed that the *Chevron*/*Mead* doctrine "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Id*. at *8. But in "extraordinary cases" there could be "reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id*. The Court found the case before it to be "one of those [exceptional] cases." The provision was a key element of significant health care

legislation; it involved "billions of dollars" in federal subsidies every year and affected the price of health insurance for millions of people. The Court determined that Congress would have said so expressly if it intended to assign the interpretation of this provision to the IRS.

C. Federal Agencies' Interpretation of Their Own Rules

1. When *Auer* Deference Applies

p. 806:

In a 2013 case the Court gave *Auer* deference to a federal agency's interpretation of the agency's own rules:

- *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326 (2013)

The Clean Water Act requires permits for water pollution discharged by a "point source." An EPA regulation called the Silvicultural Rule addresses what types of logging-related discharges come from a "point source." The Rule says that discharges consisting only of storm water are not from a point source unless they are "associated with industrial activity." EPA interpreted the Rule's phrase "associated with industrial activity" as, in general, not applicable to storm water that flows from logging roads into ditches and culverts. The Court gave EPA's interpretation *Auer* deference and upheld it.

3. Criticisms of *Auer* Deference

p. 807:

On page 807 the Course Book notes Justice Scalia's criticism of *Auer* deference. In a recent case, Justices Thomas and Alito also express doubt about *Auer* deference. *See Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1210–1211 (2015) (Alito, J., concurring in part and concurring in the judgment); *id*. at 1213 (Thomas, J., concurring in the judgment).

C. Federal Agencies' Interpretation of Their Own Rules

4. Limits on *Auer* Deference

p. 808:

The material below goes after the paragraph on page 808 that begins, "Third, the Court probably will not give *Auer* deference to an agency interpretation that the agency has cooked up to gain an advantage in litigation to which the agency is a party. . . .":

The U.S. Supreme Court has adopted a fourth restriction on *Auer* deference. The Court refused to give *Auer* deference to the Department of Labor's (DOL's) interpretation of a DOL regulation in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012). The Court withheld *Auer* deference for two reasons. First, the agency's interpretation would expose a drug company to "massive liability" to its employees for overtime compensation under the Fair Labor Standards Act (FLSA). *Id*. at 2167. Second, the drug industry had been treating this group of employees—known as "pharmaceutical sales representatives"—as exempt from the FLSA for decades, without DOL ever telling the industry that this treatment violated the FLSA. The Court summed up:

> It is one thing to expect regulated parties to confirm their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Id. at 2168. *SmithKline* indicates that *Auer* deference does not extend to agency interpretations that have unjustifiable, significant retroactive effect.

Chapter 35

Specialized Review Situations; Judicial Remedies

A. Specialized Review Situations

3. Agency Denial of Request to Rehear, Reconsider, or Reopen Prior Decision

p. 867:

The first paragraph on page 868 discusses agencies' power to rehear cases. A recent decision suggests that agencies have "inherent" power to rehear cases. The court in that case held, however, that the agency legislation superseded any such power. *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86-89 (D.C. Cir. 2015). The court's reference to "inherent" power does not mean that agencies have powers besides the ones granted by law. Instead, it means that a statutory provision authorizing an agency to decide a matter may be interpreted to allow an agency, after deciding a matter, to change its mind.

5. Claim of Unreasonable or Unlawful Agency Delay

p. 871:

A new citation should go at the end of the following sentence in the last paragraph on page 871:

> . . . The court may order the agency to take action, but not set any specific deadline. *See Forest Guardians*, 174 F.3d at 1193; *see also In re: Aiken County*, 725 F.3d 255 (D.C. Cir. 2013) (issuing mandamus requiring Nuclear Regulatory Commission to consider Department of Energy's application to store nuclear waste at Yucca Mountain in Nevada).

B. Remedies

4. Harmless Error

p. 883:

The citation in this bullet point on page 883 should be revised to reflect subsequent history:

- *City of Arlington, Texas v. Federal Communications Commission*, 668 F.3d 229 (5th Cir. 2012), *aff'd on other grounds*, 133 S. Ct. 1863 (2013)