

Agency Adjudication and Due Process

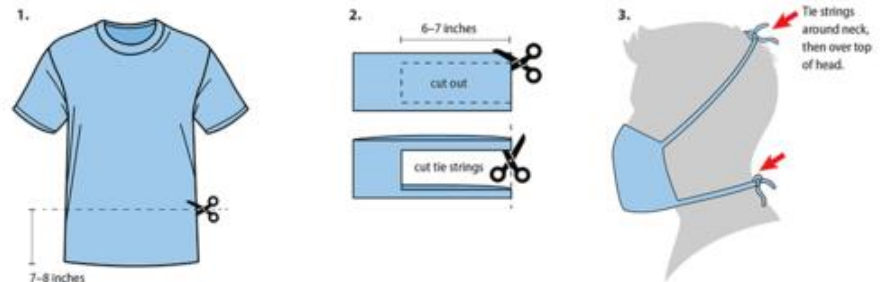
Prof. Tracy Hester
University of Houston Law Center

Statutory Interpretation and Regulatory Practice
April 6, 2020

Announcements and Updates

- Practice exam – uploaded to website and available on website after class on Wednesday, April 8
- Final exam procedures – will discuss in greater detail, but essentially flexible time slot to take exam itself.
- Final exam content – also flexible and modified
- Looking ahead – summer classes and jobs

Tutorial



Quick look back - Substantive Judicial Review of Administrative Rules

- APA Section 706(2)(A) – “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
- *U.S. v. Nova Scotia Food Products*
 - Note date and court: early, groundbreaking case
 - Requirement for explanation of rule
 - Requirement for record to support rule
 - Contemporaneous
 - More than simple agency expertise
 - Remedy: remand



Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.

- What statute kicked off this fight?
- How did the Department of Transportation carry out Congress' statutory directive?



Section 208 Timeline

1967 Original DOT rule for safety belts

1969 Proposed rule for passive restraints

1970 Revised Standard 208

1974 Motor Vehicle and Schoolbus Safety Act

1976 Coleman suspends rule and orders demo

1977 Adams stops demo; air bags and passive

1981 Lewis reopens rule

Lewis rescinds passive restraint rule



Key Questions from *State Farm*

- What standard of review did the U.S. Supreme Court use to review the DOT's vacillating decisions?
- What exactly did DOT get wrong in its ultimate decision to withdraw the standard?
- Where did the Court rule 9-0, and 5-4 – and why?
- The reverberations of dissent

Elections Have Consequences

The agency's changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. **A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.** As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.



Today's Topic: Agency Adjudication

- Remember -- “Rules” vs “Orders”, and informal vs. formal methods of action

	Rules	Orders (or Adjudications)
Formal	Rule by trial – APA section 556-557 Limited to parties; rarely used	Developing rules via case-by-case decisions in common law fashion “On The Record”
Informal	Notice-and-comment process Vast majority of agency rulemaking activity	Agencies can choose how much process to give for informal orders, but Due Process Applies (<i>Matthews v. Eldrige</i>)

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Agency Adjudications and Indecent Speech

- *Golden Globes Awards*
- *FCC v. Fox Broadcasting (Fox I)*
- *FCC v. Fox Broadcasting (Fox II)*

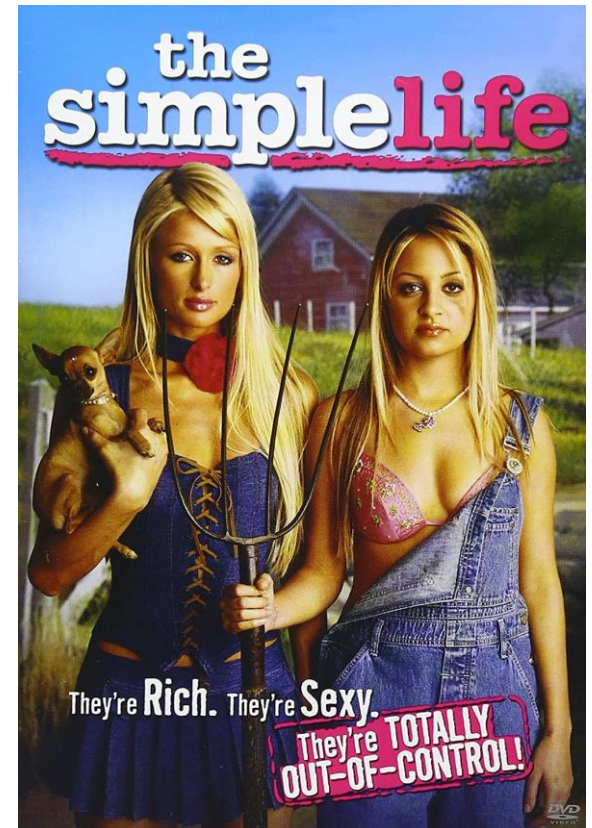
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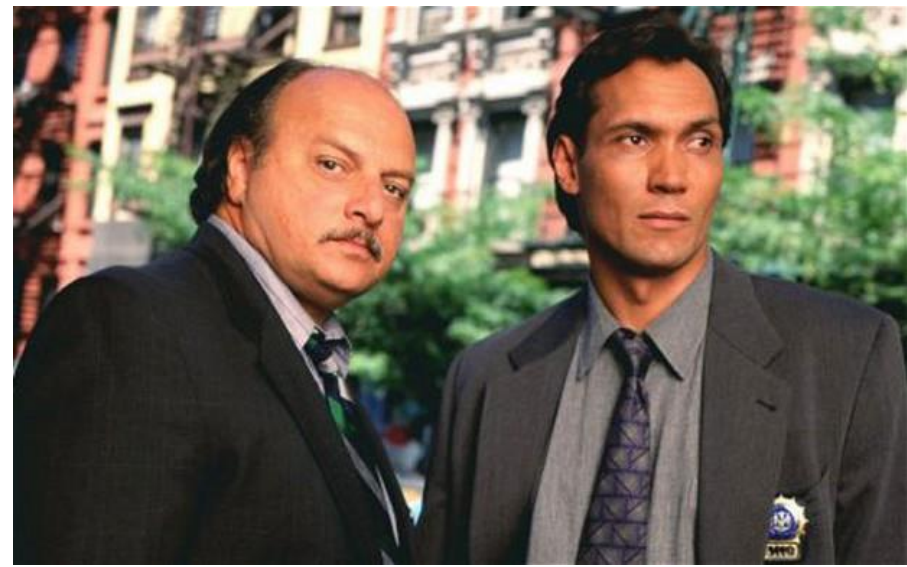
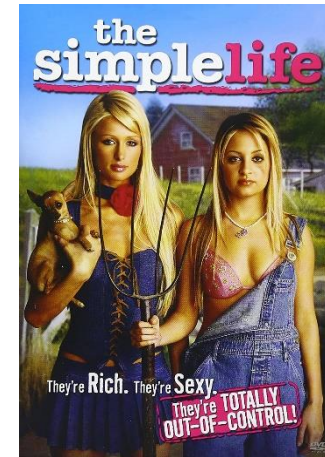
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Key Questions for the Indecent Speech Trio

- What are the differences between formal and informal adjudication?
- Why would the FCC try to change agency policy through a *post hoc* adjudication? Was it effective?
 - Any parallels with *stare decisis* concerns for courts?
- After *State Farm* and *Fox I and II*, what does an agency have to do if it wants to change course?
- When would an agency choose adjudication over informal rulemaking?





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