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The Challenge of Teaching Administrative Law

Mark Seidenfeld

THE CHALLENGE OF TEACHING ADMINISTRATIVE LAW

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In this short essay, I explain why I find Administrative Law so challenging to teach, describe several approaches I have tried to meet this challenge, and report on the failures and partial successes of the various approaches.

I think that Administrative Law is such a challenging course for two reasons: (i) the vast majority of my students do not have any experience or intuitions about how agencies make decisions; and (ii) the subject of administrative law does not lend itself to coherent step-by-step development because every topic dovetails with virtually every other topic, so that no matter where one starts, one must refer to material that has not yet been covered. Cross referencing at a general level would not be a problem if students had some idea about the cross referenced issue, but being neophytes about agency decision making means that they do not have such an idea, and are often left bewildered and confused.

I have tried what I will label two "pure" organizational approaches to teaching Administrative Law, and my current approach, which is a hybrid of the two. The first pure approach—the theoretical underpinnings approach—begins by developing a theory (or perhaps competing theories) of administrative agencies. This is the approach of many standard texts.[1] These texts talk first about how agencies are created, then move to agencies' relationships with the political branches—the President and Congress—stressing that these relationships often depend on constitutional principles governing how these branches interact with each other. This approach next addresses the relationship of the agencies and the courts, with heavy emphasis on judicial review. Finally, this approach discusses the law governing the procedures agencies use to make decisions, focusing emphasis on how

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[1] *See, e.g.*, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES (4th ed. 1998); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS (9th ed. 1995).

agencies differ from courts and legislatures.

The advantage of this approach is its abstract coherence; it builds a logical (if controversial) structure of the administrative state. Students learn about the sources of authority for agency decision making. They then learn about political constraints on agencies, which to some extent flow from principles about the sources of administrative authority. When the students get to judicial review, if they have absorbed the material from the first two topics, they can be lead to understand that the courts are not the only or even the major constraint on agency decision making. Finally, armed with a secure understanding of agencies' place in government, students are supposed to be able to appreciate the procedures that the law dictates agencies follow.

In my experience, following this approach did not achieve the coherence it promised. Students were often baffled and even more frequently bored by theories of the administrative state. They moaned when they had to reread separation of powers cases they read for Constitutional Law. Without any appreciation for either the substance or procedure of agency regulation, students did not see the relevance of the theoretical materials and simply glossed over them. That, of course, is a major impediment to an approach premised on the students learning theories of the administrative state as a means of providing a coherent framework for the course.

The second pure approach—the procedural approach—worked somewhat better, but still had its problems. Under this approach, I proceeded through the various procedural requirements imposed on agencies by the Due Process Clause of the Constitution and the Administrative Procedure Act (APA).[2] I then covered assorted sundry procedural questions, such as exceptions from procedural paradigms, courts' authority to prescribe procedures not required by statute or regulation, and agencies' discretion to choose the procedural mode by which they announce and to some extent effectuate policy. I followed coverage of procedure with the study of judicial review. The component on judicial review became the major focus of the course because, as lawyers, students primarily will be asserting arguments in agency and judicial proceedings that stem from constraints placed on agencies by the courts.

The procedural approach kept the students' attention somewhat better than the theoretical underpinnings approach. Students could see the relevance

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[2] *See* 5 U.S.C. §§ 551-559 (1994 & Supp. IV 1998).

of the law governing procedures and judicial review to the kinds of questions they might face were they to practice administrative law. But students were not able to appreciate much of the academic criticism of the law because they did not have any sense of why the procedures were imposed—that is, why the procedures mattered in the big picture of how government ought to be structured. Arguments premised on maintaining accountability or limiting non-majoritarian judicial interference with implementation of the political branches' judgments echoed hollowly in the heads of students who had no understanding of the relationship of agencies to the political branches and the courts.

In addition, the procedural approach has the drawback of requiring discussion of procedural constraints whose justification depends on other procedural aspects of administrative law. For example, it is difficult to evaluate the wisdom of allowing agencies to issue interpretive rules as an exception to notice and comment rulemaking without understanding: (i) the freedom agencies have to impose interpretations within an adjudication,[3] and (ii) the discretion given to agencies by the courts on matters of interpretation.[4] The validity of allowing agencies freedom to choose the mode by which they announce interpretations, and the deference given to their interpretations, in turn, depends on how effectively Congress can monitor agency decision making of various types. For example, can Congress monitor particular adjudicatory decisions (which raises theoretical issues about police patrols versus fire alarms as the mechanism for congressional monitoring)?[5] Unfortunately, by following this approach I leave until later (and in some years never get to) the material on presidential and congressional influence over decision making, which is essential to evaluation of the procedural controversies.

The approach I currently use for teaching Administrative Law involves what I call a hybrid approach based on successive iterations of the theoretical and procedural materials, covering that material with greater and greater

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[3] *See* SEC v. Chenery, 332 U.S. 194, 196 (1947); NLRB v. Bell Aerospace Corp., 416 U.S. 267, 268-69 (1974).

[4] *See* Chevron, USA, Inc. v. NRDC, 467 U.S. 837 (1984).

[5] *See* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

particularity with each pass. Using this hybrid approach, I begin with an overview of the place of agencies in government. I start by describing the kinds of programs that agencies implement. I proceed to discuss several proffered theoretical justifications for the administrative state (i.e. formalist/transmission belt theory, expertise theory, legal process theory, and pluralistic/interest group theory (both the optimistic models of David Truman and Robert Dahl and the pessimistic models of George Stigler, Richard Posner, James Buchanan and Gordon Tullock)).[6] In order not to lose students' attention, I inform them that although no theory enjoys hegemony in the sense of justifying all of administrative law doctrine, many (if not all) of the doctrines of administrative law can be seen as effectuating one of the theories I present. I pitch the theory as practical in aiding practitioners to develop arguments in support or opposition to particular rules of administrative law. I then hold my breath and hope that I can maintain students' interest for a week, after which I turn to more accessible (i.e. less theoretical) subjects.

After a week of theory and background, I spend some time discussing the structure of agencies and the internal/institutional procedures by which agencies make decisions. In other words, I discuss materials that many courses on administrative law consider inside of a black box, and which, if pressed, most teachers of Administrative Law categorize as falling within the province of public administration, rather than law. The discussion of agency structure is meant to provide a segue from theory to practice that is sufficiently accessible to reinforce my efforts of the first two weeks to keep students interested in theory. I have found that this discussion works to tie theory to practice for about half my students; the other half, I am afraid, consider any discussion of theory to be irrelevant.

I begin my foray into procedure by discussing the paradigmatic modes of decision making—rulemaking and adjudication. By the beginning of the third week of class, I give what is probably the single most important lecture for holding the class together—an overview of the procedural categories in the

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[6] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1965); ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 23-24 (1967); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 512-516 (1951); Richard A. Posner, *Taxation by Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 22 (1971); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3 (1971). For an overview of these potential theories as justifications for the administrative state, see Mark Seidenfeld, A *Civic Republican Justification for the Bureaucratic State*, 105 HARV.L. REV. 1511, 1516-28, 1541-62 (1992).

APA. I do this by going through a hypothetical on regulation under a fictitious "Wetlands Preservation Act." (I have attached the hypothetical as an appendix to this essay.) The hypothetical introduces the students to the definition section of the APA,[7] with particular attention to the definitions of rulemaking, adjudication and licensing. Students get very involved in the exercise of going through the hypothetical. The hypothetical is structured not only to take the students through the EPA's categories, but also to illustrate the discretion agencies have to create programs, like those that require a permit, as a means of implementing the Act. I have also structured the hypothetical to allow me to give the students "coming attractions" for the rest of the course.

Following this overview of the APA, I go through the cases that discuss the details of administrative procedure. But, in so doing, I am ever vigilant to point out to students how the theoretical understandings we have already discussed inform the debate about appropriate agency procedures. For example, one can inform discussion of *Vermont Yankee Nuclear Power Corp. v. NRDC*[8] and *Pension Benefits Guaranty Corp. v. LTV, Corp.*[9] by evaluating those decisions from the perspective of various theoretical models of the administrative state. If the agency is justified on expertise grounds, there would seem to be little role for the courts to add to agency procedures; if the agency is justified by an interest group model, the courts may have a role in assuring open access to agency procedures; if one adopts the legal process model, which distinguishes policy making by agencies from law-applying, then one might argue in favor of *Vermont Yankee's* proscription of judicial interference with rulemaking procedures, but condemn *LTV*'s holding that the same principle applies in the adjudicatory context.

In addition, I include in the materials on formal adjudication, the *Morgan* cases,[10] which address internal agency decision making processes. These cases reinforce my earlier coverage of agency organization and emphasize the institutional nature of agencies, as distinguished from the more individual decision making of judges. *Morgan IV* is also a good introduction to legal

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[7] 5 U.S.C. § 551 (1994).

[8] 435 U.S. 519 (1978).

[9] 496 U.S. 633 (1990).

[10] *See* Morgan v. United States, 298 U.S. 468 (1936) (Morgan I); Morgan v. United States, 304 U.S. 1 (1938) (Morgan II); United States v. Morgan, 307 U.S. 183 (1939) (Morgan III); United States v.Morgan, 313 U.S. 409 (1941) (Morgan IV).

fictions meant to deal with the problems of attributing intent to an institution, which become important when one discusses the judicially imposed standard of "reasoned decision making" as part of arbitrary and capricious review.[11]

Following my foray into agency procedures, I turn back to the reasons we have agencies in the first place, reviewing how they are created and the role they play. This time through this abstract material, however, I use the separation of powers cases to bring theoretical considerations to bear on the relationship of administrative agencies to the political branches of government. My students now have some idea of what agencies do and how they go about doing it, and are more comfortable considering political constraints on agencies and the likely efficacy of such constraints. Some students have told me that placing the discussion of agency oversight by the three branches of government behind the discussion of decision making procedures (without jettisoning it completely) makes the topic more interesting to them. And, reviewing political constraints on agencies and asking whether they provide meaningful checks on agency decision making introduces the students to the possibility that the political branches, rather than the courts, might be the better institutions to cabin agency power.

Finally, armed with both theoretical underpinnings and some familiarity with the workings of the administrative state, students tackle the issues raised by judicial review. Under the hybrid approach, they can better appreciate the interplay between the branches of government that informs cases like *Chevron, USA, Inc. v. NRDC*[12] and *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[13] They also can appreciate the concerns of critics such as Tom McGarity that judicial review threatens to ossify the rulemaking process.[14]

Does the hybrid approach meet all the challenges of teaching Administrative Law? Emphatically no! Students still find the course difficult because the material is foreign and the theories difficult to comprehend. Perhaps most significantly, the approach leaves until last what many consider to be the guts of Administrative Law—judicial review. Pragmatically, this forces me to hurry my coverage of judicial review, which may undo all the

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[11] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) (quoting SEC v. Chenery, 332 U.S. 194, 196 (1947)).

[12] 467 U. S. 837 (1984).

[13] 463 U.S. 29 (1983).

[14] See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387-96 (1992).

benefits of setting the stage for this topic in the first place. For my better students, however, the approach of introducing theory and procedure in increasing levels of specificity, rather than first presenting one or the other in toto, gives them the tools they need to go beyond merely learning the doctrinal rules of administrative law. I have found that the hybrid approach engages these students to a greater degree than either pure approach. On occasion, these students surprise me with how much they can learn in one three-hour course about an area of law that is so complex and non-intuitive.

APPENDIX

HYPOTHETICAL ON THE STRUCTURE OF THE APA

Congress passes the "Wetlands Preservation Act" which states as its purpose ensuring the "viability of significant wetland area as healthy ecosystems." The statute authorizes the Environmental Protection Agency (EPA) to "adopt such regulations governing use of and incidental effects on wetlands as will promote the purposes of this Act, taking into consideration the costs of compliance with such regulations and the public interest." The Act further provides that if, after a hearing, the EPA determines, based on evidence in the hearing record, that a person has violated any provisions of this Act, or any regulation adopted pursuant to this Act, the EPA may order that person to restore the affected wetlands to the extent feasible, and fine that person up to $100,000 per violation.

A. The EPA staff proposes a rule that before any person engages in construction, or digs a well, or otherwise uses earth boring or earth moving equipment within 500 feet of a wetland exceeding one acre, that person must obtain a permit from the EPA.

1. What procedures must the EPA follow (i.e. what steps must it take) in order to adopt this rule?

2. If the statute provided that the EPA must give all parties an opportunity to respond to comments filed by other parties or the agency staff, how (if at all) would this alter the procedures the agency must follow?

B. Suppose instead that the statute had said the EPA could adopt rules, but only after holding a hearing, and any rule adopted must be supported by evidence in the hearing record. What procedures would the agency then have to follow in order to adopt the rule?

C. Suppose now the agency does adopt the rule, and the EPA staff learns that after the rule took effect Joe Builder built a house within 500 feet of an existing wetland over one acre in size. The EPA wants to hold a proceeding to determine whether to fine Joe Builder.

1. What procedures must it follow before it fines Joe?

2. If the statute had authorized the EPA to fine violators, but had not said it must first hold a hearing and make a determination based on the hearing record, what procedures would the EPA have to follow?

D. Suppose that Josephine Landowner plans to build a house less than 500 feet from a wetland that is over one acre. She would like a permit from the EPA. The EPA has procedural rules that require permit applicants to complete a standard questionnaire. The EPA staff then reviews the applicant's questionnaire, and if it spots issues that may result in a denial of the permit, the staff informs the applicant in writing and asks her to submit in writing any information and arguments that respond to the staff's concern. The staff then prepares an analysis for the EPA Administrator, who decides whether to issue the permit based on the initial questionnaire, the staff analysis, and the information and arguments the applicant has submitted in support of her application.

1. Is this procedure for issuing permits sufficient under the APA?

E. Suppose that Earnest Environmentalist would like the EPA to adopt a stricter rule protecting wetlands, and he drafts such a rule.

1. How can he try to get the EPA to adopt his rule?

2. If the EPA does not want to adopt Earnest's proposed rule, what must it do? (For example, does it need to go through a rulemaking proceeding to consider the proposed rule? If not, what procedures must it go through before deciding not initiate a rulemaking procedure?)

F. In all of the situations (A through D) above, what recourse does a party have if she does not like the EPA determination?