

ADMINISTRATIVE LAW
THE AMERICAN
PUBLIC LAW SYSTEM
CASES AND MATERIALS
Third Edition

Jerry L. Mashaw
Richard A. Merrill
Peter M. Shane

American Casebook Series®



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LAW**

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CASES AND MATERIALS

Third Edition

By

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*For Jay and Mark,
for Patty and John,
and for Martha and Beth*

*

Preface

When the first edition of these materials appeared under a different title in 1975, the Preface discussed the authors' two major aims:

We wanted a casebook that combined functional analysis of specific administrative programs with conceptual analysis of administrative law doctrine. As a matter of pedagogy we were convinced (1) that conceptualism without context was an arid exercise, but also (2) that the examination of concrete questions of agency policy or procedure must be informed by an understanding of the broader issues of legality and institutional legitimation that traditionally have defined the field of administrative law. We thus struck a compromise between organization by doctrinal category and organization by case study of agency tasks or functions. This "compromise" was not so schizophrenic as it may sound. Case studies presented doctrinal issues, and doctrinal analysis of particular legal concepts could often be pursued through judicial decisions reviewing the actions of a single agency.

Our second objective was to "contextualize" administrative law itself. This purpose was pursued in two different ways. First, we wanted to expose the student to the intimate connection between administrative and legislative action. We saw the administrative lawyer operating in a world of statutes, whose creator, the Congress, perceived administration to be largely an extension of the legislative formulation of policy. Some sophisticated awareness of statutes and of legislative process, therefore, seemed essential to understanding the administrative process. We accordingly devoted three chapters primarily to issues of statutory creation and design and legislative oversight of program implementation.

Second, we thought it important to pursue linkages between the remedial issues that have formed so large a part of the traditional study of federal administrative law (standing, reviewability, governmental and official immunities, primary jurisdiction, and the like) and the broader remedial system that further defines the citizen's bundle of rights in the modern administrative state. Private rights and public law have many points of contact and continuous reciprocal influence, intersections that had largely been ignored by previous administrative law texts. The first edition, therefore, added materials on implied rights of action under federal statutes, on regulatory supersession of the common law, and on actions based on 42 U.S.C. § 1983, to the standard doctrinal fare of judicial remedies against administrators. Perhaps intoxicated by the breadth and novelty of our approach, we titled the first edition an "Introduction to the American Public Law System."

Major changes have taken place in the arena of federal administrative law since 1975. The enthusiasm of the 1960s and early 1970s for federal regulation as a strategy of social management, with prescriptive administrative rulemaking as its primary legal technique, has waned. It finds itself in heated competition with demands for deregulation and for the use of market-like regulatory incentives. Central executive oversight has assumed increased importance as cost-benefit analysis has been institutionalized within agencies and made subject to the supervision of the Office of Management and Budget. The ambitious proceduralist impulses of the Court of Appeals for the District of Columbia Circuit have been sharply constrained by a Supreme Court, which has shown reluctance either to "constitutionalize" administrative procedure or to exercise a creative interpretive role in its development. What seemed an emerging federal common law of remedies "implied" under federal regulatory statutes has yielded to renewed concern for primary administrative jurisdiction and for the prerogatives of both Congress and states. And separation of powers theory has experienced a reinvigoration few would have predicted in the early 1970s.

These developments did not, however, cause us to reject the fundamental orientation embodied in the first edition when preparing the second, published in 1985. Revised ideas, different emphases, and new primary legal materials were abundant in that edition, but many were variations on prior themes. Our most significant structural changes were the abbreviation of the materials on the legislative process and the addition of a new chapter on "Executive Supervision of Administrative Action." These revisions recognized that we had originally provided more legislative materials than most instructors could (or wanted to) use and given much less attention to the role of the Chief Executive (and Executive Office staff) than contemporary developments warranted.

Thus, while reorganized (twelve chapters were reduced to eight), updated, and in some instances featuring different illustrations, the second edition still largely embraced the pedagogic and substantive convictions of the first. Two interstitial innovations were nevertheless noteworthy. The first was the more frequent reference to, and occasional incorporation of, materials from related disciplines—particularly political science, organization theory, and public choice theory. The preceding decade had witnessed a remarkable outpouring of literature in these fields that was of interest to administrative lawyers. We also gave greater attention to agency internal and informal processes—to questions of organization, routine, staffing and departmental location that subtly yet powerfully influence the realities of administration and, therefore, the operational meaning of administrative law.

This third edition continues the process of interstitial updating begun in the second, but it has also harnessed the talents and energies of a third co-author and, as might be expected, a trio of editors can

adopt a more ambitious editorial agenda than can a pair. The third edition, therefore, in addition to major revisions to take account of contemporary developments, contains several new features. Two merit specific mention.

The first is a wholly new introductory chapter designed to provide necessary background understandings for the materials that follow. Informed by the excellent historical scholarship of the past fifteen years, Chapter 1 supplies a concise overview of the evolution of administrative agencies and of the federal "administrative state." Recognizing that few students have much experience with bureaucratic organizations, the new introductory materials also provide a description of the typical structural features of a major federal agency and explain how that structure has been shaped by developments in American administrative law. Having thus introduced the development of administrative agencies and administrative law both historically and organizationally, Chapter 1 concludes with a survey of contemporary intellectual debates about how the rise of the administrative state and the structure of administrative law should be understood.

The second important innovation is a major rethinking and reorganization of the key chapters on administrative adjudication and administrative rulemaking. While hardly abandoning the functional or "case study" approach previously employed, Chapters 4 and 5 now surround those materials with a more straightforward elaboration of statutory and doctrinal developments. Our objective is to provide a stronger conceptual grounding for functional analyses that emphasize the strategic and policy importance of procedural requirements, or of their opposite, procedural discretion. We hope that these revisions will be helpful to long-time users of the text and an enticement to others to join in our ever-evolving intellectual enterprise.

JLM
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New Haven
Charlottesville
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