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ADMINISTRATIVE LAW

Cases
and
Materials

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CASES AND MATERIALS

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For
Valerie
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Joan

PREFACE

Our decision to write a casebook in administrative law requires more than the usual word of explanation. As generations of students and teachers can attest, administrative law is a notoriously exasperating subject of study. Yet, it is precisely that sense of exasperation that has impelled us to undertake this project.

Administrative law is a field that seems forever in search of itself, hovering uneasily between vacuous platitudes about the place of administrative government in a constitutional democracy and the numbing detail of daily bureaucratic life in the regulatory state. Those who teach and write about administrative law are constantly challenged to strike the appropriate balance between abstraction and concreteness. In the formative era of administrative law, when administrative agencies were fewer in number and less complex in operation, textbook and casebook authors tended to favor concreteness. Materials were often grouped by particular agency or substantive topic. Since the watershed period of the New Deal, however, the emphasis has shifted toward the abstract. Administrative lawyers have attempted to capture the growing profusion and complexity of administrative life in a handful of universal legal principles. While these efforts at constructing overarching principles have given coherence to discussion of some administrative law problems, they also are the chief source of the current sense of disaffection that afflicts teachers and students of administrative law. In short, the process of abstraction has gone too far.

The attempt to filter the rich variety of administrative life through a handful of doctrinal categories can have three unfortunate consequences. One is the sense of redundancy, or worse, superfluity that so often characterizes students' perceptions of administrative law. The lawyer's, and

hence the law student's, concern with administrative agencies largely focuses on legal responses to agency action. Focusing on courts' responses to administrative decisionmaking necessarily implicates doctrines and lessons covered in other courses: many of the doctrines that inform judicial reaction to administrative decisions are applicable in an array of other contexts. An excessively doctrinal orientation thus invites unfavorable comparisons to other courses, such as constitutional law or federal courts, in which some of the same doctrines are treated in a more comprehensive and, therefore, satisfying manner than the truncated versions presented in administrative law.

A second ill-effect of a narrow doctrinal orientation is the distorted view it presents of administrative agencies when seen through the prism of appellate review. What students learn about agencies is confined to what reviewing courts choose to say about them in the course of justifying decisions to uphold or reverse the particular aspects of administrative activity challenged in that forum. This filtration process typically squeezes the immediacy, significance, and drama out of public life.

Even if one's view of administrative law is limited to the interplay between court and agency, formal doctrines frequently offer an incomplete or erroneous picture. Judicial responses to administrative action do not always track the accepted doctrinal categories very well. The discerning student comes to view administrative law "doctrines" as pedagogical abstractions, not genuinely explanatory constructs. The repeated inability of articulated doctrines to explain outcomes leaves students feeling either that "the law" is not relevant in this field or that some key to its comprehension has been withheld from them.

As a result, all too often students end a course in administrative law without a systematic understanding of how administrative agencies behave, without an appreciation of the working of nonjudicial controls over agency behavior, and without even an understanding of the judicial controls themselves. In preparing teaching materials for the course in administrative law, then, we have been guided by a determination to overcome these deficiencies.

At the same time, we recognize the essential importance of teaching traditional doctrine: courts and agencies approach issues in doctrinal terms and couch decisions in that language. Our attempt, thus, has been to retain the benefits of doctrinal discussion while avoiding the difficulties attending overreliance on it. In this endeavor, we have relied primarily on two devices—a mixture of categorical and functional organization, and the "case study" method—to supplement the traditional emphasis on legal doctrine.

The book's organization begins and ends with inquiries that run congruent to traditional doctrinal categories. These categorical sections examine general issues concerning the creation of agencies and control over agency operation. The materials integrate arguments based in theories of administrative regulation and theories of behavior within large

organizations — public interest theories, public choice theories, organizational and agency-cost theories — with presentation of doctrinal developments. In contrast, the middle portion of the book explores issues of agency operation in a functional context, grouping the traditional cases and supporting materials around distinct forms of administrative behavior. Each set of materials is designed to explore one of the recurring generic patterns of administrative behavior, the problems peculiar to that function, the solutions that have been attempted, and the manner in which these solutions have worked. The organization encourages a doctrinal view of issues that we think fruitfully can be discussed (or inevitably are discussed) in those terms and a functional view of problems that we think are predominately associated with a particular type of administrative activity or are resolved very differently in disparate contexts. An expanded sketch of this organization follows.

Part One of the book introduces the institutional framework of the course. The first chapter acquaints students with the basic issues of social policymaking and governmental organization that underlie all of administrative law. After discussing the origin and nature of administrative agencies, the chapter focuses on their continuing relationships to the legislative and executive branches. The next two chapters explore in greater depth the role of the courts in supervising administrative behavior. Although these chapters introduce students to the conventional rules and principles governing the scope and availability of judicial review, they serve more as vehicles to explore basic themes of comparative institutional competence that run throughout the succeeding chapters.

Part Two is the heart of the book's functional presentation, systematically examining the legal problems and doctrinal responses associated with four generic administrative activities: policy formation, benefits administration, enforcement, and licensing. Although government activities are of almost infinite variety, most can be classified within these four functional headings. Despite obvious differences from one agency to another, these functions tend, wherever they are used, to elicit similar patterns of behavior and to create similar relationships between governmental and nongovernmental parties. It is those commonalities that these chapters seek to illuminate.

In Part Three, we shift the spotlight from direct judicial supervision to indirect legal control of administrative behavior. While modes of indirect controls are legion, this part focuses on two that have generated extensive litigation and controversy: liability rules and access rules. Chapter VIII explores officers' and government entities' expanded liability to damage suits, and Chapter IX focuses on the use of information and open meeting laws to increase public access to the decisionmaking process.

The second device on which we have relied to correct the deficiencies of traditional administrative law materials is the case study method. Much of the book is divided into self-contained units — designed to be discussed in a single or double class session — centering around a particular episode,

situation, or conflict. Most case studies focus on litigated disputes, including the controversies that have produced the leading modern judicial precedents in the field of administrative law. As in traditional treatments, we present sufficient excerpts from the appellate court's opinion (and separate opinions) to illuminate the doctrinal issues presented and the doctrinal development signaled by the decision. But we typically provide a much fuller presentation of background information on the political, legal, institutional, and technical context than is found in other texts. Since most units present only a single case study, students need to master only one set of "facts" per class session. And the cases are presented in a way that is designed to capture, rather than suppress, their vitality and social significance.

A few case studies focus directly on legislative and administrative controversies and actions. The book begins with a case study on the Occupational Safety and Health Act that draws from theoretical and empirical studies of occupational injury, congressional documents, and various observers' accounts of the Act's passage. A later case study on enforcement at the FTC draws on official data, descriptive accounts, and competing polemics to confront students with the task of identifying and evaluating an agency's enforcement policies.

In sum, our effort is not to abandon legal doctrine, but to infuse it with flesh and blood—to orient the course around what is peculiar to the formation and operation of administrative agencies, to place administrative law issues in the political and social contexts that are so critical to their resolution, to suggest alternative theoretical frameworks that can inform both positive and normative discussion of administrative behavior, and to facilitate the learning process by providing a fuller, less judicially biased group of materials drawn from a smaller number of disputes.

No undertaking of this magnitude could possibly be completed, much less succeed, without the dedicated effort of many people. At the unavoidable risk of slighting some by inadvertent omission, we would like to acknowledge with gratitude the assistance of the following: Susan Banks, Charles Bennett, Larry Boisvert, Eric Dannenmaier, Rob Evans, Deborah Fawcett, Mike Fricklas, Marcia Golov, Alan Gordee, Howard Haas, Ben Jones, Marie Martineau, Bruce Meyer, David Nirenberg, Ken Parsigian, Tom Pfeifle, Beth Pollack, Dee Price, John Re, Adam Rowland, and Susan Silberberg for their diligent research assistance; Charlotte Gliksman and Lisa Vogel for their superb clerical assistance; Professors Clark Byse, Ron Levin, and Glen Robinson for their advice, criticisms, and general inspiration; and Dean William B. Schwartz for his generous financial support and encouragement.

Ronald A. Cass
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SUMMARY OF CONTENTS

PART THREE

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