Strategies and Techniques for Teaching Administrative Law

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Strategies and Techniques for Teaching Administrative Law

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Strategies and Techniques for Teaching Administrative Law

I. Introduction

This short book offers advice for teaching a law school course on administrative law. It is a companion to *Strategies and Techniques of Law School Teaching* by Howard E. Katz and Kevin Francis O'Neill. Whereas Katz and O'Neill's book offers general advice on law school teaching, this book emphasizes features of teaching an administrative law course that are distinctive and that first- or second-time teachers of the course might find useful. (And I hope even veteran teachers of administrative law can pick up some useful ideas.)

I begin by emphasizing this book's limitations. Some limitations are intrinsic to the project of offering advice on a course taught by many different people, using many different approaches, to many different groups of students. Reflecting those limitations, and in an attempt to overcome them, this book discusses factors that can help you tailor the course for your situation. Added to limitations intrinsic to the project are my own limitations. I have taught administrative law for 14 years, and yet I still have much to learn about teaching the subject and, for that matter, the subject itself. Considering all these limitations, I offer the advice here on a "for whatever it may be worth" basis and encourage my readers to share their insights and experiences with me.

The book follows a roadmap. First, it situates the administrative law course within the law school curriculum. Then it discusses the challenges of teaching the course and how to meet those challenges. From there, the book progresses chronologically, from planning the course, to teaching the course, to assessing students' learning in the course.

The book uses a convention of which you should be aware up front: It sometimes uses initial uppercase letters—Administrative Law—to refer to the law school course on administrative law while using lowercase initial letters—administrative law—to refer to administrative law as an area of law. The book uses the same convention for other law school courses and areas of law. Thus, Constitutional Law refers to the law school course on constitutional law.

II. The Place of Administrative Law in the Law School Curriculum

To teach Administrative Law successfully, you should think about tailoring the course to fit in with the curriculum, culture, and specific needs of your school. Fortunately, the administrative law course is fairly malleable, because administrative law is a sprawling subject that can include many different topics and be taught from many different angles. It is like a puzzle piece with borders and content that can largely be determined by the individual teacher. To make the course fit into the broader scheme of things at your school, however, you need to answer at least three questions.

First, is Administrative Law a required course at your school? And, whether it is or not, does your school require Administrative Law to include certain topics, skills, or projects? Most schools do not require Administrative Law. Nor do most schools have any official requirements for the course. Faculty and administrators at your school might have developed certain expectations about the course, though, which can serve as unofficial requirements. For example, suppose you are inheriting the course from a faculty member who has taught it for 20 years and has covered the same topics, in substantially the same way, the entire time. This might build up expectations about the course's contents on the part of teachers who teach related courses or courses for which Administrative Law is a prerequisite. Even if you decide to frustrate those expectations, you certainly want to do so knowingly, rather than inadvertently.

Second, does your school's culture suggest that some approaches to teaching the course will go over better than other approaches? Suppose, for example, your school seeks to shed its reputation as a school that emphasizes preparing students for practice in favor of a reputation as a school that emphasizes groundbreaking, influential scholarship. In that event, you could be bucking the culture if you adopt a highly practice-oriented approach instead of a theoretical or policy-oriented approach. Again, you might decide to march to a different drummer, but do so only after listening to your school's institutional drumbeat.

Third, what do your students need? You can usefully consider their short-term and long-term needs. In the short term, what do your students need before they take law school courses for which your

administrative law course is a prerequisite or, less formally, serves as a gateway or a foundational course? You can best find out the answer to this question by talking with the teachers of the other courses. In the longer term, how will your students use administrative law in their legal practice or other postgraduate endeavors? Will many of your students go to work for administrative agencies at the federal, state, or local level? If so, you may want to make sure you discuss material from the perspective of both lawyers who work inside agencies as well as lawyers who have matters before agencies. Will many of your students take judicial clerkships after graduation? If so, this suggests your course should not shortchange the topic of judicial review of agency action. To cite another example, if many students take jobs in small firms that cannot afford much use of commercial databases such as Westlaw or LexisNexis, this suggests your course might usefully include advice on researching administrative law problems using publicly available (e.g., Internet) sources.

You probably cannot answer these three questions without talking to administrators, faculty, and students. And doing so will probably give you information that you did not even know you needed. Besides that, it generates good will. People love to be asked for their advice. You just have to be careful not to get tied down by promising to follow their advice, especially if you've never taught the course before.

III. Challenges of Teaching Administrative Law

Before you begin designing your Administrative Law course for your school, you might find it useful to know what your fellow Administrative Law teachers believe you are up against. "Administrative Law is widely and justly regarded as one of the most difficult [courses] in the law school curriculum. It is a hard course to take and a hard course to teach."[1] Indeed, Administrative Law presents distinctive teaching challenges, which concern the students, the subject, and the teacher. This part of the book identifies the challenges and ways to meet them.

[1] Gary Lawson, *Federal Administrative Law* (4th ed. 2007).

A. CHALLENGES RELATED TO STUDENTS

1. Many Students Have Limited Prior Knowledge of the Subject

Experts say that learning is a process of building on existing knowledge. That presents a challenge because most law students lack experience with administrative agencies and knowledge of how those agencies fit into our system of government. You can respond to this challenge in three ways.

a. First, find out what prior knowledge your students do have.

The Administrative Law teacher must avoid the Scylla of assigning material that duplicates what students already know and the Charybdis of assigning material that assumes they have knowledge they don't. Before teaching Administrative Law, therefore, you must find out where your students are "coming from."

Specifically, find out what students will have learned at your law school before they take your Administrative Law course. For example, students may have learned about some topics related to administrative law in Constitutional Law or a course on legislation and regulation (Leg/Reg). If your school has those courses, get the syllabi for them and talk with the teachers. In this way, you can both learn what prior knowledge your students have and also identify topics you may not need to cover, or cover as extensively, in your course.

Besides examining the syllabi and talking to the teachers of courses that may have given your students relevant prior knowledge, you might want to find out from your students themselves what they know about administrative law. One way to find out is to hand out a diagnostic test early in the course. But more fun ways exist. For example, my colleague Anastasia Telesetksy had students in her Public International Law course discuss basic questions about the subject in small teams competing in a game-show format. If you go this route, make sure you explain the real-world, practical significance of the answers, so students don't start off thinking the course is not serious. You also can hand out an information sheet to students asking them about their prior experiences with agencies.

I take this last route. My information sheet for Administrative Law includes some questions that I ask students in every course I

teach, such as how to pronounce their names, what their goals are in taking the course, and what teaching and learning methods they have found most useful and least useful. In addition, my information sheet includes these items specific to Administrative Law:

- Right now, I plan to spend about 80 percent of the class on federal administrative law and 20 percent of the class on state administrative law, focusing on Idaho law. I will, however, also supplement the course with information on administrative law in other states. Please identify any other states whose administrative law you would be interested in learning about.
- Please describe any particular topics or agencies that you would like to learn about in this class. Please describe any particular questions about administrative law or administrative agencies you have encountered in your prior work or studies and would like addressed at some point in this class.
- Please describe any past experience that you have had working for or learning about an agency (for example, through a job, through a friend or family member who worked for an agency, or through you or someone close to you being involved in a dispute with, or subject to regulation by, an agency). It's perfectly fine if you have no past experience with agencies. That's a great reason to take this course!

I learn from these information sheets that many students have worked for agencies or against agencies (e.g., as small business owners struggling to get a permit or avoid penalties for a regulatory violation). Most students, though, have no past experience with agencies, and are relieved to know that they don't need any to succeed in my course.

b. Figure out how most effectively to supply the needed foundational knowledge.

Administrative Law should not be a remedial civics course. For one thing, some of your students already have the needed foundational knowledge. You don't want to turn them off by teaching material they already know. For another thing, it is hard enough to explore the administrative law your students need to learn in the limited time available, without having to backfill significantly. And so you need

to figure out how to get as many of your students as possible up to speed without bogging down the class.

You have at least three options. First, you can give students foundational material in a single lecture or two (or handout, or Internet-based tutorial) at the beginning of the course or through more bite-sized, mini-lectures (or handouts or tutorials) throughout the course. Second, you can make resources available, on an optional basis, for those students who need them. This can be done simply by including in your syllabus a reference to treatises, study guides, and websites with basic information about the structure and operation of the federal and state governments.[2] Third, you can ask the students who have the background knowledge to share it during class, as needed, throughout the semester. This peer-teaching approach can be informal—for example, you ask for students to volunteer their prior knowledge when it's needed during class—or, more formally, you can have students make short presentations. Either way is effective in engaging students with the foundational knowledge and rewarding them for that knowledge by giving them recognition among their peers. You could decide to use a combination of all three approaches, depending on how many students need some remedial civics on various topics and whether your class contains potential "peer instructors" of foundational knowledge.

Whatever approach you take to getting students up to speed, make sure they understand that they bear the main responsibility for filling their knowledge gaps. Also make sure to explain they bear the main responsibility for filling those gaps while they are law students because they will bear the sole responsibility of self-education when they become practicing lawyers. Illustratively, I tell students, "You are the expert in what you don't know. Indeed, no one knows better than you what you don't know." I take a further step: Early in the course I bring in, for what I call "show and tell," some examples of supplementary sources they might use. Those sources include the U.S. Government Manual, the Federal Register, and the Code of Federal

[2] For example, the White House's website has useful, objective information about federal, state, and local government at http://www.whitehouse.gov/our-government. The Library of Congress website provides useful historical information about the adoption and evolution of the federal government. In addition, many states publish "Blue Books" with almanac-style compilations of information about that state's government (see http://wikis.ala.org/godort/index.php/State_Blue_Books).

Regulations. Later on in the course I refer to those sources when students have questions that are answered in them and that don't bear directly on the current class discussion.

c. Relate new learning to prior knowledge and to current affairs.

Many students fear Administrative Law because they know how little they know about the subject. Teachers can overcome this fear by helping students (1) realize that they probably know more about administrative law than they think they know; and (2) become attuned during the course to the administrative law happening all around them. These measures not only help students learn administrative law, but may also help them "unlearn" misconceptions about the subject.

All of your students have dealt with administrative agencies before they take your course, but they may need to be informed or reminded of that. For example, every law student who gets federal financial aid will have filled out a Free Application for Federal Student Aid (FAFSA) that has been processed by an agency, the Federal Student Aid Office in the U.S. Department of Education. You can draw on such experiences early in the course, when you teach students what agencies are and what they do; and return to them later in the course when, for example, you teach students about informal adjudications. Moreover, if your law school is a state-supported school, then your school itself might qualify as an administrative agency, for example, for purposes of your state's Administrative Procedure Act (APA).

You need not limit yourself to widely shared prior experiences like FAFSAs. Chances are good that in every class you will find students who have more in-depth experiences, such as working for an agency, battling an agency, or working for a legislative or executive body that oversees an agency. I find out which students have these in-depth experiences by handing out a "student information sheet" on the first day of class, on which I ask students to tell me if they've had any such experiences. In the second class, I acknowledge these in-depth experiences and encourage the students who have them to discuss them as relevant to our course work.

Beyond drawing upon students' experience with agencies outside the classroom, you can connect Administrative Law to other law school courses your students have taken. To learn about procedures for agency adjudication, for example, students must learn how those procedures compare to the procedures for civil actions that they learned about in Civil Procedure. Teachers must help students make the

comparison partly with an eye to dispelling misperceptions students have or might otherwise develop. Indeed, agency adjudication is a particularly good example: Many lawyers mistakenly assume that an unfamiliar agency's adjudication procedures will be substantially similar to a court's procedures. If you can teach your students not to make that assumption, you have accomplished something important.

Many law teachers relate current affairs to the material assigned in their course, and that is particularly valuable in Administrative Law. Administrative law is like the air: It's all around us but it is largely invisible to most people, precisely because it's so pervasive. Administrative Law teachers can discuss current events to provide concrete, salient examples that many students have already heard about. Another option is to have students themselves identify relevant news items. By the end of your course, your students should realize that administrative law is everywhere.

2. Students Have Bad Prior Experience with, or Perceptions of, Administrative Agencies or Administrative Law

Some students approach Administrative Law with a bad attitude. A student's bad attitude may stem from a bad personal experience: Perhaps the student is a veteran who's been battling the Department of Veterans Affairs for education benefits. A bad attitude may stem from a student's political view that there is too much regulation in this country. A bad attitude may stem from a student's hearing other students say that Administrative Law is boring and difficult. Whatever its source, a bad attitude obstructs that student's learning and can sour the class atmosphere.

Perhaps the most important thing for teachers of administrative law to know is this: You can't take it personally! More than that, I repeatedly express three messages to counter bad attitudes about Administrative Law.

1. **"Knowledge is power."** Students who have had bad experiences with an agency understand the importance of learning how to prevent and remedy improper agency action, which is what students will learn in Administrative Law. I signal this point on the first day of class by assuring students: "Most people—including most lawyers—don't know much about administrative law. *And administrative agencies like it that*

way! As a former government lawyer, I cannot tell you how often people with disputes against the government lost their cases because of their lawyer's ignorance of administrative law." (The "knowledge is power" point also hits home for people who have an antiregulation point of view.)

2. **"Lots of people criticize so-called big government, but it's not that simple."** I confess to students my disagreement with not only people who believe that government is the source of all of the country's problems, but also with people who believe that government can solve all of the country's problems. I also confess that my aim is to help students have a nuanced understanding of the variety of administrative agencies and administrative tasks. The truth is, if we are going to have a government, we will inevitably have some agencies. In this connection, I find it useful to identify provisions in the U.S. Constitution that make clear the framers' intent that the executive branch will contain "departments" that will be populated by the "heads of departments" (principal officers) as well as inferior officers. I also emphasize the value of lawyers in ensuring that agencies obey the rule of law. My aim is to show students that they will benefit from learning administrative law regardless how they feel about administrative agencies. After all, the biggest opponents of agencies benefit from "knowing the enemy."

3. **"Administrative law is incredibly handy; lawyers can't avoid it."** I don't tell students they will find administrative law fun, because most of them won't. On the other hand, I do not share with my students, as some Administrative Law teachers do, Justice Scalia's infamous advice to law students: "Administrative law is not for sissies—so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture."[3] The chances are good that students have already heard something to this effect. I don't think you accomplish anything by endorsing the view that administrative law is dull, even if you agree with it (which I don't!). Instead, I tell my students they will find the course incredibly handy. I tell them so because that is what many former students

[3] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 511 (1989).

tell me. And, indeed, many of your students will have heard about the usefulness of Administrative Law from students who have taken the course and from lawyers. I reinforce this point throughout the course. To do so, I point out cases and situations that we study and in which my students might very well find themselves representing the person with a matter before the agency or the agency itself.

B. CHALLENGES RELATED TO THE SUBJECT

1. Administrative Law Is Not a Common-Law Course

Most students take mostly common-law-oriented courses before they take Administrative Law. As a result, they develop a comfort level and strategies for learning common-law subjects. But the common-law courses don't prepare them very well for Administrative Law—with its layers of statutes, regulations, and other executive branch material, and with its emphasis on sources of control in addition to courts. Not surprisingly, students can feel quite disoriented by the initial assignments and class discussions in Administrative Law. They might not know how to prepare for class properly. They might not know what to take notes on during class. In short, Administrative Law can make them feel like law school novices all over again, and they don't like that feeling.

One way to deal with this challenge is to select an administrative law casebook that uses mostly judicial opinions. That case law approach is possible because you can find cases on every administrative law topic. Although many of these cases are interpreting statutes, they still help give your course a common-law feel. All in all, the case law approach has plusses and minuses.

On the plus side, it taps into students' case-reading skills, giving them a comfort level while the teacher introduces new skills, such as statutory analysis. The case law approach also has the blessing of tradition. As Kenneth Culp Davis said, from the birth of administrative law as a discrete subject of law school courses until at least the time he wrote, we have "stud[ied] administrative law … through the eyes of judges."[4]

[4] Kenneth Culp Davis, Book Review, 72 Colum. L. Rev. 432, 434 (1972) (reviewing Walter Gellhorn & Clark Byse, Administrative Law, Cases and Comments (5th ed. 1970)).

On the other hand, the case law approach is arguably inefficient and misleading. It is arguably inefficient because students have already learned how to read cases; they don't need more practice. And even a heavily edited excerpt of a judicial opinion takes two or three pages to convey a principle that can be summarized in a paragraph or less. The case law approach is arguably misleading in implying that case law is the primary "stuff" of administrative law. The truth is that, if administrative law were a breakfast cereal, its FDA-mandated list of ingredients would put statutes at the top of the list. Case law would be way down the list, maybe just ahead of riboflavin.

Whatever you decide about how much case law to include in your course material, you might find it useful early in the course to explain how Administrative Law differs from a common-law course. In particular, students will benefit from knowing how to prepare for class and what to pay attention to during class.

2. Administrative Law Is Not a "Code" Course

Even among statutory courses, Administrative Law is a doozy. In contrast to "code" courses like Bankruptcy and Basic Income Tax, Administrative Law exposes students to many different statutes and other nonjudicial material. At least in a code course like (say) Bankruptcy, students know that the answer to most problems is likely to be somewhere in Title 9 of the U.S. Code. Students in Administrative Law have no comparable assurance. In short, students who are allergic to statutes and other nonjudicial material risk anaphylactic shock when they take Administrative Law.

Three types of responses, however, can mitigate this risk. First, I think it helps to make clear to students from the start that administrative law is challenging for students and practitioners precisely because administrative law consists of many types of law that can interact intricately. Second, it helps to have organizing themes that focus students on what you think they should be "getting out" of the course. Third, as discussed in more detail later, you can adopt an overall approach to teaching the course that doesn't emphasize close analysis of statutes, regulations, and similar material.

3. Administrative Law Has General Principles But Is Also Highly Agency Specific

Administrative law scholars disagree how much black-letter administrative law exists. No wonder it's hard for students. The difficulty arises partly because administrative law does include laws of broad applicability, such as federal and state APAs and the doctrine of procedural due process. But, as I tell my students, agencies are like snowflakes; no two are exactly alike. They have distinctive statutory missions and powers. That is why so many lawyers specialize by practicing before no more than a small number of agencies.

I know of no alternative to warning students up front that administrative law does have black-letter-law elements but is also highly agency specific. You can help students handle this aspect of administrative law's complexity partly by ensuring they understand the hierarchy of laws: Neither agency legislation nor agency rules can modify constitutional due process requirements. And, neither agency rules nor executive orders can modify statutes, unless the statute authorizes such modifications. You might think students already understand the hierarchy of laws, but Administrative Law challenges that understanding and will reveal that many students lack it.

4. It Is Not Obvious to Students What They Will Be Tested on in an Administrative Law Course

After you go over your course's ground rules and other logistics on the first day of class and ask students if they have any questions, if they were completely honest, they would ask, "What's going to be on the exam?" Although teachers don't like this question and students know better than to ask it, it is arguably a very fair question in Administrative Law. Even if you don't answer it, you should be aware students will have it more keenly in mind in your course than in other courses.

The question is so salient because Administrative Law differs from students' other law school courses but might remind them of certain other courses. Administrative Law resembles Civil Procedure in its study of the agency procedures for rulemaking and adjudication. Administrative Law also has elements of Constitutional Law, such as procedural due process. Still further, Administrative Law strays into the territory of Federal Courts when examining the availability of judicial review of agency action, as constrained by doctrines of

standing and ripeness. Depending on how you teach it, your course might also remind some students of their college courses in political science. And so inquiring minds want to know: How are you going to test us on this stuff?

That question relates directly to the issue of assessment, which is discussed later in this book. But beneath it is the broader question of what knowledge, skills, and values you want your students to learn in your course. For now, my advice is simply that, whatever assessment methods you select for giving students a grade, you should show students examples of that method—and consider giving them chances to practice with it—as early as possible in the semester. More generally, be as transparent and specific as possible about what you are looking for. By doing so, you not only show them what knowledge and skills you expect them to develop; you also prevent them from being distracted by the age-old question of what is going to be on the test.

C. CHALLENGES RELATED TO THE TEACHER

Administrative law is a sprawling subject in which few can claim comprehensive expertise. Those few would be the giants of administrative law such as (limiting ourselves to the departed) Ernest Gellhorn, Clark Byse, and Kenneth Culp Davis. Now, add to the sprawling nature of administrative law the reality that, at many law schools, the job of teaching it goes to professors for whom administrative law is not their main area of expertise or interest. Instead, the Administrative Law teaching assignment often goes to folks with expertise in a substantive area of law such as environmental law, health law, securities law, or constitutional law. The sprawling nature of administrative law combined with its typical place in a teaching package raises the risk of the teacher's experiencing severe imposter syndrome. Here are two pieces of advice to minimize the risk.

First, know you are not alone. One respected administrative law professor admits, "I have been teaching Administrative Law for over a decade, and I think I now know less about how to do it than when I started."[5] Another laments, "No matter how many times I have taught the course, . . . I have always ended the semester with a

[5] Craig N. Oren, *The Problems of Teaching Administrative Law: We Can't Solve Them Alone*, 38 Brandeis L.J. 193, 193 (1999–2000).

nagging feeling of regret."[6] These professors were part of a chorus of prominent administrative law professors participating in a discussion forum on teaching the subject.[7] I can only chime in by saying that one of the many wonderful things about teaching administrative law—and I do genuinely love it—is that it poses so little risk of causing you to become complacent about your teaching ability.

Second, design the course to complement your strengths. After all, there is no one right way to teach administrative law. Different approaches are discussed below, but the main point for now is: Don't exacerbate the risk of imposter syndrome by trying to be someone you are not. For example, I lack a political science background. That is one reason I do not take a theoretical or policy-oriented approach to teaching my course. Instead, I offer my students only as much theory as I can teach effectively. That amount has increased as I learn more political science myself, but it falls short of what many of my fellow teachers of Administrative Law can offer their students.

None of the challenges just identified is insuperable. What's more, the challenges can make for an exciting teaching and learning experience for you and your students.

IV. Specific Course Objectives

Katz and O'Neill's book includes a comprehensive list of possible objectives for a law school course.[8] It also recommends picking a manageable number of objectives on which to focus.[9] I cannot improve on that advice. Instead, I mention four specific course objectives that, in my view, are particularly appropriate for Administrative Law.

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6 Yvette M. Barksdale, *Administrative Law Pedagogy Discussion Forum*, 38 Brandeis L.J. 361, 361 (1999–2000).

7 See Russell L. Weaver, *Administrative Law Discussion Forum: Introduction*, 38 Brandeis L.J. 167 (1999–2000).

8 Howard E. Katz & Kevin Francis O'Neill, Strategies and Techniques of Law School Teaching 3 (2009); see also Michael Hunter Schwartz, Sophie Sparrow & Gerald Hess, Teaching Law by Design 38–42 (2009).

9 Katz & O'Neill, *supra* note 8, at 4.

A. RESEARCH SKILLS

One of the biggest challenges for an administrative lawyer is identifying and analyzing all of the laws potentially applicable to a particular administrative law problem. That is because every type of law is a source of administrative law: international law, constitutional law, statutory law, agency regulations, agency guidance material, agency adjudicatory decisions, other executive branch material such as executive orders, and judicial opinions. In addition to the many sources of *law,* there are *political factors* that potentially bear on a particular administrative law problem. The lawyer must often tease those factors out from legislative history, regulatory history, and the agency's unofficial (and usually unwritten) history and culture. In short, administrative lawyers must learn not just to find a needle in a haystack but to look for multiple needles in multiple haystacks. Thus, research skills count heavily. I therefore recommend that you consider including research skills among your course objectives.

You can start small. Personally, I started small and have stayed pretty small. By that I mean: I introduce research skills throughout the course in bite-sized pieces. For example, I show students administrative law material like the Federal Register and the Code of Federal Regulations, and research resources like the federal government's Federal Digital System and the Library of Congress's THOMAS system. I teach students how to find an agency's organic statute, if it has one. I also give students homework assignments to find information using various research resources.

I have one main piece of advice if you adopt the course objective of teaching your students research skills: Always have them practice those skills for a particular purpose. For example, if you want them to learn how to find Notices of Proposed Rulemaking for federal agency rules, have them practice finding the Notice for an agency rule discussed in an assigned case, and have them do so for the purpose of determining whether it addresses an issue that the court discussed in the assigned case. More generally, when a research exercise has a specific, relevant purpose, students are more likely to understand the importance of research and to remember the specific skill being taught.

B. COLLABORATION SKILLS

Consider having students develop collaboration skills by working in small teams on a project that requires them to investigate and report on a particular agency. This localizes the sprawling nature of administrative law. Students interested in environmental law, for example, can team up to investigate and report on environmental protection agencies. Likewise for students with an interest in business regulation, food and drug law, health law, poverty law, immigration law, and so on. You also can have some teams work on federal agencies and others work on state agencies.

Professor David I. C. Thomson describes an ambitious version of this small team project.[10] Professor Thomson has student teams create a wiki with information about their assigned agencies. Each week, a group uses 20 minutes of a class session to present its wiki. At the end of the semester, each student gets a CD-ROM containing all the wikis. I only wish I had Professor Thomson's technological knowledge and organizational abilities. As it is, I have included that knowledge and those abilities among goals for my future professional development. In the meantime, without those knowledge and abilities, a teacher can still have the student teams produce written reports.

Fortunately, too, you can have students collaborate on more modest projects. And, far from being ambitious, you *should* start small if you are teaching Administrative Law for the first (or second or third) time. You can, for example, assign students to (or have them sign up to be on) a team for a particular agency and then give the teams short assignments during the semester. One such assignment could be to identify their assigned agency's organic statute and post a citation on the course web page. Another one could be to determine whether their assigned agency has the power to make legislative rules. These spot assignments still help students work together on a specific agency, with many of the same benefits as those of Professor Thomson's more elaborate wiki project.

C. STATUTORY ANALYSIS

A challenge of teaching Administrative Law, as discussed earlier, is the variety of statutes and other legal material that make

[10] See David I. C. Thomson, Law School 2.0: Legal Education for a Digital Age 98–99 (2009).

up administrative law. By the same token, the course offers a great opportunity to help students learn to analyze statutes and their interaction with other types of law such as constitutional provisions and agency regulations. By helping students develop statutory analysis skills, you give them skills they can use in many other law school courses and most areas of law.

D. INTERDISCIPLINARY ANALYSIS

Administrative Law naturally lends itself to interdisciplinary perspectives. That is because many administrative agencies deal with matters requiring expertise from other fields. Indeed, a central justification for assigning a matter to an agency is to take advantage of an entity that can employ experts and develop institutional expertise to deal with the assigned matter.

Various administrative law topics can be linked to material on the physical sciences and the social sciences. For example, you could have students study material on climate change when studying the Supreme Court case in which states and other plaintiffs sued the EPA to force it to regulate greenhouse gases, *Massachusetts v. EPA,* 549 U.S. 497 (2007). Or you could bring in guest speakers from outside the law school to address how their expertise bears on administrative law matters.

V. Topics for the Administrative Law Course

Although administrative law is a sprawling subject, most administrative law teachers would agree on the irreducible core, which consists of four general topics:

1. The purpose of agencies and their place in our system of separated powers
2. Agency rulemaking
3. Agency adjudication
4. Judicial review of agency action

The first topic typically includes a discussion of the traditional justifications for regulation—such as to respond to inadequate

information in the marketplace—discussed mostly famously in Stephen Breyer's book, *Regulation and Its Reform* 15–35 (1982). The first topic also includes the blending of different kinds of powers—executive powers, quasi-legislative (rulemaking) powers, and quasi-judicial (adjudicatory) powers—found in so many modern agencies.

Some teachers stick to these "core four" topics, and you should consider doing so the first time you teach the course. They can easily take up the standard three credits allocated to the course, especially before you have identified the most efficient and effective ways to teach them. In addition, administrative law is a hard subject for most students, for reasons already discussed. Its difficulty alone supports a "less is more" approach to topic selection. Finally, if you end up having additional time to cover additional topics, you can always add them into your course planning.

Beyond the core four, you will encounter disagreement among administrative law teachers about additional topics to include. My own personal choices would be (in the order of most to least important):

1. Agency investigations and other forms of information gathering
2. Attorney's fees
3. Public access to government information (e.g., Freedom of Information Act)

Rather than defend my choice and ordering of these additional topics, I'll say that your choice should be informed by whether a decent number of your students will take a bar exam that tests administrative law, and, if so, what additional topics are fair game on the bar exams your students might take. (The core four are invariably fair game on bar exams that include administrative law.) Beyond that, you should appraise the usefulness of various topics to your students' legal practice. In short, let your students' needs be your guide.

Teachers of Administrative Law face a distinctive challenge when selecting topics: dovetailing coverage with that of other courses. Administrative Law can include topics covered in Constitutional Law, Leg/Reg, and Federal Courts:

- Separation of powers topics, such as the President's appointment power and Congress's power to delegate quasi-legislative and quasi-judicial powers to agencies
- Procedural due process
- Justiciability doctrines such as standing and ripeness

On the one hand, you don't want to duplicate coverage of other courses at your law school. Students will consider this a waste of time and resent any perceived inconsistencies between your and your colleague's coverage of a topic. On the other hand, other courses might not give as much attention to a topic as is needed for learning administrative law. At my school, for example, procedural due process gets shorter shrift in Constitutional Law than the minimum students need for Administrative Law.

In any event, you benefit from selecting topics with knowledge of the extent to which they are addressed in other courses at your school. That knowledge might influence not only your selection of topics, but also your approach to teaching those topics. For example, if you decide that your students have already learned enough black-letter constitutional law doctrine on political ways to control agency power—e.g., the appointment power, the legislative veto, etc.—you may decide to take a theoretical or policy-oriented approach to examining political controls on agency power.

VI. The Range of Analytic Approaches

It helps to have an overall approach to teaching your course. This helps you select your course objectives and your course book, and to plan what happens during and between class sessions. Having a vision also helps your students by giving them a sense of structure and an understanding of what you expect them to get out of the course. If you are convinced of the importance of adopting an overall approach, the questions become: (A) What approaches are available? (B) How do I choose among them?

A. POSSIBLE APPROACHES

Many administrative law teachers tend to favor one of three approaches: (1) the doctrinal approach; (2) the theoretical or policy-oriented approach; or (3) the practice-oriented approach. Each approach tends to have students study somewhat different questions and different material. You can get concrete examples of each approach by looking at casebooks. (Casebook selection is discussed in more detail later.) In the meantime, here are thumbnail sketches of each.

1. Doctrinal Approach

The doctrinal approach emphasizes three bodies of law:

- **Constitutional law governing the creation and control of federal agencies.** This body of law addresses constitutional limits on Congress's power to authorize agencies to make rules and adjudicate cases. It also includes constitutional law on the President's appointment power and on Congress's power to control agencies by means like the legislative veto.
- **Law prescribing procedures for agency rulemaking and agency adjudication.** This body of law includes the constitutional doctrine of procedural due process. Primarily, though, it concerns requirements of the federal APA as construed by the federal courts.
- **Law governing judicial review of agency action.** This body of law is primarily case law. Most famously, it includes U.S. Supreme Court decisions requiring federal courts to defer to a federal agency's reasonable interpretation of a statute that the agency is responsible for administering—the so-called *Chevron* doctrine. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

2. Theoretical or Policy-Oriented Approach

The theoretical or policy-oriented approach tends to focus on these issues:

- The appropriate relationship between the government and private entities (e.g., individuals, businesses)

- The justifications for regulation and the range of regulatory approaches
- Theories of agency behavior
- Political control of agency behavior

Material on these issues can include statutes and other primary sources of law that, for example, illustrate different regulatory approaches and means for controlling agency behavior. The material also includes secondary material such as scholarly books and articles.

3. Practice-Oriented Approach

The practice-oriented approach focuses on:

- Statutory analysis and other skills for solving administrative law problems
- Procedural requirements for agency processes in which lawyers might become involved, including agency rulemaking and adjudication
- Judicial review of agency action

The material for exploring these issues could include material not featured in the other approach, such as agency-generated material—for example, a formal complaint issued by the Federal Trade Commission (FTC) in an administrative cease-and-desist proceeding—and attorney-generated material such as the defendant's answer to an FTC complaint.

Of course, these three approaches reflect what teachers emphasize, rather than their exclusive focus. All teachers include some doctrinal material, some theoretical material, and some practice-oriented material. Furthermore, each approach can be supplemented by additional material such as historical material, problems, and exercises. Nor do these three approaches exhaust the possibilities. They are just the main approaches.

B. SELECTING AN APPROACH

Your choice of an overall approach should be influenced by the issues discussed earlier: your school's official or unofficial requirements for the course, your school's culture, and your students' needs. Another important consideration, already discussed, is you—

specifically, your experience, your strengths, and your philosophy of teaching. Whatever approach you choose, you will end up adjusting it during and after the first time you teach the course.

VII. Preparing for the Course

A. WHAT TO READ: GENERAL ORIENTATION

You may remember the Administrative Law course you took as a law student. Even so, it's a good idea to get a fresh lay of the land before you teach the course. For one thing, your perspective as a teacher will differ from your perspective as a student. For another thing, administrative law has changed. For example, presidents today control agency rulemaking more than in the past. Also, agencies are using more and more alternatives to the old-style "command and control" regulation. Technology has affected administrative procedure, too. Thus you will benefit from reading modern surveys of the law.

These general guides, most of which are written primarily for students, give a good survey:

- William R. Andersen, *Mastering Administrative Law* (2010)
- William F. Fox, *Understanding Administrative Law* (6th ed. 2012)
- Ernest Gellhorn and Ronald Levin, *Administrative Law and Process in a Nutshell* (5th ed. 2006)
- Richard J. Pierce, *Administrative Law* (2008)
- Keith M. Werhan, *Principles of Administrative Law* (2007)

My advice is to get review copies of all of these. Then flip through them for a sense of their organization, level of detail, and readability. Finally, read the one or two that you find best organized and written. In the process, you may be able to identify which, if any, to recommend to your students.

Several good treatises exist:

- Charles H. Koch, *Administrative Law and Practice*
- Richard J. Pierce, Jr., *Administrative Law Treatise*
- Jacob A. Stein, Glenn A. Mitchell & Basil J. Mezines, *Administrative Law* (available only electronically, on the LexisNexis database)

Treatises can help you in three ways. First, you can consult them while planning your course for detailed breakdowns of the major topics. This can help you decide on the sequence in which and depth with which you will have students explore the major topics. Second, you can use them during the semester to prepare for classes when you need a more detailed understanding than your casebook provides. Finally, you will find at least one of the treatises useful as a reliable "go-to" resource for answers to student questions that stump you.

You can make the same uses of these guides published by the ABA:

- *A Guide to Federal Agency Adjudication* (Jeffrey B. Litwak ed., 2nd ed. 2012)
- Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* (5th ed. 2012)
- *A Guide to Judicial and Political Review of Federal Agencies* (John F. Duffy & Michael Herz eds. 2005)

Finally, you might wish to start keeping abreast of current developments in administrative law. You can learn about current developments from general legal newspapers like the *National Law Journal*. You can also make sure your library sends you Bloomberg News's *AdLaw Bulletin*, a monthly newsletter. You can join the ABA's Section of Administrative Law and Regulatory Practice, so you get its quarterlies, *Administrative & Regulatory Law News* and *Administrative Law Review*. Several blogs discuss administrative law developments as well:

- Administrative Law Professor Blog (http://lawprofessors.typepad.com/adminlaw/)
- RegBlog (https://www.law.upenn.edu/blogs/regblog/)
- Rulemaking Blog (http://rulemaking.wordpress.com/)

B. WHAT TO READ: SCHOLARSHIP

Administrative law scholarship is rich and immense. You cannot read all of it, even the most important portion, before you teach the course for the first time, unless you have much more preparation time than most teachers or a much higher reading speed than mere mortals. Anyway, you don't *need* to read it all. Instead, I suggest

that you devote the time you do have to read scholarship in this descending order of priority:

First, step into the flow of the current scholarship. You can do this by subscribing to the *Administrative Law Review* (mentioned previously). You can also get regular e-mails about new articles on administrative law using (1) SmartCILP, a service of the University of Washington's law library; and (2) the Social Science Research Network (SSRN), which will advise you of draft articles on administrative law through its Administrative Law eJournal. Just by skimming abstracts (sometimes even just titles) of new articles, you will begin to get a sense of what's going on in the world of scholarship.

Second, if you choose a casebook that contains excerpts of scholarly work, begin reading the complete versions of the works excerpted in the portions of the book that you assign students. Do the same for scholarship that is cited (though not excerpted) in assigned material and that seems worth reading in full. You will gain insights and perspectives that you can share during class time to enrich your students' learning of assigned material. And you will avoid the embarrassment of having a student ask you a question that exposes your ignorance of the excerpted and cited works.

Third, begin reading the major scholarship, much of which you can identify—and some of which you will have read—in the first and second steps already described. The major scholarship is cited again and again in the current articles, in your chosen casebook, and in the articles cited in your casebook. If your chosen casebook is thin on excerpts and citations to scholarship, you will find more than enough to satisfy you by looking at one of the encyclopedic casebooks on administrative law. Another good source of the major scholarship is *Foundations of Administrative Law* (2d ed. 2006), edited by Peter Schuck. Professor Schuck's book excerpts scholarship that most administrative law teachers would consider "required reading" for anyone aspiring to administrative law expertise.

The three steps just described would have you read many thousands of pages. You may therefore wonder: Suppose I barely have time to get the lay of the land using the general material, much less time to absorb the scholarship? The answer is: Don't worry. Your job (this book presumes) is to teach a basic administrative law course. Your mission must be to help your students learn the basics. Everything you do must further that mission. The things to be done include activities discussed elsewhere in this book that, in my view,

are more important for your becoming an effective Administrative Law teacher than is soaking up the scholarship.

C. CHOOSING A CASEBOOK

In theory, someone assigned to teach a course for the first time could decide on an overall approach, course objectives, course topics, and the sequence of topics before choosing a casebook. After all, you have to figure out what the job involves before selecting the main tool you'll use to do the job. In reality, though, many professors start by ordering review copies of casebooks from the major legal publishers. As they examine those casebooks, they develop a sense of their own preferences for an overall approach, course objectives, course topics, and the sequence of topics. There is nothing wrong with this approach, I declare defensively (having used that approach myself). Examining the range of tools gives you a feel for the job itself.

But if you use the casebook review process to develop your vision for the course, do yourself and your students a favor: Before settling on a particular book, set them all aside and write out a course prospectus identifying what, in your best judgment, should be your overall approach, your course objectives, your course topics, and your topic sequence. Otherwise, you are likely to fall in love with (or leap in desperation at) a book that has surface appeal—perhaps because it has "rock star" authors or because it is the book you used as a student—but that does not wear well over the long semester. This is essentially the same advice as you get before you buy your first house: Figure out your needs before you start shopping seriously, so you don't buy based on curb appeal.

Katz and O'Neill offer excellent, additional advice on choosing a casebook.[11] The casebooks for administrative law differ in some particular ways to be aware of:

1. Mix of Federal and State Administrative Law

Some casebooks deal exclusively with federal administrative law; others give some attention—as much as (say) 25 percent—to state administrative law. Each approach has its advocates.

Advocates of the federal-only approach argue the following:

[11] See Katz & O'Neill, *supra* note 8, at 10–20.

- Federal administrative law raises all of the major issues you would want to cover in the basic course.
- There is no such thing as "state administrative law"; every state's law differs.
- Teachers who want to cover some state administrative law can create their own supplemental material for the particular state they think best.

The most famous critic of the federal-only approach is Arthur Bonfield. Professor Bonfield argues that, by "failing to integrate state law into their administrative law courses, law schools are … remiss in their intellectual obligations to students and in their duties to the bar and the public at large."[12] He points out that most lawyers practice state, rather than federal, administrative law. He also maintains that students can learn things from studying federal and state administrative law together that they cannot learn from studying only federal administrative law.

This debate reflects that you have three options:

1. Focus only on federal administrative law.
2. Focus on federal administrative law and material that discusses the law of various states, typically highlighting ways in which they compare to the federal APA and to each other.
3. Focus on federal administrative law and the administrative law of a particular state, such as the one in which your law school is located.

The first option is the easiest if you've never taught Administrative Law before. Besides ease (and the merits of the federal-only arguments), you may be influenced by whether you teach at a state-supported school, whether your school has a separate course on state administrative law, and whether most of your students end up practicing in a particular state.

Finally, in case it does not go without saying, just because you choose a book that includes material on state administrative law, that does not mean you have to assign that material. More generally, most administrative law teachers do not choose their casebook based solely on whether or not it includes state law material.

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[12] Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 Tex. L. Rev. 95, 95–96 (1982).

2. The Generalized Approach versus Particularized Approaches

Some books emphasize broadly applicable principles of administrative law without focusing on any particular agencies. This "generalized approach," as I'll call it, is taken, for example, in the long-running and highly regarded casebook, Gellhorn and Byse's *Administrative Law: Cases and Comments* (now in its 11th edition).[13] In contrast, what I will call a "particularized approach" is taken by another long-running, highly regarded casebook, which includes Justice Stephen Breyer among its editors.[14] This difference between the generalized approach and more particularized approaches, like the different mixtures of federal and state law, reflects a pedagogical disagreement worth your consideration.

The generalized approach reflects that general, black-letter-like principles and concepts of administrative law *do* exist. A focus on those principles and concepts, moreover, helps students avoid getting bogged down in the details of the laws governing particular agencies. Besides posing the danger of bogging down students, a particularized approach may be harder to sell to students who, for example, may not find the study of an environmental protection agency relevant to their intention to specialize in intellectual property.

More particularized approaches reflect the belief that the effective practice of administrative law requires a detailed understanding of the laws governing a particular agency, as well as an understanding of that particular agency's structure, mission, history, and current culture. On this view, it is almost misleading to emphasize generalized principles of administrative law. Furthermore, proponents of particularized approaches argue that the generalized approach is too abstract and confusing to students. Material that jumps from

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[13] Peter L. Strauss, Todd D. Rakoff, Cynthia R. Farina & Gilliam E. Metzger, Gellhorn and Byse's Administrative Law: Cases and Comments v–vi (11th ed. 2011) ("Your editors firmly believe that common elements may be recognized in the affairs of administrative agencies."); see also Alfred C. Aman, Jr., Administrative Law and Process vi (2nd ed. 2006) ("While acknowledging the importance of particular, substantive agency differences, this book focuses primarily on procedural issues that transcend individual agencies."); Lawson, *supra* note 1, at vii, viii ("firmly reject[ing]" an approach that "focus[es] the course on a detailed study of one or two agencies").

[14] Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein & Adrian Vermeule, Administrative Law and Regulatory Policy: Problems, Text, and Cases (6th ed. 2006).

one agency to another, to a third, ad infinitum leaves them feeling as disoriented as tourists on a 10-day, 10-country tour.

I've used the term *particularized approaches,* in the plural, to reflect that there are more than one. The Breyer book, for example, focuses on agencies responsible for regulating "price and entry, … health, safety, and the environment."[15] My own book uses the Consumer Product Safety Commission as a "go-to" agency throughout the book to illustrate various principles. A book by Professors Glicksman and Levy focuses on five representative agencies.[16] In short, there is no one version of the particularized approach.

You could fairly say that, likewise, there also is no one generalized approach, as books that take the generalized approach differ dramatically in other ways, such as whether their focus is doctrinal or theoretical or policy-oriented. In any event, the distinction between generalized and particularized approaches deserves consideration as you review the casebooks.

3. Organization of Material

You will find great variation in the way administrative law casebooks organize the material. One common sequence presents material on the core four topics this way:

1. The place of agencies in our system of government, a topic that includes, for example, separation of powers principles limiting the powers, placement, and controls to which agencies are subject
2. Agency rulemaking (or agency adjudication)
3. Agency adjudication (or agency rulemaking)
4. Judicial review of agency action

Many variations exist, though. To pick just the topic of judicial review as an example: At least one book puts judicial review near the beginning.[17] Another breaks up the subject by separating material on judicial review of agency *rules* from material on judicial review of

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15 Breyer et al., *supra* note 14, at xxxix.

16 Robert L. Glicksman & Richard E. Levy, Administrative Law: Agency Action in Legal Context (2010).

17 Daniel J. Gifford, Administrative Law: Cases and Materials iii (2d ed. 2010).

agency *adjudications*.[18] In addition, some books present material on the *availability* of judicial review before the material on the *scope* of judicial review, while other books reverse that order.[19] Books differ, as well, in the extent to which their coverage of different topics is freestanding and thus permits users to change the order.

The best advice I can offer is to highlight three pieces of advice offered by Katz and O'Neill. First, the organization that makes sense to you might not work best for your students. Second, the organization that often works best for students begins with easy material and moves on to increasingly challenging material. Third, students could get confused and suspicious if you deviate too much from the organization of the book you select, especially if pieces of the book end up being less freestanding than you thought.

4. A Final, General Consideration: Price

The most expensive administrative law casebooks cost more than $200. Others are much less expensive. Obviously, you should not let a book's relatively steep price prevent you from picking it if you decide it is the best for your course. You may, however, want to be aware of price in three ways.

First, if you pick a really long casebook and end up assigning half or less of it, be aware that some students will resent it. You could choose to accept this resentment as the cost of ensuring your students a high-quality experience in your course. If you go this route, though, you may want to consider what, if anything, to say to your students about the price of the book and the portion of the book to be assigned. I am definitely *not* urging you to say anything at all: Calling attention to the issue might stir up more student resentment. Just realize that the issue is probably floating around out there.

Second, consider whether the publisher of the book you choose has options to lower the price. Is the book available in paperback? Does the publisher offer the book as a coverless, three-hole punched packet that can be put into a student-purchased binder? Does the

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[18] William F. Funk, Sidney A. Shapiro & Russell Weaver, Administrative Procedure and Practice: Problems and Cases xvii–xix (4th ed. 2010); see also Kristin E. Hickman & Richard J. Pierce, Jr., Federal Administrative Law: Cases and Materials xiv–xviii (2010).

[19] See, e.g., Bernard Schwartz, Roberto L. Corrada & J. Robert Brown, Jr., Administrative Law: A Casebook xviii–xx (7th ed. 2010); Hickman & Pierce, *supra* note 18, at xiv–xviii.

publisher offer customized, edited-down versions of the book at a lower price? Is an e-version of the book available and viable for your course?

Third, consider other ways to help your students save money. You might, for example, let students know that, instead of buying a statutory supplement, they can print or download the statutes they'll need for free from the Internet. For that matter, many administrative law books include the needed statutes as appendices. Yet another cost-saving measure is to make sure that your library has multiple copies of the study aids that you recommend, and that you encourage students to "try (i.e., try using the library's copy) before you buy."

Students will appreciate your sensitivity to the cost of the course materials.

D. DESIGNING THE COURSE

Most teachers begin Administrative Law with introductory material on what agencies are, how they are created, what they do, and why they exist. This introductory material is necessary to orient students to the subject. Yet it cannot take too much time, because students are impatient with what they know is introductory material.

Some teachers use the introductory material as a springboard for detailed examination of the separation of powers issues raised by modern agencies and efforts to control them. The main argument for putting this separation of powers material up front is that it is fundamental to understanding what agencies are. The main arguments against it are that some students find it abstract, of limited practical use, or duplicative of material they learned in Constitutional Law. My experience suggests that both arguments are valid. Eventually, I decided against devoting much time to separation of powers at the beginning of the course because education theory suggests it is better to begin with easy material, followed by increasingly challenging material. Even so, many fellow teachers whom I respect begin with the separation of powers material.

Every basic administrative law course devotes great attention, often totaling more than half of total class time, to agency rulemaking and agency adjudication. The reasons are simple and, in my view, compelling: Many modern agencies have rulemaking and adjudicatory powers. They are important powers for lawyers to

study because they involve the making of law. And many principles governing rulemaking and adjudication have general applicability, because they derive from the federal (or state) APA or (in the case of adjudications) from the doctrine of procedural due process.

Teachers do not seem to have strong preferences about whether to examine rulemaking first, and then adjudication, or vice versa. Nor have I been convinced that the order matters. You can decide which order works best for you by examining how competing casebooks do it.

Connected to agency rulemaking and adjudication is material on how agencies choose between these two ways of carrying out their mission, and the implications of that choice. Some teachers have students examine the issue of choice before studying the rulemaking and adjudication processes themselves. Other teachers take up the choice issue after students study those processes. Still other teachers put the choice issue between the study of rulemaking and adjudication. The "choice beforehand" camp argues that, chronologically, an agency makes its choice of whether to proceed by rulemaking or adjudication before undertaking the chosen process. The "choice afterward" camp (of which I am a member) argues that students best understand the implications of the agency's choice after they have studied the two possible choices. The "choice in between" camp argues that discussion of the choice issue provides occasion for comparing rulemaking with adjudication (or vice versa) as a segue between students' study of the two processes. Perhaps the moral of the story is you cannot go wrong, or at least that you will have supporters, whatever you choose to do.

Some teachers include the study of agency investigations and other forms of information gathering. The sequencing of this topic, too, is the subject of disagreement. A chronological approach would put the topic before rulemaking and adjudication, since agency information gathering often precedes these other activities. But you will find teachers (and casebooks) that put agency investigation near or at the end, so that it can be taken up together with the topic of ways in which the public can get information *from* agencies—for example, using freedom of information statutes. I speculate that casebook authors put agency information gathering and disclosure at the end of their books because many teachers don't address these topics and don't want their march through the book interrupted by

them. That consideration has little relevance for teachers who decide to include one or both topics in their course.

I have already discussed the different location of judicial review material in different casebooks. The chronological approach tells us that judicial review belongs at the end of the course. Yet there are countervailing pedagogical considerations. Perhaps the strongest is that leaving judicial review until the end risks an undignified race through it or bobtailing of it in the waning days. If you decide to put judicial review at the end of the course, consider putting the material on the "scope" of judicial review—which includes topics like the *Chevron* doctrine—before material on the "availability" of judicial review—which includes topics like ripeness and exhaustion of administrative remedies. Most teachers would agree the "scope" material is more important than the "availability" material. Putting "scope" first ensures adequate time to teach it.

E. INNOVATION OPPORTUNITIES

Earlier I identified the core four topics that most courses include: (1) the place of agencies in our system of separated powers, (2) agency rulemaking, (3) agency adjudication, and (4) judicial review of agency action. You can spice up these bread-and-butter topics by adding some cutting-edge issues and some distinctive assignments.

1. Topics

Depending on your own and your students' preferences, and on what's going on in the outside world, you might boost student engagement by exploring any of several topics.

Immigration law reform is an important, contentious topic as I write this book, and I expect it to remain so. You can help students learn the administrative law aspects of the immigration system, such as the somewhat unusual arrangement in which one agency—the Department of Homeland Security—enforces the laws and a separate agency—the Executive Office for Immigration Review in the U.S. Department of Justice—adjudicates enforcement proceedings. Students should find this interesting, if for no other reason, because it is a growing area of law in which they might become involved as lawyers. Many students might also have a personal connection to the topic.

Another idea is to explore regulatory innovations such as proposals to use a cap-and-trade system to control greenhouse gases. This topic allows students to learn that not all regulation is alike. Cap-and-trade programs, in particular, represent a market-oriented approach that might intrigue some students.

The last decade or so has witnessed two mass disasters in the United States—the 9/11 terrorist attacks and the BP Gulf oil spill—that have led to nonjudicial (administrative) compensation programs. The oil spill compensation program is particularly interesting because of its public–private nature (resulting from an agreement between BP and the federal government). Besides exploring novel arrangements between the government and private sector that could be appropriate in response to mass disasters, students can profitably compare the procedures and liability principles of these compensation programs with those of the tort system.

Although teachers of administrative law typically separate federal law from state law, the reality is that much of our administrative system involves coordination among federal, state, and local governments. Such coordination occurs, for example, in the regulation of energy, telecommunications, air and water pollution, and education. Students do not need to learn the intricacies of overlapping regulatory authorities. As future lawyer-citizens, however, they can benefit from normative discussion of how different arrangements among these jurisdictions could be appropriate for different subjects. For instance, local control of public education is one thing; local control of nuclear power plant safety may be quite another. Some students may have taken a course that involves local regulation—Land Use would be the most obvious example—and you can draw on these students as a resource for discussing the appropriate level at which particular subjects are best regulated.

A final idea is to explore the ethical duties of government lawyers, perhaps by focusing on the "revolving door" by which former government lawyers become private-sector lawyers representing clients with matters before the agencies that formerly employed those same lawyers. You can use this topic to help students explore professional responsibility issues in an administrative law setting.

These are some ideas for topics to spice up your class. For them to serve that function, you do not need to make them the subject of entire class sessions or lengthy homework assignments. Nor do you need to develop extensive expertise on them yourself. Indeed,

you might consider offloading them to students who have an interest in the subject and are willing to make short presentations in class, as platforms for class discussion. You will be surprised that a little "jazzing up" of a class by brief discussion of one or two "hot" topics can go a long way to keep students engaged throughout the course.

2. Activities

Just as you can keep students engaged by sprinkling in some hot topics like those just suggested, you might consider activities that will add variety to the usual classroom experience. They also add to your workload, however, and my advice is therefore to consider starting with one or two that seem most useful for your students and doable for you. If these suggestions prompt you to devise alternatives that suit you better, so much the better.

Consider requiring that students attend an agency hearing and write a report on it. This gives students a concrete sense of what a hearing entails and puts human faces on what is otherwise for most students only a casebook concept. If you adopt this requirement, make sure to have students learn about the matter to be heard before they attend the hearing. That will make it more meaningful.

Also consider requiring students to work in small teams, throughout the semester, to produce a report (or a Web site or wiki) on a particular agency. This project and its benefits were discussed earlier in the book.

Another project is to have students keep a journal in which, each week, they summarize a current news story or magazine article on administrative law.

You might also want to consider having students do simulations. In my class, for example, I have had students enact a simulation in which a junior associate orally briefs a partner about an agency that is unfamiliar to the partner and that has taken enforcement action against a long-standing client.

Finally, consider giving students drafting exercises. For instance, you could have students draft amendments to the federal APA that would incorporate one or more judicial decisions interpreting the Act. You could have students study a document filed in an agency proceeding—such as a set of comments on a proposed agency rule or an answer to an administrative complaint—and then work in teams on editing the document for clarity.

All of these suggested activities are above and beyond what students are asked to do in most classroom courses. For that reason, they might force students out of their comfort zone and strike them as "extra work." To this extent, they pose a risk of pushback. To lessen the risk, undertake them only with these three final pieces of advice:

1. Plan carefully and give students detailed instructions. Talk through your plan with a teacher you trust, to spot problems or logistics you have not identified by yourself. Also have that teacher vet your draft instructions to the students. This minimizes student frustration.

2. Give students credit for these activities and announce clear consequences for a failure to do any required activities. For some activities, such as simulations, you can usually find individual students who will be grateful for the experience. For other activities, you might need to give some weight in grading to the students' successful completion of the activity toward their grades. When you require an activity, make clear what "successful completion" means and what will happen if a student doesn't achieve it.

3. Perhaps most important, tell students why you are having them do these activities. If a student doesn't see the point of doing an extra activity, the student is likely to perceive it as busy work. You can largely avoid this if you state a clear, appropriate objective up front. Students also appreciate the chance to give feedback, after the fact, on how the activity can be improved.

3. Homework

Consider giving your students daily homework to do besides reading. This may not sound innovative, but many teachers give daily assignments that consist only of page numbers from the casebook. Most students understand those assignments to entail no more than reading the assigned pages. If you want students to do something more, you have to tell them so—even if it is only an instruction to "book brief" the assigned cases. Some teachers include in each daily assignment some questions for students to consider and prepare to discuss. The questions encourage students to interrogate the text for

answers, a form of active reading. Anything else you can do to teach students how to read actively will benefit the many students who have not developed active reading skills. Consider instructing students early in the course what active reading involves for your course.

VIII. In the Classroom: General Pedagogy

A. THE FIRST WEEK

I have three suggestions for your first week of class. First, ensure opportunity for student interaction in the first class session. Second, sometime during the first week give students the "big picture" of the course. Third, if you intend to have students break into small teams at any point during class sessions, have them do so in the first week. Here are my rationales for these suggestions.

You are much more likely to have successful class discussions if you have some discussion on the first day. Getting students to talk on the first day creates an expectation that you are not conducting a "talk *at*" kind of class; they will have to carry their weight. To illustrate, I ask students as part of their homework for the first class to bring a printout of an administrative agency's Internet home page, and to be prepared to say a sentence or two about that agency. Then I ask students to tell me about their agencies while we discuss what agencies are and what kinds of things they do. I use students' examples to illustrate various types of agencies (e.g., regulatory agencies, benefits agencies) and various agency missions.

I advise you to present a game plan to students in the second or third class partly so students know you have one, but mostly because students have so much trouble grasping the big picture of administrative law—it is such a very big picture! I call the big picture a "game plan" to denote its dynamic, logical nature. Beware, though: You do not want to give students a highly detailed outline of the course at the beginning; they will get lost in the details. My approach to giving students the big picture, for what it is worth, is twofold. First, I present a problem-solving framework for analyzing most administrative law problems:

1. Did the agency act under a valid grant of power?

2. If so, did the agency comply with all valid limits on, and requirements for, exercising that power?

3. If the agency did not act under a valid grant of power, or if the agency did not comply with all valid limits on, and requirements for, exercising that power, what can be done about it?

Second, I give students a rundown of the four parts of our course:

- Part 1 explores what I call "administrative law fundamentals," such as the origin and role of APAs.
- Part 2 explores agency rulemaking.
- Part 3 explores agency adjudication.
- Part 4 explores judicial review of agency action.

The stripped-down problem-solving framework and subject-matter outline keep things simple at the beginning, and can be elaborated upon throughout the course.

I recommend some sort of small team project in the first week to get students used to working collaboratively and to begin creating a sociable classroom atmosphere. The project can be as modest as a quick "think, pair, and share" exercise, in which students analyze an in-class hypothetical. "Think, pair, and share" means (1) giving each student a few minutes to think about the hypothetical by himself or herself, and maybe jot down some thoughts; (2) discuss the hypothetical with one or more neighbors; and (3) "report back" to the entire class (if asked to do so) on the substance of the team's analysis.

B. CLASS OBJECTIVES

Because Administrative Law differs from law school courses your students will have taken in the past, students struggle to keep their eye on the ball. They're not even sure what the "ball" looks like, in this context. To help them figure that out, consider creating an objective for each class and distributing it to the students before the class.

Here is an example of a class objective I hand out in my course, which I show you not because it's especially well done but because it gives you an idea of what I'm talking about:

Objectives for Chapter 7:

- Be able to distinguish legislative rules from nonlegislative rules.
- Be able to recall the two main types of nonlegislative rules.
- Be able to determine whether a particular federal statute grants power to make legislative rules.
- Have a general understanding of the difference between the terms *legislative rule* and *substantive rule*.
- Finally, be able to identify the types of rules to which the federal APA's definition of "rule" refers.

Experts on legal education have described how to draft good objectives.[20] I have found that even my amateur efforts get consistently positive feedback from students.

A class objective helps students in three ways. First, it helps students prepare for the class by telling them what they should be getting out of the homework assignment. Second, it helps students pay attention during class to what they should be learning. Third, after class it helps students check their understanding of what happened in class and identify any areas in which they need clarification or review. I encourage students to pay attention to the objectives by describing the three uses just mentioned and by promising to use them, myself, when drafting the midterm and final exams.

Drafting class objectives helps the teacher as well as the students. Drafting a class objective forces you to think about your main goals for each class. At the same time, it helps you figure out what is not so important. Once you identify your main goals, you can design the class to meet those goals. Take, for example, the first objective in the preceding example:

- Be able to distinguish legislative rules from nonlegislative rules.

To help students learn to distinguish legislative from nonlegislative rules, you will want to think about what, if anything, to add to the discussion in the assigned material of general principles for making the distinction and the significance of the distinction. You might also want to have students do an exercise in which they examine particular rules and must classify them as legislative or nonlegislative.

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[20] Schwartz, Sparrow & Hess, *supra* note 8, at 68–71.

C. THE SHAPE OF A CLASS

Administrative law's sprawling nature makes it important for you to give your course a clear, logical structure. This includes giving structure to each class session. A class objective gives each class structure. So does planning each class to have a beginning, middle, and end.

Ideally, you want to begin the class by (1) reconnecting with your students, (2) grabbing their attention, (3) recapping the last class, and (4) motivating them to learn the day's lesson. Personally, I am not above using cheesy devices to do this. I reconnect with my students by greeting them with a sunny "Good morning!" or "Good afternoon!" in response to which, they quickly learn, I want them to respond in unison "Good morning!" or "Good evening!" To cite a cheesy example of how I grab their attention, on the day I introduce them to the federal APA, I ask students to guess what federal statute I would take to a desert island if I knew I were going to be stranded on one and could take only one federal statute with me. Typically, I motivate students for the day's lesson by explaining its relevance to the practice of law.

In the main part of the class, I try to follow two main rules. First, I avoid lecturing for more than 15 minutes at a time. Rather than lecturing longer, I have students do an activity, even if it is simply to get up and stretch. Second, I try to appeal to multiple learning "channels" by talking, using visual aids, and having the students talk, write, or even just touch legal material. To illustrate how I use the sense of touch (which otherwise might be mysterious to you, dear reader), I don't mean anything fancy. For example, on the day I introduce students to the federal APA, I take in the volume of the Statutes at Large in which the original APA was published, pass it around the classroom, and spend a few minutes discussing why the Statutes at Large is useful for legislative history research.

I use the end of class to help students solidify their understanding of the main points. (I sometimes do this by "revisiting" the class objectives.) I also set up the next class by explaining the connection between what we have just done and what we will do next.

D. IDEOLOGY AND EMOTION

Administrative law has the reputation of being boring, so you might be inclined to spice it up with controversial topics like

immigration reform. I believe that's a good idea, but I also believe you have to be careful to keep students focused on the administrative law aspects of such hot-button issues, rather than the political ones.

Because administrative law has controversial dimensions, you should decide in advance—as do teachers of subjects like constitutional restrictions on abortion—whether you will tell students your views on controversial subjects, and how to handle strong student emotions when they arise in the classroom. Both decisions are personal and highly contextual. All I can offer are my thoughts that the teacher's goals are to (1) help students develop views that are well informed; and (2) help students use their strong emotions to become effective advocates, compassionate counselors, and agents of legal reform.

IX. In the Classroom: Specific Topics

Administrative Law can contain many topics and be taught from different angles. The variety of topics and approaches complicates any effort to identify specific topics that reliably are hard for students to learn. It's all pretty hard! Even so, this section identifies seven specific topics that fall within the core four general topics identified earlier and that, year in and year out, seem to be particularly difficult for students. In addition to identifying these "slippery seven," this section gives you some ideas for handling them.

A. LAYOUT OF THE FEDERAL APA AND ITS APPLICABILITY TO DIFFERENT FEDERAL AGENCY ACTIONS

Every administrative law course examines the federal APA. As statutes go, the federal APA is shorter and less intricate than most. Even so, students have trouble understanding it. You can help students greatly simply by (1) acknowledging that the federal APA is a hard statute to wrap their minds around, and (2) explaining why it's so hard. Students also benefit from getting a big-picture understanding of the federal APA and some historical background before descending to the trees in this particular forest.

The federal APA is difficult partly because it rests on the distinction between rulemaking and adjudication. Unfortunately, the federal APA does not make the centrality of this distinction obvious

to newcomers; they have to tease it out from the Act's definition and structure. What's more, the distinction between rulemaking and adjudication is not a black-and-white distinction; there are shades of gray. Indeed, the federal APA itself has provisions that apply equally to (formal) rulemaking and adjudication. In short, although the federal APA rests on a distinction between rulemaking and adjudication, the federal APA obscures that distinction in some ways.

Another reason the federal APA is hard is because, to determine whether it applies to a particular federal agency action, you often have to look to a statute outside the APA. That external statute is, typically, the agency's organic statute or some other agency-specific statute. Agency-specific statutes can modify the APA in other ways, too. Many students in your course will not have encountered situations in which a statute's meaning and applicability rests so heavily on other laws.

A third reason the federal APA is hard is because it contains obsolete or obscure language: "initial licenses," "rules of specific applicability," and "substantive rules," to name a few instances. One of its provisions applies only to an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." Huh? Students understandably struggle to understand this and other similarly obscure phrasing.

Besides acknowledging and teasing apart the elements of difficulty, you can make sure students start with a big-picture understanding of the federal APA before they grapple with its particular provisions. The big picture would present the history, purposes, and structure of the federal APA. Its structure can be clarified through visual aids. Then, as you begin examining particular provisions—through close examination of their text—you can encourage students to return to the big-picture material so that, over time, they will gain an overall understanding of the Act as well as a detailed understanding of its most important provisions.

B. APPLICABILITY OF THE FEDERAL APA AND OTHER FEDERAL LAWS TO STATE AND LOCAL AGENCIES

I now turn to another recurring problem: Every year I have students who struggle to understand that *state* agencies do not have to obey the *federal* APA. I trace the difficulty partly to my including,

in my course, material on cooperative federalism programs, such as Medicaid and "food stamps"—in which state agencies must obey certain federal statutes and regulations. I include this material because cooperative federalism programs are so pervasive that I consider the topic important. If you do not include it in your course, you might not encounter the problem of student confusion about the federal APA's inapplicability to state agencies. The problem could conceivably arise for you, however, if you include any state administrative law in your course. Students have trouble keeping federal and state law separate.

I've dealt with the problem by separately addressing two questions:

1. When must federal agencies and officials obey state and local law?
2. When must state and local agencies and officials obey federal law?

In examining the second question, I teach students that the federal APA conceivably *could* apply to state agencies when they are administering programs of cooperative federalism. For the federal APA to apply in that situation, however, its definition of agency would have to be amended so that it is not limited to federal agencies, or some other federal statute would have to make the federal APA applicable to states administering a particular federal program.

To take up a related matter, students can get confused because they don't always recognize federal agencies by name. True, most students know that the EPA and FCC are federal agencies. But many students don't know that the National Labor Relations Board is a federal agency, too, even though any law professor would know it (and certainly the word *National* in its name should be a tip-off). I recommend that new teachers of administrative law err on the side of specifying, early in the course, whether a particular agency is a federal agency or not the first couple of times the agency's name comes up. I make this recommendation for the same reason I'd advise a new teacher of Civil Procedure not to rely on context alone to inform students whether the teacher's reference to "a district court" means a federal or state court; it might be obvious to you, but it's not to them!

C. RULEMAKING EXEMPTIONS

As mentioned earlier, all administrative law courses examine the federal APA. The federal APA might be most famous for requiring agencies to use "notice and comment" procedures to promulgate rules. But the federal APA exempts some rules from its notice-and-comment requirements. And those exemptions—of which there are seven—bedevil courts, lawyers, law professors, and law students. They have the potential to bog down your course and distract students from the central task of understanding notice-and-comment rulemaking. Despite that potential, you probably will not want to skip the exemptions altogether, because an understanding of them illuminates the purposes of the notice-and-comment requirements and raises broader issues about public participation in agency lawmaking. What to do? I take two measures.

First, I emphasize at the outset and keep repeating the aggregate effect of the exemptions: The federal APA requires federal agencies to use notice-and-comment procedures when making *substantive law on most subjects*. Because the notice-and-comment requirements apply to rules of "substantive" law, those requirements generally don't apply when the agency makes *procedural* rules. Because the notice-and-comment requirements apply when agencies use rulemaking to make "law," those requirements generally don't apply when an agency makes *nonlegislative* rules. Finally, the notice-and-comment requirements apply to rules making substantive law on "most" subjects, but *not all* subjects; rules dealing with certain subjects, such as military and foreign affairs, are exempt. By emphasizing the aggregate effect, I think I help students organize their understanding of the exceptions.

Second, I emphasize the limited learning goals I have for students with respect to the exemptions. My class objective asks students to be able to recognize when a particular federal rule "arguably" falls within one of the exemptions; if it arguably does, students should be able to discuss how a court might, in analyzing that particular rule, balance the purposes of the exemption against the purposes of the notice-and-comment requirements. This objective keeps their eye on the central value of learning about the exemptions.

D. "WHAT CAN AN AGENCY DO TO SOMEBODY WITHOUT GOING TO COURT?"

Administrative law courses invariably examine agency adjudication. Administrative law casebooks and judicial opinions often describe agency adjudicatory power as quasi-judicial. Students have trouble with the "quasi" part. Their difficulty is not so much with the specific subject of constitutional restrictions on Congress's power to give agencies adjudicatory power. Students generally accept (while disliking) the highly indeterminate nature of these constitutional restrictions. Rather, students have trouble answering a more practical question: What can an agency do to somebody without going to court?

I have found it hard to go much beyond the answer: "It depends. Specifically, it depends on what the agency is allowed to do by the particular laws governing it." Since that's not very satisfying, I also offer students three generalizations: Without going to court, (1) an agency cannot impose a criminal sentence, and (2) an agency cannot jail someone for contempt, (3) but an agency *can* withhold things, including government benefits (such as federal financial aid), government permits (such as licenses to practice law), and even private property that the agency has seized using statutory power. These generalizations give students something to hang onto.

I also qualify these generalizations: An agency cannot impose a criminal sentence, but it can issue a rule or order, the violation of which carries statutorily prescribed criminal penalties that can be sought in a court proceeding. An agency cannot jail someone for contempt, but violation of an agency order (including agency process such as an administrative warrant or subpoena) can lead an agency to bring contempt proceedings in court. An agency can withhold benefits or a permit, and can even sometimes seize private property, but those actions are almost always subject to judicial review.

Students wonder about agency orders that impose fines, that direct someone to cease and desist, or that require compliance with some agency statute or regulations. They wonder: What can the agency do to you, without going to court, if you don't pay the fine, don't cease and desist, or don't come into compliance? I answer this question by introducing important terminology: "The orders usually are not *self-executing*." But then I explain that someone can still get into trouble by failing to obey an agency order. The relevant

statutes or other laws might make disobedience subject to additional penalties—which, admittedly, the agency will usually have to go to court to impose—including even criminal penalties. Likewise, I point out that judgments in civil actions are usually not self-executing. If a defendant doesn't pay a money judgment, the plaintiff must return to court to execute the judgment. If a defendant doesn't obey an injunction, the plaintiff must seek a court order requiring obedience, and, if the defendant still doesn't obey, the plaintiff must bring contempt proceedings.

E. THE DIFFERENCE BETWEEN JUDICIAL PROCEEDINGS PRESENTING APA-TYPE CHALLENGES TO AGENCY ACTION AND OTHER JUDICIAL PROCEEDINGS IN WHICH AGENCIES PARTICIPATE

Agencies get involved in two kinds of court proceedings that students have trouble distinguishing, unless you take pains to draw the distinction.

One type of court proceeding involves what I call an APA-type challenge. An APA-type challenge arises when someone harmed by agency action seeks judicial review of the action under an APA (or some specialized statute that authorizes review under more or less the same circumstances as the APA and that authorizes more or less the same types of judicial relief as the APA). In an APA-type challenge, the challenger can get relief for a wide variety of procedural and substantive flaws in the agency action. Those substantive flaws include the well-known flaw that the agency's process or outcome was "arbitrary and capricious." The defining feature of an APA-type challenge is that the court ordinarily uses the appellate model of review. That means the court usually does not take new evidence. Instead, the court reviews the "administrative record"—that is, the material on which the agency based its action. Also, the court often gives some weight to the agency's resolution of any factual disputes. In short, the reviewing court reviews the agency action somewhat like an appellate court reviews a trial court's decision.

Agencies get involved in many other kinds of judicial proceedings besides APA-type challenges. For example, an agency that has no adjudicatory power of its own might have the power to file an action in court to enforce an agency rule or statute against someone whom,

the agency believes, has violated the rule or statute. To cite another example, someone can sue an agency or an official to recover damages for a breach of contract, or for injury arising from the tortious or unconstitutional conduct of an agency employee. In neither of these examples does the court follow the appellate model used for APA-type challenges. Instead, the court will decide the case based on a record made in that court. Factual disputes between the parties can go to trial, sometimes even to a jury trial.

In short, there are important differences between APA-type challenges and other judicial proceedings in which agencies participate. I believe that students have trouble distinguishing between APA-type challenges and other kinds of judicial proceedings because students have limited prior experience with either kind, and the casebooks do not always take pains to distinguish them. Because APA-type challenges are distinctive in important ways, however, I believe it's worth the effort to teach students the distinction.

F. AVAILABILITY OF JUDICIAL REVIEW

Administrative law casebooks typically include material on the "availability" of judicial review. The material on availability typically includes material on the doctrines of standing, ripeness, exhaustion of administrative remedies, finality, preclusion of judicial review, statutory subject-matter jurisdiction, and primary jurisdiction. Teaching these subjects poses a challenge for three reasons:

1. Several of these subjects are taught in other law school courses.
2. It is hard to find a middle ground between teaching these subjects at a highly superficial level and teaching them in enough depth to enable students to analyze even fairly simple problems.
3. Each of the subjects presents nuances and complexities, and several of them are hard to tell apart.

One way to deal with these challenges is to save availability for the end of the course, and, if need be, treat it superficially or incompletely. In my view, the main justification for this approach is that, of all the subjects subsumed within the core four topics, availability is most dispensable. As a practical matter, availability issues don't come up

all that often. Furthermore, most students will get exposure to most facets of the availability issue in other courses.

Some teachers, myself included, resist putting availability last because it so logically belongs before material on the scope of judicial review. We argue that you must study *how* to get judicial review (the availability issue) before you study *what* you get in judicial review (the scope issue). So, instead of leaving availability material until the very end, I have in some years devoted only a single class session to it, during which I have lectured on a 15- to 20-page overview of the subject that I've written myself. This is a clean approach, if not entirely satisfying.

G. DIFFERENCE BETWEEN THE AVAILABILITY OF JUDICIAL REVIEW AND THE EXISTENCE OF A CAUSE OF ACTION (OR RIGHT TO JUDICIAL RELIEF)

Students have trouble distinguishing between, on the one hand, some issues related to the availability of judicial review and, on the other hand, the need for a viable cause of action. Their trouble is understandable. Take federal court actions. You would think that a plaintiff would invariably be entitled to relief from a federal court if the plaintiff shows that (1) the court has subject-matter jurisdiction, (2) the defendant violated federal law, and (3) the violation has caused the plaintiff "cognizable" harm—meaning harm that constitutes "injury in fact" for purposes of Article III standing analysis. But you would be wrong. Besides establishing subject-matter jurisdiction, a federal law violation, and standing, the plaintiff must plead and prove a cause of action (i.e., a right to relief). That is true whether or not the defendant is an agency.

The difficulty of grasping the need for a cause of action, as distinguished from establishing the availability of judicial review, stems from at least three sources. First, the federal courts have not always distinguished the standing requirement and the cause of action requirement. (Indeed, some scholars believe the Supreme Court was wrong when, 40 years ago or so, it separated those requirements.) Second, many special review statutes, in one fell swoop, grant subject-matter jurisdiction to some court to review some agency action and, at the same time, create a right to judicial review. Third, sometimes a federal court *can* grant relief against a government defendant because

that defendant has harmed the plaintiff by violating federal law, even if no federal statute expressly creates a cause of action; this is called nonstatutory relief or review. No wonder students are confused.

I don't know how you can get around this thicket. I think you must go through it, urging students to use their sharpest and strongest intellectual blades to do so. One entry point to the thicket that I have found helpful is the federal APA. The U.S. Supreme Court has held that provisions in the federal APA expressly creating an entitlement to judicial review do not grant subject-matter jurisdiction to any courts. Naturally, this question arises: If that is not the function of the APA's entitlement language, what function does it serve? The answer the Court has given is that the APA creates a cause of action. This answer seems to help students grasp the need for the plaintiff to have a cause of action.

X. Review and Exams

Katz and O'Neill offer advice on exam review and exam writing that I cannot improve upon.[21] Nor can I offer any additional advice specially tailored to Administrative Law. I therefore simply describe my methods here and include my rationales where they are not otherwise apparent.

A. PREEXAM REVIEW

During the semester, I assign exercises and homework problems that, I tell students, are either old exam questions or take a form that I'd use on an exam. When we go over those exercises and problems in class, I encourage students to discuss what a good exam answer would look like. In addition, after class I post on the course's Web site model answers for the problems.

I also hold an end-of-semester review session. I tell students beforehand that the review session will deliberately emphasize the big picture, not the details, because a focus on the details will only freak out students who haven't started reviewing. In sketching out a big picture, I elaborate on the elements of the problem-solving framework and the four parts of the course that I introduced in the first week. I

[21] See Katz & O'Neill, *supra* note 8, at 62–63.

also use the end-of-semester review session to urge students to give themselves credit for all they have learned. I do this partly to relieve the stress that most students at that point are experiencing because of what they *haven't* yet learned adequately. Furthermore, to make their review of the course efficient, students need to distinguish the parts of the course that remain foggy from the parts that are clear.

Between the last class of the semester and exam day, I restrict student access to me as follows. During that interval, I will not meet face-to-face with any students to answer questions about the course. Any student who has a question must either e-mail the question to me or post it on the course Web site. In either event, I will post my response to the question on the course Web site, so everyone can read my response. I establish a cutoff time for submission of questions, so that I have enough time to answer them, and the class has enough time to read them, before exam day. Usually, for example, I ask students to submit all questions by 6:00 a.m. on the day before the exam, and I promise to respond to all questions no later than noon of the same day. That way, students can check the course Web site sometime during the afternoon of the day before the exam, and rest assured that they can see everything there is to see from me.

B. EXAMS

I give a midterm and a final exam. The midterm will count for 25 percent of the student's final grade, and the final exam will count for the remaining 75 percent—*if* that results in a higher grade than the student would get if I counted his or her exam 100 percent. As a result, the midterm can only help the student's final grade. This gives students a chance to use the midterm as a chance to practice and get feedback on my assessment method. I do require students to take the midterm, though, and I score and return all of them.

As soon after the midterm as possible, I score the test and return it. I give students a score—for example, 38 out of 50 points—rather than a letter grade, because a particular student's midterm might end up not counting, and therefore it is not meaningful to assign a grade like A, B–, and so on. In addition to returning the students' answers with individual scoring sheets, I post on the course Web site (1) a memo in which I discuss the right answers and how I scored the midterm, (2) a copy of a high-scoring set of student answers (after

I've gotten that student's permission and removed any identifying information), and (3) a distribution of scores for the class. I also offer conferences under the same ground rules as I use for conferences after the final exam, which are discussed in the next section.

The midterm and final exams have the same format and types of questions. I put as many as four types of questions on each:

1. **True–False with required explanation.** These questions take the form of statements to which the student must respond "true" or "false" and give a short explanation of that response. I don't award credit, even for correct responses, unless the student includes an explanation, and if the response is correct but the explanation is wrong or not actually an explanation, I award partial credit.

2. **Multiple choice with optional explanations.** The student can get full credit for making the correct choice without adding any explanation. Students can earn partial credit if they select the wrong choice but give a good explanation and can lose some credit if they select the right choice but give a bad explanation.

3. **Short answer.** I ask students specific questions about (1) an unfamiliar agency statute, (2) an agency statute we have studied throughout the semester, or (3) both.

4. **Short essay.** My essay questions typically ask students to "spot" issues as well as to analyze specific issues that the questions themselves "tee up." The short essays also prompt students to discuss the relevant theories and policies that we discussed during the course.

Immediately after students take the exam, I send them an e-mail seeking their feedback on four or five questions. The questions invariably include: "What did you think of the exam?" and "If you had a sentence or two of advice to offer someone who was about to start this course, what would it be?" Students can reply by e-mail or, if they prefer anonymity, they can fill out a hard copy and slip it under my office door. I promise not to read any responses until after I have turned in final grades.

C. POSTEXAM REVIEW

After I turn in final grades, I e-mail students a packet of exam material. It consists of (1) a copy of the exam; (2) a memo analyzing the substance of exam questions, explaining how I scored the answers, and describing common mistakes; (3) a copy of the scoring sheet; (4) a copy of a set of student answers that earned an A (after I have gotten the student's permission to use his or her answers as a model and removed any personally identifying information); and (5) a memo describing how I calculated final grades and how students who want an individual exam conference with me can get one.

Some years ago I wrote an article on exam conferences. I no longer follow the approach I described in that article. I will discuss my current approach by reproducing what I say in my postexam memo:

> If you got a disappointing grade, it makes sense to use this as an opportunity to improve (a) your understanding of the material and (b) your exam-taking skills. If you wish, you may schedule a conference with me to discuss your exam. I will not change a grade except for clear computational error; instead, I will help you think through ways to improve your understanding of the material and your exam taking strategies. To schedule a conference, please do the following:
>
> a. Study (i) your exam, (ii) the scoring sheet that I filled out for your exam, (iii) the analysis of the exam that you will find below, and (iv) the model student answer that is a separate attachment. Because your final exam has to be kept on file, you won't be able to take it out of the front office, except to photocopy it, which I encourage you to do, in order to take the next step.
>
> b. Write a memo that describes all of the points you missed on the exam and *why.* As to the "why," did you miss certain points because of confusion about the material? Because you didn't have time to cover the missed issues? Because you didn't think it was important to address? Etc.

c. Also include in your memo some reflection on how you might change your approach to preparing for classes and for future exams, in light of your performance on the final.

d. E-mail me your memo, informing me of your exam number, and let me know when would generally be good times for us to meet.

e. Once we schedule a time to meet, I will review the hard copy of your exam, including the scoring sheet, before our conference.

I have prescribed these steps for getting a conference with the goal of helping you figure out for yourself what you did well, what you did not-so-well, and how you can improve on future tests. This self-learning is much more effective (in part precisely *because* it is more laborious) than having you show up at my office for a conference without having done any careful studying of the exam material or any structured self-reflection.

XI. Conclusion

It is challenging to teach Administrative Law, for reasons discussed in this book. But it is also possible to teach Administrative Law effectively, as I hope this book helps you do. And it is an honor to teach Administrative Law for several reasons. For one thing, the challenges of teaching it give you an opportunity for continuing reflection on, and improvement of, your teaching. For another thing, some of the best and brightest minds in the legal academy teach it; you can learn so much from them! Last but not least, by joining the community of administrative law teachers, you are helping your students learn a subject that they are bound to find valuable in practice.