THE TOP TEN REASONS THAT LAW STUDENTS DISLIKE ADMINISTRATIVE LAW AND WHAT CAN (OR SHOULD) BE DONE ABOUT THEM?

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Some years ago Tom McGarity told me that he believed that no untenured teacher should be assigned to teach Administrative Law. McGarity argued it was unfair to have an untenured faculty member teach Administrative Law because, even if the person were a good teacher, student evaluations would contain complaints and negative comments, which Tom worried might adversely impact the person during the tenure decision.

My surmise is that most of us have had a noticeable amount of student griping about Administrative Law over the years. After I wrote this sentence, I came upon two supporting comments in the administrative law list serve. Edward Richards noted that “at some places I and other professors have been, Administrative Law is consistently rated the most boring class and the one the student is most clueless about at the end of the course.” Craig Oren responded, “I agree that the Administrative Law course is often a slough of despond for professors and students alike. (There is the story of Todd Rakoff asking his Administrative Law students at Harvard if they had all decided to join the Rhett Butler school of jurisprudence).”

My thesis is that student complaints are related to a number of factors inherent in teaching Administrative Law that are difficult to overcome even for experienced teachers. To establish this claim, and to stimulate discussion regarding teaching methods, I will propose the top ten reasons why students dislike Administrative Law and some ideas about what might be done to address these factors.

Before starting, I would note that some have concluded that they cannot overcome the difficulties in teaching Administrative Law. After I received a teaching job at Kansas, I telephoned Bob Hamilton, one of McGarity’s colleagues at Texas, to thank him for serving as a mentor in my search for a job. With some excitement, I told him that I would be able to teach

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Administrative Law at KU. Bob responded, "It can’t be done." When I asked what he meant, he responded simply that Administrative Law was "impossible" to teach.


In the introduction to a student study guide, Charles Koch and I thought students might find Administrative Law easier to learn if we told them about some of the difficulties that the subject posed.1 One of the difficulties that Professor Koch and I identified for students was that administrative law is composed of three processes, but the complete study of all three is difficult in a single course. There is the:

empowerment process, or the process by which the agency receives its authority to make decisions and enforce them;

internal decision-making process, or the process by which the agency makes its decisions; and

external control process, or the process by which agencies are made accountable through judicial review and through review by elected officials.2

Time limitations and the complexity of each subject usually results in limited coverage of at least one of these processes. When this occurs, the student necessarily will have an incomplete picture of the subject.

We are not the only teachers in law school to voice this complaint; anyone teaching a complicated course complains that she or he cannot cover "all of the material." But these other teachers are teaching substantive courses and the deletion of some issues from the course should not adversely affect the students’ ability to learn the issues that are taught.


Students learning administrative law read the Administrative Procedure Act (APA)3 and, depending on the teacher’s approach and coverage, at least some of the other dozen or so statutes (and executive orders), such as the Regulatory Flexibility Act,4 Negotiated Rulemaking Act,5 or the Federal Advisory Committee Act.6 Depending on the casebook, students may also

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1 Charles W. Koch, Jr. & Sidney A. Shapiro, Administrative Law (3d ed. 1999)
2 See id. at 1-6.
read sections of statutory material relating to an agency’s mandate provided to understand the cases or as part of a problem approach. Administrative Law, of course, does not begin to compare with some other law school courses, such as Environmental or Tax Law, regarding the degree of statutory complexity. Still, the common law it is not.

Some students are uncomfortable in reading statutes and sometimes seem overwhelmed by the task. There appear to be several reasons for this discomfort. If the mantra of real estate is location, location, and location, then the key to applying statutory language is details, details, and details. Yet, many students seem to resist the type of attention that the parsing of statutes requires. This is simply a level of detail about which they do not wish to be troubled. This may be the result of generation X and Y work habits. As likely, students who take Administrative Law lack experience in reading and interpreting statutes, especially if they are third semester students, who had little or no statutory interpretation in their first year courses. And some students simply dislike the type of detail that reading statutes involves. One presumes they will gravitate to areas of the law that do not require this type of close contact with so much language.

The problem of work habits obviously is school-wide, but it may impact courses like Administrative Law more because the statutory details are important. Few teachers anymore (I perceive) are willing to be a Kingsfield in running their classrooms, and today’s students appear to be more impervious to such techniques in any case. I would be interested in whether students in the more elite schools are better prepared because of a more competitive environment.

My limited response to students’ failure to grapple with statutory language has been to read aloud. When students are asked to defend an answer on the basis of their understanding of a statutory section, I ask them to read the specific language on which their answer depends. I do likewise if I am lecturing. By focusing the students on the particular words or phrases that are controlling, I hope to build the students’ ability to read statutes critically.

8. If Administrative Law is so Important, Why Isn’t it on the Bar Exam?

Law students appear to receive a mixed message about Administrative Law. On the one hand, we tell them that Administrative Law is a crucial course. On the other hand, it is not a required course, nor is it tested on most state bar examinations. The mixed message may result in a kind of “bait and switch.” Students take the course, believing it to be essential, and then they are especially disappointed when the course turns out to be boring, difficult,
and confusing. Lacking the official imprimatur of a required course or bar examination subject, there is no reinforcing message that sends the signal that learning administrative law is indeed worth the difficulty it entails.

The fact that Administrative Law is not a required course raises the issue of whether it should be. We do, after all, require Civil Procedure. Perhaps judicial proceedings are more common than administrative ones, but this is doubtful, given the ubiquitous nature of government in our society. In fact, it is difficult to imagine that an attorney representing private clients will not have dealings with government at some level. Thus, for the same reason that we require Civil Procedure, it would seem that Administrative Law should also be required.

I suspect I am preaching to the converted, so let me ask why have law schools resisted making Administrative Law a required course? In the same vein, why is knowledge of administrative law not a requirement for admission to the bar, at least to the extent that a bar examination establishes such knowledge?

7. Too Many Perspectives, Too Little Time.

Administrative Law professors have pursued the effort to understand how administrative procedure impacts bureaucracy through the lens of various social science perspectives. There is organization theory, public choice, law and economics, positive political theory, to name a few. All of these perspectives have found their way into Administrative Law teaching. Indeed, the AALS Administrative Law Teaching Conference, held in the spring of 2000 was on interdisciplinary perspectives and administrative law.

Presumably, these social science insights, by adding perspective and content, make the course more appealing and administrative law more understandable. One suspects, however, that students are perplexed by the transition from a legal perspective to one or more social science perspectives, and then back again, sometimes multiple times. Moreover, as Peter Strauss noted some years ago regarding multidisciplinary efforts to study administrative law, “our plate [is] being piled higher with necessary combustibles than any professor—much less student—could possible digest.”

One can strip her or his course of such perspectives. Administrative Law can be taught without organization theory, positive political theory and the like.

But we arrive at a dilemma: rules are instrumental and understanding them requires an appreciation of the purposes and effect. Social science perspectives supply this information, but they can also confuse and overwhelm students. Perhaps it is a question of balance. What is the appropriate balance?

6. Every Student Previously Had Civil Procedure.

Administrative Law is taught in the shadow of Civil Procedure and most law students do not like Civil Procedure. In Civil Procedure, we ask students to learn rules about a process they have never experienced and about which they know little. This gives Civil Procedure an abstract quality that makes it difficult to appreciate both the function of the rules and how they operate to serve the goals of dispute resolution. As a result, many procedural questions appear boring to students, because what is at stake is not obvious.

Students carry over their dislike of “procedure” to Administrative Law. This is clearly a matter of “if you have seen one procedural course, you have seen them all.” And the same problems apply in Administrative Law teaching. We too ask students to learn procedural rules for a system that is at least as foreign to their experience and knowledge as Civil Procedure. Moreover, we cannot call upon the enthusiasm that first year students typically bring to the curriculum.

I have some sympathy with this reaction. As a second year student at the University of Pennsylvania, I dropped Administrative Law after two weeks, although it was taught by one of the famous names in administrative law scholarship. My (unfortunate) reaction, based on my snap perception of the course, was that it was simply too boring to be worthy of my time.

The solution, of course, is to acquaint students with the administrative process and expose them to the values (substantive and procedural) that are at stake concerning various administrative law issues. But, as I discuss below, this “solution” presents its own set of difficulties and is not easily accomplished.

5. Washington, D.C., is a Long Way Away.

Students appear to view administrative law as being of limited relevance to their future because the focus of most courses is on federal practice. These students anticipate being in local practice, which they think will not involve any type of federal administrative law. Because there is little or no mention of state agencies, let alone local ones, the students believe that what they are learning has little or no application to what they might do after graduation.
The students' assumption is questionable. The long arm of federal regulation reaches everywhere, and even clients in small, remote towns can and do have conflicts with federal agencies. Students can be informed about this reality, and this may help persuade them of the benefit of what they learn about federal practice. Additionally, I assume we tell students that the basic concepts of administrative law are transferable to state and local practice. Indeed, in states like Kansas, where state administrative law is rudimentary, there is some benefit in studying the more developed federal administrative law.

Another way to address this difficulty, of course, is to teach state administrative law. This informs students about local practice, and permits them to compare federal practice. Yet, I would guess the majority of administrative law courses do not give much attention to state administrative law. In our casebook, my co-authors and I debated how much attention to give state administrative law, and we ended up giving it only limited emphasis. We have some text and notes that call students' attention to some aspects of state practice. Our reason for this choice was our perception that it is difficult enough to get students to understand one system of administrative law, and that presenting two systems adds more confusion than light.

This issue presents several pedagogical issues: What is the proper mix of state and federal coverage? Is state coverage more important in states with more developed administrative law, such as California? Can students successfully learn two complex systems at once? Does it depend at what type of school one teaches?


Judge Harold Leventhal is reputed to have once observed that, in administrative law, complexity has a bright future. Complexity, however, is not the only growth stock in administrative law. Administrative law has more than its fair share of open-ended, judicially created, ambiguous legal standards, often based on multiple factors, with no indication of the weight to be given to any criterion. Students, not surprisingly, are frustrated with such tests because they make the subject more difficult to learn and examinations more difficult to answer.

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In a recent article, Rick Levy and I suggested that the judges employ indeterminate tests in judicial review of administrative actions because it permits them to engage in result-oriented decision making without adversely affected their reputation for legal decision making. Our idea was that when judges do not wish to appear result-oriented, they prefer indeterminate tests because such tests more easily permit result-oriented decisions without sacrificing the judge’s reputation for craft. We defined “craft” as the well-reasoned application of doctrine to the circumstances of a particular case.

The test employed in *PATCO* springs to mind. In *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, the D.C. Circuit held that it would not reverse an order although agency decision makers had been the subject of undisclosed *ex parte* contacts in formal adjudication. Reversal was unnecessary because the contacts did not so “irrevocably taint[]” the process “as to make the ultimate judgment of the agency unfair.” In making this determination, the court applied a “number of considerations” without any additional indication of the weight to be given to each, or a conflict in considerations might be resolved. Not surprisingly, students had some difficulty in appreciating how the court applied the factors, particularly the court’s decision that a particularly grievous communication was not all that “grave,” and even more trouble deciding the outcome based on applying the factors to a hypothetical problem.

Constitutional law, of course, is rife with such open-ended tests. The three factor test in *Mathews v. Eldridge* is but one prominent example. The indeterminacy, however, goes even deeper. Consider the Court’s facilitation between “formalistic” tests and more pragmatic balancing tests in separation of powers. The law student wonders, correctly, what meta-principle the Court employs to determine which road to go down. The answer is, not surprisingly, indeterminate.

For many administrative law teachers (and some practicing lawyers), indeterminacy is a wonderful challenge. One must read the subtle tea leaves of individual cases in order to build arguments or make predictions. And it is our job to teach students how to read cases in this manner. Most students do

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10 685 F.2d 547 (D.C. Cir. 1982).
11 *Id.* at 564.
not like this exercise, however. They find it difficult, and, even after it occurs, they still do not know "the answer."

It may be helpful, however, to point out what one of my colleagues describes as "knowable" law and "unknowable" law. When students understand that the indeterminacy is built into the law, and it is not the result of their lack of understanding, or the inability of the teacher to explain the material, then they may be somewhat more comfortable with what they have to do.

3. We Are All Realists Now.

The open-texture of many administrative law doctrines invites ideological explanations for the result of many judicial opinions. As noted, I have proposed that judges favor indeterminate doctrines because this approach gives them more flexibility to engage in result-oriented, ideological approaches to administrative law. Some recent empirical work, which correlates the results of cases with a judge's ideological orientation, supports our thesis.

It is easy, perhaps too easy, for students to conclude, in light of such explanations, that no administrative law doctrine is safe from political manipulation by judges, and that administrative law is largely influenced by judges' political predilections. Such a realist perspective can discourage students from learning the type of argumentation that administrative lawyers use to persuade judges to favor one outcome over another. Students who fail to learn this discourse find administrative law to be particularly vague and amorphous.

This difficulty suggests that we should resist the temptation to offer ideological explanations for case outcomes. To ignore this component, however, presents a misleading explanation of administrative law. Thus, it seems that we need to teach students about how ideology and doctrine come together in administrative law, a more difficult task. The question then becomes, of course, can this be done? If it can be done, then how should it be done?

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13 See Shapiro & Levy, supra note 9.
14 See Richard J. Pierce, Jr., Is Standing Law or Politics?, 77 N.C. L. Rev. 1742, 1744-50 (1999) (demonstrating studies by Cross and Tiller and by Revesz support the model proposed by Shapiro and Levy).
2. If I Wanted to Take Political Science, I Wouldn't Have Gone to Law School.

To appreciate administrative law, students need to appreciate the purposes for which administrative procedure exists. Thus, we suggest to students that great issues are at stake in establishing the procedures that implement agency government. We teach students about the role of procedures in promoting legitimacy and democratic government, in promoting deliberation, in identifying policy issues, and so on. The message here is that great work of government is at stake and it is important to get it right. In short, this is Administrative Law as "legal civics," using Dick Pierce's terminology.

The difficulty is that, except for the political science majors, many of today's students are profoundly uninterested in legal civics, or in civics of any type for that matter. They appear to care little about government, and thus about the values that underpin "good government." I have attempted to stimulate interest by bringing into class newspaper articles that relate to "legal civics" issues, and this has helped, at least by suggesting that these issues have an every day reality and existence.

The problem method that I currently use takes a different tact. It attempts to interest students in procedural issues by asking them to play the role of attorneys in practice. But this is a "good" and "bad" news story. Some students appear to relate better to this orientation, because it minimizes the political aspects of administrative law, and emphasizes administrative law practice. The downside is that it downplays the political aspects of administrative law, and thus involves less discussion of the important political dimensions of the course.

It seems wrong to give up on instructing students about the democratic importance of administrative procedures and the real world ramifications of administrative law. Surely, educated lawyers must know these things. Thus, it would appear the issue is one of balance. What is the appropriate balance between emphasizing legal civics and the more mundane issues of distinguishing cases and applying rules?

1. If Administrative Law Is the Instrument, What Is the Tune?

Administrative law serves not only to constrain the discretion of agency decision makers, but also to assist in the creation of rational and effective policies. Indeed, as I have argued elsewhere, the *sine qua non* of

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administrative law is the trade-off between governmental efficacy and accountability. Yet, we have little or nothing to say about the substantive purposes of government in a typical administrative law class. And we have nothing to say because it seems impossible to say much of anything given the enormous size and diversity of what the government does.

Since the substantive goals of government remain in the deep background, students usually lack a concrete sense of what is at stake when, for example, rulemaking becomes ossified. Little wonder that it is difficult to get a good debate going in class over whether more rulemaking analysis requirements are a good or bad thing.

At the risk of self-promotion, I will suggest one solution to this problem. I see Administrative Law as a two-semester course, with a survey course on the “substance” of government in the first semester and a traditional course in procedure in the second semester. Joe Tomain and I happen to be the authors of a casebook on regulatory law and policy, which is intended to serve this purpose.16

Assuming that the idea of a two semester Administrative Law curriculum is desirable, it seems unobtainable for understandable reasons. Most Administrative Law teachers already have their plate full with other specific subject matter courses, such as Environmental Law. Moreover, new teachers do not come to law school as regulatory lawyers, rather, they have practiced in specific subject matter areas. The course therefore lacks a natural base of support. There is the difficulty of enticing students to take yet more administrative law. Finally, even if we convince ourselves of the value of this approach, there is still the matter of convincing law school administrators that this is the way to go.

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