REFLECTIONS ON TEACHING
ADMINISTRATIVE LAW:
TIME FOR A SEQUEL

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Dear Roy Schotland,¹

I read with interest your dialogue with Dick Pierce,² and I could not resist
the temptation to respond to your request that others continue the discus-
sion concerning the scope of teaching administrative law. You referred to
the movie “Five Easy Pieces” to order your thoughts. In the tradition of
Hollywood, it is time for a sequel in the teaching of administrative law.
Students should be offered two semesters of administrative law: one semes-
ter focusing on administrative procedure (Administrative Law I) and the
other on regulatory law and policy (Administrative Law II). I am currently
at work with Joe Tomain³ on an Administrative Law II casebook to be
published by Michie entitled “Regulatory Law and Policy.”

TWO DEFINING EVENTS

My approach to the scope of administrative law evolved between two
events. The first was a speech by Peter Barton Hutt⁴ at the first AALS
administrative law teaching conference, which you describe in your admin-
istrative law casebook.⁵ As you relate, Hutt stated that most administrative
law courses were irrelevant to his law practice. He noted that the typical
administrative law course, because it focused on judicial review of agency
actions, ignored much of what agencies, and the lawyers who appear before
them, actually do. Hutt said his efforts were devoted almost exclusively to

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³ Schotland, "How Much Truth Is Too Much Truth For Judicial Review?" And Other Easy
Pieces After an AALS Workshop on Teaching Administrative Law, 43 ADMIN. L. REV. 113 (1991);
Pierce, "How Much Should an Administrative Law Course Accomplish?"; A Response to Schotland's
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⁶ E. Gellhorn, C. Byse, P. Strauss, T. Rakoff, & R. Schotland, Administrative
advocating policy positions before the Food and Drug Administration (FDA) and that he had failed as an advocate when a client had to resort to judicial review to challenge an unfavorable decision.

The second event was a panel discussion hosted by the Section of Administrative Law and Regulatory Practice of the American Bar Association in the Fall of 1990. The discussion centered on how the practice of law in Washington had changed since the publication in 1952 of The Washington Lawyers, written by Charles Horsky. Horsky's book was the first published account of the nature of practice for a regulatory lawyer. All of the panelists agreed with Thomas Susman, who pointed out that one of the most important changes since 1952 was the political nature of Washington law practice. In 1952, regulatory lawyers went over to an agency to plead their cases, whereas today, they not only go to an agency, but they also go to the White House and Congress. Susman indicated that today's Washington lawyer is not only a policy advocate, but a lobbyist as well.

These stories (and Tom McGarity's hypothetical described in your article) suggest that the traditional administrative law course with its procedural orientation ignores important aspects of the actual administrative process. Of course, this point has been recognized by administrative law teachers for a number of years. Nevertheless, as you know, we have been unable to agree concerning what to do about it.

THE REJECTION OF THE PUBLIC LAW TRADITION

Disagreements concerning the scope of administrative law courses relate back to the rejection in this country of the "public law" concept used in European countries. Lawyers in the European tradition who practice "regulatory" law are considered to be part of the administrative process and, accordingly, are trained to be policy analysts. Their education encompasses instruction in political science and economics, as well as constitutional and administrative law.

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8Partner, Ropes and Gray, Washington, D.C.

7Continental law is divided into private and public law. Private law typically involves a law suit brought by private parties usually against other private parties in a state or federal court. Public law typically involves the attempt of a governmental administrator to regulate the conduct usually of many persons under legislative standards designed to promote the public interest. Continental legal scholarship uses this distinction to discuss the relationship of the state of private markets. R. Pierce, S. Shapiro & P. Verkuil, Administrative Law and Process, at § 1.2 (1985). According to this approach, the codified private law exists to protect private property and freedom of contract from government intrusion. The function of the state is limited to the recognition and enforcement of individual property and contract rights. When there is a dispute between private parties, the state serves as a neutral referee. By comparison, in public law, which generally is uncodified, the state is a party and not a referee. As the representative of the public interest, the state is considered to have interests "superior" to that of the private parties involved in a dispute. This conception permits the state to be the "driving consideration" to "effectuate the public interest." J. Merryman, The Civil Law Tradition 100–01 (1969).

The common law brought to this country from England made no distinction between property ownership and public office of the type made in civil law because both "public" and "private" rights were defined by property interests. In addition, unlike civil law countries, the same courts were used in the United States for review of public law and private law disputes. Finally, early American legal scholars found the concept unnecessary to the synthesis of judicial decision in such private law subjects as torts or contracts. These scholars were uninterested in the European tradition of seeking an overriding conceptual framework for their efforts.\footnote{R. Pierce, S. Shapiro & P. Verkuil, supra note 7, at § 1.2.}

Reflecting the previous developments, Professor Wyman in 1903 divided public law into substantive and procedural components. He distinguished the study of administrative policy, which he said belonged to the field of public administration, from the study of judicial review of final agency actions, which he located in administrative law.\footnote{B. Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers 1–23 (1903).} Later scholars admitted the relevance of policy decisions to legal study, but they adopted another method of narrowing administrative law. They distinguished "general" administrative law, which pertained to the procedural questions common to most agencies, and "special" administrative law, which pertained to the substantive law made by an agency and any unique procedures used by that agency. "General" administrative law became the province of administrative law courses while "specialized" administrative law was left for specific subject matter courses.\footnote{R. Pierce, S. Shapiro & P. Verkuil, supra note 7, at § 1.2.}

THE IMPACT OF THE 1960s

As you will recall, the division of administrative law into a general and specific segment had a limited impact prior to the 1960s on the curriculum of most law schools. Until the 1960s, government regulation was primarily concerned with economic regulation; that is, the use of administrative agencies to monitor firms and industries to ensure that they did not abuse their monopoly power, manipulate prices, or deceive consumers. Although there were some exceptions—the origin of the Food and Drug Administration (FDA) dates back to early 1900s—the promotion of health and safety was left principally to the judiciary under the tort system or to workers compensation. As a result, most of specific administrative law was covered by just one course, Regulated Industries, which studied industries subjected to administrative economic regulation. For this reason, students who took Administrative Law and Regulated Industries had, in effect, a survey of public law in the United States.

The concentration of public law into those two courses fell apart with the explosion of regulatory activity, which occurred in the 1960s and early 1970s.
Professor Weidenbaum counts forty-two federal laws passed between 1962 and 1978 to regulate business. Most of these new laws addressed the social behavior of business. For example, Michael Pertschuk has identified twenty-five consumer, environmental, or social regulatory laws passed between 1967 and 1973 alone. At the same time, numerous “entitlement” programs securing welfare and other benefits for citizens were adopted as part of the Great Society.

Scholars designated the new regulation as “social” regulation to distinguish it from the older “economic” regulation. Law schools followed this distinction by creating new courses to cover “social regulation,” such as Environmental Law and Poverty Law, while maintaining older courses, such as Regulated Industries, to cover economic regulation. A few courses, such as Energy Law, cover both economic and social regulation, but the two areas are treated as conceptually distinct law. As a result, students no longer had the option of studying the bulk of public law by taking only two courses.

THE DEBATE

The splintering of administrative law into procedural and substantive components came under attack in the mid-1970s. One focus of this criticism was that administrative law, with its focus on judicial review, ignored much of what administrative agencies actually do. Robert Rabin concluded, “The crux of the case against the traditional approach to administrative law is that it has been excessively wedded to a legalistic, as contrasted to a political, perspective.” Glen Robinson and Ernie Gellhorn contended that “administrative procedures and the administrative process are intimately related to the substance of administrative regulation” and the “appropriate study of administrative law requires an understanding of the agency’s substantive mandate.”

These criticisms fueled a new generation of administrative law books. Whereas traditional casebooks, such as yours, reflected the distinction between “general” administrative law (procedures) and “specific” administrative law (substance), casebooks originally published in the 1970s introduced students to the substantive contexts in which procedural issues arose.

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15Mackay Professor of Law, Stanford University.
17Menis Professor of Law, University of Virginia.
18Partner, Squire, Sanders, & Dempsey, Los Angeles, CA.
19Gellhorn & Robinson, Perspectives on Administrative Law, 75 Colum. L. Rev. 771, 787 (1975).
In addition, our hornbook emphasized the political dimensions of agency decisionmaking, as did a later casebook.

Although your casebook reflects these trends, you have stated the case against the integration of procedure and substance, and two of the newest casebooks continue the traditional approach of emphasizing the study of administrative procedure. You admit that “Mr. Hutt speaks the truth about administrative law practice,” but you were “not persuaded by Mr. Hutt’s suggestions as ones for administrative law instruction.” You and your co-authors note that as a result of attempts to study procedure, substance, and politics all at the same time, “our plate [is] being piled higher with necessary comestibles than any professor—much less student—could possibly digest.”

You proposed that the traditional administrative law course, with its focus on procedure, should be understood as a starting point, “simplified though it might be, [from which] the effort at digestion of the world’s rich body of data [can] begin.”

WHAT IS A TEACHER TO DO?

I have a foot in both of the previous camps and find my situation untenable. On the one hand, I agree with the critics of a predominantly procedural orientation that students ought to have greater awareness of the rich broth in which administrative law practice is simmered. On the other hand, I agree with your trenchant criticism that it is asking enough of students to learn in one semester something about administrative procedure without also introducing them to the additional complexities of administrative law practice and policy.

The answer, however, is not to leave the teaching of the nonprocedural complexities of the administrative process to our colleagues who teach environmental law, labor law, and the other substantive public law courses. They have their plates full teaching the students the “law” of their particular subject and find little time for an organized discussion of the role of policy and politics in administrative decisionmaking. Moreover, from the narrow perspective of those courses, students do not have an opportunity to understand the full panoply of public law, including the interrelationships of different areas of regulation and the use of regulatory tools that cut across areas of regulation. To borrow a phrase from Paul Harvey, after an

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20R. Pierce, S. Shapiro & P. Verkuil, supra note 7.
23Administrative Law, supra note 5, at 3.
24Id.
26Id.
administrative procedure course, students need "the rest of the story."

IT CAN'T BE DONE

Immediately after accepting the position at Kansas, I called Bob Hamilton, to thank him for his support and encouragement in the hiring process. I excitedly informed him that Kansas was going to let me teach administrative law. He replied, "It can't be done."

Hamilton had in mind the difficulty of grounding students in the full complexities for the administrative process in a one-semester course. But he was also expressing the conventional assumption that there was also no alternative to the one-semester approach. After all, how can one teach a course about the "substance" of regulation when there are hundreds of regulatory agencies and even more subjects of regulation?

At the time I entered teaching, the conventional wisdom was probably correct. But developments in the administrative law literature since that time have pointed the way for the approach that Joe Tomain and I have taken. To give you the flavor of our plan, allow me to refer to three such developments: the law and economics movement, Stephen Breyer's path-breaking book on regulatory match and mismatch, and the public choice literature.

LAW AND ECONOMICS

At one time, the use of economics in legal scholarship was basically limited to antitrust and regulated industries, where legal theories were derived from welfare economics and industrial organization. After Judge Richard Posner established the use of economic principles in a broad range of legal subjects, the law and economics movement broadened the previous orientation. Although Posner primarily addressed private law subjects and economic regulation, his efforts unleashed the use of economic analysis of social regulation based on the economics of externalities and of public goods.

The law and economics movement is important for the study of public law because it created a language that offers an integrative view of the "substance" of regulation. The economic paradigm defines a private market as a place where the forces of supply and demand operate to maximize consumer welfare. A market will operate in this "efficient" manner, however, only if it has certain characteristics such as numerous buyers and sellers, adequate information, the absence of any spillover benefits or costs, and no public goods. When a market lacks one of these characteristics, it has a market "failure" or "defect." According to economic theory, the purpose of regulation is to remedy market "failures" by making markets that lack

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27Drysdale Regents Professor of Law, University of Texas. S. BREYER, REGULATION AND ITS REFORM (1982).
one or more of the previous characteristics operate more efficiently.\textsuperscript{39}

Understood in this manner, regulation can be discussed as a generic or unitary subject. Although there are hundreds of regulatory programs, they all relate to the purpose of overcoming market defects. Moreover, since there are only a few categories of market defects, regulatory programs can be subdivided into a limited number of categories for further study.

I do not mean to suggest that economic concepts provide the only acceptable normative basis for regulation or that Congress looks only to economic principles when it passes new laws.\textsuperscript{34} Indeed, one of the subjects of our casebook will be to identify both the economic and noneconomic justifications for regulation and consider the validity of each. I also recognize that those who rely on economic principles as a justification for regulation sometimes fail to acknowledge unresolved theoretical problems that limit the usefulness of some economic concepts. The book will address the nature of these limitations as well.

Nevertheless, despite normative objections and other qualifications, the law and economics movement has had a profound effect on regulatory analysis. As Professor Mashaw points out, economic theory now "provides the substantive criteria for the application of law, describes its underlying rationale, or defines parameters for the evaluation of the law's success or failure."\textsuperscript{32} Students ought to be aware of this "policy" language and have some facility for using it in the regulatory areas in which they choose to practice.

**MATCH AND MISMATCH**

In the 1980s, the primary topic in public law became "regulatory reform." One of the pioneers of the deregulation movement, Judge Stephen Breyer, has proposed a concept of regulatory reform that also integrates the study of regulation. Breyer argues that regulatory reform should be approached from the perspective of "match and mismatch."\textsuperscript{33} According to this approach, two questions should be asked about a regulatory program. First, does it serve a legitimate purpose in terms of addressing some form of market failure? This first question recognizes that regulation can fail because it does not have a proper purpose. Second, if the program can be "matched" to a market defect, does it use the proper regulatory method or tool to solve that defect? This question recognizes that "regulatory failure sometimes means a failure to correctly match the tool to the problem at hand."\textsuperscript{34} If there is a mismatch between the purpose of a regulatory scheme and the

\textsuperscript{39}R. Pierce, S. Shapiro & P. Verkuil, supra note 7, at § 1.5.

\textsuperscript{34}See C. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 47–69 (1990).


\textsuperscript{32}S. Breyer, supra note 28, at 191 et seq.

\textsuperscript{34}Id. at 191.
method used to address that goal, regulatory reform should consist of a change in the method of regulation.35

Breyer’s “match and mismatch” approach integrates the study of regulation in two ways. First, it suggests that the same two issues underlie each regulatory scheme: What is the justification for regulation, and does it make sense based on economic (or noneconomic) reasoning? What is the most appropriate regulatory method or tool to remedy the perceived market defect or achieve some other public purpose? Second, his analysis identifies the fact that there are only a few regulatory tools or methods. Likewise, reform involves the use of only two or three alternative methods of regulation.

Thus, even though there are hundreds of regulatory programs, all can be related to the remedy of one of a limited number of market defects or other purposes, and all involve one or more of a limited number of regulatory methods. Students should also have some awareness of the “tools” of regulation and their advantages and disadvantages. Where regulation is justified, there is no reason not to do it in the most effective manner available.

PUBLIC CHOICE

Developments in the literature concerning regulatory politics also make it possible to discuss regulation as an integrated subject. As you are aware, a branch of economics called “public choice” (because it studies how governmental or public decisions are made) has proposed a theory of how regulations become law. Public choice analysts interpret the competition between groups concerning regulatory policy as a market process similar to private market decisionmaking. These groups demand more or less regulation according to the economic self-interest of their members and public officials supply more or less regulation according to what would benefit their self-interest.36

One does not have to agree with all of the conclusions of public choice analysis, and there is much with which to disagree,37 to recognize nevertheless that the public choice model offers a method of organizing the study of regulatory politics. Students who become regulatory lawyers should have some appreciation for the dynamics of regulatory politics and some familiarity with the public choice literature would solve this need. Our casebook hopes to fulfill this function as well.

35Id.
COLUMBIA CURRICULUM

Some of the ideas to be utilized in our book have already been adopted by the Columbia Law School in its new, innovative first-year curriculum. After a three-week legal methods course, which draws attention to both the role of the common law and the regulatory state in addressing social problems, students take a seven-week law and economics course. A second semester course entitled “Foundations of the Regulatory State” invites students to consider options (including regulatory methodologies) for solving problems concerning workplace safety, air pollution, and low-income housing. Students also take a legal perspectives course which, among other topics, asks them to consider the limitations of the law and economics approach.

MORE DIALOGUE

I hope others might be stimulated by my thoughts (as I was by yours) to respond concerning what it is we are up to. I would like to think that Bob Hamilton had it wrong and that “it can be done.” I leave it to others to weigh in concerning whether this is a correct judgment.

My best,
Sid Shapiro