

These are truly momentous times in the field of administrative law. Powerful forces of globalization, technological change, economic dislocation, social unrest, and political conflict all seem to be converging on the administrative state. Mechanisms designed primarily to fill statutory interstices and administer stable policies are now called upon to address problems such as climate change, illegal immigration, financial instability, economic inequality, and dissatisfaction with the established health care system. With the political branches often immobilized by partisan gridlock and the judiciary constrained by institutional limitations, these issues increasingly have appeared to be the province of our nation's vast array of administrative agencies.

Administrators' responses to these contemporary challenges, however, place increasing strains on the system of legal principles that have evolved over the past century and a half to legitimize and control our "fourth branch of government." The challenge of administrative law always has been to balance the need for efficiency, flexibility, and discretion in the exercise of administrative authority against the need for due process, rationality, and accountability, while maintaining fidelity to the Constitution. The task of an introductory course in Administrative Law is not only to acquaint law students with those principles that have shaped administrative law, but to equip future lawyers to apply those principles to the rapidly changing environment of administrative practice that they will soon confront. This casebook seeks to provide the platform for achieving both of those goals. Further, with the movement in many law schools to include a regulatory component in the first-year curriculum, such as a course on Legislation and Regulation, this casebook is also designed to contain sufficient advanced materials to be used in an intermediate or advanced course on Administrative Law.

As a field of academic study, administrative law is forever in search of itself, hovering uneasily between vacuous platitudes about the place of administrative government in a constitutional democracy (pro and con) and the numbing detail of daily bureaucratic life in the regulatory state. Those who teach and write about administrative law constantly are challenged to strike the appropriate balance between abstraction and concreteness. In the formative era of administrative law, when administrative agencies were fewer in number and less complex in operation, textbook and casebook authors tended to favor concreteness. Materials were often grouped by particular agency or substantive topic. Since the watershed period of the New Deal, when the number of agencies multiplied, many of which were given broad powers to address a host of social and economic problems, however, the emphasis has shifted toward the abstract. Administrative lawyers have attempted to capture the growing profusion and complexity of administrative life in a handful of universal legal principles, such as a uniform formulation of the "arbitrary and capricious" review standard (*State Farm*), deference (or not) to agencies' interpretations

of laws they administer, resistance to “formalizing” informal rulemaking, and the presumption of judicial reviewability of agency action. While these efforts at constructing overarching principles have given coherence to discussion of some administrative law problems, they also are often a source of confusion and dissatisfaction when they seemingly fail to produce determinate results or to fit particular situations.

The attempt to filter the rich and changing variety of administrative life through a handful of doctrinal categories can have three unfortunate consequences. One is the sense of redundancy, or worse, superfluity that so often characterizes students’ perceptions of administrative law. A second ill effect is the distorted view of administrative agencies presented when seen exclusively through the prism of appellate review. And, finally, formal doctrines frequently offer an incomplete or erroneous picture, causing many students to view administrative law “doctrines” as pedagogical abstractions, not genuinely explanatory constructs.

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

At the same time, we recognize the essential importance of teaching traditional doctrine: courts and agencies approach issues in doctrinal terms and couch decisions in that language; students will need to be familiar with these doctrines, and skilled at deploying them, once they enter practice. We have tried here to retain the benefits of doctrinal discussion while avoiding the difficulties of relying exclusively on it. To that end, we have used case studies to put many important cases in a larger political and policy context, enabling students to see the gritty reality in which sometimes abstract doctrinal questions arise. And we have organized administrative actions into certain useful categories or grouped them according to certain functions agencies are seen to perform, as a way of enriching otherwise abstract doctrinal points.

Part 1 of the book introduces the institutional framework of the course. The first chapter acquaints students with the basic issues of social policymaking and governmental organization that underlie all of administrative law. After discussing the origin and nature of administrative agencies, the chapter focuses on their continuing relationships to the Legislative and Executive Branches (so far as agencies might be viewed apart from their places in the Executive Branch) and the means by which these branches try to exert supervisory control. The next two chapters explore in greater depth the role of the courts in supervising administrative behavior. Although these chapters introduce students to the conventional rules and principles governing the scope and availability of judicial review, they serve more as vehicles to explore basic themes of comparative institutional competence that run throughout the succeeding chapters.

Part 2 is the heart of the book’s emphasis on the *functions* agencies perform, where we examine legal problems and doctrinal responses by grouping them into four generic administrative activities: policy formation (covered in two chapters, one on choice of policymaking instruments, the second on rulemaking); adjudication; enforcement (including private alternatives to agency enforcement); and

licensing. Although government activities are of almost infinite variety, most can be classified to fit within these four functional headings. Despite obvious differences from one agency to another, these functions tend, wherever they are used, to elicit similar patterns of behavior and to create similar relationships between governmental and non-governmental parties. It is these commonalities that the chapters in Part 2 seek to illuminate.

In Part 3, we shift the spotlight from direct judicial supervision to indirect legal control of administrative behavior. While modes of indirect controls are legion, this part focuses on one mechanism that has generated extensive litigation and controversy: public access rules. Chapter 9 focuses on the use of information and open meeting laws to increase public access to the decisionmaking process.

The other approach we use to compensate for the deficiencies of traditional administrative law materials is the case study method. Much of the book is divided into self-contained units centering around a particular episode, situation, or conflict. Most case studies focus on litigated disputes, including the controversies that have produced the leading modern judicial precedents in the field of administrative law. As in traditional treatments, we present sufficient excerpts from the appellate court decision to illuminate the issues presented and the doctrinal development for which the case stands. But we typically provide a much fuller presentation of background information on the political, legal, institutional, and technical context than is found in other texts.

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

The need for a new edition at this time arises from the pace of changes in the standards embraced by the Supreme Court for judicial review of agency actions and the Court's recognition of jury trial rights in administrative enforcement actions. This builds on a series of developments that were at the core of changes to the Ninth Edition—changes in both judicial review and in the breadth and form of agency actions often taken outside the scope of standard rulemaking procedures or in an emergency posture that prompted corresponding adjustments in the Supreme Court's separation-of-powers jurisprudence. Those developments are reflected in the units on nondelegation and removal of agency officials and the Court's application of the major questions doctrine in the unit on judicial review of questions of law.

While adhering to the architecture of previous editions, the Ninth and Tenth editions reflect significant changes to the jurisprudence and practice of administrative law, incorporated in adjustments to several chapters. Many modifications to these editions are designed, by highlighting contemporary developments, to convey a sense of the dynamism discussed in the opening paragraph of this Preface and to keep up with developments, especially those related to separation of powers and controversies over the power of agencies to meet new, and perhaps unforeseen, challenges. Other changes to the book are designed simply to improve its flow, organization, and teachability. In particular, we have tried in the Ninth and

Tenth editions to highlight important secondary cases by presenting them in squib format and to streamline the notes and questions following leading cases. Because the pace of change in legal doctrine necessitated a new (Tenth) edition a bit earlier than planned, we present in this Preface highlights of changes made both in this and the previous edition. (For those focused primarily on this edition, we note that changes in the Tenth Edition are concentrated in Chapters 1, 2 and 7, concerning separation of powers, standards of judicial review, and adjudication, respectively.):

*Chapter 1.* The basic structure of this chapter has been retained, but, as in the Ninth Edition, this chapter now more clearly separates the material on appointment and removal of agency officials and updates developments in what has proved to be a far more dynamic area of the law than seemed likely two decades ago. These developments are introduced with a note on separation of powers and the administrative state to prepare students better for what's coming. In the nondelegation unit, we have expanded coverage of *Gundy v. United States*, including Justice Gorsuch's dissent, and we have updated the note on *Jarkesy v. SEC*, added in the Ninth Edition, now providing explanation of the Supreme Court's decision in the case. Otherwise, we have preserved the prior edition's unit on presidential control, which truncated the coverage of President Clinton's tobacco initiative in favor of attention to several more recent controversies, including immigration-related initiatives of the Obama and Trump 45 Administrations and President Biden's student loan forgiveness plans. This chapter also shortened the coverage of recess appointments and, in the removal section, added *Seila Law* as a principal case. We also include new notes on issues raised in litigation challenging funding for the Consumer Finance Protection Bureau and on presidential immunity questions raised in prosecutions of President Trump between his first and second terms.

*Chapter 2.* The most substantial changes in the Tenth Edition are in this chapter, notably reflected in the part addressing Judicial Review of Questions of Law. The primary impetus for restructuring this Chapter was the Supreme Court's *Loper Bright* decision, overruling the *Chevron* decision. *Chevron* and the cases applying and interpreting it for decades had been the focus of discussion respecting review of questions of law. We have retained the *Chevron* decision and some of the cases related to it, as we believe that issues raised in those cases remain relevant to understanding the parameters of judicial review. At the same time, we eliminated some cases and reduced others from principal cases to notes. Following *Chevron* and *Loper Bright*, we have added a new section on Administrative Statutory Construction Beyond *Chevron* that presents material illustrating the courts' use of canons of statutory construction and other tools of interpretation. This section includes *Dole v. United Steelworkers* (which is new to the book), *Babbitt v. Sweet Home Chapter of Communities for a Better Oregon*, the *UARG* case, *Sackett v. EPA*, *American Hospital Association v. Becerra*, *Garland v. Cargill*, and *Mayfield v. Department of Labor*. It also includes brief summaries of the primary canons of construction used by courts in recent years. This edition retains the Supreme Court's decision in *West Virginia v. EPA* as the centerpiece in a section on the major questions doctrine, along with notes on the structure, propriety, and meaning of the major questions doctrine. While the section addressing whether and what deference is due to administrative agencies' interpretations of their own rules remains much as it was in the Ninth Edition, this edition also ties it to potential changes following *Loper Bright*.

*Chapter 3.* We added an important note on statutes of limitation and pre-enforcement review of rules focusing mainly on the recent decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve* and its potential impact. In the Ninth Edition, we added discussion of some technical issues concerning the timing of judicial review and the proper understanding of the agency record that forms the basis of the review. In the standing unit, we added coverage of the recent *Transunion* decision and whether nominal damages are sufficient for standing, and we clarified some issues concerning procedural injury. In the timing unit, we added coverage of *Axon v. FTC*, which may be viewed as making it easier to bring a facial challenge to allegedly unconstitutional agency structure.

*Chapter 4.* In addition to general streamlining and updating, we added to the notes on agency use of guidance documents. Otherwise, this chapter remains essentially as it was in the Eighth and Ninth editions.

*Chapter 5.* We made relatively minor changes to this chapter. We added discussion of agency withdrawal of rules before publication in the Federal Register based on an interesting decision in the D.C. Circuit. We also updated the material on centralized regulatory review and reduced coverage of President Trump's executive order on that matter.

*Chapter 6.* For the Tenth Edition, we expanded the material on the agency constitutional authority to adjudicate to cover the Court's decision in *SEC v. Jarkesy*, which brings new attention to the applicability of the Seventh Amendment's jury trial right to agency enforcement actions. In the Ninth Edition, we added more attention to the independence of administrative law judges and a clearer demarcation between bias and prejudgment.

*Chapter 7.* This chapter is largely unchanged from the Ninth Edition, in which we added material on the issue of on-site agency monitors, that is, situations in which agency monitors are embedded into workplaces to ensure compliance with regulatory requirements. We also added notes on agency choice of whether to bring enforcement actions before agency ALJs or directly to federal court and on limits to the range of remedies an agency may impose. In the pre-emption unit, we added a note on the *Glacier Northwest* case, in which the Supreme Court decided that an employer's state law tort suit against a union for destruction of property during a strike is not pre-empted by the National Labor Relations Act.

*Chapter 8.* Except for some tightening and updating, this chapter is virtually unchanged from the Eighth and Ninth editions.

*Chapter 9.* The Tenth Edition is virtually unchanged from the Ninth Edition, in which we replaced *NLRB v. Sears, Roebuck and Co.* with the more recent and more interesting *U.S. Fish and Wildlife Service v. Sierra Club, Inc.* concerning the deliberative process exception to the Freedom of Information Act. We also added notes on the controversy surrounding disclosure of President Trump's financial records and on more general issues on executive privilege. The remainder of the chapter is unchanged.

No undertaking of this magnitude could possibly be completed, much less succeed, without the dedicated effort of many people. We first thank our former coauthor, Jody Freeman, Archibald Cox Professor of Law at Harvard Law School, for her contributions to the Sixth, Seventh, and Eighth editions of this casebook. At the unavoidable risk of slighting some by inadvertent omission, we would also like to acknowledge with gratitude the assistance of the following who contributed

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