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BOOK ESSAY

"SUBSTANTIVE ADMINISTRATIVE LAW":
A REVIEW OF RECENT TEXTS†


Samuel Estreicher††

THE TRADITIONAL APPROACH AND ITS CRITICS

Administrative law continues to be treated as the law controlling the administration, and not as law produced by the administration.

Ernst Freund, 1928

From the start, administrative law has been three parts constitutional law (initially separation of powers concerns and increasingly due process issues) and four parts judicial review. Its focal point has been not the process of administration per se or the authority of the executive generally, but the administrative agency—an engine of twentieth-century regulatory government often exercising an amalgam of the traditionally separated powers of

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2. For a comparison between administrative law and public administration, see J. Davison & N. Grundstein, Cases and Readings on Administrative Law vii (1952).
rulemaking, adjudication, and administration. Responsive to the objections, constitutional and otherwise, raised by opponents of the administrative agency,\(^3\) administrative law has traditionally been a course in the legitimacy of the agency and the integrity of external controls, largely judicial, on the exercise of administrative discretion.\(^4\) With the emerging constitutional acceptance of the administrative agency during the New Deal period, modern casebooks—first Walter Gellhorn’s in 1940\(^5\) and then Louis Jaffe’s in 1953\(^6\)—enlarged the focus to include a fairly systematic treatment of the major procedural issues involved in rulemaking, adjudication, and other aspects of the “administrative process.” In the hands of Gellhorn and Jaffe, the field was liberated from its obsession with questions of “legitimacy.”\(^7\) But the approach remained one of attempting to develop general principles of administrative law, cutting across particular statutory schemes and regulatory environments, which were capable of enforcement in the courts. The conclusion reached by Ernst Freund\(^8\) retains much of its force to this day.

The durability of this traditional method of teaching and thinking about administrative law may be attributed to several factors. First, questions concerning the legitimacy of administrative power, the ability of courts to keep agencies within their legislative mandate, and the equity of procedure necessarily lie at the forefront of any basic course in the area.\(^9\) Second, the traditional approach mirrors the vision of both the federal Administrative Procedure Act

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5. W. GELMHORN, ADMINISTRATIVE LAW (1940).

6. L. JAFFE, ADMINISTRATIVE LAW (1953).

7. The theme of crisis and legitimacy is a recurring one in this field, see J. FREEDMAN, CRISIS AND LEGITIMACY 3-12 (1978), although Gellhorn and Jaffe are responsible for shifting the focus of the administrative law text to questions of administrative procedure and process.

8. See note 1 supra and accompanying text (administrative law as “a course on the exercise of administrative power and its subjection or non-subjection to judicial control”).

9. See J. FREEDMAN, supra note 7 passim. For example, at a time when many observers thought the delegation doctrine had been relegated to the status of mere hortatory principle, Justice Rehnquist opened up the possibility that the Court may “once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators.” Industrial Union Dep’t v. American Petroleum Inst., 100 S. Ct. 2844, 2886 (1980) (Rehnquist, J., concurring in the judgment) (footnote omitted).
(APA) and Supreme Court opinions that there are general principles of administrative law presumptively applicable to all agencies. As Jaffe wrote in 1953:

[I]t is clear to the courts there is an abstract, general “administrative law.” The doctrines of delegation of power, primary jurisdiction, exhaustion of remedies, and substantial evidence are not completely explained by or restricted to the occasions that first gave them birth. There is a differentiated “universe of discourse” relating to administrative agencies as such.11

Even if courts were less inclined to generalize about administrative law, there remains the point made by Walter Gellhorn and his colleagues Clark Byse and Peter Strauss that “[i]f general rules applicable to the behavior of the thousands of diverse instruments of government did not exist, surely judges and lawyers would be obliged to invent them, to assure the possibility of control and avoid undue specialization.”12 Third, focusing on the process of administrative government writ large distinguishes the administrative law course from the panoply of substantive courses in regulatory law offered in the modern law school curriculum. The raison d’être of the course is that it permits a comparativist perspective: the effort “is to facilitate identification of resemblances as well as of differences, in the hope that capacity to make predictive judgments about administrative and judicial behavior will thus be enhanced.”13 Finally, the course materials, principally appellate court decisions, are amenable to “case method” treatment in class, offering a body of knowledge and a menu of issues capable of reasonable mastery in the traditional one-semester course.14

The traditional approach has not been without its critics, and, in the writings of Howard Westwood,15 Robert Rabin,16 and Glen  

11. L. JAFFE, supra note 6, at v-vi (emphasis in original).
14. See Rabin, supra note 4, at 126 (“Each of the three major themes—delegation of legislative power, adequacy of formal agency procedures and scope of judicial review—involves judge-made law developed largely through appellate court opinions defining doctrine and establishing a tolerably cohesive body of legal principles.”).
Robinson and Ernest Gellhorn, the criticism has reached a level of considerable persuasiveness. These commentators question the vision of divorcing administrative law from the bodies of substantive law for which particular agencies are responsible.

These critics have exposed a problem familiar to all who teach in the area. We start each term hoping that what is the basic offering in the law of modern government will spark interest among public law-minded students. Yet our expectations are often dashed; the course simply fails to "grab them." This is in part because of the ethereal, abstract quality of the appellate decisions that are the stuff of the traditional text. This failure of enthusiasm may simply be endemic to all procedure courses, and perhaps all that can be done is to make the abstractions somewhat more concrete through supplementary materials.

The critique mounted by Westwood and Professors Rabin and Robinson and Gellhorn, however, transcends considerations of effective pedagogy. The argument is that administrative law differs from, say, civil procedure in important respects which doom any attempt to develop similar general principles in advance of student mastery of the substantive law. "There is no one administrative process," write Glen Robinson and Ernest Gellhorn; "[t]here are, in fact, as many different administrative processes as there are separate, distinct agencies or systems." Each agency is a creature of its organic statute, of the perceived evils that led to its creation,

20. This is not to say that an understanding of some of the classic "puzzles" of civil procedure, e.g., Hanson v. Denckla, 357 U.S. 235 (1958); Shields v. Barrow, 58 U.S. (17 How.) 129 (1854), might not be enhanced by an appreciation of the underlying substantive law context, or that some procedural rules ought not to be wedded quite explicitly to substantive law concerns. See, e.g., Berry, Ending Substantive's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action, 80 Colum. L. Rev. 299 (1980); Larrabee, Substantive Policies and Procedural Decisions: An Approach to Certifying Rule 23(b)(3) Antitrust Class Actions, 31 Hastings L. Rev. 491 (1979).
21. G. Robinson & E. Gellhorn, supra note 17, at xi.
22. Id.
and of particular practical constraints—whether flowing from the
quality of its personnel, patterns of interaction with the legislature,
executive, or court, or from the relationships developed with the
regulated industry or other pressure groups. The “character of the
administrative process . . . is much more the product of the partic-
ular administrative functions served than is civil procedure.”23

Westwood’s influential 1958 review adds a practitioner’s per-
spective: Both practitioner and agency pay little attention to
decisional developments in other agencies, and indeed “even the
agency directly involved in an appellate case often is not drastically
affected thereby” and simply adjusts to the court’s directive by
changing the form, not the substance, of what it had been doing.24
Westwood’s recommendation is “that there should be no single
body of administrative doctrine and that for each agency (or type of
agency) there can be its own set of principles which should be rec-
ognized by appellate courts.”25

Dissatisfaction with the traditional approach among law
teachers falls considerably short of endorsing Westwood’s call for
an end to administrative law as such, and the substitution of “prac-
tice and procedure” courses in the particular substantive law areas.
While they perhaps favor such courses and would encourage
teachers in the substantive areas to highlight administrative proce-
dure and process concerns, advocates of “substantive administrative
law” agree that the basic survey course still plays a distinctive
role.26 Robinson and Ernest Gellhorn, for example, concede:
“[A]dministrative problems do recur; the experience developed in
one agency is often applicable to another; the requirements of the
Administrative Procedure Act apply to many, and the commands of
the Constitution apply to all. Moreover, the teacher’s function is
one of synthesis as well as of challenge.”27 But what is needed,
they argue, is a course that weds substance to procedure so as to
make the subject intelligible to the student, reflect the underlying
reality of the administrative process, and provide a basis for mean-
ingful synthesis and comparativism in the field.

23. Id. at xii.
25. Id. at 612.
26. Although a good part of Professor Rabin’s insightful critique of traditional
approaches in the field concerns an agenda for research, he also calls for an integra-
tion of substantive and procedural law in the basic course. See Rabin, supra note 4,
at 144.
27. G. ROBINSON & E. GELLHORN, supra note 17, at xi.
It is not a new insight that an understanding of traditional administrative law concerns may be enhanced by study of the underlying substantive law and regulatory context. In words that could as easily have been written by Robinson and Gellhorn, Professors Felix Frankfurter and J. Forrester Davison made much the same point in their pathbreaking 1931 text:

Administrative Law is markedly influenced by the specific interests entrusted to a particular administrative organ, as well as by the characteristics—history, structure and enveloping environment—of the particular organ of regulation. . . . [T]he problems subsumed by "judicial review" or "administrative discretion" must be dealt with organically; they must be related to the implications of the particular interests that invoke a "judicial review," or as to which "administrative discretion" is exercised. In short, for the scientific development of Administrative Law a subject like "judicial review" must be studied not only horizontally but vertically; we must explore not "judicial review" generally or miscellaneously, but "judicial review" of utility regulation, "judicial review" of Federal Trade Commission orders, "judicial review" of postal fraud orders, "judicial review" of deportation orders. "Judicial review" in Federal Trade Commission cases, for instance, is affected by totally different assumptions, conscious and unconscious, from those which govern courts when reviewing orders of the Interstate Commerce Commission. Likewise "judicial review" in postal cases is under the sway of the whole structure of which it forms a part, just as "judicial review" in land office cases or in immigration cases derives significance from the agency which is reviewed no less than from the nature of the subject matter under review. 28

The Frankfurter and Davison text organized the judicial-review materials into substantive law categories. A similar organization was later followed by Maurer, 29 Stason, 30 Sears, 31 and Katz. 32 These


29. See R. MAURER, CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW chs. 9-14 (1937).


31. See K. SEARS, CASES AND MATERIALS ON ADMINISTRATIVE LAW viii, ch. 3 (1938).

32. See M. KATZ, CASES AND MATERIALS ON ADMINISTRATIVE LAW vii (1947).
were nascent efforts, but they apparently failed to win general acceptance among law teachers. The reasons are obscure. Perhaps what was needed was a figure of the intellectual range and perspective of a Frankfurter who left the field in 1939 for the Supreme Court. Perhaps the achievement of the APA in 1946, which presented a fairly unitary model of administrative procedure, as well as the continuing quest to improve regulatory government through procedural reform, irresistibly influenced the traditional text's format and content. Perhaps the commercial success of Gellhorn and Byse or Jaffe and Nathanson eclipsed efforts to develop alternatives. The explanation may, however, lie elsewhere—in the pedagogical desirability of imparting an overview to students taking a survey course in administrative law.

In recent years, criticism of the traditional approach has yielded alternative texts. One, authored by Harvard Professors Stephen Breyer and Richard Stewart, offers an intermediate alternative: It retains much of the structure of the traditional text while interlacing conventional materials with court decisions and textual notes highlighting the substantive dimension of the issues considered. Another, authored by Virginia Professors Robinson and Gellhorn and Arizona Professor Harold Bruff, departs significantly from the traditional text: It organizes the materials along functional and subject matter lines, supplementing the presentation of essentially substantive law issues with materials that develop considerations of process. These texts mark a major advance in

34. The APA was considerably more flexible than the Walter-Logan bill, S. 915, H.R. 6324, 76th Cong., 1st Sess., 84 CONG. REC. 668, 5561 (1939) (introduced), which President Roosevelt had vetoed, 86 CONG. REC. 13,943 (1940) (veto message of the President), as its formal-hearing provisions must be triggered by organic agency legislation, but it did give rise to a unitary model of administrative procedure in the sense of a general procedural format for the great variety of statutory schemes. See generally Verkuil, supra note 3, at 268-78.
35. For current proposals, see G. ROBINSON, E. GELLHORN & H. BRUFF, supra note 17, at 865-81.
38. This essay does not discuss H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESSES (1976), and J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM (1975), because they are designed primarily for first-year students. One chapter of J. MASHAW & R. MERRILL, supra, attempts an integration of substance and procedure. See id., ch. 7.
thinking about administrative law teaching. They offer much which is useful to the teacher and student. But at the same time they pose a danger that increased appreciation of substantive context may have been purchased at the loss of the general perspective that was the principal virtue of the traditional approach. The question is whether that price is too high to pay in a basic course.

BREYER AND STEWART: AN INTERMEDIATE ALTERNATIVE

Breyer and Stewart’s text opens with an endorsement of Rabin’s critique that the traditional course is too abstract and gives a misleading, incomplete picture of the texture of administrative law, the efficacy of judicial review, and the actual impact of administrative action. Their stated goal, however, is modest: “to preserve the essential virtues of the traditional course while adapting it to meet these objections.” In addition to material organized along traditional procedural lines, “the book uses notes and problems systematically to survey regulation, [to] sho[w] the interaction between substance and procedure, and [to] describ[e] some of the bureaucratic and political factors at work.”

The book is modeled in part after the Jaffe and Nathanson text—indeed, it is dedicated to Louis Jaffe. For instance, the second chapter of Jaffe and Nathanson’s “Administrative Discretion in Formulating Policy” was a novel attempt to convey the texture of agency-policy formation and the importance to that process of the choice between rulemaking and adjudication. The materials occasionally followed the full course of a litigation—from agency proposal to agency action, judicial decision, and agency decision on remand—describing in vivid fashion the pattern of agency response to court intervention. Not surprisingly, Breyer and Stewart adopt a similar treatment of such matters.

The book has several strengths that distinguish it from earlier texts. It includes materials on regulation, including a survey of

41. S. BREYER & R. STEWART, supra note 18.
42. R. RABIN, supra note 16, at 7-14.
43. S. BREYER & R. STEWART, supra note 18, at xxix.
44. Id.
45. Id.
46. See L. JAFFE & N. NATHANSON, supra note 37.
47. E.g., id. at 182-207 (the Federal Power Commission and its regulation of independent, natural-gas producers).
classical regulatory tools and market-based alternatives, and a rather lucid account of the ratesetting process, providing an enlightening introduction to basic issues in regulatory policy.

Secondly, the authors' comprehensive analytical treatment of doctrines of judicial intervention imparts to the student a "feel" for the underlying substantive context. Thus, for example, material on the delegation doctrine includes excerpts from economists Galbraith and Friedman, the text of the Economic Stabilization Act of 1970, and the House committee report and executive order—all as a prelude to understanding Judge Leventhal's important opinion on the subject in Amalgamated Meat Cutters v. Connally. Similarly, the treatment of the "hard look" or "serious consideration" doctrine, also attributable to Judge Leventhal, raises questions about the danger of disguised-value imposition through nominally procedural review. Particularly successful sections in this vein are those addressing the Ashbacker Radio Corp. v. FCC requirement of comparative hearings in Federal Communications Commission (FCC) licensure, which highlights serious policy questions about the utility of judicial control and the wisdom of a scheme of agency allocation of valuable, exclusive licenses under a "public interest" standard, examining the phenomenon of judicially imposed "hybrid" procedures in informal rulemaking

50. S. BREYER & R. STEWART, supra note 18, at 200-26, 421-44.
51. Id. at 68-70 (reprinting in part To Extend the Defense Production Act of 1950, as Amended: Hearings on H.R. 17880 Before the House Comm. on Banking and Currency, 91st Cong., 2d Sess. 6, 6-10 (1970) (statement of John K. Galbraith)).
52. Id. at 71-73 (reprinting in part Friedman, What Price Guideposts?, in GUIDELINES, INFORMAL CONTROLS, AND THE MARKETPLACE 17, 31-34, 36 (G. Shultz & R. Aliber eds. 1966)).
53. Id. at 73-74 (reprinting §§ 201-206, 12 U.S.C. § 1904 note (1976)).
54. Id. at 74-75 (reprinting in part H.R. REP. No. 1330, 91st Cong., 2d Sess. 9-11 (1970)).
55. Id. at 75-77 (reprinting Executive Order No. 11,615, 36 Fed. Reg. 15,727 (1971)).
58. See S. Breyer & R. Stewart, supra note 18, at 299-309.
60. S. Breyer & R. Stewart, supra note 18, at 359-97.
61. Id. at 499-511.
and its denouement in the *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council* litigation; and presenting developments in “public interest” representation.  

A third distinctive feature of the Breyer-Stewart text is its periodic attempts to integrate substance and procedure. Sections on FCC allocation of licenses “in the public interest,” Federal Power Commission areawide ratemaking and the problem of “rent control,” Food and Drug Administration (FDA) regulation of drug efficacy and the use of summary adjudicatory procedures, and Civil Aeronautics Board (CAB) regulation of airline rates and the effect of adjudicatory procedure in exacerbating a preexisting problem of counterproductive regulatory policy provide heartening examples of successful integration in a text organized along traditional lines. A separate chapter is devoted to a single agency, exploring the problems arising from the combination of functions in the Federal Trade Commission (FTC) and the utility of efforts to reform the agency through personnel and structural changes, and revitalize it through a regulatory initiative against false advertising.

Nevertheless, despite its strengths, the book is not without drawbacks; they are primarily problems of organization and emphasis. The APA receives no sustained treatment until after the authors’ consideration of many of the important doctrines of judicial control. Thus, the relationship between the APA and principles of judicial review is not developed in a clear, systematic fashion. Moreover, space devoted to substantive law issues often takes its toll in compression of traditional procedural materials. A chapter entitled “Hearing Requirements in Economic Regulation and Taxation” tries to do too much—embracing due process standards, “hybrid” rulemaking, scope of review of agency factfinding in rulemaking, APA requirements and judicial review in informal adjudication, ex parte contracts, and the interaction between proce-

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64. S. BREYER & R. STEWART, supra note 18, at 359-97.
65. Id. at 421-45.
66. Id. at 557-68.
67. Id. at 568-92.
68. Id., ch. 8.
69. Id., ch. 6.
dural rules and the regulatory policies of the FDA and CAB. One might also question the appropriateness of a few of the digressions into substantive law. For example, a discussion of rate structure,\textsuperscript{70} curiously divorced from an earlier treatment of cost-of-service ratemaking,\textsuperscript{71} seems to be a distracting introduction to a discussion of the requirement of consistency in applying regulations.\textsuperscript{72}

There are also some significant omissions. There is no systematic treatment of informal agency action, prosecutorial discretion, or other aspects of discretionary jurisdiction,\textsuperscript{73} although sections such as the textual note\textsuperscript{74} on the special issues raised by the \textit{Citizens to Preserve Overton Park, Inc., v. Volpe}\textsuperscript{75} ruling, and isolated discussions of Professor Davis' work on discretionary justice,\textsuperscript{76} and the problem of inaction in the context of public intervention in agency proceedings\textsuperscript{77} provide a pastiche of relevant material. One might also wish for a fuller consideration of legislative and executive controls on administration.\textsuperscript{78}

These critical observations do not detract from the advantages of the Breyer-Stewart volume over the traditional text. Admittedly, the authors attempt only a partial integration of substance and procedure and have been criticized for less than total commitment to the revisionist critique,\textsuperscript{79} but it is this moderate approach which permits incorporation of traditional materials within a generally procedural format, and contributes to a very strong basic text.

\textsuperscript{70} \textit{Id.} at 445-50.
\textsuperscript{71} \textit{Id.} at 200-26.
\textsuperscript{72} \textit{Id.} at 450-58.
\textsuperscript{73} In this regard, compare \textit{S. Breyer \& R. Stewart, supra} note 18, with \textit{K. Davis, Administrative Law} 440-534 (6th ed. 1977) and \textit{L. Jaffe \& N. Nathanson, supra} note 37, at 376-417.
\textsuperscript{74} \textit{S. Breyer \& R. Stewart, supra} note 18, at 524-30.
\textsuperscript{75} 401 U.S. 402 (1971).
\textsuperscript{76} \textit{S. Breyer \& R. Stewart, supra} note 18, at 321-26 (reprinting in part \textit{1 K. Davis, Administrative Law Treatise} 208-15 (2d ed. 1978); quoting \textit{K. Davis, Administrative Law in the Seventies} 116 (1976), and \textit{K. Davis, Discretionary Justice} 99 (1969); and citing \textit{K. Davis, Police Discretion} (1975)).
\textsuperscript{77} \textit{Id.} at 1030-40.
\textsuperscript{78} \textit{Id.} at 93-102, 144-59.
\textsuperscript{79} See Gellhorn, Book Review, 93 \textit{Harv. L. Rev.} 1384, 1394 (1980); As evidenced by their attempt, a successfully integrated text generally must first examine substantive regulatory policies, and only then explore procedural law, which is the handmaiden of those policies. Breyer and Stewart, it seems to me, have turned this organizational scheme on its head, and by emphasizing procedural over substantive law have failed to forge the organizational link so essential to an integrated administrative law textbook.
ROBINSON, GELLHORN, AND BRUFF: A FUNCTIONAL APPROACH

Robinson and Gellhorn are leading advocates of a substantive approach to administrative law. In a second edition80 to a casebook originally published in 1974,81 they have joined with Professor Bruff to produce a text unique in the field. The three principal chapters—forming part II of the book, “The Government as Regulator”82—provide elaborate case studies of administrative law in selective substantive contexts: The role of judicial review in environmental regulation,83 the FCC’s functions in regulating the electronic media,84 and the FTC’s activities as a prosecutorial agency.85 Each offers an in-depth analysis of the development of regulatory policy within the constraints imposed by substantive law, administrative procedure, and bureaucratic reality.

Here are rich resources for further study and analysis. The treatment of The National Environmental Policy Act of 1969’s environmental impact-statement requirement86 in the chapter on “Government and the Environment” suggests that impact statements do not improve agency decisions and often permit litigants and courts to further substantive objections to agency projects;87 these materials place in question reliance on impact statements as a means of improving agency decisionmaking. The chapter on the FCC examines the consequences of a broad delegation of authority to an agency operating in a context rife with first amendment considerations (a process culminating in the accretion of jurisdiction over cable television), and offers a useful basis “for comparison with the [relatively] more confined discretion of the Environmental Protection Agency.”88 The chapter on the FTC develops several

80. G. ROBINSON, E. GELLHORN, & H. BRUFF, supra note 17.
81. G. ROBINSON & E. GELLHORN, supra note 17.
83. G. ROBINSON, E. GELLHORN & H. BRUFF, supra note 17, ch. 3.
84. Id., ch. 4
85. Id., ch. 5.
87. See G. ROBINSON, E. GELLHORN & H. BRUFF, supra note 17, at 141-69.
88. Id. at xvii. This part of the book benefited greatly from Professor Robinson’s distinguished service on the FCC. See generally Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169 (1978).
important themes, including the constitutionality of and economic justification for government regulation of consumer advertising, the significance of a 1944 victory on standard of proof\textsuperscript{89} in expanding the agency's regulatory reach, the issue of adverse publicity as a technique of regulation,\textsuperscript{90} and the impact of statutory authorization of legislative rulemaking\textsuperscript{91} on regulatory initiatives in the late 1970's. These materials are full-bodied essays that contribute significantly to understanding the regulatory process.

The question remains, however, whether Robinson, Gellhorn, and Bruff have fashioned a successful text for use in a basic survey course. This is difficult to answer without actual trial in the classroom, but there is a basis for concern. In order to make room for their very rich treatment of issues of substantive policy and regulatory context, the authors have had to compress a great deal of the stuff of the traditional course into textual notes scattered throughout the book. The result is a rather breezy treatment of some very difficult, important administrative law issues. In the third chapter, for example, thirty-five pages are devoted to the subtopic, "Basic Issues in Administrative Policymaking and Judicial Review"\textsuperscript{92}—including such matters as Overton Park and the problem of informal adjudication under the APA, the function of administrative findings and reasons in both formal (on-the-record) and informal proceedings, inquiry into the administrator's internal decisional processes, the concept of a "record" in informal proceedings, the scope of review in informal adjudication, on-the-record adjudication and informal rulemaking, and the vision of agency-court partnership developed in Judge Leventhal's decision for the D.C. Circuit in Greater Boston Television Corp. v. FCC.\textsuperscript{93} Certainly these issues are present in Overton Park and judicial review of environmental law generally, but one must question the wisdom of treating them so cursorily and all at once.

Similarly, in the context of judicial review of scientific decisionmaking,\textsuperscript{94} the authors offer an excerpt from the Supreme Court's decision in Vermont Yankee, which, while involving review

\begin{itemize}
  \item \textsuperscript{89} See Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (1944).
  \item \textsuperscript{90} See generally Gellhorn, Adverse Publicity by Administrative Agencies, 86 Harv. L. Rev. 1380 (1973).
  \item \textsuperscript{91} See Magnuson-Moss Warranty—Federal Trade Commission Improvement Act \S 202(a), 15 U.S.C. \S 57a (1976).
  \item \textsuperscript{92} G. Robinson, E. Gellhorn & H. Bruff, \textit{supra} note 17, at 116-41.
  \item \textsuperscript{93} 444 F.2d 841 (D.C. Cir. 1970) (en banc), \textit{cert. denied}, 403 U.S. 923 (1971).
  \item \textsuperscript{94} G. Robinson, E. Gellhorn & H. Bruff, \textit{supra} note 17, at 195-207.
\end{itemize}
of a Nuclear Regulatory Commission licensing proceeding, was principally concerned with the reviewing court's common law authority to require "hybrid" procedures in informal rulemaking. Vermont Yankee is not obviously pertinent to what precedes it in the text, and, moreover, the authors simply fail to give a full account of the context—increased agency reliance on rulemaking, pre-enforcement judicial review of rules, and the difficulties of review in the absence of a well-defined record—leading to the phenomenon of hybrid rulemaking.95

In addition to this tendency toward undue compression of complex issues,96 the authors are often compelled arbitrarily to insert seemingly unrelated material into the functional chapters. Thus, a section on judicial techniques for avoiding decision on the merits97 is sandwiched between Vermont Yankee and an "excursus" on federal lands and wilderness policy. Similarly, a quick tour through various statutes providing for public access to government information and those suggesting limits on disclosure of sensitive information held by the government98 is out of place and distracting in a chapter on the FTC.

This impressive volume then, despite its major contribution to the field, leaves one uneasy and concerned that perhaps the general has been sacrificed on the altar of the particular. Students will have a deeper appreciation of the regulatory environments confronting the Environmental Protection Agency (EPA), the FCC, and the FTC, and may gain a heightened sensitivity to the problem of delegation of legislative authority; nevertheless, they may lack a sufficient general understanding of the panoply of issues in the area and of the range of procedural options available to the administrative process.


96. Perhaps the treatment that leaves the reader most breathless is the discussion of the tort liability of public employees. See G. ROBINSON, E. GELLHORN & H. BRUFF, supra note 17, at 699-721.

97. Id. at 207-56.

98. Id. at 504-39.
SUPPLEMENTING THE TRADITIONAL TEXT: A MODEST AGENDA

The texts reviewed here demonstrate that significant improvements upon the traditional approach are possible. Those teachers who are dissatisfied with the course as conventionally taught but unwilling to abandon the traditional text may wish to consider a strategy of supplementing the traditional text; the following offers some suggestions in this regard.

First, an understanding of history is essential if one is to evaluate present and future developments. For example, consideration of the Bumpers bill,99 providing for an end to judicial deference to administrative expertise, might well benefit from a reading of the history leading to the creation of administrative agencies and the attempts to hamstring the administrative process through undue judicialization.100 History also provides a useful perspective on the debate sparked by J. Skelly Wright,101 John Hart Ely,102 William Rehnquist,103 and others calling for a return to active judicial implementation of the delegation doctrine. Similarly, the history of the enactment of the APA would illuminate the issues considered in Overton Park, United States v. Florida East Coast Railway104 and Vermont Yankee. For example, as Professors Nathanson,105 Auerbach,106 and Scalia107 have suggested, the campaign to impose hybrid procedures on informal rulemaking may well have been a judicial response to a review role representing a fundamental alteration in the compromise embodied in the APA.

Second, the network of legislative and executive controls on administrative action is a subject treated only summarily in all texts in the field. This has the effect of magnifying the importance of judicial review, and contributing to an overly abstract class discussion of the major issues. The problem of delegation of legislative author-

100. See, e.g., Verkuil, supra note 3, at 261-79.
101. See Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 582-87 (1972).
105. See Nathanson, supra note 95; Nathanson, supra note 95.
106. See Auerbach, supra note 95.
107. See Scalia, supra note 95.
ity, for example, ought not to be discussed without evaluating the effectiveness of controls emanating from the politically accountable branches.\(^{108}\) The debate over the one-house legislative veto or presidential control over administrative agencies requires some understanding of the practical implications,\(^{109}\) including the extent of staff influence in congressional committees or in the Office of Management and Budget in implementing such controls.\(^{110}\) The issue of presidential intervention in rulemaking, illuminated by the suggestion of Professors Bruff\(^{111}\) and Strauss\(^{112}\) that the President has considerable residual authority over policymaking by independent agencies as well as executive departments, warrants a fuller treatment of executive controls than is given in traditional texts.

Third, case studies are an important feature of the new casebooks, and suggest a useful device for supplementing traditional texts. Published research on the administrative process offers a rich vein of material in which to ground discussion of many important issues in the area. Examples include Professor Boyer's recent study\(^{113}\) of hybrid rulemaking under the Magnuson-Moss Act,\(^{114}\) Professor Asimow's study on separation of functions even in agencies not subject to the APA compulsion,\(^{115}\) Professor Strauss' study of the choice between rulemaking and adjudication in the federal mining bureau,\(^{116}\) Professor Williams' study of remand proceedings in hybrid rulemaking cases,\(^{117}\) and William Pedersen's

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108. Professor Robinson's essay on the FCC offers such a perspective. See Robinson, supra note 88, at 196-212.
110. See generally M. MALBIN, UNELECTED REPRESENTATIVES (1979).
112. See Address by P. Strauss, Presidential Authority Over Regulatory Decisions, before the Conf. on the President's Role in Regulatory Policy of the Center for Law and Econ. Stud. of Colum. U., in New York, N.Y. (Oct. 23, 1980).
study of the process of "record"-creation in informal rulemaking and of the effect of D.C. Circuit rulings on the quality of EPA decisionmaking. These are but a few of the riches found in the accumulated work product of the Administrative Conference and secondary literature.

The case-study approach might also include an in-depth account of the workings of one or two agencies selected for particular characteristics. Breyer and Stewart's chapter on the FTC or Robinson, Gellhorn, and Bruff's chapters on environmental law, FCC licensure, or FTC prosecutorial regulation would serve this purpose. I intend in my course to focus on the National Labor Relations Board, as an example of an independent agency that makes policy through adjudication, and on the Occupational Safety and Health Administration (OSHA) of the Department of Labor, as an example of an executive agency that makes policy through informal rulemaking with adjudication assigned to an independent commission. Both agencies implement substantive labor law and also face relatively inhospitable reception in the courts and Congress; they provide an occasion for studying the significance of environmental factors to the implementation of regulatory agenda.

Fourth, a related point is the desirability of concretization. A discussion of the role of cross-examination, whether in informal rulemaking or disability-termination proceedings, requires some understanding of what the process looks like in particular proceedings. The Williams study as well as Professor Mashaw's writ-

121. See note 68 supra and accompanying text.
122. See notes 82-91 supra and accompanying text.
123. My intention is to attempt to implement Professor Rabin's suggestion that "[t]he most promising means" of relating substance to procedure without subordinating the latter to the former "would be to choose an area of substantive policy that is occupied by a number of agencies, thus providing a comparative basis for analyzing agency processes." Rabin, supra note 4, at 142.
123. See Williams, supra note 117.
nings\textsuperscript{124} on \textit{Goldberg v. Kelly}\textsuperscript{125} and \textit{Mathevs v. Eldridge}\textsuperscript{128} can be of considerable help here. Similarly, the theoretical distinction between "legislative fact" and "adjudicative fact" has to be brought down to earth, and one suggestion is focusing on the role of predictive rules in agency-policy formation and the nature of the justification for such predictions. Examination of OSHA's cancer principles\textsuperscript{127} or a study along the lines of Getman, Goldberg, and Herman's critique of NLRB predictive judgments in regulating representation elections\textsuperscript{128} might enhance meaningful student consideration of these points.

Fifth, thought ought also to be given to comparative analyses, such as a study of intervention in different types of agencies,\textsuperscript{129} and transnational evaluations,\textsuperscript{130} such as an inquiry into the French administrative-court experience.\textsuperscript{131}

Sixth, there are important lacunae in traditional texts. For example, informal action, the "lifeblood of the administrative process,"\textsuperscript{132} remains beyond the verge of the course called "Adminis-


\textsuperscript{125} 397 U.S. 254 (1970).

\textsuperscript{126} 424 U.S. 319 (1976).

\textsuperscript{127} \textit{See} Industrial Union Dep't v. American Petroleum Instit., 100 S. Ct. 2844 (1980); American Textile Instit., Inc. v. Marshall, Nos. 79-1429, 79-1583.


\textsuperscript{129} \textit{See}, e.g., MacIntyre \& Volhard, \textit{Intervention in Agency Adjudications}, 58 \textit{Va. L. Rev.} 230, 253 (1972) (intervention in FTC adjudications should follow the approach of prosecutorial agencies, such as the Justice Department in the antitrust field, rather than agencies that regulate by supervision).


\textsuperscript{132} \textit{Final Report of the Attorney General's Committee on Adminis-
trative Law.” Similarly, delay in administrative decisionmaking is a recurring problem, but neglected in the conventional course. Materials on adjudication should provide some occasion for a systematic discussion of the sources of delay, as well as a consideration of the recent movement by some courts to hasten the process.

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Administrative law—the law of modern government—is a subject brimming with interesting questions, but the objectives of a survey course are necessarily modest. It is, after all, “an introduction to a complex and important area of the law.” Improvements in the basic text are nevertheless long overdue. Breyer and Stewart and Robinson, Gellhorn, and Bruff light the way, enriching the basic course and identifying issues for further exploration.

133. TRATIVE PROCEDURE, S. Doc. No. 8, 77th Cong., 1st Sess. 35 (1941) (“It was, and is, the best study of federal administrative procedure ever prepared.” Verkuil, supra note 3, at 275).


