Law Quadrangle (formerly Law Quad Notes)

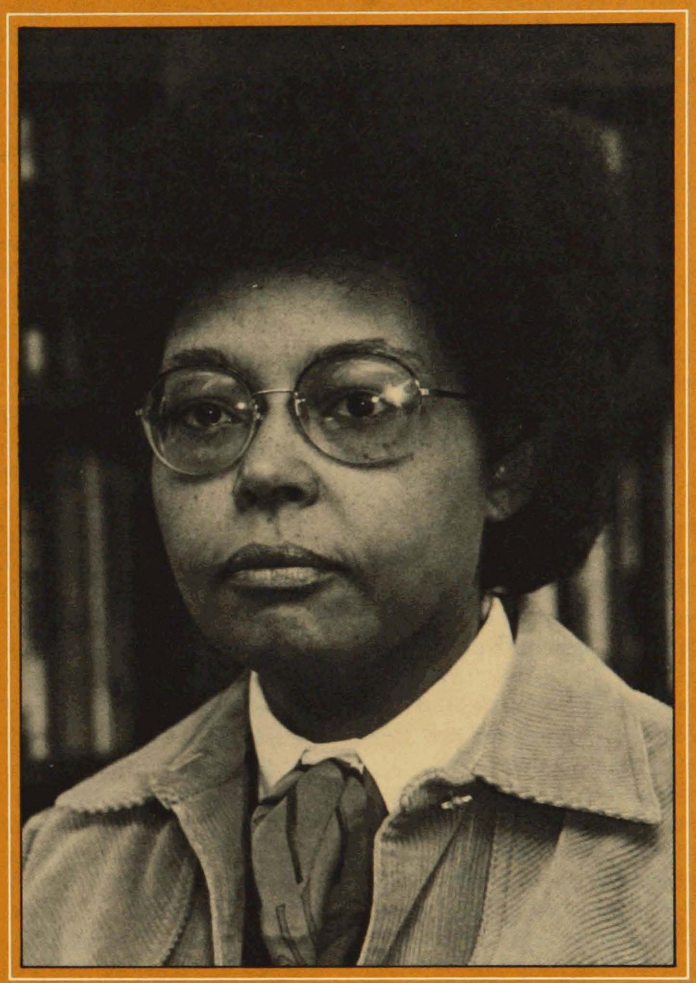
Volume 28 | Number 1 Article 7

Fall 1983

Administrative Law: What Is It and What Is It Doing in Our Law School

Sallyanne Payton
University of Michigan Law School

ADMINISTRATIVE LAW:
WHAT IS IT, AND WHAT IS IT DOING IN OUR LAW SCHOOL?



by Sallyanne Payton

The community of administrative law teachers and scholars seems to be in perpetual doubt over how "administrative law" should be approached as a branch of legal doctrine, and, indeed, whether the subject exists at all. At its core, "administrative law" is a collection of abstract, even pithy, principles that purport to describe and predict the bases on which judges review agency action. For example, agency decisions are to be supported by "substantial evidence" or are not to be "abitrary and capricious" and are to have "a reasonable basis in law"; agencies must accord "due process" when they inflict deprivations of life, liberty, or property, and so on. Any experienced lawyer knows, however, that the actual content of these principles cannot be comprehended except by observing how they are applied to particular actions by particular agencies. Administrative law can only be understood in its native disorderly profusion; doctrinal synthesis and rationalization, the mainstays of traditional legal scholarship, may be not only futile in this area but actually misleading, an observation that has led observers to question whether there really is an encompassing subject known as "administrative law."

These observations are now commonplace. It is widely acknowledged that the principles of administrative law are distinguished for their malleability and that the actual outcomes of cases involving challenges to agency action depend on, among other

Ever since the flowering of government regulation during the New Deal, it has been apparent that judicial review alone, or even in combination with legislative oversight, is inadequate to curb abuses of administrative discretion.

things, the nature of the government activity under review, the professional reputation of particular agencies and even of particular administrators and administrative law judges, the apparent soundness of the agencies' own decisional process, courts' willingness to grapple with the substance of the agencies' work, and their taste for reviewing agency records, which are frequently voluminous.

Consequently, some agencies tend to be reviewed more stiffly than others; and some subjects—notably major rulemaking activity in the areas of health and safety regulation and environmental protection—tend to stimulate a higher degree of judicial interest than does the routine activity.

Because of the close relationship between the nature of an agency's activity and the nature of the judicial review to which it is likely to be subjected, administrative law scholarship must have one foot in public policy. Indeed, it is nearly impossible to appreciate the interplay of politics, government, and law in the administrative state without specializing in some substantive area of public law in which policy and legal principles are shaped by an agency. This means that administrative law teaching and scholarship mainly focus away from the judicial system, not on it. Even the continuing controversies respecting the institutional role of the courts in overseeing the work of the agencies tend to focus on the agencies themselves, since it is their peculiar role in making law that gives rise to judicial deference or disquiet. Administrative law is mainly about agencies, not mainly about courts.

There is a good practical reason for centering the discipline on the work of the agencies. Ever since the flowering of government regulation during the New Deal, it has been apparent that judicial review alone, or even in combination with legislative oversight, is inadequate to discipline administrative discretion. These oversight mechanisms operate episodically and largely consist of review or criticism after the fact. If the agencies are to be influenced decisively, they must be affected directly and prospectively—that is, through statute and regulation. The federal government and nearly all the states have general administrative procedure acts; and legislatures tinker periodically with procedures affecting particular programs. A very large proportion of administrative law scholarly activity is now devoted to the study and improvement of administrative procedure, particularly at the federal level.

Much of the writing on administrative law, mired as it is in disputation over the details of administrative procedure, lacks dash. The general reader can hardly be expected to appreciate the intensity of conflict over such issues as, to take a current example, the certification of contract claims brought against the federal government; but the tedium is deceptive. Procedures are power; they may assist or hinder the agencies in accomplishing their missions, may force agencies to redefine their missions or their constituencies, may provide visibility into decision-making processes and thus facilitate political accountability, and so on.

Once the relationship between procedure and power is appreciated, the political content of even the most apparently boring administrative law scholarship becomes manifest. Preferences for one type of decision maker or process over another are at base political preferences, which regularly escape the bounds of technical legalistic argumentation and become the subject of explicit ideological conflict. In recent years, for example, Presidents Carter and Reagan have both brought administrative procedural reform to the level of presidential politics.

Administrative law and procedure are thus unabashedly associated with politics and government, which helps to account for their awkward posture within a legal system that finds it generally useful to camouflage the relationship between law and political authority. In administrative law, political ideas are on the surface of, as well as at the heart of, the law. In this regard, administrative law is kin to constitutional law, a similarly politicized subject. In fact, administrative law can best be thought of as the collection of principles of which the idea of government under law, an idea older and more basic than the written American constitution itself, is effectuated in practice.

Administrative law attempts to reconcile the practical realities of the administrative state with two central propositions on which the government itself is founded: *first*, that the laws of a free people are anchored in the consent of the governed as expressed by its elected representatives; and *second*, that no matter how legitimate its short-term political authority the government must act in accordance with the higher and more enduring requirements of the rule of law, which preserves the individual liberty that makes democratic self-governance conceivable.

Thus, administrative law concentrates on ensuring that government officials act only within the scope of their lawful authority and adhere to minimum standards of fairness and rationality in dealing with those subject to their power. Since the government is an active force, administrative law tends to reflect

current political controversies. The development of administrative law can fairly be characterized as a collective scramble by the judiciary to keep up with what the government is doing and to civilize executive branch officials who are inclined to tear the fabric of fundamental law in their pursuit of immediate programmatic or political gains.

The consequence of judicial review of agency action is that in administrative law, as in constitutional law, the behavior of the courts is openly political, whether they help government along by moderating and legitimizing the exercise of managerial discretion or whether they obstruct and delegitimize it. In both constitutional and administrative law, the politically independent judiciary has the capacity to retard or reject the work of the politically accountable branches in the name of political values that transcend the daily exigencies of representative government.

Administrative law scholarship is perforce obsessed with the big issues. For example, imposing legalistic requirements on agencies tends to inhibit their managerial discretion, to impair their effectiveness in carrying out their programs, and to reduce their political responsiveness. One cannot make an intelligent argument for or against requiring agencies to abide by legally enforceable procedural or intellectual standards without having general views on the propriety of judicial oversight of administration, on the appropriate balance between meticulousness and effectiveness in the work of the particular agency, and on the proper role of the agencies in the political system.

Reforms designed to enhance citizen participation in the administrative process, to force agencies to disclose information in their possession, to advertise their intended rules and to allow adversary challenge to them, to engage in procedures that preserve the appearance of care and impartiality, are all to be measured for their net contribution to responsible and rational governance, as are contrary reforms designed to eliminate such requirements in the name of reducing government bureaucracy and regulation. If there are any themes that cut across discrete regulatory areas and can be considered as the true subject of general "administrative law," they are these large problems of achieving the proper mix of legality, political legitimacy, accountability and effectiveness in the administrative process. One backs inexorably into the large issues, no matter how tiny the topic with which one began.

While the big issues are implicit in administrative law controversies, not all good administrative law scholarship deals with them at a high level of abstraction. The grand problems of administrative legitimacy and authority can only be appreciated in the context of particular regulatory morasses. The problems of the National Park Service bear virtually no resemblance to the problems of the Social Security Administration, even though both agencies are governed ostensibly by the same body of "administrative law."

The grand problems of administrative legitimacy and authority can only be appreciated in the context of particular regulatory morasses.

Consequently, administrative law does not lend itself to broad precocious theorizing. Being an aspect of the art of governing, it represents a union of experience, insight, and theory, and requires mastery of whopping amounts of factual information about particular government activities. Because the subject matter itself unites theory and practice, the best administrative law theory climbs out of empiricism. Professor Jerry Mashaw's interesting theoretical models of due process in administrative adjudication, for example, are informed thoroughly by his decade-long involvement with the particular problem of deciding Social Security disability claims.[1]

This comes out to be a paradox. Administrative law involves some of the most interesting theoretical problems of governance; yet the actual development of the law occurs in the context of specific issues arising under complicated regulatory schemes. To the reader of the case reports, it may seem that there is no middle ground between the courts' articulation of meaninglessly abstract principles of judicial review and their dive into particularistic examination of the facts and reasoning supporting the agency decisions under review. Intermediate doctrinal analysis, the usual mainstay of judicial reasoning, is virtually absent in administrative law opinions.

Even if the courts are trapped in the format of individual case analysis, however, administrative law scholarship is not so confined. Where administrative law scholarship seems to be headed is toward a better understanding of the craft of governing.

Increasingly in recent years the community of administrative law scholars has taken its obligatory focus on the agencies as a reason for pride. Materials on judicial review have been moved to the backs of the casebooks; the agencies' own procedures are being showcased and their decision-making processes examined. Some administrative law scholarship is reaching for closer ties with political theory, sociology, organization theory, and, in accordance with the trends of the time, economics, in an effort to achieve insight into agency behavior. Perhaps out of a need to compensate for the limited opportunities for mid-level doctrinal analysis in administrative law, some younger scholars are turning toward model building as a technique of

While the competence of the practicing administrative law bar is awesome, administrative law being the meat and potatoes of the Washington legal establishment, extreme specialization means that many lawyers confine their attention to narrow areas and may not appreciate the intellectual currents blowing in the general legal community.

generating conceptual insights that cut across discrete regulatory schemes. Jerry Mashaw's models of due process have already been mentioned. Colin Diver of Boston University has blended doctrinal analysis with organizational theory, inferring from judicial opinions the models of administrative decision making that seem to reside in the minds of judges.[2]

These intellectual currents may over time push administrative law scholarship even further away from traditional doctrinal analysis into the arms of social science and political theory; but the movement is enriching. Administrative law purports to be based on insight into the nature of government; if the pragmatic insight of experienced lawyers and judges can be made more accurate by the infusion of more systematic learning from other disciplines, then surely the law will be made more intelligently.

There is little or no danger, however, that administrative law will be taken over by the organizational theorists (as the economists are attempting to claim the whole of regulatory policy). For so long as judges continue to review agency action, administrative law and procedure will continue to be the special province of lawyers, whose comparative advantage over other students of public policy lies in their appreciation of the relationship between procedure and power.

Nor is legal doctrine, or the traditional role of legal scholarship in describing, synthesizing, and rationalizing the law, yet dead or irrelevant. The administrative law community still has need of thoughtful traditional scholarship, particularly work that alerts that practitioners to generally applicable principles that may be developing in areas removed from their own. While the competence of the practicing administrative law bar is awesome, administrative law being the meat and potatoes of the Washington legal establishment, extreme specialization means that many lawyers confine their attention to narrow areas and may not appreciate the intellectual currents blowing in the general legal community.

In addition, broadly descriptive doctrinal analysis and criticism that focuses explicitly on political ideology may be due for a revival. The conservatives of the Burger Court have resurrected old-fashioned liberal and populist objections to the administrative state and have revived the non-delegation doctrine. Their turn toward literalism in statutory construction has eroded the tradition of judicial deference toward agencies' interpretation of their own statutes. The tenor of the conservatives' opinions suggests that they would reduce the influence of the federal courts on the agencies and would force Congress to control them more closely through legislation.

This development is occurring in the context of a general resurgence of interest in federalism issues. As governmental power shifts toward state and local governments and private voluntary organizations, the attention of administrative lawyers must follow.

Administrative law scholarship thus has new fields to plow.These are times that recall administrative law to its original task, midway between law and politics, of civilizing the exercise of power. It is a fertile time for administrative law scholars.

Professor Payton, who teaches administrative law and regulatory policy at Michigan, serves as a public member of the Administrative Conference of the United States. This article was written for Law Quadrangle Notes.

NOTES

1. *See* F. Mashaw, BUREAUCRATIC JUSTICE (1983); Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 BOSTON U. L. REV. 885 (1981).

2. *See* Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV L. REV. 393 (1981).