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Administrative Law: The Hidden Comparative Law Course

Peter L. Strauss

What does today's Administrative Law course give your students that you might not be aware of and might be helped by knowing? That, as I understand it, is the question I am to answer. But we may also want to think about the overall shape of the curriculum: it may be useful to ask about fundamental issues our students may *not* be aware of, that may *not* be dealt with elsewhere in the law school curriculum. I'll spend most of my time on the question I've been asked to address, but I hope you will accept a few sentences on this second question. For administrative lawyers, that probable gap remains the one Harold Lasswell and Myres MacDougal suggested long ago, that contemporary law studies should include explicit instruction in the skills of public policy analysis—in particular, how to evaluate the need for and probable effectiveness of regulation.

Administrative Law is the hidden comparative law course of the public law and adjectival law curriculum. In my judgment, that is its main contribution to your students' appreciation for your own subjects. Its students come to grips again and again with problems whose contrasts with those of the standard court-centered curriculum can illuminate their other courses. The common thread here is in the rather pragmatic adjustments legislatures and courts have made to the exigencies of the administrative state, in the face of legal theories developed in the simpler theoretical world of one-function institutions and individual rights. Ideology and theory have rarely prevailed in competition with function and necessity.¹ Although the situation may be changing, as we shall have to discuss, Administrative Law repeatedly confronts its students with doctrinal differences driven by "the necessity of the case," which can illuminate standard courses as well as our own. I'm going to give a few examples, proceeding in alphabetical order through the curriculum and stressing those developments that are more recent in origin.

Let's start with Civil Procedure, although usually we get your students rather than vice versa. While we could identify many candidates here—

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1. This way of putting the "tension between ideology and necessity" was suggested by my colleague Michael Young. See Michael K. Young & Constance Hamilton, Introduction to Japanese Law, *in* Japan Business Law Guide 2251 (Sydney, 1988).

discovery techniques, for example—two are particularly compelling: characterizing the discretion of an initial decision-maker in relation to judicial review, and determining what procedures are fair. The standard-of-review question is rather old hat, yet I find my students constantly challenged in thinking about administrative fact-finding by the issues that arise on appellate review of trial court fact-finding. Being made to walk through comparisons of both the standards courts articulate and the reasons they ascribe for respecting the judgment of the lower tribunal is invariably revealing. My late colleague Maury Rosenberg's writings about the discretion of trial judges have parallels in issues of administrative discretion that warrant—and have not often received—close attention.

Evaluating claims about what procedures are due is the more contemporary issue; here, Criminal Procedure and Constitutional Law may also come into play. Where Criminal Procedure draws on the Bill of Rights' rather explicit listing of necessary elements, and Civil Procedure often plays off the long history of common law courts, we administrative lawyers have no formal grounding beyond the capacious words *due process, life, liberty, property, and deprived*, appearing in the Fifth and Fourteenth Amendments. Theories about incorporation cannot begin to reduce the uncertainties, as they could for criminal procedure; judicial recognition from the outset that agencies are *not* courts has sapped the common law history of process rights in civil proceedings of force it might otherwise have had. And thus we find ourselves in the position of having to accommodate function and necessity.

The possibilities were defined before the recent years I've been asked to address: the baseline assertion that adjudication must involve notice of the government's case and opportunities for presenting evidence and orally addressing the tribunal;² the choice among analytic techniques that are in turn holistic,³ prescriptive,⁴ and cost-beneficial;⁵ recognition that issues of timing are often at the heart of the difficulty. What the contemporary cases and analyses do, in my judgment, is illuminate in a particularly lawyerly way the difficulties of reaching judgment—and the consequent high temptation to rely on legislative judgments, at least those that cannot be shown to have been infected by special interest judgments adverse to those arguably entitled to a fair hearing.

We have not been able to generate stable theory about when and what process is due. In almost the same breath as it rejected the outworn and unworthy dichotomy between right and privilege as the threshold of due process, for example, the Supreme Court restored it by another name. Lawless injuries to undoubted citizen interests have been left to uncertain remedies—for example, a student must bring a speculative tort action to redress physical

2. *Londoner v. Denver*, 210 U.S. 373 (1908).

3. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 160 (1951) (Frankfurter, J., concurring).

4. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

5. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

harm inflicted by a teacher's summary use of corporal punishment—out of fear that constitutional doctrine might displace traditional state common law. Jury claims have been rejected on the strength of legislative categorizations that might, in themselves, have been thought suspect.

Two of my casebook colleagues have written wonderfully about the difficulties and potential of due process analysis: Cynthia R. Farina, asking if feminist perspectives can help to reconceptualize the field,⁶ and Todd D. Rakoff, asking if taking “the new property” seriously will not require us to think about due process quite differently in regulatory than in beneficiary contexts.⁷ For me, who have not written, the best classroom time is spent asking whether, if the precedents do not decide concrete cases very well, they at least serve to give structure to litigation about procedural issues. *Mathews v. Eldridge*⁸ put in place a series of concrete questions to be asked about procedures whose constitutional adequacy is challenged: what private and governmental interests are affected, how great is the risk of error prejudicing the private interest, and what are the likely contribution and the likely cost of particular additional procedures. In other words, a rather particularistic cost-benefit analysis is prescribed.

If this does not answer the question, it does tell you how to build your case to be persuasive; and this approach seems equally relevant to *any* procedural context where the Constitution's text itself does not answer the matter. In *Walters v. National Association of Radiation Survivors*⁹ a substantial majority of the Court rejected the proposition that some procedures—in that case, a claimed right to the assistance of counsel—could simply be supplied as a matter of constitutional common law history. As in so many other contexts, the Court has not been consistent in its attention to this analytic framework. Yet to the extent your students are aware of it, they will wonder why a similar inquiry is not made in civil and criminal procedural matters as well. Or, to put the matter another way, these settings share a central question: *What procedures best accommodate the tensions among accuracy, efficiency, and fairness?* How is that question to be answered? And why should it be answered using different analytic techniques in civil, criminal, and administrative contexts?

The second curricular area I want to talk about is Constitutional Law. Here the issues are less comparison than supplementation—Administrative Law often seems like the institutional constitutional law course—but recent developments respecting separation of powers well illustrate the difficulties for theory posed by our history of muddling along problem to problem, responding to the perceived necessity of the case. My first illustration concerns the

6. Conceiving Due Process, 3 Yale J.L. & Feminism 189 (1991).

7. *Brock v. Roadway Express, Inc.* and the New Law of Regulatory Due Process, 1987 Sup. Ct. Rev. 157.

8. 424 U.S. 319 (1976).

9. 473 U.S. 305 (1985).

president's¹⁰ directory authority over the work of the executive branch; the second, relatedly, the nature of the appointments authority.

Arguments about the strength of the presidency have been around since the founding, but they became urgent with the explosion of separation-of-powers litigation that followed Watergate and, in particular, the strong efforts of Presidents Reagan and Bush to seize control of the federal bureaucracy from 1981 forward. These were the institutional realities by that point: an extraordinarily diverse government, with decisional authority clearly placed in agencies of varying type, and not in the White House. The case law so far has sustained those assignments, from independent prosecutors¹¹ to the Sentencing Commission,¹² but against increasingly forceful protests from "originalist" justices whose views in other respects have often prevailed. One also notes in the literature a groundswell of support for the idea of a unitary presidency.¹³ Since the Constitution places all executive authority in one president, this argument runs, that president must himself have the authority to direct the exercise of whatever discretion Congress may confer on the executive branch.

Probably I don't have to spell out the tyrannical implications of the argument,¹⁴ but a concrete example may be helpful. Waivers of the Endangered

10. The author and the editors disagree over whether the elected head of the Executive Branch should get the same capitalization treatment as the Congress and the [Supreme] Court. He thinks that the President is a unique institution in the same way the Court is, and that separation-of-powers principles call for capitalizing references to that institution/office equally with the others. The President and a dogcatcher differ in just the way the Court and a court do. In this respect, he thinks the *Chicago Manual of Style*, which the editors generally follow, is wrong as a matter of principle. For the editors, president and dogcatcher get the same treatment. The editors' judgment has controlled, with the exception of this footnote, which they include at the author's request. They and he would like to hear from any reader who has a view on the issue.
11. *Morrison v. Olson*, 487 U.S. 654 (1988).
12. *Mistretta v. United States*, 488 U.S. 361 (1989).
13. E.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *Yale L.J.* 541 (1994); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 *Am. U. L. Rev.* 443 (1987); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153 (1992); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 *Geo. L.J.* 671 (1992); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 *Duke L.J.* 449 (1991); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 *U. Pa. L. Rev.* 1513 (1991); Geoffrey P. Miller, *Independent Agencies*, 1986 *Sup. Ct. Rev.* 41. Symposia on the subject include 57 *U. Chi. L. Rev.* 331 (1990), 30 *Wm. & Mary L. Rev.* 209 (1989), 1988 *Duke L.J.* 215, and 36 *Am. U. L. Rev.* 277 (1987).
14. They were put best by Edward S. Corwin:

Suppose . . . that the law casts a duty upon a subordinate executive agency *eo nomine*, does the President thereupon become entitled, by virtue of his "executive power" or of his duty to "take care that the laws be faithfully executed," to substitute his own judgment for that of the agency regarding the discharge of such duty? An unqualified answer to this question would invite startling results. An affirmative answer would make all questions of law enforcement questions of discretion, the discretion moreover of an independent and legally uncontrollable branch of the government. By the same token, it would render it impossible for Congress, notwithstanding its

Species Act's ordinary ban on activities that could be harmful to protected species are made the responsibility of an extraordinary high-level commission convened ad hoc; its members include cabinet secretaries and the heads of the Council of Economic Advisers and the EPA. They are to reach their conclusions following statutorily specified procedures. The commission was called upon in the well-known struggles over the spotted owl and logging in the virgin rainforests of the Northwest, and President Bush took the position that as president he was entitled to give private instructions to the commissioners, some of whom worked in the White House itself and all of whom served at his pleasure. The Ninth Circuit had relatively little difficulty rejecting the claim.¹⁵ But what your students will have seen is that the claim was made without embarrassment, and that its rejection was limited by the court to the on-the-record adjudicatory context in which it concluded the case arose. Suppose instead the authority being exercised was the authority to adopt rules, a context where your students will also have been exposed to a very considerable apparatus for presidential guidance of agency effort that has grown up. May the president insist upon substituting his own judgment here, despite the statutory assignment of responsibility to the agency? The increasing importance of theories of political responsibility suggests at least the possibility that the strength of the presidency is on the verge of a dramatic increase.

What seems to be building in interpretation of the Appointments Clause is a tension between the formalism of an originalist approach to interpretation and the functional realities of today's federal government worthy of the San Andreas fault; its release at the wrong place will leave few of our government structures standing. *Freitag v. Commissioner*¹⁶ is a little-noticed case, because it reached an unexciting conclusion. The litigation challenged the power of the chief judge of the Tax Court to appoint special judges with master-like powers, and the case held that grant of authority constitutional. In the course of getting to that unexciting conclusion, however, the Court revived a late-nineteenth-century proposition—also expressed in the course of getting to an obvious decision—that the “departments” the Constitution occasionally refers to are *only* the cabinet departments; it gave an expansive reading to who is a constitutional “officer of the United States,” and therefore may be appointed

broad powers under the “necessary and proper” clause, to leave anything to the specially trained judgment of a subordinate executive official with any assurance that his discretion would not be perverted to political ends for the advantage of the administration in power. At the same time, a flatly negative answer would hold out consequences equally unwelcome. It would, as Attorney General Cushing quaintly phrased it, leave it open to Congress so to divide and transfer “the executive power” by statute as to change the government “into a parliamentary despotism like that of Venezuela or Great Britain, with a *nominal* executive chief or president, who, however, would remain without a shred of actual power.”

The President: Office and Powers 1787–1957, 4th rev. ed., 80–81 (New York, 1957) (quoting 7 Op. Att’y Gen. 470 (1855)).

15. *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993).

16. 501 U.S. 868 (1991).

only as authorized by the Appointments Clause; and it nailed these propositions down with a perfectly attractive originalist account of the reasons for limiting the right to appoint in the executive branch to the president and his politically closest associates.

Do you see where this is going? Forget about the independent agencies and the Federal Reserve Bank of St. Louis (although in a characteristic footnote the Court professed confidence it was not threatening them). If a special judge of the Tax Court is an officer of the United States for Appointments Clause purposes because of the authority she wields, so certainly is an administrative law judge in the Department of the Interior; so is an Agriculture Department bureau chief serving in the Senior Executive Service of the Civil Service; and so is a deputy general counsel of the Environmental Protection Agency who owes his appointment to the EPA's general counsel or at best its administrator—neither of whom is the president or the head of a cabinet department exercising a prerogative the Constitution says can be given only to that very small group of high political officials. This is not about whether Congress can limit removal authority, a less important proposition, although in my judgment one also settled by the course of history. It is about how widely it can confer appointments authority, and what *Freytag* said, on readily appreciated originalist principles, seems quite capable of bringing down our government, as we understand it.

What I think constitutional law teachers can usefully be aware of, then, is that their students in Administrative Law may be spending a lot of time dealing with the proposition that the conventional arrangements of our government are at the moment under concerted assault—and that, indeed, there is some chance that the assaults will prevail. If we cannot continue to find our way past the demands and implications of theory and consistency, it is unlikely we will be able to continue to sustain the institutional arrangements that have become so familiar in this century.

In Criminal Procedure, your students *might* be asking, in the largest dimension, why we don't regard prosecutors—executive officials exercising a kind of delegated authority—as a part of the apparatus of administrative law, and subject to its various constraints and disciplines. Kenneth Culp Davis persuasively raised that question over a quarter of a century ago,¹⁷ and it is still awaiting response.¹⁸ Less universally, interesting implicit comparisons and accommodations include the Fourth and Fifth Amendments. Again, this is not new; the idea that self-incrimination and unreasonable search and seizure might have different meanings in administrative and criminal contexts has been present for half a century. Regulatory government cannot function without means of access to information and requirements for cooperation with government that the libertarian premises of criminal law enforcement

17. *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, 1969).

18. Aspects of the question were raised on last term's Supreme Court calendar. See *United States v. Melendez*, 116 S. Ct. 2057 (1996); *United States v. Armstrong*, 116 S. Ct. 1480 (1996).

would inevitably deny. The difficulties, nonetheless, have been recently captured and highlighted.

Take, for example, the Court's decision nine years ago in *New York v. Burger*,¹⁹ involving a warrantless inspection of an automobile junkyard that, as it happened, disclosed considerable evidence of trafficking in stolen automobile parts. Probable cause was not claimed; no warrant had been obtained. In the event, the search was carried out by uniformed police, and it was conducted even after the junkyard's owners had admitted that they lacked the licenses and records that were the only significant requirements of the administrative scheme officials were purporting to enforce. The majority upheld the search, invoking the permissive administrative search rules that had been developed for pervasively regulated entities like underground mines. A dissent fairly argued that only criminal enforcement purposes and only criminal law enforcers were apparent; indeed, the New York Court of Appeals had unanimously concluded that "providing the police an expedient means of enforcing penal sanctions" was the statutory scheme's sole justification in state policy. The strongly arguable misuse of an administrative law approach in this case underscores the uneasy character of an accommodation that arguably *must* be made when the stakes are prospective assurance of community health or safety through more cooperative and remedy-generating measures.

So, too, if you treat the Fifth Amendment, you probably talk about the suspect in the station house, or on her way there. *Braswell v. United States*²⁰ focuses attention on the accommodations made to regulatory government's insatiable appetite for information and to the special problems posed in dealing with collective entities—entities that, on the one hand, owe their very existence to the state and that, on the other, inevitably act through representatives who may be targets of investigation and thus understand that their compelled production of entity records will raise a high *personal* risk of criminal prosecution. Randy Braswell was the sole shareholder of two Mississippi corporations that came under criminal tax investigation. He resisted a subpoena to produce corporate records on Fifth Amendment grounds, arguing that his very act of producing the records would be incriminatory; the Court found this defense unavailing, fashioning a limited immunity against government use of the act of producing the records—but not their contents. Again, the particular result is questionable—it was not so often that one found Justices Kennedy and Brennan, Marshall and Scalia, together in dissent. Yet the accommodations that permitted this particular struggle over characterization are not questionable or questioned. Unanimously accepted, grounded in the realities of the mixed economy and of the administrative state, they may provide a counterpoint for your students that it will be useful for you to be aware of.

Now, Evidence. Here, I have to say, is a setting in which for years our side of the problem has been clearer to me than finding an effective way to bring

19. 482 U.S. 691 (1987).

20. 487 U.S. 99 (1988).

students to deal with it. Nor do I know of discrete developments within the decade that will help to illuminate it. One evidentiary comparison, of course, is commonplace: the more casual approach of administrative tribunals to witness facts, conventionally presented. The administrative trial need not follow the Federal Rules or worry about the technicalities of hearsay, and the student who knows this will have a possibly useful footing for question. The issues that concern me, however, are those of more general fact, both issues of judgment that are easy to call legislative and impersonal propositions, like the effect of a certain degree of thermal shock upon the viability of soft-shelled clam larvae, that seem more hard-edged and scientific in character.

We administrative lawyers have been responsible for inflicting an analytic mode upon the world of evidence in general—Ken Davis's influential distinction between legislative and adjudicatory fact²¹—and what I have to report is that in our classrooms, at least, that distinction is most likely to be painted as inadequate. Rule 201 of the Federal Rules of Evidence not only embraces the distinction for deciding questions of judicial notice at trial, but also leaves judges scot-free on the legislative fact side of that divide. Yet as we have become more and more concerned with high-consequence rulemaking in the administrative state—a setting from which the discipline of trial is in fact absent—the inadequacies of Davis's distinction have become more and more clear. We do not require trials; but neither do we permit agencies to find rulemaking facts of a general, but concrete, character simply by consulting books in the library or agency expertise. We expect revelation, ventilation, explanation in a public process not required of a legislature—or, for that matter, in the judgmental determinations that most easily fit Ken Davis's polar model. This paper hearing process, which Richard B. Stewart once called the "tertium quid,"²² survived the Supreme Court's repudiation of trial procedures for rulemaking in the *Vermont Yankee*²³ case; healthy and still growing, the paper hearing adopts a sort of science model for fact-finding that also influences current legislative proposals on cost-benefit analysis and risk assessment. What are adequate, efficient, and fair procedures for determining contested propositions about the impact of pollutants, pesticides, drugs, and worker risk are questions we share and on which we might be able to make common progress.

In relation to Federal Courts, overlaps may be substantial; problems of access to the federal judiciary are at the heart of both our endeavors; issues like standing are in flux today. Perhaps Administrative Law students will be in a better position than most to relate that shifting analysis to apparently changing judicial attitudes towards the role of regulatory beneficiaries. The

21. Judicial Notice, 55 Colum. L. Rev. 945 (1955).

22. The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 Iowa L. Rev. 713, 733 (1977).

23. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

great expansion of the late '60s and '70s in public interest law, which many claimed to reflect a new paradigm for the field, has ended. The courts are noting more pointedly, it seems, that regulatory subjects and regulatory beneficiaries do not have equal claims to judicial relief.

The development I particularly want to note is again one of seeing separation of powers at work in Congress's particular design of government institutions. What perhaps we supply are the headwaters for one stream of alternative tribunals, whose work is the result of congressional assignment of what could be judicial business away from the federal courts. That is, we provide a concrete setting for your students to encounter the problems of Henry Hart's famous exercise in dialectic. And for administrative agencies, more than for the more conventional Article I courts, that assignment has often enough expressed a measure of hostility or distrust toward the judiciary. In creating workers' compensation tribunals, legislatures were not just seeking the advantages of expertise, or some means of relieving courts from the most routine elements of a generally excessive caseload. Legislatures did not trust courts to do the work they had in mind, with reason, and so set up a competing tribunal that they thought would do that work more reliably. In this sense, the delegation of adjudicatory authority to agencies should set up as large and central a puzzle as delegation of legislative authority.

Thus, alongside the Article I court difficulties of recent years—*Freytag* comes again to mind—your students may well be placing *CFTC v. Schor*.²⁴ That case directly concerned the Commodity Futures Trading Commission's authority to decide a counterclaim based on state common law, in a proceeding that was initially brought by a disappointed investor to enforce aspects of the CFTC's regulations against a regulated broker. Assuming the propriety of giving the commission authority to decide disputes between customers and brokers about the enforcement of its rules, the Court upheld its decision of the counterclaim functionally, on what might be understood as pendent jurisdiction grounds. But the challenge of explaining how Congress can make that derivative assignment consistent with Article III is less troubling than the question the Court treated as routine—Congress's assignment to a specialized, nonjudicial agency of the task of collecting reparations between citizens for violations of agency rules. An action by one citizen to collect money from another is not easily characterized as one involving "public rights," even when the basis for the action is an agency rule rather than a statute. Indeed, one could argue that permitting the agency to decide the matter compounds the problems of separation of powers created both by initial delegation of rulemaking authority and by the decision to place rulemaking and decisional authority in the same place. We can see that Congress has often made such judgments, and that pragmatically we have long accepted them, but we have no very convincing way to explain them—particularly when we acknowledge, as we must, that the historical roots of these assignments lie in distrust of the judiciary and the wish significantly to displace it. As the Fifth Circuit recently remarked, the agency context reveals "[t]he public rights/private rights di-

24. 478 U.S. 833 (1986).

chotomy of *Crowell* and *Murray's Lessee* is a deceptively weak decisional tool.”²⁵ Or, as Harold H. Bruff has put it, “the Supreme Court cases are notoriously obscure.”²⁶ Here, then, is a setting in which the competition between ideology and theory, on the one hand, and function and necessity, on the other, seems particularly acute.

In Legislation, too, administrative law is likely to raise comparative issues for your students, respecting both the bromide that the courts have complete authority to determine what statutes mean, and the current brouhaha about the uses, if any, of legislative history.

At least as early as 1940 the Supreme Court found it possible to affirm in the same opinion that statutory interpretation in justiciable controversies “is exclusively a judicial function,” and that agency views of statutory meaning “are entitled to great weight.”²⁷ This is not really a paradox. First, a court genuinely wishing to be cooperative with legislatures, as the newly chastened courts were in the wake of the defeat of substantive due process, could rationally find signals for its own interpretation in the behavior of the agencies the legislature had assigned to implement legislation. That Congress was creating so many agencies was itself a signal of unhappiness with judicial activism, generally judicial resistance to legislative policies, which the courts of that time doubtless understood. Second, a court independently interpreting a statute could nonetheless find in it an unmistakable instruction that certain policy issues, which might appear in the guise of disputes over statutory meaning, had been left to the agency to decide. Respecting reasonable agency judgments in such cases was only a matter of obeying the instruction the court had independently found the statute to contain.²⁸

These ideas found fresh and rather emphatic expression in the Supreme Court’s unanimous opinion in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁹ a case I imagine as familiar ground and certainly a prominent part of your students’ Administrative Law study. *Chevron* reiterated the two-step approach to statutory construction that had been evident in the earlier cases: first the court determines whether there are clear congressional instructions on the issue before it; then, finding an issue not resolved, and finding an assignment of relevant policy-setting responsibility to an administrative agency, it tests the agency approach for reasonableness. Congress had not decided whether or not the EPA could treat the whole of an industrial site as one stationary source for purposes of air pollution regulation; the EPA’s judgment that that would be the optimal approach to regulation was to be accepted as

25. *In re Clay*, 35 F.3d 190, 194 (5th Cir. 1994) (referring to *Crowell v. Benson*, 285 U.S. 22 (1932); *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856)).

26. *Specialized Courts in Administrative Law*, 43 Admin. L. Rev. 329, 353 (1991).

27. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 544, 549 (1940).

28. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944).

29. 467 U.S. 837 (1984).

long as it was “reasonable.” Save for making a general principle out of what previously had been found in particular statutes, and for its (in my judgment, healthy) tying of the proposition to political controls, the opinion is not nearly so surprising as the enormous literature it has generated would suggest. Yet the attention it has received is of a piece with the revival of theorizing about separation of powers issues, and in that respect may signal instability rather than stability in the paradigm it expresses. Certainly, *Chevron’s* inconsistent treatment by the Court in recent years, of which the literature is interestingly full, suggests that the opinion may have done more to define a coming field of battle than to express well-settled truths, as its rhetoric appeared to claim.

That field of battle, I think we all know, is over the right relationship of legislature and courts when it comes to statutory interpretation. As Thomas W. Merrill recently documented, we have moved from a practice in 1981, shortly before *Chevron*, when legislative history played a part in 100 percent of the Court’s statutory interpretation cases and dictionaries played a part in one percent, to a world of 1992, in which legislative history was seriously consulted in less than one case in five, and dictionaries were referred to about twice as often.³⁰ That trend is not abating.³¹ What I hope I can briefly suggest here is that the context and the consequences of this dispute for administrative agencies and administrative law are rather different than for the ordinary case in which court and legislature deal directly with each other’s work product.³² Your student who has had Administrative Law will have been dealing with this issue in a somewhat more complex situation, in which the interpreter—that is, the agency—has important and continuing relationships with Congress and the White House as well as with the courts. Caught in a crossfire, it is not free, and we might not wish it to be free, to disregard the signals coming from all directions. And it is in an expert position vis-à-vis the legislative process that might render some of the current skepticism about legislative history less persuasive—you may think, in other respects more persuasive—than would be the case for the only occasionally involved and policy-neutral courts. Agencies are chosen for their qualities of cooperation with the political leadership of government; when we want neutrality we choose the courts. But if, then, as it seems, we are entering a time when the dominant *judicial* stance towards the legislature is one of distance rather than cooperation, the tensions between administrative and judicial approaches to statutory materials and charges are likely to be rather high.

With more time, we could investigate other comparisons, which reach into the private law curriculum: public contracts present revealing problems in relation to Contracts, the issues of public liability present important issues for

30. Textualism and the Future of the *Chevron* Doctrine, 72 Wash. U. L.Q. 351, 355 (1994).

31. Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 Sup. Ct. Rev. 429.

32. See Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 Chi.-Kent L. Rev. 321 (1990).

Torts, and “the New Property” of course figures in Property. These are more peripheral to Administrative Law, however; and here, too, I am reasonably confident that our students know what you teach, rather than vice versa, in the usual ordering of the curriculum.

Rather, let me take just a moment to suggest some issues that we don’t yet sufficiently encounter, and that from an administrative lawyer’s perspective bid strongly to become significant elements of the curriculum of the future. These might all, perhaps, be caught up in the need for reinventing government, to coin a phrase—for finding new paradigms for government structure and action that correspond to the new forms of corporate organization and thinking. Similar challenges, I imagine, are faced by colleagues teaching courses like Corporations. They entail not only drawing extensively on the work of other social sciences—economics, game theory, and public choice in particular—but also imagining different legal regimes suited to the challenges thus created. Seduced, perhaps, by the appearance of deregulation in the familiar contexts of economic controls, we provide scant room in our curricula for the newer issues of “regulation,” such as are reflected in the intellectual disciplines of cost-benefit analysis and risk analysis, or in the increasing calls for performance- rather than standards-based approaches to the identification and achievement of government’s ends.

Probably this is not the forum for addressing these problems of curricular reform—although, as you may know, we at Columbia are making a stab at it. For today our issue is what our students may know that you may not, and not what the future ought to hold but the present lacks. And I hope to have given you a few ways to think about perspectives that your Administrative Law colleagues may contribute to your students’ understanding, and indeed that you might find useful to enrich your own scholarship, as I find conversations with you about your fields enrich mine. To end where I began, Administrative Law is the hidden comparative law course of the public law and adjectival law curriculum; bringing that characteristic into the open gives your work and mine added interest.