
Preface

This casebook, while also giving much play to functionalism, assumes a formalist approach to administrative law that largely, although not entirely, defends the constitutionality of the modern administrative state. The theory driving the casebook is that there are “exclusive” powers that only Congress, the President, and the courts can respectively exercise, but also “nonexclusive” powers that can be exercised by more than one branch. The overarching claim is that much of what the administrative state does is in this latter category, although some, to be sure, is not.

In a time when the modern Supreme Court appears on the verge of rethinking many administrative law doctrines, a casebook like this that focuses not only on fundamentals, but also on theory, is terribly needed. The book has many innovations, but one that highlights its approach is the extensive discussion of the 1852 steamboat legislation and the 1887 Interstate Commerce Act, the full texts of which are supplied in appendices. Another is the inclusion of sections on “Debating Deference,” “Debating Delegation,” “Debating Presidential Control,” “Debating the Due Process Revolution,” and “Debating Universal Injunctions,” which comprise excerpts from the secondary literature debating the theory, values, and policy merits of the various doctrines.

Organizationally, the book begins with a historical introduction and constitutional overview, before turning to rulemaking, adjudication, and judicial review of the same. The second half then returns to constitutional questions, with dedicated chapters on legislative, executive, and judicial power, before concluding with reviewability.

The book discusses Article III and due process in the same chapter, with due process following Article III. The history and theory of private rights and public rights makes this organization logical. The material on agency action “committed to agency discretion by law,” 5 U.S.C. § 701(a), possibly for the first time, is included with material on judicial review of agency action. Many exercises of discretion are reviewable, and the question thus becomes whether such exercises are reviewable under § 706 or not per § 701. These materials also fit together because they involve distinguishing different kinds of agency action, whereas other reviewability doctrines apply irrespective of the kind of agency action at hand. The casebook further reworks reviewability by placing the zone-of-interest test where it belongs: not as part of prudential standing, but instead as part of the materials on causes of action.

There is much intellectual ferment in administrative law. My hope is that this casebook can help students, professors, and scholars navigate both the steady, and the shifting, currents.

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