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Blending State and Federal Administrative Law

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BOOK REVIEW

BLENDING STATE AND FEDERAL ADMINISTRATIVE LAW

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The addition of a new casebook to a field of law already crowded with quality competitors is rarely noteworthy. The recent emergence of Bonfield and Asimow's *State and Federal Administrative Law* is an exception to this generalization. The authors crafted a casebook that emphasizes state administrative law. By doing this, Bonfield and Asimow offer information that will be immensely valuable to the lawyer who is more likely to encounter issues of state, rather than federal administrative law. Moreover, *State and Federal Administrative Law* appropriately emphasizes regulation by rulemaking and de-emphasizes judicial review. Because adjudication is a comparatively costly mode of regulation,[1] agencies have renewed their interest in, and use of, rulemaking. Although the authors present some material that makes this book demanding to use as a teaching tool,[2] *State and Federal Administrative Law* is a welcome addition to the existing, distinguished group of administrative law books.

I
DE-EMPHASIZING FEDERAL ADMINISTRATIVE LAW BY COVERING STATE LAW

By including substantial state materials, *State and Federal Administrative Law* departs from the dominance of federal law coverage in administrative law casebooks. Lawyers and scholars familiar with

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1 *See, e.g.*, Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 254-60 (1986) (emphasizing efficiency of a rulemaking which can cover a broad scope of related issues); William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975) ("Administrative law . . . has entered an age of rulemaking. . . .as the burden of existing responsibilities has increased.") (footnote omitted); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 S. CT. REV. 345, 376 (1979) (noting "the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking.") (footnote omitted). *Compare* Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300 (1988) (positing that agency costs of rulemaking have increased because of the demanding and unpredictable attitude of circuit courts generally and the D.C. Circuit particularly).

2 *See infra* text accompanying notes 23-24 & 61-80.

Arthur Bonfield's work should expect this book to focus on state administrative law. Professor Bonfield's prior scholarship has stressed the need for law schools to devote more attention to state administrative law,[3] and has focused on optimal schemes of state administrative procedure.[4]

In their casebook's preface, Bonfield and Asimow explicitly justify their state law focus. They note that "a comparative state-federal approach to the study of [administrative law] suggests problems or solutions to problems in the administrative process that are not otherwise apparent."[5] They also reason that the emphasis on state administrative law creates a "clear professional advantage" because "most law students will deal with state administrative agencies in their practice more frequently than with federal agencies."[6] The latter justification mirrors Bonfield's earlier assertion that "most lawyers in this country, . . . spend as much or more time dealing with state administrative processes as they do with the federal process."[7]

Bonfield and Asimow deliver on their promise to cover state as well as federal administrative law. Their book devotes substantial attention to state administrative law developments and doctrine. The authors present state law cases and the 1981 Model Administrative Procedure Act throughout the book. The authors use the 1981 Model State Administrative Procedure Act, reprinted in Appendix B, often refer to it in notes, and together with the Federal Administrative Procedure Act ("APA"),[8] it is the basis for the problems examined in the book. In addition, state law theories and developments are discussed in the notes following principal cases.

The authors' emphasis on state materials will give readers a sense of the differences between state and federal administrative

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3 Arthur E. Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95 (1982) (criticizing administrative law teachers for overemphasizing federal administrative law while neglecting state administrative law, and asserting that those teachers usually treat state law "as if it were unimportant, redundant, irrelevant or uninformative.").

4 *E.g.*, ARTHUR E. BONFIELD, STATE ADMINISTRATIVE LAW RULE MAKING (1986); Arthur E. Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986); Arthur E. Bonfield, *Rulemaking Under the 1981 Model State Administrative Procedure Act: An Opportunity Well Used*, 35 ADMIN. L. REV. 77 (1983); Arthur E. Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 IOWA L. REV. 285 (1977); Arthur E. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 IOWA L. REV. 731 (1975).

5 ARTHUR E. BONFIELD & MICHAEL ASIMOW, STATE AND FEDERAL ADMINISTRATIVE LAW xxiii (1989).

6 *Id.*

7 Bonfield, *supra* note 3, at 100.

8 Codified at 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1988). The Federal Administrative Procedure Act (APA) is contained in Appendix A of the book.

law. Yet, the authors do not include state materials at the expense of ignoring federal administrative law. In fact, their casebook contains more federal than state law. Specifically, the book contains seventy-three principal cases—fifty-three of which are federal cases, the remaining twenty are state cases. Thus the authors prudently temper their state law passion.

Readers may question whether a book with a relatively small proportion of state cases—approximately 25%—merits the state law patina that surrounds the book's title, preface and marketing. Other respected administrative law books[9] contain a significant number of state cases.[10] Yet, Bonfield and Asimow uniquely emphasize state law.

The coverage of state cases, however, does not prevent the reader from obtaining a solid understanding of the casebook's federal law content. Any administrative law book that purports to cover federal law (as this book does), should contain a substantial number of seminal *federal* cases. Accordingly, the authors include Supreme Court landmarks such as *Universal Camera Corp. v. NLRB*,[11] *United States v. Grimaud*,[12] *NLRB v. Wyman-Gordon Co.*[13] and *Vermont Yankee Nuclear Power Corp. v. NRDC*.[14] Additionally, an administrative law book should cover the leading federal cases on constitutional issues because of their importance to the study of administrative law. Again, *State and Federal Administrative Law* contains a number of leading constitutional cases, including *Goldberg v. Kelly*,[15] *Mathews v. Eldridge*,[16] *Londoner v. Denver*[17] and *Withrow v. Larkin*.[18] Moreover, where federal law dominates topics of contemporary relevance, an administrative law book should provide adequate coverage of recent federal cases. For example, casebooks should cover federal law such as the Freedom of Information Act. Similarly, in the increasingly significant areas of executive and legislative control over agencies, federal developments and cases domi-

9 *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK (3d ed. 1988).

10 Twenty-two of the 111 principal cases in the third edition of the Schwartz casebook are state cases. The Schwartz book, however, does not stress state law in its notes and lacks problems requiring consideration of the Model Act.

For a typical administrative law book employing mainly federal cases, see WALTER GELLHORN, CLARK BYSE, PETER L. STRAUSS, TODD P. RAKOFF & ROY A. SCHOTLAND, ADMINISTRATIVE LAW (8th ed. 1987) (this book contains only four state decisions out of over ninety principal cases selected).

11 340 U.S. 474 (1951).

12 220 U.S. 506 (1911).

13 394 U.S. 759 (1969).

14 435 U.S. 519 (1978).

15 397 U.S. 254 (1970).

16 424 U.S. 319 (1976).

17 210 U.S. 373 (1908).

18 421 U.S. 35 (1975).

nate. The authors cover the important cases, including *Morrison v. Olson*,[19] and *Amalgamated Meat Cutters v. Connally*.[20] An understanding of several federal cases reveals that a grasp of federal law is possible from these materials.

Although the casebook includes significant state cases, its state law focus emerges in the notes and problems, which contain rich discussions of state cases and case law developments. Perhaps even more important, the notes and problems consistently refer to state legislation and the Model Act.

The casebook's repeated references to legislation give students a unique perspective of administrative law. Indeed, the entire book is more legislatively oriented than previous materials, primarily because the Model Act itself is more recent and detailed than the APA. The APA, in contrast, is more abstract and constitutional in nature when compared to the Model Act. Alan Morrison's thesis that "the APA is more like a constitution than a statute"[21] comes alive when a student studies the APA in relation to the Model Act's specific provisions. For example, after puzzling over the absence of a provision in the APA specifying the contents of a rulemaking record, and then studying section 3-112 of the 1981 Model Act, which lists the multipart contents of a state rulemaking record,[22] the student can discern and assess differences in statutory construction and legislative purposes. In this connection, the difference in the tone and texture of these two legislative schemes provides professors with a framework for comparative legislative inquiry unavailable in other books.

Even veteran teachers of administrative law, however, will find it challenging to lead a fruitful discussion of the comparative differences in administrative law legislation. Like the extensive material on rulemaking,[23] the important issues underlying these legislative questions often are unfocused and difficult to teach. Without a coherent analytical framework, legislative study tends to become an unwieldy topic that escapes a tidy set of imperatives. As Judge Posner recently noted, "it is unclear what it is that lawyers, as distinct from political scientists or even economists, have to say about legis-

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19 108 S. Ct. 2597 (1988).

20 337 F. Supp. 737 (D.D.C. 1971).

21 Morrison, *supra* note 1, at 253; *contra* Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 454-59 (1986).

22 The specific Model Act section regulating the contents of rulemaking records includes the following major items: agency docket entries relating to the rule, any written materials considered by the agency when formulating the proposed rule, a transcript or tape of oral presentations made in a proceeding regarding the rule, and a copy of any regulatory analysis of the rule. Model State APA § 3-112; A. BONFIELD & M. ASIMOW, *supra* note 5, at 777-78.

23 *See infra* text accompanying notes 45-49.

lation."[24] While this reviewer considered the casebook's questions on the optimal specificity of administrative law legislation a useful pedagogical tool, my students found the discussion difficult to comprehend and too policy-based. One professor's difficulty in teaching this portion of the book, however, does not indicate that a similar fate will befall others. Using this book will, in any case, provoke classroom discussion on whether specific administrative law statutes are preferable to more open-ended legislation.

Once editors decide to integrate state and federal law, the task of selecting appropriate state materials is daunting. Editors must confront whether it is preferable to select state cases and materials from so-called "progressive" states (that may be at odds with the mainstream of states), or focus on cases that are purely illustrative or that reach novel results. Bonfield and Asimow have chosen a pragmatic route by selecting state cases that either illustrate principles or reflect noteworthy or path-breaking developments that deviate from federal law.

In an analogous sense, the choices facing an administrative law casebook editor in selecting a mix of state and federal cases are not unlike those of her civil procedure casebook counterpart. In civil procedure, the Federal Rules of Civil Procedure dominate the field. Most state courts have rules systems patterned after the Federal Rules.[25] Nonetheless, numerous states have particular rules and caselaw that diverge from the Federal Rules.[26] Faced with the task of imparting basic doctrine and policy to students, civil procedure textbook authors generally have chosen to include federal decisions interspersed with state cases to present the reader with a comparison. A focus on state law is especially significant whenever state rules differ from federal law. For example, procedure texts often include state cases involving pleadings, since some state rules require much more factual specificity than do the Federal Rules.[27]

One should not, however, overstate the analogy to the writing of a civil procedure text. In civil procedure, the Federal Rules of Civil Procedure are the model for most state rules. State variations

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24 Richard A. Posner, Book Review, 74 VA. L. REV. 1567, 1568 (1988) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)).

25 *See* John B. Oakley & Arthur F. Coon, *The Federal Rule in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

26 *E.g.*, OREGON RULES OF CIVIL PROCEDURE ANNOTATED 63 (1988) (mandating pleading of "ultimate" facts constituting a claim for relief); *see* RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 113 (1989) (New York and California "still retain features of code pleading").

27 *See, e.g.*, R. MARCUS, M. REDISH & E. SHERMAN, *supra* note 26, at 114-18 (casebook selection of a North Carolina code pleading case, Gillispie v. Goodyear Serv. Stores, 258 N.C. 487, 128 S.E.2d 762 (1963), to illustrate state variation in pleading requirements).

exist, but are the exception. Moreover, states typically imitate the detailed drafting of the Federal Rules. In the administrative law context, however, the APA's broad, sweeping style, perhaps instrumental in thwarting efforts to amend it, stands in stark contrast to both state statutes and case law. In administrative law, many state laws are different from federal law in both result and style. State administrative law codes are vast documents that have become "extensive, detailed, and sophisticated bodies of administrative law"[28] that do not emulate the 1946 federal APA.

In this connection, some of the state materials in *State and Federal Administrative Law* deviate to such an extent from their federal counterparts that they become models, not just points of comparative departure. After reading certain state cases in Bonfield and Asimow, students may question why the federal law has remained so tepid. For example, *Megdal v. Oregon State Board of Dental Examiners*[29] involved a state licensing agency possessing broad rulemaking power to regulate dentists for "unprofessional conduct." The court required the agency to adopt published rules rather than rely on unprincipled and inconsistent *ad hoc* regulation by adjudication. This decision is contrary to federal case law that has given agencies increasing discretionary authority to select either rulemaking or adjudication.[30] Unlike federal law, *Megdal* forced agencies faced with broad legislative terminology to promulgate rules that provide notice to the regulated community and, at the same time, to channel bureaucratic energy. A reading of *Megdal* may prompt the student to question the breadth of present judicial deference, under federal law, to an agency's choice of regulation. *Megdal* also presents the student with a question of judicial method: What is the ideal rationale for mandating rules? The provocative post-*Megdal* note examines whether the goal of court-required rulemaking should be accomplished via a due process holding, a form of statutory construction, or a candid and activist common law of administrative

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28 *See* Bonfield, *supra* note 3, at 101.

29 288 Or. 293, 605 P.2d 273 (1980), *reprinted in* A. BONFIELD & M. ASIMOW, *supra* note 5, at 267.

30 *See, e.g.*, NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267 (1974) (leaving to NLRB discretion whether to articulate new principles in either a rulemaking or an adjudication); SEC v. Chenery Corp., 332 U.S. 194 (1947) (rejecting argument that agency could not apply a new, general standard in an adjudication). *State and Federal Administrative Law* includes the *Bell Aerospace* opinion, but excludes *Chenery II*. A. BONFIELD & M. ASIMOW, *supra* note 5, at 261-64. The thorough note material after *Bell Aerospace* excerpts Judge Goodwin's decision in Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982), which vacates an agency order because the subject matter was of general applicability. This section also presents the ABA Section of Administrative Law's resolution, which states a preference for agencies to use rulemaking rather than adjudication for instituting proscriptions in industry-wide practices. A. BONFIELD & M. ASIMOW, *supra* note 5, at 264-67.

law.[31]

The authors' treatment of estoppel provides a second illustration of how an emphasis on state materials can extend beyond a mere comparative purpose. The authors do not introduce their estoppel section with federal cases where courts have refused to estop government agencies under circumstances that amount to textbook examples of common-law estoppel.[32] Rather, in *State and Federal Administrative Law*, this section begins with a bold, well-reasoned state opinion, *Foote's Dixie Dandy, Inc. v. McHenry*,[33] where the court estops a state agency because of the erroneous oral advice of an employee. The notes following this case present conservative federal cases.[34] This presentation strengthens the authors' argument for allowing and expanding estoppel against agencies. Moreover, the selection of such cases presents the reader with an expanded vision of the sources of administrative law; namely, a common law of administrative law, in addition to the more familiar statutory and agency rule sources.

II

ORGANIZATION AND RESOURCE ALLOCATION: EMPHASIZING REAL AGENCY ACTION AND DE-EMPHASIZING JUDICIAL REVIEW

The success of *State and Federal Administrative Law* will depend upon the academic community's perception of the importance of

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31 *See* A. BONFIELD & M. ASIMOW, *supra* note 5, at 270-74. For a comparison of the judiciary's review function as either a "red light" that checks agency action or a "green light" that facilitates governmental action to enhance an agency's procedural efficiency, see CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION (1984).

32 *See, e.g.*, Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant."); Schweiker v. Hansen, 450 U.S. 785 (1981) (refusing to estop Social Security Administration despite bad advice not to file a written claim for benefits); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (rejecting estoppel argument after claimant farmer received erroneous advice that his wheat crop was insurable and had crop destroyed); *see also* Rock Island, A. & L.R. Co. v. United States, 254 U.S. 141, 143 (1920) (in refusing to permit estoppel claim, Justice Holmes reasons "[m]en must turn square corners when they deal with the Government."); Rider v. United States Postal Service, 862 F.2d 239 (9th Cir. 1988) (refusing to allow estoppel despite erroneous advice by postal service employee), *cert. denied*, 109 S. Ct. 2430 (1989).

33 270 Ark. 816, 607 S.W.2d 323 (1980), *reprinted in* A. BONFIELD & M. ASIMOW, *supra* note 5, at 237.

34 The notes following *Foote's Dixie Dandy* present the policy issues for and against estoppel against government and make good use of an excerpt from Professor Asimow's writing. *See* A. BONFIELD & M. ASIMOW, *supra* note 5, at 240-43 (quoting MICHAEL ASIMOW, ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES 60 (1973)) (noting that the existing practice at most agencies is to "consider themselves bound by erroneous advice" and reasoning that "[i]t no longer seems credible that the government will be ruined by a judicious application of estoppel").

state administrative law. Readers should note, however, that this new book does not have a one-dimensional "state" focus. The organization of the book and the authors' choice of contents provide fresh insights into the present state of administrative law.

Bonfield and Asimow divide their relatively short casebook—a mere 741 pages of text—into three distinct organizational units. Part I, "Agency Procedures," comprises over one-half of the book.[35] This segment covers agency adjudicatory procedures and rulemaking. Part II, "Nonjudicial Control of Agency Action," focuses on the increasingly important role of the legislative and executive branches in controlling agency action.[36] The remainder of the book, Part III, "Judicial Review," discusses the role of the courts in administrative law.[37]

This division of material and the comparatively lean treatment of judicial review makes a timely and realistic statement: The core of administrative law is found in the internal, everyday workings and political oversight of the modern agency, rather than in the relatively rare cases that wind their expensive way to the court system. Thus, the primary setting of *State and Federal Administrative Law* is the administrative agency, not the courts. The authors' placement of judicial review at the end of the book and their restriction of its discussion to relatively few pages mirrors a reality. Since litigants appeal only a small percentage of administrative agency actions, agency activities are of central importance to a course in administrative law. Other scholars have emphasized that the agency, rather than the court, is the appropriate "setting" for an administrative law course.[38] *State and Federal Administrative Law* echoes this idea throughout a traditional casebook format.

This orientation does not imply that *State and Federal Administrative Law* excludes either administrative law theory or judicial review. The book devotes considerable resources to encouraging students to draw upon theoretical concepts in deciding the appropriate regulatory strategy for particular situations. Bonfield and Asimow provoke students to assess whether rulemaking or adjudication is more sensible in a given context.

Similarly, by probing the true meaning of "administrative dis-

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35 A. BONFIELD & M. ASIMOW, *supra* note 5, at 22-418.

36 *Id.* at 419-560.

37 *Id.* at 561-741.

38 *See, e.g.*, C. HARLOW & R. RAWLINGS, *supra* note 31 (emphasizing work within the agency as the primary and preferred source of administrative law norms); ROBERT L. RABIN, PERSPECTIVES ON THE ADMINISTRATIVE PROCESS (1979) (emphasizing the functions of agencies); Robert L. Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U.L. REV. 120 (1977) (tracing shift in administrative law away from judicial review toward substantive policies underlying agency work).

cretion," the casebook gives teachers an opportunity to educate students in a practical lesson in legal philosophy. This term should be distinguished from the crude and inartful "scope of review" standard under the APA.[39] Administrative discretion is a concept that is central to understanding the practical, everyday workings of an agency. As Professor Davis taught, bureaucrats regularly deal with requests from regulated parties for an exception to a seemingly applicable agency rule.[40] Under these circumstances, the agency is faced with a crucial question: Should it exercise its discretion to ignore the rule and craft a customized solution or, conversely, should it apply the rule to what may be a recurring problem?

Agency personnel often appreciate the easy application of rules and their seeming appearance of evenhanded treatment. Agency refusal to exercise discretion can protect personnel from claims of favoritism or discrimination. In this context, refusal to exercise discretion is seen as "fair"[41] and enables the agency to avoid the charge of employing a hidden agenda.[42] At the same time, an exercise of discretion may be an effort to circumvent a published rule in order to provide customized treatment to a unique situation. A bureaucrat exercising discretion in this way may be achieving Davis' proclaimed "discretionary justice."[43] These observations suggest that the internal agency exercise of discretion should not be understood as occurring in a vacuum or black hole of "no law." In fact, Professor Dworkin's vision of discretion as being surrounded by a "doughnut" or "belt" of norms limiting the freedom to act typifies a "discretionary" act or decision.[44]

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39 5 U.S.C. § 706(2)(A) (1988) (permitting a court to overturn agency "action, findings, and conclusions" on undefined "abuse of discretion" grounds).

40 *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 17 (1969) ("No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power."); *see also* DENIS JAMES GALLIGAN, DISCRETIONARY POWERS (1986); Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problems of the Individual Special Case*, 35 N.Y.U. L. REV. 925 (1960).

41 *See* D. GALLIGAN, *supra* note 40, at 160-61 (noting that fairness concerns are "based on the risk of unequal treatment" in discretionary actions).

42 *See* P.S. ATIYAH, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1271 (1980) (increasing use of discretion conceals the values of the decisionmaker).

43 *See* K. DAVIS, *supra* note 40, at 9-17 (identifying costs of inconsistent and extralegal agency discretionary acts, but emphasizing that discretion has the virtue of facilitating tailor-made rules that fit the parties and facts presented).

44 *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) ("Discretion, like the hole in the doughnut does not exist except as an area left open by a surrounding belt of restriction."); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 31 (1967) (criticizing the view that the absence of a clear rule vests unlimited judicial discretion to make "a fresh piece of legislation"). Galligan defines discretionary decisions as those made "in the absence of that pattern of normative standards and principles." D. GALLIGAN, *supra* note 40, at 1. Barak defines discretion as the power "to choose between two or more alternatives, when each of the alternatives is lawful." AHARON BARAK, JUDICIAL

Part I's discussion of agency procedures devotes substantial attention to rulemaking. The thorough chapter on rulemaking ("Chapter 6. Rulemaking Procedures")[45] is at the heart of this section. Further, Chapter 6 follows a related short chapter ("Chapter 5. The Relationship Between Rulemaking and Adjudication") on the different characteristics of rulemaking and adjudication.[46] These materials stress the advantages of rulemaking over adjudication. The authors depict rulemaking as fair because it affects like parties similarly. Budgetary pressures that have reduced or frozen federal and state agency staffs have made rulemaking preferable to adjudication on a cost basis: Legislative rulemaking usually provides more regulatory results. Bonfield and Asimow offer readers an up-to-date rationale for employing increasing regulation by rulemaking and, in so doing, lay a foundation for their detailed treatment of rulemaking case law and legislation in Chapter 6.

Chapter 6's lengthy and detailed coverage of rulemaking is remarkable. Professors who want their students to understand contemporary administrative law within the setting of a modern, budget-strapped agency will find Chapter 6 quite valuable. Unlike any existing book, the rulemaking chapter stresses the major exemptions from public participation and publication in the rulemaking procedures. In addition to including materials on the "good cause" exemption to the APA and Model Acts, *State and Federal Administrative Law* covers the so-called "categorical exemptions" including "proprietary matters,"[47] "procedural rules,"[48] "interpretive rules" and "general statements of policy."[49] Although some might criticize the inclusion of these arguably mundane materials, the exemptions discussion gives students a sense of the practical policy choices that agencies face. A byproduct of this coverage may be to provoke criticism of the multiple and broad exemptions to the few safeguards associated with rulemaking.

The repeated reference to the theory of a common law of ad-

DISCRETION 7 (1989). Professor Davis criticized the view that courts must refuse to review agency decisions where there is "no law to apply" by suggesting that courts should use judicial discretion to review agency decisions for "abuse of discretion." *See* Kenneth Culp Davis, *No Law To Apply*, 25 SAN DIEGO L. REV. 1 (1988).

45 A. BONFIELD & M. ASIMOW, *supra* note 5, at 282.

46 *Id.* at 244.

47 *See* 5 U.S.C. § 553(a)(2) (1988) (exempting from section 553 notice and comment rulemaking procedures matters relating to "public property, loans, grants, benefits, or contracts").

48 *Id.* § 553(b)(3)(A) (1988) (exempting from section 553(b) procedures "rules of agency organization, procedure, or practice" except when notice or hearing is required by statute).

49 *Id.* § 553(b)(3)(A) (1988) (also exempting from section 553(b) procedures "interpretative rules" and "general statements of policy" except when notice or hearing is required by statute).

ministrative law is a paradoxical feature of Bonfield and Asimow's text. At various points in their notes, the authors refer to the concept of administrative common law. In particular, they summarize Professor Davis's view that section 559 of the APA intentionally bootstrapped judicial administrative common law by Congress' declaration that the APA would not " 'limit or repeal additional requirements imposed by statute or otherwise *recognized by law*.' "[50] The explicit reference to administrative common law may seem inappropriate in a book that downplays judicial review. Nonetheless, an administrative common-law emphasis furthers the opportunity for jurisprudential discussions in an administrative law course.

An administrative law course also provides a natural opportunity for debating the appropriate roles of the respective branches of government. The authors recognize this and structure their material accordingly. Delegation and separation of powers materials, for example, facilitate discussion of the positions of the court, the executive, and the legislature in relation to the agency. Similarly, the juxtaposition of court-made administrative common law against legislation, such as the Model Act of APA, provides a framework from which to probe the ideal roles of the courts. In addition, the chapter on legislative and executive control of agencies sets up opportunities to compare discretionary judicial control of agencies with more specific and politically accountable control by the "political" branches of government.[51] The authors offer bold state cases that reject the delegation of legislative power,[52] as well as state decisions that uphold delegation.[53] Bonfield and Asimow also present material on state executive veto and executive branch review of rules for purposes of comparison with Executive Order 12,291.[54]

While satisfying to this reviewer, the straightforward, rule-oriented treatment of the scope of judicial review in *State and Administrative Law* may not please everyone. Bonfield and Asimow present

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50 Kenneth Culp Davis, *Administrative Common Law and the Vermont Yankee Opinion*, 1980 UTAH L. REV. 3, 10 (quoting section 12 of the original APA, enacted in 1946) (quoted and discussed in A. BONFIELD & M. ASIMOW, *supra* note 5, at 316) (emphasis added).

51 *See* A. BONFIELD & M. ASIMOW, *supra* note 5, at 420 (Chapter 7. "Control of Agencies By The Political Branches of Government").

52 *See id.* at 451-54 (featuring Thygesen v. Callahan, 74 Ill. 2d 404, 385 N.E.2d 699 (1979) (decision striking down a delegation of power despite the presence of procedural safeguards and apparent standards)).

53 *See id.* at 454-55 (featuring Warren v. Marion County, 222 Or. 307, 353 P.2d 257 (1960) (upholding a delegation due, in part, to presence of appeal procedures).

54 *Id.* at 502-08 (describing section 3-202 of the Model Act, which allows a Governor to rescind or suspend a rule or rulemaking if the agency possesses a like power, and explaining the California Office of Administrative Law's ability to veto and rescind rules by probing some of the many questions regarding Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601, at 473 (1988)).

the essential materials on scope of review by employing a logical doctrinal organization. After starting with judicial review of agency factfindings, the authors include sections on legal interpretation, application of law to facts and, finally, judicial review under the highly discretionary arbitrary and capricious standard.[55] The authors highlight doctrinal considerations throughout this chapter. Although Bonfield and Asimow show sensitivity to the amorphous nature of scope of review norms,[56] this chapter conspicuously lacks any note discussion of the academic debates regarding the proper role for courts in reviewing agency action under various statutory regimes.[57]

The doctrinal emphasis on administrative procedure in this chapter tends to ignore the substantive law that activates agency action, the subject of judicial review. For example, the authors wisely present *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[58] as one of two principal cases illustrating an "arbitrary and capricious" standard of review.[59] They omit, however, subsequent note reference to the recurrent and fascinating problem of judicial review of agency deregulatory action.[60] Cases such as *State Farm* should be launching pads for discussion of the appropriate judicial role in differing substantive regulatory settings, each setting having unique and increasingly complex legislative histories. Teachers using this book will need to rely on secondary readings that discuss these contemporary dynamics affecting judicial review.

III

NITPICKS AND KUDOS

While *State and Federal Administrative Law* is generally well writ-

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55 BONFIELD & ASIMOW, *supra* note 5, at 562-627.

56 *See, e.g., id.* at 562-63 (authors list formulas for review of agency factfinding and then ask readers: "isn't a reviewing court likely to reverse agency fact findings which it strongly believes are wrong regardless of what formula is employed?").

57 *Compare* Colin Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985) (preferring executive branch legislative interpretation due to economies of uniform, consistent and low cost construction) *and* Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) (advocating judicial respect of partisan legislation demanded by interest groups) *with* Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U.L. REV. 646, 671 (1988) (stressing judicial branch advantages such as the "non-majoritarian characteristics of independence and life tenure" and judicial "training and experience") *and* Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 74-75 (1985) (advocating "hard look" judicial review in selective contexts).

58 463 U.S. 29 (1983).

59 A. BONFIELD & M. ASIMOW, *supra* note 5, at 607.

60 *See generally* Hirshman, *supra* note 57, at 676-703 (defending recent Supreme Court arbitrary and capricious review decisions as consistent with proper judicial role and public choice theory); Cass Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177 (1984).

ten, there are a few items meriting attention for prospective users. Although one could construe the following paragraphs as criticism, the authors' choices usually are reasonable and defensible.

First, some users will find the principal case selections overly edited. The authors have severely reduced the length of many decisions by replacing the bulk of factual material with terse editorial statements of facts and by omitting chunks of the legal rationale within the opinions. Bonfield and Asimow succeed in satisfying their goal of producing a lean casebook. This achievement, however, comes at the expense of incompleteness—numerous cases possess only a portion of valuable factual information.[61] Of course, teachers who use this book can add supplemental material. They may find it difficult, however, to supply the cogent facts that provide real-life interest to case discussion. Moreover, the time used to determine whether the facts should be supplemented carries an opportunity cost.

A related, yet distinct, point concerns the comprehensive problems that the authors pose throughout *State and Federal Administrative Law*. In addition to being well-drafted, the problems raise significant issues and policies, and emphasize appropriate points made by the cases, notes and legislation.[62] Many of these problems call for a "three-tier" discussion involving the APA, the Model Act

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61 To illustrate, in Hewitt v. Helms, 459 U.S. 460 (1983), readers might better understand the court-imposed "administrative segregation" if the authors supplied more facts rather than the bland prison "uprising" in which "several guards were injured." A. BONFIELD & M. ASIMOW, *supra* note 5, at 47, 77. In fact, inmates attacked prison guards with table legs, flashlights and barbells; one guard reported a broken jaw and teeth, while another "received a broken nose, and another a broken thumb. . . . Violence erupted into a riot during which[ ] a group of prisoners attempted to seize the institutions 'control center.' " *Hewitt*, 459 U.S. at 463.

Bonfield & Asimow's editing of the non-factual portions of decisions also is occasionally frustrating. For example, the editing of United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973), omits "shall" language from legislation mandating the Interstate Commerce Commission to consider various factors. A. BONFIELD & M. ASIMOW, *supra* note 5, at 307; *see* 410 U.S. at 225-26 n.I (quoting section 1(I4)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a) (1970)). These words seem important to Justice Rehnquist's statutory construction style of analysis. In the same case, the authors also probably omit the most important and questionable sentence of the opinion in which Justice Rehnquist suggests that the terms " 'on the record' and 'after . . . hearing' used in § 553 were not words of art, and that other statutory language having the same meaning could trigger the provisions of §§ 556 and 557 in rulemaking proceedings." *Id.* at 238. This critical sentence reveals the Court's flexibility about the words that can trigger protections under section 553(c) of the APA. At the same time, the Court seems to iguore the mandatory "shall" language used in section 1(I4)(a) of the Interstate Commerce Act. Students who use Bonfield and Asimow's version of *Florida East Coast*, therefore, cannot readily grasp the significance of the case and its inflexibility regarding triggering words needed to call for formal rulemaking.

62 For succinct and thoughtful discussions of the virtues of the problem method, see David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449 (1943); Kenneth Culp Davis, *The Text-Problem Form of the Case Method as a Means of Mind Training*

or the Constitution, and administrative common law. In order to cover the APA and the Model Act, the authors include short problems raising fewer factual and regulatory policy issues. Nearly every problem ends with a "See" reference to a related case or, occasionally, an article. Some of the case references represent decisions with a similar factual base. These decisions, however, do not necessarily provide optimal legal solutions to the problems presented.

Some users may find these problems too unrealistic. A competing textbook contains problems that are much longer and more factually complex.[63] One commentator concluded that "lengthy problem statements accurately reflect the complexity of administrative law problems, especially when federal regulatory issues are included, so that many of the problem statements would be misleading and unrealistic if they were boiled down to a one-page statement."[64] Yet, shorter problems are consistent with the authors' desire for a casebook of manageable length. Moreover, by keeping their problems factually simple, Bonfield and Asmiow redirect the students' energies toward solutions of multi-issue legal questions generally involving both the Model Act and the A.P.A. Additional facts may well have made these problems unworkable. The brevity of the problems, however, may lull students and professors into believing that their analysis can be correspondingly brief. Some of the more complex problems, on the contrary, merit lengthy classroom discussions. Professors will welcome the painstakingly thorough discussions of the problems in the detailed Teacher's Manual accompanying the casebook.[65]

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for Advanced Law Students, 12 J. LEGAL EDUC. 543 (1960); Quintin Johnstone, *Student Discontent and Educational Reform in the Law Schools*, 23 J. LEGAL EDUC. 255, 264-70 (1971).

63 *See* PETER L. STRAUSS & PAUL R. VERKUIL, ADMINISTRATIVE LAW PROBLEMS (1983), for use with WALTER GELLHORN, CLARK BYSE & PETER L. STRAUSS, ADMINISTRATIVE LAW: CASES AND COMMENTS (7th ed. 1979).

64 Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 667 (1984). Ogden defends longer administrative law problems by reasoning that the multi-issue nature of the course requires problems of sufficient length. He states that administrative law casebooks and problems necessarily raise "a variety of common law, constitutional, statutory, regulation, and policy issues that are not easily pigeonholed." *Id.* (footnote omitted).

65 One problem covering the unavoidable relationship between *ex parte* contacts and the need for a decision on an exclusive record exemplifies how Bonfield and Asimow present brief, yet demanding, three-tier problems. Following Professional Air Traffic Controllers Org. (PATCO) v. Federal Labor Relations Auth., 685 F.2d 547 (D.C. Cir. 1982), Bonfield and Asimow pose the problem of a locally elected mountain board of supervisors hearing a petition to rezone rural land adjacent to a park for residential use. A. BONFIELD & M. ASIMOW, *supra* note 5, at 174-75. As was true with the main PATCO case, the applicant, Martha, is a friend of one of the supervisors, Sarah. Martha asks Sarah to dinner and explains the need for rezoning. Later, Martha's land purchaser, a developing company, contributes to Sarah's reelection campaign. Students are

Another nitpick pertains to Chapter 8, "Freedom of Information and Other Open Government Laws."[66] This relatively short, twenty-six page chapter focuses on the Freedom of Information Act ("FOIA"). Like most administrative law casebooks, the limited space devoted to this topic barely scratches the surface of a huge and unwieldy statutory scheme.[67] The authors' treatment here is too sketchy and out of character with the "hands-on" approach of the rest of the book. Following the high quality textual material that outlines the basics of the FOIA, the casebook offers only two cases on FOIA exemptions, *NLRB v. Sears, Roebuck & Co.*[68] and *Chrysler Corp. v. Brown.*[69] These materials convey a sense of the FOIA's technical constructions, but fail to do much more than that. In fact, the cases cover only two of the nine FOIA exemptions. Like many other administrative law materials, the authors' decision to ignore large pieces of FOIA reflects the inherent unmanageability of the topic. It is particularly surprising that the authors of *State and Federal Administrative Law* opt for in-depth coverage of exemptions from notice and comment rulemaking, yet skim over most of the FOIA exemptions.

State and Federal Administrative Law also contains material on numerous issues largely ignored by its competitor casebooks. In addition to including state materials, its detailed coverage of rulemaking, and its discussion of rulemaking exceptions, the casebook covers other subjects that are not ordinarily emphasized. Specifically, the authors wisely include a section on the *res judicata* impact of administrative adjudications.[70] Questions of claim and is-

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asked if a petition to rezone, in which Supervisor Sarah is participating, can be set aside by a reviewing court. Since the Model Act does not apply to local decisions of this nature, the problem presents a constitutional due process issue. Students consider whether procedural due process can apply to the discretionary legal standards involved in rezoning. *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976). The authors then suggest analysis under section 4-213 of the 1981 Model Act, which calls for disclosure of prehearing contacts, and analysis under section 557(d) of the APA. The problem presents the dilemma of whether a rule prohibiting *ex parte* contacts with members of an elected board who must decide a hot political issue of great local significance is pragmatically feasible.

66 A. BONFIELD & M. ASIMOW, *supra* note 5, at 536.

67 For an exception to the usually brief treatment of the FOIA, see W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, *supra* note 10 (richly footnoted but relatively succinct 51-page casebook coverage of FOIA).

68 421 U.S. 132 (1975).

69 441 U.S. 281 (1979).

70 A. BONFIELD & M. ASIMOW, *supra* note 5, at 227-34. This section's crisp case and note materials present University of Tennessee v. Elliot, 478 U.S. 788 (1986) (giving preclusive impact to a 42 U.S.C. § 1983 claim but refusing to allow preclusion on a companion claim brought under Title VII of the Civil Rights Act), and raise the related policy issue of agency non-acquiescence, the practice of an agency intentionally ignoring existing law. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986); Joshua I.

sue preclusion increasingly arise in court suits following administrative adjudications.[71] Further, the authors cover a related set of materials that address whether courts should require agencies to be consistent.[72]

Conversely, *State and Federal Administrative Law* devotes scant attention to the current development of alternate dispute resolution ("ADR") in administrative agencies. True, the authors give readers useful materials on regulatory negotiation, the creative process that allows affected interest groups to negotiate rules.[73] Nevertheless, rather than highlighting agency ADR as a distinct section in the text, the authors place this material within the section on initiating rulemaking proceedings.[74] Similarly, the authors' organizational choice apparently led them to omit references to equally important developments in mediation and arbitration of agency adjudicatory disputes. The 1980s witnessed a dramatic surge in interest regarding agency experimentation with ADR.[75] Indeed, some agencies

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Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989).

71 *See, e.g.*, United States v. Mendoza, 464 U.S. 154 (1984) (refusing to apply nonmutual issue preclusion to prevent litigation of an issue of law); Zanghi v. Incorporated Village of Old Brookville, 752 F.2d 42 (2d Cir. 1985) (applying issue preclusion to bar false arrest case following earlier agency determination that a defendant-village employee had reasonable grounds to arrest); Lopez v. Heckler, 725 F.2d 1489 (9th Cir.) (allowing preclusion and distinguishing *Mendoza*), *cert. granted and judg. vacated* 469 U.S. 1082 (1984); Losey v. Roberts, 677 F. Supp. 101 (N.D.N.Y. 1986) (applying preclusion after earlier unemployment compensation adjudication to bar a later claim for unemployment benefits); Langdon v. WEN Management Co., 537 N.Y.S.2d 603 (App. Div. 1989) (applying issue preclusion to bar civil case following earlier workers' compensation determination); A. Leo Leven & Susan M. Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113 (1984) (critical of systematic relitigation by government).

72 A. BONFIELD & M. ASIMOW, *supra* note 5, at 234-37 (presenting International Union, United Auto. Workers of America v. NLRB, 802 F.2d 969 (7th Cir. 1986), where Judge Posner allows the NLRB to ignore existing precedents only if it provided an explanation for an apparent inconsistency). The consistency issue looms large within the Internal Revenue Service. *See* Deborah Geier, *The Emasculated Role of Judicial Precedent in the Tax Court and the Internal Revenue Service*, 39 OKLA. L. REV. 427 (1986); Lawrence Zelenak, *Should Courts Require the IRS to Be Consistent?*, 40 TAX L. REV. 411 (1985).

73 A. BONFIELD & M. ASIMOW, *supra* note 5, at 286-91 (summarizing 1985 Administrative Conference Recommendation on regnlatory negotiation, *Procedures for Negotiating Proposed Regulations*, 1 C.F.R. § 305.85-5 (1988), and then providing readers with contradictory views for and against regulatory negotiation in excerpts from Henry H. Perritt, *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471 (1986) (stressing positive features of negotiated rulemaking) and William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987) (observing that regnlatory negotiation can obscure and even pervert the public interest)).

74 A. BONFIELD & M. ASIMOW, *supra* note 5, at 286 (presenting regulatory negotiation materials in part of a section entitled "Initiating Rulemaking Proceedings" and within a subsection labeled "Formulation of Proposed Rules").

75 *See, e.g.*, Savage v. CIA, 826 F.2d 561 (7th Cir. 1987) (Judge Posner's recommendation that disputes centering on fee waivers under FOIA be subject to binding arbitra-

looked to ADR as a means of reducing serious backlogs in adjudications.[76] During this period, a corresponding increase in criticism of agency ADR arose.[77] In the rush to settle adjudications, agencies may bargain away the public values that underlie specific statutory schemes.[78] Thus, agency mediations can produce results at odds with legislative intent. Moreover, these mediation results may thwart the significant guidance function of published substantive laws that require regulated firms to obey clear and consistently prosecuted norms.[79] It seems paradoxical that the latest casebook in the

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tion); ADMINISTRATIVE CONFERENCE OF THE U.S. SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATE MEANS OF DISPUTE RESOLUTION 701-860 (1987) (listing and describing increasing agency use of ADR); Administrative Conference Recommendation 86-3:1 C.F.R. § 305.86-3 (1988) (recommendation that federal agencies adopt ADR methods); GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES (1986) (studying 161 cases of ADR environmental conflicts and encouraging greater usage to improve the quality of dispute resolution); Phillip J. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L.J. 141 (1987) (urging expanded use of alternative dispute resolution in administrative agencies); Richard Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?*, 18 ENVTL. L. REP. 10,098 (1988) (cataloging and lauding EPA efforts to employ ADR techniques).

76 *See* Mays, *supra* note 75 (expressing need to reduce EPA backlog by use of ADR techniques).

77 *See, e.g.*, Harold Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441 (1989) (raising constitutional problems with various federal arbitral programs and offering suggested restructuring to minimize these problems); Edward Brunet, *The Costs of Environmental Alternative Dispute Resolution*, 18 ENVTL. L. REP. 10,515 (1988) (showing how compromise adjudication results are inconsistent with substantive law); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 671-72 (1986) (criticizing governmental encouragement of compromises when public interest issues are involved); David Shoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y.U. L. REV. 1453 (1983) (questioning results reached by mediation of environmental conflict).

78 *See, e.g.*, Edwards, *supra* note 77; Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("[S]ettlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."); F.A. Mann, *Private Arbitration and Public Policy*, 4 CIV. JUST. Q. 257, 267 (1985) (demanding that private arbitral awards be reviewed by courts, "not only to develop the law, but also to ensure the administration of justice and thus to avoid the risk of arbitrariness"); Richard E. Speidel, *Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. DIS. RES. 157 (1989) (critical of results reached by arbitration where clear statutory mandates exist).

79 *See* LON L. FULLER, THE MORALITY OF LAW 39, 49-51, 63-65 (2d ed. 1969) (emphasizing the legal system's need to inform "the affected party [of] the rules he is expected to observe," describing this process as a need for "education" about law, and stressing clarity in legal regulation as "one of the most essential ingredients of legality"); Edward Brnnet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 55 (1987) (outcomes reached by mediation and arbitration may ignore substantive law and undercut the "crucial guidance function of positive law"). In short, an agency program of mediating compromise can lead to results that are different from published sanctions. Over time, these results may diminish the essential self-policing characteristic of law that is essential to the resource-short modern administrative agency. ADR, "like plea bargaining, . . . elevates dispute termination above compliance with the purposefully crafted standards that constitute positive law." Brunet, *supra*, at 24. For an analogous criticism of criminal plea bargaining, see Albert W. Alschuler, *Implementing the Criminal Defendants Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L.

ADR field contains a comprehensive discussion of administrative agency ADR,[80] while the newest administrative law casebook devotes only minimal attention to this controversial but growing development.

CONCLUSION

Administrative law should benefit from *State and Federal Administrative Law*'s shift in thinking. That state statutes, rules and case law can be an important source of innovation in this field makes intuitive sense. The casebook's emphasis on legislative solutions based on the Model Act gives this body of law a different tone—the legislature and the agency, not the courts, dominate. Similarly, the focus on agency action through rulemaking and agency adjudication, and the correspondingly brief treatment of judicial review, reflect a recognition that the primary source of administrative law should be outside the court system. These themes characterize Bonfield and Asimow's book and present a unique treatment of a core curriculum course that is still seeking its identity.

REV. 931, 933-34 (1983) ("[P]lea bargaining perverts both the initial prosecutorial formulation of criminal charges" and has undercut the goals of legal doctrines").

80 *See* JOHN S. MURRAY, ALAN SCOTT RAU & EDWARD F. SHERMAN, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 688-701 (1989) (highlighting agency dispute resolution and emphasizing alternatives to the traditional adjudication model).