Integrating Theory With Practice

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INTEGRATING THEORY WITH PRACTICE

by Robert C. Power

I. INTRODUCTION

Administrative law may not continually reinvent itself, but we teachers reconceptualize the subject with some regularity. The reason may be that there is no such thing as administrative law, that it is just a false organizing principle propagated by deans and textbook publishers unwilling to support each of the separate disciplines taught under this heading. The reason may also be that it is a new discipline, only now undergoing the identity search other fields suffered earlier this century. Or it just may be that administrative law professors as a group are particularly self-absorbed. In any event, I hope we can take administrative law seriously without taking ourselves too seriously.

The most difficult thing about teaching administrative law is
that students tend to treat it as the public law equivalent of the Rule against Perpetuities. When students give nicknames to their courses, "Ad Law" is frequently called "Bad Law." There are a number of reasons for this. One is simply that the traditional format is somewhat dry; another is that we try to cover too much in too little time. In any event, the course is simply too important to leave as it is. Professor Sargentich makes a number of suggestions relating to the need to address theoretical problems in the basic course, and I wholeheartedly agree. My first suggestion, however, is a curricular one. Limit enrollment in Administrative Law to those students who have already taken the course. At least there would be fewer complaints.

Since there may be other possibilities for reform, I will look at Professor Sargentich's two examples—deference and statutory interpretation—for what they reveal is missing from the traditional Administrative Law course. Next, I will discuss the procedural focus of the course. Finally, I will make a few comments on restructuring Administrative Law around problems that students readily understand.

II. DEFERENCE

The controversy over judicial deference to administrative constructions of authorizing statutes illustrates one of the primary difficulties of teaching Administrative Law. The basic issue, the separation of powers, is a notoriously slippery topic, one that most law students, and I suspect most practitioners, have trouble relating to their day-to-day work. Administrative law often seems as remote as the Rule in Shelley's Case.2 We know, of course, that

2 1 Co. Rep. 93b, 76 Eng. Rep. 206 (1581). Someone has told me that the Rule in Shelley's Case has the effect of converting a life estate followed by a remainder in the owner of the life estate's heirs into a life estate followed by a remainder in the owner of the life estate. Then, as a result of the doctrine of merger (like "incorporation," this doctrine is mysteriously not a part of Business Organizations Law), the two estates become a fee simple in the (now former) owner of the life estate. WARNING. Do not rely on this description for any purpose. Now, doesn't that put all of our griping about the terrors of teaching separation of powers into perspective?
highly technical separation of powers issues have animated the legal aspects of events from Watergate to the budget crisis to the Gulf War; most of our students do not, and they are the ones who count.

The problem is further aggravated because the separation of powers aspects of cases such as *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* cannot be neatly defined. As Professor Sargentich points out, *Chevron* involved a challenge to the Environmental Protection Agency’s (EPA) "Bubble Policy"—a regulation based on the agency’s interpretation of the phrase "stationary source" in the Clean Air Act. The Supreme Court deferred to the EPA’s interpretation and upheld the regulation. More importantly, the Court directed federal courts to defer to reasonable administrative interpretations in all situations in which the underlying statute is silent or its language is ambiguous.

If the issue resolved in *Chevron* was which branch decides certain questions of law, as the holding may suggest, then *Chevron* was a remarkable decision, silently overruling *Marbury v. Madison*, among other cases. I suspect that was not the Court’s intention. Only one year earlier, in fact, the Court was far less deferential in an area in which it had usually granted great deference in the past. This was *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, in which the Court unanimously overturned the National Highway Traffic Safety Commission’s rescission of the passive restraint regulations. The Commission had flip-flopped on these regulations for a number of years, finally concluding in 1981 that requiring automatic seatbelts or airbags would not be cost effective. The Supreme Court

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5 40 C.F.R. § 51.18(j) (i) and (ii) (1983).
7 *Chevron*, 467 U.S. at 842-45.
8 5 U.S. (1 Cranch) 137 (1803).
10 The Court described the administrative process in this matter as "complex
applied the appropriate statute and reviewed the Commission's decision under the arbitrary and capricious standard. Prior to State Farm, the Court sometimes characterized that standard as requiring only a rational basis for the agency's decision, an exceptionally deferential approach.\textsuperscript{11} In some settings, at least, the rational basis test is almost a judicial rubber stamp, satisfied by a scintilla of support, either in the record or someone's—anyone’s—imagination. The Court chose, however, to rewrite the arbitrary and capricious standard and to give it some teeth. This new version, cited about as often as \textit{Chevron}, sharply limits judicial deference and imposes substantive and procedural requirements on agency reasoning.\textsuperscript{12}

and convoluted.\textsuperscript{11} \textit{Id.} at 34. It then set out the regulatory history, \textit{id.} at 34-38, which culminated in the rescission of the requirement that automobiles be equipped with airbags or automatic seatbelts, Notice 25, 46 Fed. Reg. 53,419 (1981).

\textsuperscript{11} Two pre-APA cases that set the tone for this extreme deference are Gray v. Powell, 314 U.S. 402 (1941), and Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935). In Gray, the Court foreshadowed \textit{Chevron} by deferring to a reasonable administrative interpretation of statutory language. 314 U.S. at 411-12. In Pacific States, the Court applied the almost non-existent rational basis standard applicable to substantive due process challenges to economic legislation. 296 U.S. at 185-86. The Court quoted the following:

"'[I]f any state of facts reasonably can be conceived that would sustain [the decision], there is a presumption of the existence of that state of facts, and one who assails [that decision] must carry the burden of showing . . . that the action is arbitrary.'"

\textit{Id.} at 185 (quoting Borden's Farm Prods. v. Baldwin, 293 U.S. 194, 209 (1934)). Government attorneys continued to urge use of the rational basis test, as applied in these cases, in judicial review of federal administrative decisions, until \textit{State Farm} was decided in 1983.

\textsuperscript{12} The Court artfully suggested that its decision broke no new ground, characterizing the judicial task as follows:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. \textit{State Farm}, 463 U.S. at 43. Any greater discussion of \textit{State Farm} is beyond the scope of this paper, but two points stand out. The traditional "rational basis"
It is reasonable to suspect that the Court's sharply different rulings in *Chevron* and *State Farm* reflect the absence of any cosmic view of the relative powers of courts and agencies in the policymaking/lawmaking spectrum. Decisions since *Chevron* also suggest that the case is weaker than its language suggests. In fact, the Court has simply ignored it in any number of cases in which it would seem to be applicable. That is not the sign of a successful case. On balance, *Chevron* is just one more case that seems to say more than the Court intended. But if one were to put two Administrative Law teachers together in a room without a television or a pinball machine, they would argue about *Chevron*. The case is not coherent, but it provides a good vehicle for classroom discussion.

The fact that even the Supreme Court ignores *Chevron* when it pleases reveals at least one truth about the Supreme Court's separation of powers jurisprudence: it is much more a series of essays on government than applications of legal doctrine. Justice White's dissenting opinions in the series of major separation of powers cases in the mid-1980's reveal the extent to which each Justice is forced to rely more on gut instinct than on the niceties of constitutional interpretation or precedent. This suggests that separation of powers is largely a matter of mood, and on the aspect of the test appears only in the "so implausible" portion of the Court's statement. Judicial review is potentially quite intrusive, given the open-ended nature of the "relied on," "failed to consider," and "runs counter to the evidence" portions of the statement.

I take issue with only one minor part of Professor Sargentich's analysis of *Chevron*. He concludes that the case is subject to criticism even though the courts do not always follow it. Sargentich, *supra* note 4, at 166-67. I think that this actually makes the matter worse. If the Supreme Court were forced to confront *Chevron* 's implications in all arguably pertinent cases, it would probably trim the *Chevron* doctrine to remove some of these implications. Even if it did not, lawyers would at least be able to predict the judicial treatment of agency interpretations, and Congress would have an incentive to minimize *Chevron* 's impact by drafting legislation with greater care.

Supreme Court that mood swings between abstract theorizing and pragmatic problem-solving. The law, if that is what actually comes out of these cases, is more in the nature of "feelings" than "holdings." This is hard sledding for law professors, and it is hard to communicate to second year students in the typical classroom setting. Recently freed from the overt judicial lawmaking of the common law taught in their first year courses, they are not yet ready for the fun-house mirrors that we call the scope of judicial review of administrative decisionmaking, and they do not yet have the confidence to stop looking for rules that do not exist.

III. PUBLIC CHOICE

Professor Sargentich's discussion of statutory interpretation\textsuperscript{15} raises additional issues central to the content of the Administrative Law course. It is remarkable how little attention our profession has given to the question of how administrative decisions are made, except to the extent that the answer involves the rudiments of the Administrative Procedure Act (APA)\textsuperscript{16} or due process procedures. It is probably correct to attribute that deficiency to the long-standing assumption that legislatures and agencies march in step to serve a unified vision of the public interest. That assumption no longer exists. We can thank the public choice theorists for forcing us to reconsider our assumptions, even if we deny their assumption that self interest governs virtually all decisionmaking.\textsuperscript{17}

One intriguing aspect of public choice scholarship is its focus

\textsuperscript{15} Sargentich, \textit{supra} note 4, at 171-80.


\textsuperscript{17} Professor Sargentich's reference to arguments by Steven Kelman and others concerning the existence of true public servants is telling. See \textit{Steven Kelman, Making Public Policy} 233-45 (1987); Sargentich, \textit{supra} note 4, at 177. Every one of us must know people in government—even legislators!—who act based on principles at least some of the time. The logical public choice response would be that the personal gain in self-esteem (etc.) from "doing the right thing" outweighs the personal disadvantages resulting from the decision and therefore constitutes a selfish decision. Taking the "selfish bargaining" line to that point, however, undercuts the utility of the analysis. It is no great discovery to prove that decision-makers balance pros and cons that can be restated in such personal terms.
on legislative decisionmaking. In fact, most of the lessons drawn
by public choice theorists are as applicable to courts and
administrative agencies as they are to legislative bodies. With
respect to courts, some of those lessons help to explain the
development of incoherent doctrines\textsuperscript{18} such as deference under
\textit{Chevron} and \textit{State Farm}. With respect to agencies, some of those
lessons expose a fundamental weakness of the traditional
Administrative Law course—our failure to confront the impact of
the ideology of administrative decisionmakers.

Throughout the period in which the public interest paradigm
dominated administrative law discourse, most agency decision
makers were committed to their agency’s public purpose. As
Robert Kagan points out in his analysis of the wage-price freeze of
the early 1970’s, agencies are assigned a "mission" that is
"justified in terms of a categorical ethical principle."\textsuperscript{19} The word
"mission" connotes zeal, and agency officials at most levels of
authority shared and pursued with zeal a vision of the public
interest that required aggressive enforcement of their agency’s
enabling act.\textsuperscript{20} That is, officials of the SEC \textit{believed} in stock
market regulation, officials of the FCC \textit{believed} in broadcast
regulation, and so on.

That construct changed in 1981, when President Reagan
appointed officials generally hostile to government regulation,
thereby reversing this dynamic on the federal level. His appointees
have now had ten years to burrow into the bureaucracy and—of
equal or even greater importance—ten years to determine which
career employees would be promoted to policymaking positions.
In short, the young Republicans of the college campuses of the
1970’s now dominate policymaking at the federal level.

The Administrative Law course and administrative law
scholarship tend to overlook this significant fact. Ironically, our
students do not. Michael Fitts of the University of Pennsylvania
Law School discovered to his chagrin a few years ago that his

\footnotesize{\textsuperscript{18} See, \textit{e.g.}, Frank H. Easterbrook, \textit{Ways of Criticizing the Court}, 95 HARV.
L. REV. 802 (1982) (relying on public choice theory to explain that inconsistent
decisions are inherent in the nature of the appellate judicial process).

\textsuperscript{19} ROBERT A. KAGAN, \textit{REGULATORY JUSTICE} 9 (1978).

\textsuperscript{20} \textit{Id.} at 165-82.}
students believed him to be an arch-conservative. They had inferred this from the fact that he favors broad discretion for administrative agencies. 21 Before the 1980's, even during Republican administrations, his attitude would be perceived as reflecting an activist, pro-regulation mindset. But things are different today. As long as the nation continues to elect Republican presidents and Democratic congresses, it is likely that federal agencies will continue to impose policies associated with the Republican right rather than the public purposes espoused by the Congress that enacts the underlying legislation. 22 Broad interpretation of administrative authority no longer means aggressive enforcement of environmental and other consumer-oriented statutes. Instead, it means more cases like Rust v. Sullivan 23 — last year’s abortion speech case—which is ultimately about the authority of agency officials to expand upon the specifics of statutory delegations. In all, the recasting of federal agencies has changed administrative law more than any ten Chevrons, but it has received very little attention in legal scholarship.

IV. AN ADMINISTRATIVE PROCEDURE COURSE?

It should be obvious from what I have said that I do not favor treating the Administrative Law course as a purely "nuts and bolts" romp through the APA and the common law of administrative practice. Still, much of administrative law is procedure. 24 It is

21 Comments of Prof. Michael A. Fitts, Tape 6, Interpreting Statutes, AALS Workshop on Administrative Law (June 22 and 23, 1990).

22 President Reagan’s Executive Order 12291, 46 Fed. Reg. 13,193 (1981), also helped to centralize regulatory decision-making under the White House control. This has underscored the new reality of administrative law as a vehicle for executing administrative policy rather than congressional policy.

23 111 S. Ct. 1759 (1991). One aspect of Rust reveals the manipulability of the Supreme Court’s scope of review cases. The majority relied on both Chevron and State Farm with respect to the deference courts owe to administrative interpretations. Id. at 1769. Justice Blackmun’s dissent un成功fully relied on recent Chevron scholarship to argue against deference. Id. at 1780.

24 The notion of administrative law as only procedure reminds me that my colleague, Alexander Meiklejohn of the Bridgeport School of Law, always refers
incumbent on us to teach—and our students to learn—that the APA exists, that notice and comment rulemaking is the most common form of adopting regulations, that agencies follow trial-type procedures in resolving some disputes, but only very informal procedures in other matters, and so on.

Teaching just those topics, however, is like teaching Constitutional Law by discussing only a single Supreme Court case on each issue. Such coverage has no bite, no context, no sense of the extent to which law is governed by the moods of lawmakers and judges. In short, it lacks the content that Professor Sargentich suggests we need. The procedure-only approach makes administrative law appear to be a series of blueprints for building a government decision. It masks both the normative content of those procedures and some profound disagreements about the nature of administrative decisionmaking.

Perhaps a more fitting explanation for the need to supplement the procedural content of the course with broader perspectives is revealed by this story. In my first year of teaching I had dinner with a number of attorneys from the General Counsel’s office of the Department of Energy, my previous employer. They were interested in hearing about how I taught Administrative Law, and I described the course in detail. Finally, one broke in to say, "I hope you tell your students that no one really follows the APA. Someone makes a policy decision, and we call it a proposal and then go through the motions." She could have gone on to add:

Then we announce the earlier decision as the agency’s final decision, reached only after careful consideration of all the information submitted. Then we write an elaborate explanation of how the public comments convinced us to

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to the course as "mere adjectival law." It is impossible to replicate on paper the disdainful sound of Sandy’s "mere."

Administrative law as procedural law also suggests Grant Gilmore’s comment, "The worse the society, the more law there will be. In hell there will be nothing but law, and due process will be meticulously observed." GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977). The metaphor is best understood by persons who have dealt with bureaucracy, which is one reason that teaching the course to students with extensive work experience is particularly rewarding.
reach a decision that in fact we reached months before the public ever heard of the matter.

This cynical view of agency behavior may be exaggerated, but it is not entirely false. While our students need to learn APA procedures, they need even more to learn that those procedures are not the entirety of administrative law.

V. TEACHING ADMINISTRATIVE LAW

How can we do a credible job of teaching Administrative Law? Perhaps a better question is, why isn't the course required? Professor Sargentich accurately describes this era as the "Bureaucratic Age," and notes that agencies are far more active than other parts of government. An understanding of administrative law, more than any other subject, is of paramount importance in legal practice. The reasons are simple: there are more disputes resolved in agencies than in courts; there are more regulations than statutes; there are even more bureaucrats than lawyers. Most attorneys regularly practice administrative law, even if they don't realize it, whether they are tax lawyers jousting with the IRS, real estate lawyers seeking variances from zoning boards, or even criminal lawyers seeking parole for incarcerated clients.

If Christopher Columbus Langdell were setting up the legal curriculum for the ages in the 1970's rather than in the 1870's, I have no doubt that administrative law would be a central part of the first year of law school.

I don't think that is likely to happen. But in a school with so many upperclass requirements, it is problematic that we do not

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25 Sargentich, supra note 4, at 148.

26 Some of my colleagues accuse me of exaggeration. I don't think so. Langdell would have to see administrative law as central to the modern legal system in the way that judicial enforcement of private rights was central to late 19th century legal life. Of course, the Langdellian vision of administrative law might be very different from those of educators and officials schooled by the Realists or their (various) progeny.

27 After completing the traditional first-year requirements, Widener students must take courses in Business Organizations (4 credits), Commercial Transactions (3 credits), Constitutional Law (4 credits), Evidence (3 credits), Federal Income Taxation (3 credits), and Professional Responsibility (2 credits).
require the course. The message we send by not requiring the
course is that all of the upperclass required courses are more
important than Administrative Law. Yet, if content and usefulness
in practice are at all relevant, Administrative Law is as important
as any other course we teach. If there were no upperclass
requirements at all, at least we would be neutral about the
importance of Administrative Law.

My solution to the need for additional coverage is not simply
to slap an extra hour onto the basic course. At a minimum, we
need to put thought into sequencing, even if the only result is to
convince more students to take the course in the second rather than
the third year. We should also be more ambitious and follow
schools such as Columbia and Georgetown and restructure our
public law offerings, another matter already under consideration by
the Curriculum Committee. Another possibility is to emulate
George Mason and offer "track programs," one of them an
administrative law specialty. After all, one of the professed aims
of the Harrisburg Campus is to emphasize public sector law. We
can and should maintain the unified curriculum that serves both
campuses. A track program would be consistent, however, with
our professed aim of developing an administrative law expertise in
Harrisburg to match our corporate and health law programs in
Wilmington.

Nevertheless, we should not be surprised if we do not
adequately teach the administrative law of the 1980's until the year
2000. As historian Robert Stevens has pointed out, Constitutional
Law was not widely treated as a foundational course until the
1930's. Administrative Law is still trying to find its place.

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28 COLUM. LAW SCHOOL, THE JURIS DOCTOR PROGRAM 27-29 (law school
29 GEORGE MASON UNIV. SCHOOL OF LAW ADMISSIONS PROSPECTUS 5, 22-
30 Robert Stevens, Where's the Judicial Fun?, N.Y. TIMES, July 21, 1991,
§ 7, at 20 (reviewing DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME
COURT, THE SECOND CENTURY 1888-1986). Elsewhere, Stevens has noted that
Administrative Law was first taught at Columbia University in 1892 and the
University of Chicago in 1902, and moved to the LL.B. programs at Yale
University in 1918 and Harvard University in 1941. ROBERT STEVENS, LAW
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VI. THE CONTENT OF THE COURSE

One thing we can and should do now is to integrate our discussions of the theory, procedure, and forms of administrative decisionmaking—and do so in the context of settings that are readily understandable by law students who have never grappled with governmental bureaucracy. That last part is key. The difficulty of relating to administrative law has nothing to do with our students as opposed to students elsewhere. The problem exists for anyone who has not lived or worked outside of home or school.

An ongoing controversy provides a good vehicle to raise issues from administrative law without losing our students. You have all heard, I suspect, of California’s snack tax—the law that doesn’t tax cheese because it is food and doesn’t tax crackers because they are food, but taxes something called "crackers with cheese" because it is a snack. That particular determination was an administrative interpretation by the California Board of Equalization.\(^{31}\) It was similar in kind to the EPA’s Bubble Policy, which led to the *Chevron* decision.

The enactment and implementation of the snack tax provides Administrative Law teachers with an opportunity to examine issues from throughout the course. For example, how did the California legislature decide to tax snacks? The decision to exempt "food" from the tax can perhaps be seen as a classical public interest decision not to increase the cost of necessary purchases. Public choice theorists, however, may suspect that the snack food industry was not sufficiently attentive to the state legislature’s self interest in campaign contributions, or that snack consumers are too diffuse to constitute an effective interest group. Another problem relates to the fact that the California legislature largely avoided the political fallout by delegating most of the hard decisions to the

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(1983). Oddly enough, a number of schools included Administrative Law in the first year curriculum in the 1930's and 1940's, *id.*, a movement that may be beginning anew.

\(^{31}\) All serious references to the snack tax (and some other references as well) are drawn from Katherine Bishop, *California Tax Text: Is it Snack or Food?*, N.Y. TIMES, Aug. 3, 1991, § 1, at 1, col. 2, and 7, col. 4.
agency. Our students can relate to the facts and context of this decision much more than they can to the broad statutory delegations of the New Deal legislation. Arguably, the snack tax provides a better setting than either the "hot oil" case\textsuperscript{32} or the "sick chicken" case\textsuperscript{33} for discussing the policies underlying the delegation doctrine.

We could then use the snack tax to examine the administrative decisionmaking process. It appears that the Board of Equalization is taking its job seriously and is conducting methodical fact-findings. Auditors are studying eating habits, advertising practices, and shelving practices; they are recording contents, weight, and packaging claims, and even eating the products in question, all in the attempt to decide which items we eat are food and which are snacks.

The Board could have taken a number of different approaches to classifying products. For example, assume that the agency's policymakers chose to act in a nutritionally correct manner (remember, this is California).\textsuperscript{34} If so, they would probably have decided that the underlying purpose of the legislation was to encourage healthy eating. Is this a moral question, a scientific question, or something else entirely? And are revenue agents the proper people to answer the question? A nutritionally correct approach should please at least some economic analysts. Even if they would have qualms about relying on an alleged public purpose to construe a statute, they would nonetheless like some things about such a policy. For example, transaction costs would be imposed on conduct likely to lead to increased public burdens. Examples would include increased health costs and excessive sick leave for persons with such anti-social habits as eating Twinkies.

As it happens, there is substantial support for something called the "plate test." If the item is normally eaten from a dish or plate, it is treated as food and tax-exempt; if it is eaten in the hands, however, it is treated as a snack and taxed. While this test may work for many items, some anomalies would exist. Granola bars

\begin{itemize}
\item \textsuperscript{32} Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).
\item \textsuperscript{33} A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
\item \textsuperscript{34} This is very unfair. In reality, the Board of Equalization has adamantly opposed "nutritional paternalism." Bishop, supra note 31, at 7, col. 6.
\end{itemize}
would be snacks, while granola cereal would be food. Apples
would be snacks, while hot fudge sundaes would be food. The
Board itself seems to recognize the hopelessness of its task. The
chairman recently admitted, "We cannot make this tax rational." 35

Well, they had better make it rational enough to withstand
judicial review. Let's assume that the board applies this approach
across the board and taxes granola bars. On judicial review, the
court's attitude toward statutory interpretation could be critical. A
Chevron-oriented court would defer, concluding that the statutory
language does not address the precise issue, and that the Board's
interpretation is reasonable. A process-oriented court, such as the
Supreme Court that decided the State Farm case, however, might
very well remand the decision because the board had not
considered all of the relevant factors in rendering its decision. And
an aggressive court, such as the D.C. Circuit of the 1970's or the
present New Jersey Supreme Court, would probably define the
terms "food" and "snack" for itself—perhaps using the only
workable test, the one that treats as a snack anything that a
teenager is willing to eat.

VII. CONCLUSION

I'm not sure what's going to happen to the California snack
tax. But I am fairly sure that if we are going to teach the theory
of administrative law in an effective fashion, we are going to have
to design materials that bring together issues now usually
considered in isolation, and present them in user-friendly factual
settings.

I don't necessarily predict that we will, however. Mindful of
the dangers of prognostication to which Professor Sargentich
alluded in his talk, I predict only that law schools will still teach
Administrative Law in the twenty-first century.

35 See Bishop, supra note 31, at 1, col. 2.