Welcome
to Administrative Law. Our textbook is Gary Lawson, Federal Administrative Law (6th ed. 2012; ISBN 978-0-314-28200-2). All other materials are (or will be) on TWEN.

This is a very demanding course, with tons of readings, oodles of rules to memorize, and countless traps, exceptions, and twists of arguments (and all you get is three measly credits). Every prof has his or her own path through this minefield. This introductory note outlines mine and provides a rough overview.

Overview

The basic premise of Administrative Law is that at the end of the day, government gets to do what it wants. AdLaw is about (1) the hoops government must jump through and (2) what happens when desperate plaintiffs say that government has screwed up majorly. (They lose about nine times out of ten. Still, they keep coming.) The way we teach this is through cases. That method screens out all the stuff that goes on within agencies, or between an agency and the Congress or OMB. But it’s the conventional way, and TINA (there is no alternative). Even so the material is overwhelming, and complicated.

First, the administrative state is big-gish. (Take a look around your own bathroom: can you name an item that is not designed or regulated by at least one government agency? I can find the Department of State under your sink: can you?) Moreover, the administrative state does an infinite number of things in many different ways. It grants business licenses; administers disability benefits; sets industry rates and standards; writes checks; collects taxes; takes over small banks and subsidizes and prosecutes large ones; collects your selfies and sends drones to kill U.S. citizens at the local Starbucks (kidding); etc. Your textbook supposes that this is all of one piece, more or less. I’m not so sure; still, I’ll teach this as a single body of law, while noting misgivings along the way. By and large, moreover, I have sacrificed breadth for depth. To flag several major omissions: due process (i.e., the question of how long and in what way government has to talk to you before it gets what it wants—you’ll have to learn that in ConLaw II); internal agency proceedings; state (and local) administrative law; and statutes governing agency disclosure, especially the Freedom of Information Act. There simply isn’t enough time.

Second, AdLaw isn’t self-contained. It’s about what government does and how it may do it; so it overlaps with ConLaw. It plays out in a statutory context, so it overlaps with Statutory Interpretation and with the
specialized law of whatever playpen one happens to be in (Environmental Law, Food and Drug Law, Banking, etc.) Jurisdiction is a big deal, so there’s a lot of FedCourts'-ish material here. The administrative state seeks to nudge private conduct into productive (or at least not-non-productive) channels; hence, AdLaw has come to intersect with cost-benefit analysis, auction pricing, and economics of the normal and the behavioral kind. Most of the business is conducted by and within agencies; thus, a basic familiarity with theories of organizational behavior would help you (as well as the courts that review agency decisions). I have crammed some of this stuff into Part I and ignored the rest.

Third, the internal structure of AdLaw is of almost Hegelian complexity. The doctrines on agency procedure, the scope of judicial review, the availability of judicial review, etc. all hang together; and in a way, you can’t understand any of them until you’ve understood all of them. Your textbook author does a good job at taking this one step at a time, and the course follows the book’s organization. But you’ll want to remember that the connections between and among the cases and doctrines matter big time.

Fourth, administrative law has a complicated history. It was squeezed awkwardly into the Constitution, beginning a century or so ago. And it’s proven very unstable ever since. Sometimes AdLaw is sedimentary—layer upon historical layer. At other times, big chunks of doctrine simply disappear (and once-foundational cases become unteachable). The textbook covers the historical development in considerable detail; the course will present a brutally curtailed version, focused on themes that are still of practical relevance. We’ll focus on modern cases (i.e., cases decided between, roughly, the recordings of Wild Thing and Blurred Lines). That’s Parts II-IV of the course—the humdrum core.

Fifth, and relatedly, AdLaw goes through periods of quiescence, when political compromises have been worked out and everyone knows what the rules are; and periods of nervous breakdown and ideological contest, when everything is up for grabs. That happens every 40 years or so: around 1900, the 1930s, the 1970—and, right on schedule, now. What administrative agencies do and fail to do now—and how courts are dealing with it—is in many ways beyond textbook teaching and doctrine. I’ve put the post-Robin Thicke stuff, principally encompassing very recent and pending Supreme Court cases, into Part V. It’s fun, and a great way to review the doctrines and their interconnections.

Logistics, Requirements, Syllabus, Exam

Readings. “Too much reading” has been a consistent complaint about this course in past semesters. My sympathy is exactly zero, and I have responded (in a fashion) by assigning yet more readings.

There is method to this madness: any serious AdLaw case you will ever encounter will present you with a record spanning hundreds or thousands of pages. (Carefully edited textbook versions of cases give a very misleading picture of what this is like.) The course is designed to give you at least a glimpse of the real world: way too much paper, way too little time.
Course Participation. This isn’t a course to knock around hypos, and there’s won’t be a whole lot of time to elicit from y’all who did what to whom. More often than not, the cases you’ll read are pieces of very complicated regulatory schemes, which require a bit of explanation. Thus, much of this is a modified lecture course. I’ll present the issues, and then ask questions. No cold calls. There is, however, a premium on volunteering questions or answers: I’ll keep track of it (little check marks next to your names and pictures) for grading purposes.

Syllabus. The Syllabus (below) is subject to occasional changes, depending on our pace and your instructor’s sheer whim. I’ll try to send email alerts but you’ll still want to check TWEN periodically.

Exam. You may bring the textbook and any of the TWEN materials, marked up and tabbed any which way you like; plus, your class notes. Nothing else. The best way to prepare for the exam is to prepare for each class.
SYLLABUS

All page numbers refer to Gary Lawson, *Federal Administrative Law* (6th ed.). When there’s no specific case, the pages are identified as “GL.” All other materials are on TWEN. That includes a textbook update Professor Lawson has been kind enough to send along; “Lawson Supp 2014” on TWEN. Generally, it’s best to read the materials in the listed order.

**Part I: Foundations**

**Session 1: What Is Administrative Law?**

GL 1-9; *FDA v. Brown & Williamson* (641-656)

Don’t try to comprehend the precise legal issues in *Brown & Williamson*: you’ll encounter the case again, later. Instead, focus on the institutional matters. Who or what is the FDA? What did it do here to make the world a better place? Where does its authority come from, and what are the limits? Who is suing the agency over what? How do the justices think about the agency and its place in the larger scheme of government?

**Session 2: The Ages of Administrative Law**

Handout (TWEN); Breyer *et al*., “Historical Development” (TWEN); Skowronek, “Building a New American State” (TWEN); Landis, “The Administrative Process” (GL 48-50); Sunstein, “Factions, Self-Interest, and the APA” and Shapiro, “APA: Past, Present, Future” (single document on TWEN); Kagan, “Presidential Administration” (TWEN); GL 34-40.

Lecture class. The Handout is no more than a crutch, in form of a schematic overview. Bear in mind that history and AdLaw don’t come in boxes, and read Breyer *et al.* for context. Get the general gist of the remaining readings.

**Session 3: Constitutional Foundations and Boundaries**

GL 41-59; *Hayburn’s Case* (TWEN); Hamburger, “Is Administrative Law Unlawful?” (TWEN); Mashaw, “Pragmatic State-Building” (TWEN).

Recommended: G. Lawson, “The Rise and Rise of the Administrative State” (TWEN)

I have nothing against the U.S. Constitution (it’s imperfect but a lot better than what we have now). But there’s no time for a ConLaw I review, so we’ll have to do this quickly. This first (of a few) sessions on the Con Law jazz is a bare-bones introduction to a complicated, raging debate. The Constitution doesn’t
contemplate a “Fourth,” administrative branch of government—does it? But do you read it as affirmatively prohibiting such a thing—or is there simply a “hole” in the document (Mashaw)?

*Hayburn’s Case* stands for the proposition that Congress can’t make judicial decisions subject to executive review. Remember that for FedCourts, and focus here on the practicalities: what problem was Congress trying to address here? Who *should* deal with pensions (or railroad rates, internet services, or transboundary pollution)?

**Session 4: Congress: Delegation**

GL 59-66; *Panama Refining, Schechter Poultry* (66-74); *Mistretta* (74-85); “Debate” (GL 131-139); *Ass’n of American Railroads v. DoT* (Lawson Supp 114).

GL’s hypo (p. 59): Congress creates the Goodness and Niceness Commission, authorized to make binding rules “for the promotion of goodness and niceness on all subjects within Congress’ constitutional jurisdiction.” Constitutional? A good idea?

If you think that there has to be a limit to delegation, what’s the test—statutory language and “magic words”? Does *Schechter* provide a (plausible) alternative approach?

Does *Ass’n of Am. Railroads* scream anything other than “reversal”?

**Session 5: Controlling Delegations: Legislative Oversight, Judicial Construction**

Recommended: *INS v. Chadha* (115-124); Notes (GL 124-131); REINS Act (TWEN)

Assigned: *Industrial Union v. API* (86-107); *ATA v. EPA/Whitman v. ATA* (110-113)

Skip *Chadha* if you think you remember it from ConLaw I. (I don’t like teaching it in AdLaw: it’s a clueless decision that’s been roundly ignored, so why inflict it on students?) Use it as a “prompt” to make a list of all the ways in which Congress might be able to check agencies’ delegated authority: why isn’t that enough to obviate any (constitutional) problem?

Let’s say there’s no direct, enforceable “first-order” limit to delegation: is there anything left to do for the courts? Is *Industrial Union* a plausible approach? And let’s start drawing some connections: can you read *Brown & Williamson* as a delegation case? Does it make sense when read that way? **Pay attention!** You will encounter this set of questions again when we get to the foundational *Chevron* decision.
Session 6: The Executive—Appointment and Removal

Buckley v. Valeo (incl. Notes) (140-152); Landry v. FDIC (152-159); Morrison v. Olson (incl. Notes) (159-178); Free Enterprise Fund v. PCAOB (200-215); Conti-Brown, “Is the Fed Constitutional?” (TWEN)

Recommended: “Removal of Agency Officials” (GL 178-199)

We will not rehearse the constitutional jazz; I expect you to remember the holdings in Myers, Humphreys, Morrison, etc. Instead, we’ll discuss the more “functional” aspects. Who are all these various officials, and what do they do? Who in Congress thinks of the often funky appointment and removal arrangements, and why? How important is this stuff (especially removal) in real life, to real presidents?

Session 7: The Executive (continued)—Direction and Supervision

Breyer et al., “Directive Authority/Supervisory Authority” (pp. 131-154) (TWEN); Dodd-Frank Act (Title X) (TWEN); In re Aiken (TWEN)

All about the not-so-unitary executive. It may look like a jumble to you but it’s way more important in practice than the ConLaw types’ obsession over removal. OIRA review matters greatly (enough do that many agencies have found clever ways of evading it.) The CFPB, brought to you by Dodd-Frank, is a fun way to think about “independent” agencies (the CFPB is so independent, it deserves its own air force). In re Aiken is a fine example of agency maneuvering to thwart meaningful judicial review. You’ll see more of that later. For now, consider: does Judge Kavanaugh get the executive/separation of powers stuff right?

Session 8: Agencies and Article III; Separation of Powers and Functions


This is very important—and, alas, very difficult. Don’t start obsessing over bankruptcy courts (and most emphatically not about the late Anna Nicole Smith); keep thinking about agencies. As you plow through the FedCourts stuff, ask yourself: just what is the judicial power that can’t be handed over to administrative tribunals? Is the private/public rights distinction tenable? Do the constitutional limitations here come from Article III, or are they better inferred from elsewhere (perhaps, the due process clause)? And what’s all the fuss about anyhow—why don’t we just create more Article III judges?
PART II: AGENCY PROCEDURE

Session 9: *The Structure of the APA*

APA (GL 1141-54); GL 256-263; GL 10-34 (*Yesler*; *AIR v. EPA*).

Read the APA in its entirety. The APA lives off a basic distinction between rulemaking and adjudication and a second distinction between formal and informal proceedings; make sure you catch that.

Session 10: *The Chenery Saga*

*SEC v. Chenery Corp.* (I,II) (426-456)

Amazing stuff. At the end of this travesty, Justice Jackson and Frankfurter dissent but still embrace “the administrative process ... as an expeditious and nontechnical method of applying law”—as distinct from “dispensing with law.” What, though, is “the administrative process” (as opposed to, say, constitutionally due process), and what can it do for you?

Session 11: *Formal Rulemaking and Adjudication*

*Florida East Coast R’way* (263-288); *City of West Chicago, Seacoast Anti-Pollution League, Chem Waste Mgmt* (288-306).

Where do agency procedures come from? Make a list.

GL notes that *FECR* follows *Roe v. Wade* in the U.S. Reporter, suggesting that *Roe* was just a warm-up act for this piece of work. Do you agree?

*Chem Waste Mgmt*, pp. 303-306, cranks through a *Chevron* analysis, which you don’t know yet. Don’t worry for know: we’ll get to it. Remember this case when we do.

Session 12: *Informal Rulemaking(I)*

*Vermont Yankee* (306-332); *CT Light & Power* (332-342); Notes (GL 342-344)

This is huge: “The Reformation of Administrative Law” *circa* 1970 and the Supreme Court’s response. The Notes, pp. 342-344 explain how the various pieces fit together. Very helpful especially when we get to judicial review later in the course.
Session 13: *Informal Rulemaking* (II)

NPRs (GL 344-358); Statements of Basis and Purpose (GL 359-365); Exemptions (GL 365-413); *Mortgage Bankers Ass'n v. Harris* (Lawson Supp xxx).

Lots of reading but no great intellectual challenges here; only case illustrations of recurrent notice and comment rulemaking problems, many “enshrouded in considerable smog” (by the D.C. Circuit’s *en banc* lights). You may want to make a list of the basic doctrines and cases.

Re the pending *Mortgage Bankers* case: Do we think the *Paralyzed Veterans* doctrine is doomed? Should it be?

Session 14: *Informal Adjudication*

*Citizens to Preserve Overton Park* (413-420); *PBGC v. LTV* (420-425)

*Overton Park* is another central piece of the “Reformation” of Administrative Law. It’s totally made up but a good introduction to the interplay between procedure, substance, and scope of review, which comes next.

PART III: SCOPE OF REVIEW

Session 15: *Findings of Fact*

“Introduction” (GL 457-464); *Universal Camera Corp v. NLRB* (465-475); *ADPSO v. Bd of Governors* (492-501); *Corrosion Proof Fittings* (TWEN)

I’ve substituted long excerpts from *Corrosion Proof Fittings* for the ancient NLRB cases in the book, for three reasons. (1) I don’t like unions but I love asbestos. (2) *Corrosion Proof Fittings* illustrates that doctrine actually matters (can you see how)? (3) The case hangs together with the earlier stuff on anti-delegation—don’t you think?

Session 16: *Legal Conclusions*

*NLRB v. Hearst* (508-516); Notes (GL 520-522); *Packard v. NLRB* (incl. Notes) (522-527); *Skidmore v. Swift* (527-532)

Why would or should courts give deference to an agency’s *legal* conclusions? Under what circumstances—and how much?
Session 17: Chevron

*Chevron U.S.A. v. NRDC* (532-541); *INS v. Cardoza-Fonseca* (541-550)

Recommended: Merrill, “The Story of Chevron” (TWEN); Schuck & Elliott, “To the Chevron Station” (TWEN)

The sum and substance of modern AdLaw, made up in an afternoon and then implemented by the D.C. Circuit. Get the two/three-step down.

Session 17: Chevron, Step Zero

*Christopher v. SmithKline* (553-559); Notes (GL 559-565); *Rapaport* (565-569); *Christensen* (569-575); *U.S. v. Mead* (incl. Notes) (575-592); *Gonzales v. Oregon* (incl. Notes) (592-608); *City of Arlington v. FCC* (Lawson Supp 608)

Before we do the *Chevron* two-step, we have to know whether it applies. Make sure you understand *Chevron’s* domain! When *Chevron doesn’t* apply, some other form of deference may: *Skidmore*, *Auer/Seminole Rock*, *Mead*... Make a list: case name, year, deference to what. Good to remember for exam purposes.

*City of Arlington* is a pretty big deal. Can you explain the curious vote line-up and the cranky tone of the opinions?

Session 18: Chevron, Step One: Is That Clear?

*Zuni Pub. Sch. Dist. v. DoEd* (609-628); *Dole v. Steelworkers* (628-636); *Pauley* (636-640); *FDA v. Brown &Williamson* (641-656)

If the statute is “clear,” how come the justices always seem to disagree? (Not a trick question.)

**Note:** Whether a statutory provision is or isn’t “ambiguous” depends on canons of construction. (The same is true of the related questions in Session 19.) Those canons have become extremely controversial—especially in high-stakes litigation over global warming and, of course, the Affordable Care Act. We’ll revisit these issues and examine recent and pending cases in Part V.

Session 19: Chevron, Step Two: What’s Reasonable?

Notes (GL 665-668); *Entergy v. Riverkeeper* (TWEN); *EME v. Homer City* (TWEN); *Brand X* (669-675); *U.S. v. Home Concrete & Supply* (676-685); “Debate” (GL 685-696);
Assuming “Step Two” is a separate step, is it legal lingo for “the government wins”?

Re “Debate,” noodle over the past sessions and materials: does the *Chevron* framework make sense?

**Session 20: Hard Look Review**

“The Great Debate” (GL 697-709); *State Farm* (715-727); *Business Roundtable v. SEC* (TWEN)

For the most part the “great debate” (in Bruce Springsteen’s words) “leaves you with nothing, Mister, but boring stories of glory days” (the D.C. Circuit’s). Understand what the debate was about, and then let’s talk about the foundational *State Farm* case. *Business Roundtable* is way harsh, don’t you think? A second coming of Bazelon & Leventhal?

**Session 21: Hard Look in Practice and Context**

“The Great Convergence” (GL 752-753); “Defining the Record” (759-763); “Hard Look at Step Two”; “Crossroads” (GL 779-786); *Electric Power Supply Ass’n v. FERC* (TWEN).

Recommended: *LeMoyne-Owen* (763-769); *Dept of Treasury v. FLRA* (769-778)

There’s really no teaching hard look review; you just have to get a feel for it. (Flipping through the “recommended” cases will help.) I’ve substituted the *FERC* case for the textbook cases because it’s a big whoop (*en banc* petition pending) and because it illustrates how the various scope-of-review question fit (or don’t fit) together. Think: are *Chevron II* and arbitrary and capricious review the same, or not?

**PART IV: JUDICIAL REVIEW**

**Session 22: (Statutory) Review and Preclusion**

GL 936-954; *Am. School of Magnetic Healing, Switchmen’s Union* (single document on TWEN—Breyer et al 812pp); *Abbott Labs* (1087-1091)

As GL notes, this stuff is really nasty. Unfortunately it’s also really important (among other reasons, because government agencies always raise jurisdictional defenses, whether they have them or not). I’ll summarize the FedCourts-ish stuff on pp. 936-954. Then, we’ll talk about the “presumption of reviewability” to which the preclusion cases and doctrines (starting on GL p. 955) are the exceptions.
Session 23: Preclusion, Express and Implied; Agency Discretion

Block v. CNI (960-965); Bowen (incl. Notes) (965-972); Heckler v. Chaney (TWEN); Amer. Horse Protection Ass’n (TWEN); Webster v. Doe (972-984); Lincoln v. Vigil (984-989)

Enforcement and “committed to agency discretion” questions have begun to assume huge (political) salience. If the President doesn’t feel like enforcing some portion of a statute, can he simply decline to do so? How far does his authority reach—and who can get judicial review in the event?

Session 24: Standing

Notes (GL 989-991); Lujan v. Defenders of Wildlife (992-1005); FoE v. Laidlaw (incl. Notes) (1005-1015); Notes (1016-1024); ADPSO v. Camp (1024-1029); Clarke v. SIA (1030-1035); Air Courier (1035-1042); NCUA v. First Nat’l Bank (1042-1050); Grocery Mfrs (TWEN); Lexmark v. Static Control (Lawson Supp 1050).

The spotted owl flaps its wings at dusk and flutters straight into a federal courthouse. We’ll spend very little time on constitutional standing (which you’re supposed to remember from ConLaw) and quite a bit on statutory/prudential/zone of interest standing.

Session 25: Exhaustion, Finality, Ripeness

Notes (GL 1053-1056); McCarthy v. Madigan (1056-1063); Darby v. Cisneros (1063-1069); FTC v. Standard Oil (1069-1076); Air Brake Systems (1076-1086); Abbott Labs (again) (1087-1091); Toilet Goods Ass’n (1091-1097); Ohio Forestry Ass’n (incl. Notes) (1098-1105); “State of Confusion” (GL 1106-1117).

Often difficult in practice, but no great intellectual challenge. Pay particular attention to the pre-enforcement issues.

PART V: ADMINISTRATIVE LAW WITHOUT DOCTRINE

Recommended: Greve & Parrish, “Administrative Law Without Doctrine” (draft) (TWEN)

Really: recommended, not required (and you certainly need not agree with the substance). The piece may help you to get a general sense of the current landscape. For a very different perspective—and in case you’re running out of stuff to read—see Cass Sunstein & Adrian Vermeule, “Libertarian Administrative Law” (TWEN). If you’re short on time: the cases are way more important than the secondary materials.
Session 26: Statutory “Re-writes?”

*Massachusetts v. EPA* (734-743); *Utility Air Reg. Group v. EPA* (Lawson Supp 667); *Halbig v. Burwell* (TWEN); *Sierra Club v. EPA* (657-665)

We’ll all stay very calm even if the rest of the country doesn’t. Here’s what we’ll do, in roughly this order:

Read *Massachusetts v. EPA* and especially the majority opinion carefully. Make a list of the doctrines/AdLaw precedents that are in play: what happened here to *Chevron, Brown & Williamson, American Horse Protection*...?

Next, think about the institutional dynamics: What was the *Mass v. EPA* Court trying to accomplish? How did EPA respond—do you think the agency over-read the Court’s “signal”? Did the D.C. Circuit? (The *UARG* Court whacked the lower court pretty hard: was that to be expected?)

Speaking of *UARG*: what do you make of EPA’s canons (especially “absurdity”) and the Court’s treatment? In oral argument, the SG was asked for his “best case” in defense of EPA’s revision of the numerical statutory thresholds—and came up empty. Can you do better?

Then, read *Halbig*: what do you make of the majority’s analysis? Is it like *Sierra Club*, or is this a different case? Let’s say the statute is ambiguous (as the dissent says, and as the Fourth Circuit said in a virtually identical case): does the agency win hands-down, or are there other issues?

Session 27: Big Delegation, Big Waiver

Barron & Rakoff, *In Defense of Big Waiver* (TWEN); TBA

Session 28: Review