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**AALS New Law Teachers Conference: Upper-Level Teaching**  
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- I. Introduction. *Upper-level teaching* is a general category: pedagogical method might differ by field.
  - A. For example, those of us working in fields that primarily occur on paper might have a different idea about good pedagogy from those of us working in fields that occur in court.
  - B. We also might teach differently in areas in which we have practiced versus fields in which our familiarity has come primarily through scholarly research.
  - C. Other variables.
  
- II. Teaching at multiple levels.
  - A. Introduce video: The class from which these few minutes are taken comes about a third of the way into my Administrative Law course.
    - 1. General structure of the course (see syllabus): The course can be conceptualized as proceeding along a timeline.
      - a. It begins with the delegation of authority by a legislature to an agency.
      - b. The second third of the course focuses on intra-agency processes. We begin with the constitutional requirements under the due process clause, then move to the Administrative Procedures Act (APA) and cover rulemaking and adjudication in a fairly detailed way.
      - c. The course concludes with what could be understood to come last along the timeline – judicial review of adverse agency action.
    - 2. The class in the videotape comes early in the due process unit, after we cover the constitutional requirements. It introduces the students to the APA.
  - B. Goal of lesson is to bring the APA to the students from different angles.

1. so that each student can enter from the angle at which he or she is most comfortable, and
  2. so that each version of the introduction reinforces the other versions.
- C. If you could have seen the whole lesson, what you would have seen is:
1. Review of constitutional background (including *Goldberg*, *Mathews*, *Roth*, etc.)
  2. *Londoner* and *Bi-Metallic* to introduce the concepts of rulemaking and adjudication, initially as constitutional concepts.
  3. Definitions in the APA.
  4. Historical context (New Deal, WWII).
  5. The next step of the lesson is a case, *Florida East Coast* in which Rehnquist has to navigate the APA.
    - a. First, follow the text.
    - b. Then we do it again in a flow chart for the visual learners.
- D. Ensure reciprocal reinforcement by asking questions.
- E. Three assignments in this course:
1. Choose any agency in any field, go to the library, find its enabling legislation, locate the delegation of a specific regulatory authority, find an agency regulation promulgated pursuant to the statutorily granted authority, submit with a cover memorandum explaining their relationship.
  2. I provide a hypothetical political situation and a hypothetical, poorly drawn, vague, legislative response. They act as agency counsel, convene a policy meeting, resolve the policy problem embedded in the legislation, and draft a proposed rule that sets forth the policy, making it operational and being attentive to due process concerns.
  3. I provide a factual scenario involving a statute, a rule and an adjudicatory decision. Some party is aggrieved by an agency's action or inaction and the students have to write a memo, this time as private counsel, conceptualizing judicial review, including the

complaint, what would likely show up in a motion to dismiss, and arguments on the merits.

- F. In this course I can offer the insights of a practitioner on these concrete exercises, while in my other courses I assign a final paper or give an exam.
- III. Politics in the classroom.
- A. Techniques to mitigate against student anxiety about voicing their views in the classroom.
    - 1. Depersonalize by asking questions like: *What's the argument, and what's the counter-argument?*
    - 2. Adopt different voices: *Justice X says..., but Justice Y responds...*
  - B. These are not techniques for minimizing the politics of the law school classroom. I advocate honesty about your politics.
    - 1. This does not mean you should try to force everyone to adopt your positions.
    - 2. It means sending the message that law and politics are not distinct domains.
  - C. Example
    - 1. My Administrative Law course is organized along a timeline, but the course can be conceptualized another way.
      - a. The introductory lesson on the non-delegation doctrine sets up the conundrum at the center of the course, between the formal constitutional requirement that Congress make the law and the reality that this is impossible.
      - b. So what we get is a lot of bureaucratic discretion, often justified by reference to agency expertise, then we need the APA's procedural requirements to constrain that discretion.
      - c. The APA invites judicial review, which raises the danger that courts will exceed their role.
      - d. The course can also be understood, therefore, as organized around the struggle for power and arguments for expanding or constraining bureaucratic discretion.

2. The course also could be:
    - a. about the efficiency of government regulation, or
    - b. how bureaucratic organizations function, or
    - c. part of the property curriculum.
  3. This is a way to be honest about my own perspective and give students the chance to think critically about it.
- D. *A human being is therefore on the whole only accessible to influence, even on the intellectual side, in so far as he is capable of investing objects with libido...* (Sigmund Freud, *A General Introduction to Psychoanalysis*)
1. There are times when you might have to depersonalize a discussion and make it safe, but the best law teachers do not dwell in safe territory all the time.
  2. Find the painfully irresolvable conundrums of your field. Help students to learn to function in a state of uncertainty.
    - a. In Administrative Law, make them face the impossibility that all lawmaking will really be done by the legislature, that we do in fact need experts to deliberate on technical matters, but that this means that unaccountable bureaucrats are making law every day.
    - b. In Constitutional Law, bring out the conflict between the principle of majoritarian will, and the terror that an unchecked majority can do, and has done, terrible things, but that counter-majoritarianism raises another terror – that unaccountable aristocrats are making our laws.
    - c. In the law of sex and gender, bring out the deep wish to protect women from violence and abuse, but the equally deep wish to vest women with sexual autonomy and choice.
  3. Politics in the classroom does not mean telling them what you think is the right outcome. It means bringing the uncertainty to the surface and taking care of them as they learn to make choices that will be imperfect, and arguments that almost never bring total resolution.