

1997

## The Rise and Fall of Administrative Law

Richard A. Posner

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)

 Part of the [Law Commons](#)

---

### Recommended Citation

Richard A. Posner, "The Rise and Fall of Administrative Law," 72 Chicago-Kent Law Review 953 (1997).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# THE RISE AND FALL OF ADMINISTRATIVE LAW

RICHARD A. POSNER\*

Academic law is an intellectually insecure field. It lacks a theoretical gyroscope and therefore wobbles, grabbing at the methods and insights of other fields while buffeted by the political and ideological currents of the day. I shall illustrate this thesis, and its paradoxical corollary that law can be improved by being made a little less like law and a little more like economics, with the changing shape and fortunes of administrative law in the academy and in the judiciary.

The Constitution established a system of lawmaking that was designed for a small eighteenth-century government of circumscribed powers. An essentially three-headed legislature—Senate, House of Representatives, and President—would enact statutes, but not many, because of the transaction costs of tricameralist legislating. A tiny judiciary would make additional law by interpretation and by common law rulemaking, but it would not make much additional law, because of the well-known informational, remedial, legitimacy, and, again, transaction-cost limitations of courts. I emphasize transaction costs as impediments to ambitious lawmaking. Increasing the size of a legislature increases the costs of reaching agreement, and increasing the size of a judiciary increases the costs of maintaining consistency and direction.

You cannot have big government—the government that tries to do more than secure the night watchman state—with just courts and legislatures. So when the demand for a big (at first just bigger) federal government arose toward the end of the nineteenth century, the constitutional mold had to be broken and the administrative state invented. Opponents of big government, emphasizing the quasi-judicial powers of agencies, pointed to the constitutional illegitimacy and political menace of an administrative state that would grab power from the courts. Supporters of big government sought to allay these concerns about the politicization of adjudication by depicting administrative agencies as arenas for the deployment of neutral expertise. Indeed, the supporters turned the tables on the opponents by noting the

\* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. I thank Cass Sunstein for helpful discussion of the topic and many helpful comments on a previous draft.

ideological character of the judiciary and contrasting it with the scientific neutrality to which the administrative process aspired; they claimed that the administrative process would be less, not more, political than the judicial process. These "Progressives," champions of technocratic public administration, triumphed with the coming of the New Deal.

The struggle that I have just sketched, which defined the first phase of academic thinking about administrative law, ended with the enactment of the Administrative Procedure Act in 1946. The Act was a historic compromise. It signified the acceptance of the administrative state as a legitimate component of the federal lawmaking system, but imposed upon it procedural constraints that have made the administrative process a good deal like the judicial. Even notice and comment rulemaking, the most conspicuous departure of administration from adjudication, is in practice a lot more like litigation than like legislation, although the fault (if that is what it is) is, as I shall point out, not entirely that of the Act's draftsmen. The Act, a reaction to the politicization of some agencies, such as the National Labor Relations Board, imparted a considerable measure of political and ideological neutrality to administrative law, much as the Taft-Hartley Act, enacted in the following year, imparted a considerable measure of political and ideological neutrality to labor law, correcting to a degree the pro-union bias of the Wagner Act. World War II had created a yearning for normalcy—and, incidentally, had crushed the radical right because of its prewar defeatism and isolationism, and, the war's aftermath crushed the radical left. The result of these war-induced developments was a temporary suspension of ideological conflict, which allowed administrative law to be assimilated comfortably to a post-formalist, post-realist, consensus era of American law. It was natural that the focus of academic thinking about administrative law would shift from the issues of politics, legitimacy, and policy that had dominated the earlier literature to issues important to completing the domestication of administration as law—such issues (all closely related to each other) as the proper demarcation of the border between questions of fact and questions of law, the circumscribing of agency discretion, the need for reasoned explanation of agency decisions, and the need for more definite standards, consistently administered, in order to particularize the agencies' broad statutory mandates and thus make administrative regulation more objective and predictable.

During this period of consensus, in which Professors Jaffe, Hart, and Davis were the dominant voices in administrative law scholar-

ship,<sup>1</sup> and Frankfurter and Friendly in the judiciary, few people bothered to ask whether the administrative agencies were accomplishing what they were supposed to accomplish, whether what they were supposed to accomplish was worthwhile, and whether the actual consequences of administrative regulation were good or bad (and what the standard of goodness or badness in regulation should be). These were not procedural or doctrinal, or even constitutional, questions, so they were unlikely even to occur to lawyers. They were unlikely to occur to anyone the more that agencies were conceived to be, and were in fact, like courts. No serious person asks whether we need courts; we obviously do. If agencies are just another form of the judiciary, handling as it were the overload of cases that courts cannot handle either because of the sheer number or because some cases present issues that baffle judges, no one is likely to ask whether we need agencies.

When ideological strife resumed in this country in the 1960s, the administrative state was caught up in it. On the left, Ralph Nader and his ilk, building on an earlier but heretofore rather ignored literature on regulatory capture, began asking whether the agencies were the zealous protectors of the public interest that they pretended to be and whether there was not a need both to increase citizen involvement in the existing agencies and to expand administrative regulation into new domains, such as automobile safety.<sup>2</sup> On the right and increasingly in the center as well and even in the center left, economists began questioning the missions of a number of the most prominent federal administrative agencies. They found that much of what the agencies did, such as limiting airlines' entry into city pairs, regulating the prices of rail and truck transportation, awarding broadcast licenses in exchange for commitments to provide local programming, putting a ceiling on the price of natural gas, and even fostering unionization and trying to make advertising and labeling more informative, just was not worthwhile; the agencies were performing allocative functions, in transportation, labor, advertising, communications, energy, and other important sectors of the economy, that the market could perform more effectively and at lower cost. The *real* mission of the agencies, the economists showed, here converging with Nader and his academic allies such as the historian Gabriel Kolko, was to cater to powerful

1. The *summa theologica* of this era of administrative law scholarship is Professor Jaffe's 792-page treatise. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

2. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* ch. 3 (1990).

interest groups, and no amount of procedural improvement would do anything to change the situation.

The economic critique implied that academic thinking about administrative law had missed the point by failing to understand that administrative agencies were fundamentally different from courts. Agencies belonged to the interest-group state; they were political captives and instruments; they were agents of overregulation. They could no more be improved (whether by better procedures or better personnel) than a private cartel or a stolen-car ring could be improved; making them work better would simply increase the drain on society's wealth. The Naderites, in contrast, having no faith in markets, thought that agencies weren't doing enough, or were doing the wrong thing, or that we needed new and different agencies. But they agreed with the economists that the academic lawyers had missed the boat by focusing on the law on the books rather than on the law in action—the actual operation and effects of administrative regulation.

The Naderite critique inspired reforms designed to make regulation more public-interested, for example by empowering citizens' groups to obtain judicial review of regulatory actions and inactions. The economic critique helped to power the deregulation movement, which has achieved, though probably more as a result of fortuitous technological and economic changes than of the power of economic theory and evidence, some remarkable successes. Some agencies have disappeared, such as the Civil Aeronautics Board, the Federal Power Commission, and the Interstate Commerce Commission. Others have become shadows, such as the Federal Trade Commission and the National Labor Relations Board; others—notably the Federal Communications Commission and the banking agencies—have so far relaxed their grip as to become almost deregulatory agencies. Others, including the Securities and Exchange Commission and the agencies that regulate banks and other financial intermediaries, have been marginalized by rapid growth in the variety and complexity of the regulated activities.

The accelerating deregulation of the American economy has been masked by the rise of agencies concerned primarily with health and safety, such as the National Highway Transportation Safety Administration, the Department of Labor's Benefits Review Board, and the Occupational Safety and Health Administration, with environmental amenities (the Environmental Protection Agency, but also, though with less enthusiasm, the Army Corps of Engineers, under the prodding of various environmental laws), with discrimination, such as the

Equal Employment Opportunity Commission, and with retirement and disability. Less obviously (though perhaps *only* less obviously) protectionist than the old-line industry-specific agencies that felt the deregulatory axe, these newer programs are legacies of Naderite and other brands of leftism that flourished in the 1960s and 1970s and that are now, some of them, embattled. But in addition the Immigration and Naturalization Service has become busier of late because of heavy legal and illegal immigration and the tightening of the immigration laws. As further evidence that the administrative state is not inherently left-wing, the creation of the U.S. Sentencing Commission in the 1980s marked a notable expansion of administrative at the expense of judicial authority.

So there is plenty of administrative regulation, probably more than ever, though possibly with less aggregate impact (but who knows?). Much of this regulation is subject, and has been subjected, to economic critique, in particular the regulation of pollution and of job safety and health and the prohibition of discrimination on grounds of age; much of that regulation appears to be regressive, ineffectual, perverse, or all three at once. That is not yet the consensus view of legal scholars, by any means; but the success of the economic critique in so many of the older areas of regulation has forced administrative law scholars to address the merits, and not merely the procedures or other forms, of the surviving (and in some areas growing) regulation. Administrative law scholarship has acquired in consequence a more substantive, a more economic, and a more institutional cast. There is much more interest in what works, and much less in the forms and formalities of the administrative process except insofar as they shape consequences in the real world.

The original form of the economic critique treated regulation largely as a form of cartelizing, and this proved fruitful for many of the industry-specific regulatory programs, such as the control of price and entry by public utility and common carrier regulation, programs preceding or created by the New Deal. This kind of regulation confers concentrated benefits on the regulated industry (and sometimes on important customer groups as well—such as beneficiaries of regulation-mandated cross-subsidies) while diffusing its costs much more broadly, and so it is easy to explain this kind of regulation in terms of interest groups. Much of the newer or surviving regulation, however, exhibits the opposite pattern—diffuse benefits and concentrated costs (most environmental regulation is of this character)—and so cannot easily be assimilated to a model of regulation that is based on cartel

and interest-group theory. Instead economists and political scientists have tackled this kind of regulation with public-choice theory.<sup>3</sup> This body of theory is most easily understood as simply the general principles of economic theory applied to the political arena, as distinct from the application of highly specific subtheories, such as cartel theory or interest-group theory (the latter, moreover, modeled on the former). Public-choice theory is nowadays infused with a heavy dose of game theory in recognition of the strategic character of the interactions that determine public policy.

The point I wish particularly to emphasize is that cutting-edge administrative law scholarship today looks very different from what it looked like forty years ago; indeed, it looks a good deal less like *legal* scholarship. We can see this by considering what are the vital issues in administrative law scholarship today. One is how best to regulate hazards to safety, health, and the environment. This issue, in a sense inevitable simply because of the changing focus of regulation, has engaged the sustained and imaginative attention of such able economists as Kip Viscusi and such able jurists as Stephen Breyer and Cass Sunstein. The cardinal findings of this literature are as follows:

1. The law fails to distinguish sufficiently between situations in which transaction costs prevent risks to safety and health from being internalized, as in the case of pollution and other environmental degradation, and situations in which they do not, as in the case of job-related hazards. Administrative regulation is much more easily justified in the first class of situations than in the second.

2. There may, however, be subtle sources of market failure in the second class as well, sources identified for example by the growing scholarship in behavioral economics. Behavioral economists (really, economic psychologists) have identified quirks in human reasoning which they believe impede the ability of people to think sensibly about low-probability risks to health and safety. In addition, the adequacy of using normative economics ("cost benefit analysis") to monetize nonmonetary costs, such as reduced health or safety or a diminution in the number of animal species, has been questioned.

3. Even those administrative law scholars who support active regulation of job safety and the environment recognize that the actual performance of the regulatory agencies in these areas has frequently been deplorable. Their criticisms are illustrated by the tables that list

3. See, e.g., *Conference on the Economics and Politics of Administrative Law and Procedures*, 8 J.L. ECON. & ORG. 1 (1992).

the values (essentially the cost of compliance with an agency's safety directives divided by the number of lives saved by compliance) that different regulatory programs impute to a human life. The tables reveal enormous variance and irrational extremes.<sup>4</sup> Any variance seems largely irrational, since, allowing for some differences in antecedent pain and suffering, death is death whatever the particular causal agent. The agencies that fix the value of a human life at the high end of the scale may actually be impairing human longevity, because the heavy compliance costs implied by such valuations have the effect of regressive taxes, disproportionately reducing the real incomes of the poor—and income and longevity are positively correlated.<sup>5</sup>

4. Those who want to improve rather than jettison or curtail the regulation of health, safety, and environmental entities have come up with a variety of suggestions for reform, suggestions primarily institutional rather than doctrinal or even procedural in character. An example is Stephen Breyer's proposal for the creation of a high-level federal administrative agency to coordinate the risk-reduction activities of the existing administrative agencies in an effort to iron out some of the discrepancies in the agencies' valuation of human lives and other intangibles.<sup>6</sup>

This branch of administrative law scholarship draws more on economics and political theory than it does on law. But so, it turns out, does much of the best scholarship concerned with the procedural aspects of the administrative process, including the scope of judicial review and the distinction between rulemaking and adjudication. This scholarship has exposed a significant lag in judicial thinking relative to academic. The most important administrative law decisions of the Supreme Court in this period of growing sophistication of academic thinking about administrative law include decisions authorizing pre-enforcement review of administrative rules (*Abbott Laboratories*<sup>7</sup>), expanding, curtailing, and then expanding again the right to attack administrative action in federal court (*Morton*,<sup>8</sup> *Lujan*,<sup>9</sup> *Northeastern Chapter*<sup>10</sup>), invalidating the one-house veto of regulatory action

4. See, e.g., W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423, 1432-35 tbl. 1 (1996).

5. See Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533 (1996).

6. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* ch. 3 (1993).

7. *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967).

8. *Morton v. Ruiz*, 415 U.S. 199 (1974).

9. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

10. *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993).



(*Chadha*<sup>11</sup>), insisting that agencies justify their about-faces (*Motor Vehicle Manufacturers' Association*<sup>12</sup>), squashing intrusive judicial review of agencies' procedures (*Vermont Yankee*<sup>13</sup>), allowing federal criminal sentencing policies to be consigned to an administrative agency (*Mistretta*<sup>14</sup>), and curtailing judicial review of agencies' interpretations of their statutes (*Chevron*<sup>15</sup>). The academic response to these decisions has been shaped more by game theory and public choice theory than by conventional legal theory. The most influential administrative law scholars are interested in the actual or probable impact of these decisions on public regulation rather than in how they fit into a preexisting structure of legal doctrine. They have pointed out, for example, that insofar as administrative agencies now exercise a substantial amount of the legislative power of the United States, and insofar as these agencies are under far greater control by the President than by Congress, and insofar as federal judges are far more likely to enforce original legislative deals than agencies controlled by the President are, the effect of decisions such as *Chadha* and *Chevron* that curtail federal judicial review of agency determinations is to displace legislative power into the executive branch—a paradoxical result since the authors of these decisions defend them by reference to the allocation of powers in the Constitution, which endeavored to lodge the legislative and executive powers in different branches.

As this discussion illustrates, the Court has ignored the lessons of the recent administrative law scholarship. The law that best describes the results in the Supreme Court's administrative law jurisprudence of recent decades is the law of unintended consequences. I am sure that the Court did not realize when it authorized pre-enforcement judicial review of administrative rules in the *Abbott Laboratories* case that this would curtail the use of notice and comment rulemaking because it would require the agency to create a highly elaborate record in order to withstand that review, whereas if review were postponed to an enforcement proceeding a record narrowly tailored to the issue in that proceeding could be developed on the spot as it were, rather than in advance. Or that the Court's endorsement of the "hard look" doctrine in *Vermont Yankee* would simply slow down the administrative

11. *INS v. Chadha*, 462 U.S. 919 (1983).

12. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

13. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

14. *Mistretta v. United States*, 488 U.S. 361 (1989).

15. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

process with no offsetting gains in greater accuracy.<sup>16</sup> One wonders whether the Court has any clue as to the consequences of its administrative law decisions for society. Maybe it doesn't think that that is any of its business.

Those tables of imputed values of human life that I mentioned bring to mind another, though somewhat muted, theme of modern administrative law scholarship, and that is the management of sheer volume. For example, as more and more federal judges were appointed to handle an increasing caseload, the number of different judges involved in federal criminal sentencing grew (even though the federal criminal caseload itself wasn't growing much), and this underscored the sentencing variance produced by the traditionally uncanalized discretion of the sentencing judge. So we got the sentencing guidelines, which alter the relation between the federal district courts and their administrative adjuncts, the federal probation service and parole commission; the Sentencing Commission is the probation service and parole commission writ large. By laying down rules for sentencing, the Commission was able to centralize and rationalize the sentencing process to a degree that the courts could never have done by themselves. Sentencing is to an ineliminable degree arbitrary, and courts are not comfortable making arbitrary determinations.

Earlier the Department of Health and Human Services had done much the same thing in its domain as the Sentencing Commission was to do with sentencing. The Department curtailed the discretion of the hundreds of administrative law judges who make social security disability determinations by promulgating a detailed set of largely quantitative criteria, the "grid," to guide determination of entitlement to disability benefits. I have urged a different response to the problem of managing volume, and that is to strengthen the appellate review process within the administrative agencies in order to reduce the burden of appellate review on the federal courts. Specifically, I have urged the creation of a court of disability appeals—an interagency Article III appellate court that would review disability determinations by the Social Security Administration, the Department of Labor, and other federal agencies, with further review by the federal courts of appeals limited to determinations of issues of pure law.<sup>17</sup> The issues raised by

16. See Stephen Breyer, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978).

17. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 266-67 (1996).

all these developments and proposals are, it should go without saying, institutional and managerial rather than doctrinal or procedural.

The point that I made earlier about judicial disinclination to make arbitrary determinations may help answer the vexed and unsettled question, one of great importance to the rulemaking activities of the agencies, of how to distinguish between "legislative" rules, which can be promulgated only after notice and comment rulemaking proceedings, and "interpretive" rules, which can be promulgated without any such formalities, and therefore much more cheaply and swiftly. For a rule to be interpretive it is not enough, I believe, that the rule is consistent with the purpose of the statute that it is interpreting; for that is equally true of any valid legislative rule. A valid interpretive rule must in addition be *derivable* from the statute that it implements by a *process* fairly to be described as interpretive; that is, there must be a path that runs from the statute to the rule, rather than merely consistency between statute and rule. A largely jurisprudential literature concerned with establishing the outer boundaries of what can reasonably be described as judicial interpretation rather than judicial legislation can help courts and agencies determine when a rule can be described as a reasoning from the statute rather than an addition to the statute. A specific period of limitations, for example, cannot be derived from the statute establishing the right that is to be subjected to a limitations period. It might be possible to reason from the statute that the enforcement of the rights created by it should be subject to a deadline, even that the deadline should be short or long relative to the deadlines for enforcing other kinds of right. But the sorts of argument and evidence available in an adjudicative proceeding (the usual form in which interpretive rules are promulgated) lack the precision and trenchancy necessary to derive a specific number of months or years. And so with the precise height in feet of the retention fence for wild animals that was before my court in the *Hocctor* case.<sup>18</sup> When the fixing of a rule requires either the kind of scientific or technical data obtainable only in a rulemaking proceeding, or simply an arbitrary judgment, the adjudicative process is unusable. Notice and comment rulemaking must be employed, and the required rule is therefore a legislative rather than an interpretive rule. So once again the courts and agencies have to go outside the narrow precincts of traditional legal analysis in order to answer a difficult question of administrative law.

18. *Hocctor v. United States Dept. of Agric.*, 82 F.3d 165 (7th Cir. 1996)

There are, then, despite deregulation, plenty of interesting questions of administrative law. But if I am right, they can be answered well only by administrative lawyers who, like the participants in this conference, are willing to cast beyond law's traditional limits for methods of analysis and sources of insight.

