

## Introduction

Among the legacies of the Reagan years was a mixed challenge and affirmation of the administrative state. The challenge was both political and constitutional, as a deregulatory wave beginning in the Carter Administration swelled to new heights, and as members of the academy ventured—and the Supreme Court accepted—legal attacks upon key attributes of the contemporary federal governmental apparatus, such as the legislative veto. The countervailing affirmation of the administrative state in the Reagan years was at once subtle and emphatic. An Administration that had entered vowing a chastised federal government left behind a larger federal structure than ever before, with the Energy and Education Secretaries secure and joined by a Secretary for Veterans Affairs, a drug administrator, and, on the horizon, a cabinet-level EPA. Meanwhile, those with headier hopes of constitutional inroads on federal administrative innovations received a sharp rebuff from a Reagan-influenced Court, first in *Morrison v Olson* and again in *Mistretta v United States*.

But if *Morrison* and *Mistretta* answered the more portentous questions of what federal administrative institutions there *can* be, inquiry is more intense than ever as to what the structure, operation, and role of the federal agencies *should* be. And if now, for instance, there is broad political consensus that responsibility for environmental protection ought ultimately to rest with federal authorities, the distrust of centralized administration reflected in Reagan Administration policies today underlies an analogous

agreement that those federal environmental authorities would do well to use local and private actors to channel conduct in a manner calculated to achieve those regulatory goals.

Contributing to and drawing upon the vacillating fortunes of the administrative state has been a new scholarship in the field of administrative law. Until recently, scholarship in the area had concentrated on the role of the judiciary in supervising administrative conduct. In the last decade, however, the legal academy has turned increasingly to questions more fundamental to the administrative state itself—first to determining what its basic structure should be, and more recently to identifying the regulatory strategies best-suited to effectively administering the administrative state. If today the constitutionality of the most controversial aspects of the administrative state is again fairly secure, in the academy, as in Washington, questions of what to do with the institutions and innovations that the Supreme Court has approved are more active than ever. This issue of *The University of Chicago Law Review* is dedicated to this new administrative law.

Judge Mikva's piece exemplifies the new focus on the political branches and their proper role in guiding the federal bureaucracy. He argues that the deregulatory policies of the Reagan Administration were improperly pursued exclusively by the Executive; the policies would have been far more successful, and constitutionally legitimate, if implemented in coordination with the Congress. Because these two branches did not cooperate, the judiciary ended up arbitrating challenges to the Reagan Administration's initiatives.

Though the Supreme Court made its view of the permissibility of alterations of basic governmental arrangements clear in *Morrison v Olson* and *Mistretta*, Professor Carter writes that these decisions should not be the end of the story. He argues that the decisions in *Morrison* and *Mistretta* lack legitimating force because they are not properly reasoned and do not even attempt an historical reading of the structural Constitution. Thus the political branches have an obligation to exercise self-discipline in further expanding the administrative state, to avoid committing "constitutional improprieties" by creating institutions that violate the "spirit of the Constitution."

Recent Supreme Court decisions such as *Chevron v NRDC* and *Mistretta* have sharply curtailed the scrutiny with which the judiciary will review agency actions. Professor Pierce writes generally in support of judicial deference, suggesting that so-called "bias" in agency decisionmaking identified by the lower federal courts is often desirable, because such "bias" is the result of per-

missible political control by the executive branch. In particular, he focuses on the social security courts and argues that the lower courts have improperly curtailed efforts by the Social Security Administration to regulate the behavior of its administrative law judges.

A central concern of the new scholarship in administrative law is the need to examine and reassess the strategies that have traditionally been used to achieve the goals of the administrative state. Assistant Attorney General Stewart's article discusses the need for new strategies designed to combat the ubiquitous interest groups that tend to derail (and where possible, hijack) regulatory efforts. He argues in favor of a new "reconstitutive law" that will permit greater use of market forces and of state and local implementation of federally-formulated policy objectives. Though he accepts the need for centralized formulation of policy and supervision, Mr. Stewart supports minimal roles for specialized agencies in implementing federal policies, because of the susceptibility of those agencies to factional control.

Professor Sunstein takes a somewhat different approach towards the same basic problem of reassessing regulatory strategies. He examines particular approaches to regulation that have created what he calls "paradoxes of the regulatory state." These are situations where regulatory strategies have effects exactly counter to the objectives of those strategies, such as when minimum wage laws increase unemployment among the most needy, or excessively strict regulatory standards lead to underenforcement of those norms. Professor Sunstein identifies particular strategies that have a tendency to create these paradoxes, and recommends alternative approaches that would minimize or avoid them. Such approaches, he argues, would more effectively achieve Congress's regulatory goals, the legitimacy of which he fully accepts and in fact defends.

Finally, Professor Mashaw and Mr. Harfst's piece explores the role of the legal influences in the contemporary administrative state. Messrs. Mashaw and Harfst undertake a detailed examination of the inner workings of the National Highway Traffic Safety Administration (NHTSA) and highlight the role that external legal control (1970s judicial decisions) played in inducing NHTSA to largely abandon the regulatory strategy of issuing detailed safety regulations controlling the design of automobiles, in favor of a less intrusive strategy of pursuing recalls. The change was probably contrary to both congressional expectations and sound administrative policy, but it occurred because NHTSA responded to the courts' reactions to various regulatory strategies. Thus this piece

demonstrates how the courts can affect the regulatory strategies that are actually chosen in the administrative state, and highlights the barriers that would face the regulatory reforms proposed by any and all of our authors.

In conclusion, the *Law Review* would like to thank Professors Michael McConnell and Cass Sunstein for their guidance in conceiving this project, and their assistance in carrying it through.

*The Editors*