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### Administrative Law: The U.S. and Beyond

Cary Coglianese

*University of Pennsylvania Carey Law School*

Author ORCID Identifier:

 Cary Coglianese 0000-0002-5496-2104

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## **Administrative Law: The U.S. and Beyond**

Cary Coglianese

Edward B. Shils Professor of Law  
Professor of Political Science  
Director, Penn Program on Regulation  
University of Pennsylvania Law School  
cary\_coglianese@law.upenn.edu

### Abstract

Administrative law constrains and directs the behavior of officials in the many governmental bodies responsible for implementing legislation and handling governance responsibilities on a daily basis. This field of law consists of procedures for decision making by these administrative bodies, including rules about transparency and public participation. It also encompasses oversight practices provided by legislatures, courts, and elected executives. The way that administrative law affects the behavior of government officials holds important implications for the fulfillment of democratic principles as well as effective governance in society. This paper highlights salient political theory and legal issues fundamental to the U.S. administrative state but with relevance to the design and application of administrative law in any jurisdiction.

### Keywords

*Administrative agencies, administrative process, benefit-cost analysis, courts, delegation, democracy, governance, government, judicial review, oversight, procedure, regulation, regulatory impact analysis*

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## **Administrative Law: The U.S. and Beyond**

Cary Coglianese

University of Pennsylvania

Administrative law refers to the body of rules and procedures affecting government agencies as they implement legislation and administer public programs. Yet it is also much more than just rules and procedures. Administrative law applies to the ongoing operation of government bodies and seeks to shape official decisions that impact businesses and citizens throughout society. These decisions include granting licenses, dispensing government benefits, conducting inspections and investigations, imposing sanctions, issuing orders, awarding contracts, collecting information, hiring employees, and even making still further rules and regulations that apply to both governmental and private actors. Administrative law affects all of these varied decisions and addresses fundamental questions about how government authority can and ought to be exercised. It implicates society's most deep-seated political and moral values: democracy, equity, efficiency, privacy, transparency, and justice. And it does so by intervening in complex and diverse organizational environments within which public and private actors face varied, often shifting, motivations, incentives, and constraints. A proper study of administrative law therefore requires immersion in a wide breadth of issues in social science: normative as well as positive political theory; individual as well as organizational behavior; and law as well as politics, sociology, public administration, and economics.

Even when it is just considered as a body of rules, administrative law is complex. It draws its legal pedigree from a variety of sources: constitutional law, statutory law, internal policy, and, in some countries, common law. Government agencies' organizational structures and routines are shaped by provisions derived from both generic procedural statutes (such as, in the US, the Administrative Procedure Act) and statutes addressing specific substantive policy issues such as energy, education, taxation, or welfare benefits. This array of legal sources means that administrative rules and procedures can vary significantly across agencies and, even within the same agency, across discrete policy issues or types of actions.

The social science study of administrative law seeks to make sense of the complexity of administrative law and how it shapes, and is shaped by, the organizational environments within which it operates. Research has proceeded not only to test theoretical propositions about whether and how legal norms and institutions influence administrative behavior but also to identify and help solve applied problems. Administrative law research is characterized in part by prescriptive efforts to design rules that better promote political and social values, and in part by empirical efforts to explain how law influences the behavior of government agencies. Government agencies often possess considerable policy discretion but are staffed by unelected officials, so a key objective for administrative law scholars has been to understand how agency officials are, or can be, held democratically accountable (Lodge and Stirton,

2010). Administrative law places particular emphasis on the empirical understanding of the impact of courts and other oversight bodies – as these entities purport to hold administrators accountable to elected officials and the publics they represent. Although administrative law scholarship has a rich and important tradition of doctrinal analysis, the insights and methods of social science have become essential for understanding how administrative law and legal institutions can affect democratic governance. By drawing on social science methods to understand how legal rules and institutions affect governance, administrative law scholarship aspires both to inform and to improve the outcomes of public institutions.

### **Administrative Law and Democracy**

Administrative agencies make decisions affecting citizens' lives and entire industries – but these agencies are usually staffed by officials who are neither elected nor otherwise directly accountable to the public. A fundamental challenge in both positive and prescriptive scholarship has been to analyze administrative decision making from the standpoint of democracy. This challenge is particularly pronounced in constitutional systems with executive bodies that are formally separate from the legislature and where political party control can be divided between the branches of government, as in the US. But the general challenge applies anywhere because of the enormous discretion afforded to unelected administrative officials. Much work in administrative law aims either to justify administrative procedures in democratic terms or to analyze empirically how those procedures can effectuate democratic values.

A common way to reconcile decision making by unelected administrators with democratic principles has been to consider administrators as mere implementers of decisions made through a democratic legislative process. Under what is sometimes called the 'transmission belt' model of administrative law, administrators are treated as mere instruments used to implement the will of the democratically controlled legislature (Stewart, 1975). Statutes serve as the 'transmission belt' to the agency, both transferring democratic authority to administrative actors and constraining those actors so that they advance legislatively approved goals.

As a positive matter, the 'transmission belt' model underestimates the amount of discretion held by administrative officials. Statutes are seldom self-executing. They need interpretation and must be applied in myriad concrete circumstances. In interpreting and applying statutes, administrators assume discretion. Statutes do not always speak clearly to the varied circumstances that confront administrators. Not only are many of these circumstances unanticipated by legislators, but elected officials often may lack incentives for making laws clear or precise in the first place, as it can be to their electoral advantage to appear to have addressed vexing social problems only in fact to have passed difficult policy questions and tradeoffs along to unelected administrators. For some administrative tasks, particularly monitoring and

enforcing laws, legislators give administrators explicit discretion over how to allocate their agencies' resources to pursue broad legislative goals.

Scholars disagree about how much discretion legislators ought to allow administrative agencies to exercise. Minimalists, emphasizing the electoral accountability of the legislature, have urged that any legislative delegations of authority to agencies be narrowly constructed (Lowi, 1979). Those scholars of a more expansionist bent emphasize administrators' indirect accountability to elected officials and contend that legislatures themselves are not perfectly representative, especially when key decisions are delegated internally to committees and legislative staff (Mashaw, 1985). While the optimal amount of authority to be delegated to agencies remains a subject of analysis (Stephenson, 2008), in practice administrative agencies continue to possess considerable discretion, even under relatively restrictive delegations.

Given that agencies do possess discretion, one aim of administrative law has been to identify procedures that encourage administrators to exercise their discretion in ways that promote both procedural and substantive values. A leading approach has been to design administrative procedures to promote broad public participation, including representation of a wide array of interest groups (Stewart, 1975). Transparent procedures and opportunities for public input give organized interests and ordinary citizens an ability to represent their views in the administrative process. Such procedures include those providing for open meetings, access to government information, hearings, and opportunities for public comment, and the ability to petition the government. Transparency and participation requirements are defended not only on the grounds of procedural fairness, but also because they are expected to deliver more information to administrators before they make decisions. These procedures may also protect against regulatory capture – the much-decried predicament where an agency's decisions come to promote an industry's private interests to the exclusion of the broader public interest (Stigler, 1971).

Although certain requirements, such as the notice-and-comment procedure followed by US agencies when making rules, provide the public with the opportunity to participate in administrative decision making, this does not necessarily mean that any extensive or representative portion of the public actually participates in administrative policymaking. Nor does it mean that public participation has any significant impact on agency decisions. In the US experience, most agency rulemaking proceedings garner only a small number of comments – and in most rulemakings by far the largest number of these are submitted by businesses or other organized groups rather than by what might be considered ordinary members of the public (Coglianese, 2006). On occasion, however, agencies will issue high-salience rules that do garner thousands of comments – typically short, unsophisticated expressions of preferences rather than comments conveying substantive information.

As to whether comments, simple or sophisticated, make a difference, the answer appears to be at most 'sometimes.' Studies find varying degrees of association between arguments presented in comments and changes made to proposed rules (West, 2004; Yackee, 2005; Shapiro, 2008). Formal comments,

though, are submitted only after agencies have invested much staff time in developing their proposed rules, a point at which much analysis and decision making has already been completed. For this reason, representatives of organized interest groups often seek to influence administrative policy by making informal contact with officials well before the agency proposes a rule and invites formal public comments (Furlong and Kerwin, 2005). Interest group representatives may also continue to remain involved with the agency after a ‘final’ decision has been made. Whether through litigation or further discussions, agencies can be persuaded to issue amendments or make other policy changes to otherwise final rules (Coglianese, 1996; West and Raso, 2012).

The widespread use of the Internet has generated interest in so-called e-rulemaking, or the use of information technology to connect the public more closely with the work of administrative agencies. The advent of agency web sites has put much more extensive information about administrative matters at the fingertips of users around the world (provided, of course, individuals can easily navigate through all the extraneous information also taking up space on agency web sites) (Coglianese, 2013). Agencies now routinely accept public comments submitted by email, and many also have a presence on social media sites like Facebook and Twitter (Coglianese, 2013). In the US, the federal government has created a one-stop web site called *Regulations.Gov* which indexes agency regulatory proceedings, houses supporting documents and previously submitted public comments related to new rules, and provides a button for users to submit comments on proposed rules. Although many early advocates of e-rulemaking heralded technology’s promise to expand public participation in the regulatory process, to date it appears that the patterns of commenting on agency rulemaking remain largely unchanged (Balla and Daniels, 2007).

It should not be surprising that levels of public participation in rulemaking remain relatively low, as the subject matter of much administrative action remains high in complexity or low in salience – or both. However, technology has undoubtedly made it easier for elites inside and outside of government to monitor what agencies are doing, as well as for scholars of administrative law to study more systematically how administrative rules and procedures may better serve democratic principles.

## **Courts and Judicial Review**

Concern about democracy also undergirds administrative law’s emphasis on judicial review of government action. Under well-accepted legal principles, courts serve as key enforcers both of the substantive laws that government officials are charged with implementing as well as the procedural requirements that these same officials must follow in their implementation of substantive laws. Courts have also imposed their own additional procedures on administrators based on constitutional and sometimes common law

principles. A key normative question has centered on how aggressive courts should be when it comes to reviewing the actions of administrative agencies.

Administrative agencies typically possess a greater capacity for making sound technical and policy judgments than do courts. Even in legal systems with specialized administrative courts, not only do agency officials and their staffs possess greater policy expertise than judges but administrators are also often more closely connected to democratic institutions than judges. These considerations have long weighed in favor of judicial deference to administrative agencies, lest judges disregard either the technical expertise or the political legitimacy reflected in many administrative decisions. On the other hand, it is also generally believed that some credible oversight by the courts bolsters agencies' compliance with administrative law and may improve their overall performance. The prescriptive challenge has been to identify the appropriate degree of deference for courts to give to agencies overseeing their decision making.

Sometimes the degree of deference is said to depend on whether agencies are making factual, policy judgments as opposed to making judgments about the meaning of the law. Courts might have grounds for giving more deference to agencies' policy judgments, simply ensuring that they have followed transparent procedures. Yet courts have also been known to take a careful look at policy decisions to see that they are based on a thorough analysis of all relevant issues. The latter approach is sometimes referred to as 'hard look' review in the US, as it calls for judges to probe carefully into the agency's reasoning to ensure that agency officials conducted a thorough analysis of policy options before reaching a decision. Although one might suspect courts would give less deference to agencies' legal interpretations than to their factual judgments, especially when agencies must interpret their own governing legislation, one of the most widely cited US Supreme Court opinions calls upon courts to defer to agency interpretations of ambiguous provisions within the statutes they implement (*Chevron v. Natural Resources Defense Council*, 1984). Prescriptive scholarship seeks to provide analytic guidance for judges on the appropriate level of deference that they should give to both legal and policy choices made by agencies (Zaring, 2010).

The proliferation of prescriptive doctrinal principles in contemporary legal systems gives rise to the question of what impact administrative law has on the actual decision making of judges in deciding cases. After the US Supreme Court issued its *Chevron* decision, lower courts reportedly shifted to deferring more to agency interpretations (Schuck and Elliott, 1990). Yet legal principles, whether articulated by the Supreme Court or reflected in laws adopted by the legislature, are only one factor that may explain how judges make their decisions. Just as administrators themselves possess residual discretion, so too do judges possess discretion in deciding how deferential to be to administrative agencies' policy and legal determinations. As in other areas of law, political ideology also may help explain patterns of judicial decision making in administrative law cases (Revesz, 1997; Miles and Sunstein, 2006).

In addition to analyzing judicial decision making, the field of administrative law has been centrally concerned with the impact of judicial review on the behavior of officials within administrative agencies. Normative arguments about judicial review typically depend on empirical assumptions about the effects courts have on the behavior of administrative agencies. Indeed, much legal scholarship in administrative law builds on the premise that judicial review, if deployed properly, can improve governance (Edley, 1990). The effects often attributed to judicial review include making agencies more observant of legislative mandates, increasing the analytic quality of agency decision making, and promoting agency responsiveness to a wide range of interests. Administrators who know that their actions may be subjected to review by the courts can be expected to exercise greater overall care, presumably making better, fairer, and more responsive decisions than administrators who are insulated from direct oversight.

Notwithstanding these purported beneficial effects from judicial review, scholars have also emphasized courts' potentially debilitating effects on agencies. They have widely accepted, for example, that administrators in the US confront a high probability that their actions will be subject to litigation. Cross-national research suggests that courts figure more prominently in government administration in the US than in other countries (Kagan, 2003). The threat of judicial review purportedly creates significant delays for agencies seeking to develop regulations (McGarity, 1992).

In some cases, agencies have been said to have retreated altogether from efforts to establish regulations. The US National Highway Traffic Safety Administration (NHTSA) is usually cited as the clearest case of this so-called ossification effect, with one major study suggesting that NHTSA has shifted away from developing new auto safety standards in order to avoid judicial reversal (Mashaw and Harfst, 1990). Other research, however, indicates that the threat of judicial interference in agency decision making has been significantly overestimated. Litigation challenging administrative action in the United States occurs less frequently than is generally assumed (Coglianese, 1997), and some research indicates that agencies can surmount seemingly adverse judicial decisions to achieve their policy objectives (Jordan, 2000). Large-sample studies have failed to confirm the view that judicial review significantly obstructs the rulemaking process in the United States (O'Connell, 2008; Yackee and Yackee, 2010).

Concern over excessive adversarialism in the administrative process persists in many countries. Government decision makers have at times pursued collaborative or consensus-based processes as alternative strategies for creating and implementing administrative policies. In the US, an innovation called negotiated rulemaking has been used by some administrative agencies in an effort to prevent subsequent litigation. In a negotiated rulemaking, representatives from government, business, and nongovernmental organizations work toward agreement on proposed administrative policies (Harter, 1982). In practice, however, these agreements have not reduced subsequent litigation, in part because litigation in the US



over agency rules has ordinarily occurred much less frequently than generally assumed (Coglianese, 1997). Moreover, even countries with more consensual, corporatist policy structures experience litigation over administrative issues, often because lawsuits can help outside groups penetrate close-knit policy networks (Sellers, 1995). In pluralist systems such as the US, litigation is typically viewed as a normal part of the policy process, and insiders to administrative processes tend to go to court at least as often as outsiders (Coglianese, 1996).

Overall, the impact of the judiciary on administrative governance has been and will remain a staple issue for administrative law. Empirical research on the meaning and impact of litigation in an administrative setting has the potential for informing prescriptive efforts to craft judicial principles or redesign administrative procedures in ways that contribute to more effective and legitimate governance.

### **Legislative and Executive Oversight**

In addition to the judiciary, other governmental institutions oversee the work of government agencies and may have a significant impact on administrative governance. In the US, given its system of separate branches of government, administrative agencies find themselves on the receiving end of pressure from both legislative and executive officials. Much empirical scholarship on administrative law has investigated oversight mechanisms and how they affect behavior within administrative agencies.

An influential political economy theory treats the procedures imposed by legislative and executive overseers as mechanisms of control deployed to influence agency outcomes (McCubbins et al., 1987). According to this approach, administrative law addresses the inherent principal-agent problem confronting elected officials when they delegate power to unelected administrators. Administrators inevitably face incentives to implement statutes in ways that may stray from the goals intended by the coalition that enacted the legislation. Yet it is difficult for legislators and others to monitor agencies continually and, in any case, a law's original enactors do not remain in power forever. Elected officials therefore have good reason to create administrative procedures with the goal of entrenching the outcomes desired by the original coalition. Empirical research, however, suggests that administrative procedures provide at best only limited tools for locking in the enacting coalitions' preferences (Balla, 1998). Agencies may be less faithful to the enacting coalition's interests because they are more responsive to the politics of the moment than their institutional independence might suggest. Some analysis suggests that agencies are actually better reflective of current public preferences than are legislatures or elected executives (Stephenson, 2008).

An overarching question in research on legislative and executive oversight is whether officials from either legislative or executive bodies exert the greater degree of influence over administrative agencies. One school of

thought posits legislative dominance in the oversight of US agencies, whether through the legislation they adopt, their control of agency budgets, or their ability to hold hearings or launch investigations (Weingast and Moran, 1983). Another school of thought holds that presidents exert more influence, whether through their powers to appoint the heads of agencies, direct agencies to comply with internal management and analytical requirements, or take the leading role in negotiations over agency budgets (Moe and Wilson, 1994). Given that agencies operate in a complicated political environment in which they are subject to multiple institutional constraints and pressures from both legislators and executive officials, the existing evidence seems to provide support for both schools of thought. It is clear, in other words, that both presidents and legislative officials exert influence over agencies, even if neither exercises complete control over administrative action.

One way legislatures have sought to influence agencies has been to try to direct their policymaking agendas. Not only can a legislature shape the direction of an agency by how it structures its delegation of substantive authority, but a legislature can also exert influence on the timing of administrative action. Statutes can contain deadlines for agency action, imposing a legal obligation on agencies to develop implementing rules by a specified time. Only a minority – perhaps even only a small fraction – of all regulations in the US are established under the stricture of a statutory deadline (West and Raso, 2012; Gersen and O’Connell, 2007). However, the legislature still prompts the initiation of many more administrative regulatory proceedings in the US than do executive branch officials or the courts (West and Raso, 2012). The imposition of deadlines also appears to speed up the regulatory process, at least modestly (Gersen and O’Connell, 2007).

Once an administrative agency decides to initiate a regulatory proceeding, in many jurisdictions the agency must conduct a regulatory impact analysis that will be reviewed by either a legislative or executive branch oversight body (Wiener, 2013; Radaelli and de Francesco, 2010). In the US, every president since Ronald Reagan has imposed a requirement that agencies develop regulatory impact analyses for their most significant administrative rules. Such mandated analyses must be reviewed by a White House office called the Office of Information and Regulatory Affairs (OIRA), an oversight body that has been extensively debated by administrative law scholars. The dominant theory is that presidents use the OIRA oversight process to coordinate regulatory priorities and resolve the principal–agent problem that exists between the president and those appointees the president selects to head regulatory agencies. As a normative matter, proponents of legislative supremacy decry the encroachment of presidents on the work of agencies that possess authority delegated to them by statute. Presidentialists, on the other hand, favor OIRA review as it offers a mechanism for the one official elected in a nationwide election to oversee the ongoing work of dozens of agencies that issue hundreds of important rules every year. OIRA oversight, based as it is on economic analyses that agencies prepare, has also triggered normative debate over the use of benefit–cost analysis in

administrative policymaking. Advocates claim that benefit–cost analysis helps improve regulatory policy, while opponents claim it only obfuscates decision making and delays much needed rules. Concern also exists that business interests use the OIRA process as a backdoor means of influencing regulatory policy to the detriment of achieving statutory goals or advancing the overall public interest.

Empirical researchers have been motivated by the normative debate over the OIRA process. They have documented that modern presidents have indeed sought to use OIRA review to achieve goals consistent with their policy priorities, even if these may not always comport with the results of benefit–cost analysis (Shapiro, 2005). Researchers have also shown that, in practice, OIRA review manifests itself differently across different administrations, especially in the degree to which interactions between White House and agency staff are cooperative or adversarial (West, 2006; Croley, 2003). Notwithstanding OIRA’s prominence, agency staff members continue to report that they retain considerable discretion in framing and making many regulatory policy decisions, even ones formally subject to OIRA scrutiny (Bressman and Vandenberg, 2006). Furthermore, the economic analysis produced as part of the OIRA review process appears to have much less impact on decision making than many advocates of benefit–cost analysis have hoped (Hahn and Tetlock, 2008) – but also much less of an impact in terms of delaying regulatory output as opponents of such analysis have feared (Coglianese, 2008).

Administrative policymaking occurs within a complex political and legal environment, one in which legislatures and high-level executive officials clearly play important roles. However, even major oversight entities do not possess the high degree of control that their proponents desire or their critics fear. An ongoing challenge for administrative law research remains to explain better the precise effects of legislative and executive oversight under varied conditions.

## **Administrative Law and Governance**

Administrative law lies at several intersections, crossing the boundaries of law and politics, political theory and political science, public law, and public administration. As the body of law governing governments, the future of administrative law rests in expanding knowledge about how law and legal institutions can advance core political and social values. A concern with democratic principles will continue to dominate research in administrative law, as will interest in the role of judicial, legislative, and executive oversight in improving administrative governance. Yet administrative law can and should expand to meet new roles that government will face in the future. Ongoing efforts at deregulation and privatization may signal a renegotiation of the divisions between the public and private sectors in many countries, the results of which will undoubtedly have implications for administrative law. Administrative law also now functions in an increasingly globalized and

digital world, with the emerging application of both international administrative institutions and new uses of technology that might advance both public legitimacy and policy effectiveness – or that might undermine or support administrative law institutions. No matter where the specific challenges may lie in the future, social science research on administrative law will continue to be needed to understand the operation of governmental institutions and identify ways to design rules and procedures that can potentially increase social welfare, promote the fair treatment of individuals, and expand the potential for transparent and democratic governance.

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