

# PART I

## THE RULE OF LAW IN PUBLIC ADMINISTRATION

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Chapter 1 Why Administrative Law?

Chapter 2 The Origins and Meaning of Administrative Law

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## CHAPTER 1

# WHY ADMINISTRATIVE LAW?

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This book introduces you to one of the most important and far-reaching fields in American law and politics. From a local zoning board that decides whether a tall apartment building can go up across the street and obstruct our lovely view, to the large federal agencies that tax us and regulate the safety of the air we breathe and the airplanes we fly on, unelected public administrators make and enforce the vast majority of rulings that govern our lives. We may think of politics as elections, fights in Congress, and declarations of policy from the White House, but the real muscle of government resides in bureaucrats and bureaucracies.

Because we live in a liberal democratic political system, “we, the people” are empowered to question how government uses its muscle. We do that in large part by insisting that government justify its uses of power in terms of legal rules and procedures. The principles of administrative law you are about to explore describe the legal tools that government uses to defend its bureaucratic power and that aggrieved parties use to attack that power.

Administrative law has political consequences for all citizens, but it has even more immediate consequences for people who deal with government on a daily basis. Students of business know they will contend in their professional lives with much governmental control of their efforts. They want to know what protections the law affords them in this process. Students who now work or plan to work in public careers have an equally pragmatic reason for studying administrative law. They need a road map to help them find their way through the

maze of rules and procedures they may confront on the job. This book teaches both the practical aspects of administrative law and the important political theories that underlie them.

The themes raised in this book touch central problems in American politics—how we came to have our present political system, how that system may fail to achieve the ends we expect of it, and what we may be able to do about such failures. Here, in a nutshell, are the five major themes of this book.

### FIVE THEMES

1. Bureaucratic government has existed in varying degrees in nearly all organized political systems. Modern American bureaucratic government has been shaped by a belief that the dominant free market economic system cannot meet certain important social needs. Administrative power grew to offset the tremendous economic, social, and political power that another form of organization—large private business enterprises—accumulated in the nineteenth century.

2. Today the effects of administrative government influence us literally every moment of our lives. Understanding the character of administrative regulation, as well as its scope, is critical for understanding the development of the modern state. The initial motivation—to counter the power of large business enterprises—remains, but the authority of administrative government today includes goals like regulating technology and protecting people from major unforeseeable and/or uncontrollable

modern risks, such as natural disasters, global warming, or chemical/biological hazards.

3. Bureaucratic government has provided no utopian cure for the shortcomings of capitalism. Nor have the policies and technologies to protect people from risks in modern life produced a worry-free environment. In fact, the bureaucratic state has built-in tendencies that can lead it to treat individuals unfairly and to produce arbitrary and unjustifiable policies.

4. Administrative law seeks to reduce the tendency toward arbitrariness and unfairness in bureaucratic government. It is part of a political culture that values placing controls on the use of power, thus keeping exercise of power within democratic boundaries.

5. Administrative law is a relatively new and open-ended field of law. This book reviews the key ethical issues in administrative law: Does administrative law actually improve the quality of our lives? If not, how must it change in order to do so?

The remainder of this chapter elaborates the first three stage-setting themes. The last two themes will introduce administrative law itself in chapter 2.

### THEME ONE: A BRIEF HISTORY OF THE ADMINISTRATIVE STATE

Political leaders from the beginning of recorded history have controlled their subjects through rules and government enforcement of rules. Most aspects of life have been regulated at some time in history and some public concerns have been regulated since ancient times. For example, regulation of ferryboat operators trace back to 1900 BC. In 1901, archeologists working in what is now Iraq discovered ancient stone inscriptions now known as the Code of Hammurabi, King of Babylon. The code, a record of the legal rulings the king had made during his reign, contained 280 entries, carefully organized by subject matter. Twenty-five sections regulated a variety of professionals, among whom were ferrymen. Similarly, in the eighteenth century, one of the Maryland state legislature's first statutes authorized county judges to set the maximum prices that could be charged by those ferrying

passengers and cargo across the state's waterways. In 1838, after one-too-many explosions of steamboat boilers, Congress created an agency to inspect steamboats for safety. Today, if you travel across the northwestern part of Washington State, you will cross Puget Sound by a state-operated ferry.

Surely, if a phenomenon such as governmental control of the ferry business occurs throughout human history, good reasons for it must exist. Public safety is one obvious reason. Another, which applies equally to ancient Babylon, eighteenth-century Baltimore, and twentieth-century Bremerton, Washington, is perhaps less obvious: Once a society begins to follow the principle of the division of labor, some people will develop monopolies. The person who controls the land where people find it safe to cross a river, or the person who has obtained the privilege of ferrying people across for a fee, possesses a natural monopoly. He can charge not only his operational costs plus a reasonable profit, but also whatever the customer is willing to pay, which may be much more. Farmers in ancient and modern times alike resent losing part of the value of their crop to such a monopolist, and they complain to their king or their government when they believe someone gouges them. The ferrying business, in other words, is an ancient example of a natural monopoly and hence of a free market failure.

But why should powerful kings listen to ordinary citizens? Honoring the claims of such citizens often means ruling against the interests of the wealthy and powerful. What political advantage does a king gain by siding with the powerless? How can we explain the existence of regulation in the public interest? This is one of the great, fundamental questions of politics in general, and one to which we can suggest the beginnings of an answer. Some rulers are truly altruistic. Others try to remain popular to prevent uprisings that could remove them from power by force. Furthermore, rulers throughout history have had to build and maintain the power to fight—to defend territory against outsiders at the very least and wage effective territorial conquests at best. History rather clearly indicates that rulers, while they may win battles, do not win wars when the bulk of the citizenry resists them or

stops caring about the outcome. Thucydides's history of the losses of Athens to Sparta teaches this lesson. So does the United States' defeat in Vietnam and its failures in Iraq.<sup>1</sup> To maintain political popularity and military strength, rulers must please not just those few with wealth and power, but also the less wealthy majority that constitutes the political base and on whose morale the war effort depends. This, in fact, is the most significant aspect of "democracy" as a political system: it gives people a tangible resource—the right to vote—to make sure that rulers in a democracy, the politicians, are forced to "please" them.

Today we use words like *liberty*, *equality*, and *individual dignity* in our discussions of public policy. We want to believe that government serves all social interests. These values are indeed noble, but we must recognize that governments honor them partly for reasons of self-preservation.

### *Administrative Government in the United States*

Recall the Maryland statute allowing county judges to regulate ferry charges. Why would judges rather than administrators perform such tasks? The early authors of regulations—Hammurabi or the Maryland legislature—had no grand scheme of administrative government plotted out for the future. In Maryland, county judges were mainly responsible for governing their counties. The legislature simply added the setting of ferry rates to their list of duties.

Congress's early efforts to create administrative agencies had no grand design either. The first Congress of 1789 faced two problems for which the expedient solution at the time rather obviously seemed an office or agency. The first problem was to establish a way of estimating the duties that importers should pay on goods they obtained in foreign countries. The second task was to organize a response to claims for pensions filed by soldiers "wounded and disabled during the late war." Congress created two agencies to solve those problems, presumably because each problem would last for the foreseeable future and because some expertise and consistency from case to case would be desirable. Both organizations continue to this day.

1. On a smaller but more dramatic scale, so does the American film *On the Waterfront* (1954), which depicts the breakdown of an organized crime syndicate.

In one sense these early agencies had very modest aims. They resulted not from any monumental political battles between the wealthy and the common man, but rather from a basic need to serve widely recognized public interests. Notice also how both these tasks fit squarely into the age-old reasons for government to protect "us" (domestic producers, in this case) against "them" (foreign competition) and to encourage, in the case of veterans' claims, the willingness to fight in defense of country.

The expansion of administrative government in the United States since 1789 did not follow anyone's plan. One relatively minor contemporary indication of this fact is that the various names of government offices—*Agency*, *Board*, *Commission*, *Administration*, *Bureau*, and so forth—tell you absolutely nothing about the office to which they attach.

Understanding the growth of administrative government, particularly in the twentieth century, requires review of some economic history. The producer of, say, Flemish harpsichords in Antwerp in the seventeenth century, would have belonged to a guild. The agreements and customs of the guild controlled most aspects of the harpsichord trade: who could work, how many units per year they could produce, prices, wages, and the like. The introduction of so-called free competition would only upset this balance. By the end of the eighteenth century, however, the concept of free and unlimited competition had been elevated from something devilish to something holy. In no small part because of Adam Smith's widely read *The Wealth of Nations* (1776), people in power began to undo self-imposed restrictions on who could produce how many of which goods. Freedom to compete was also the freedom to specialize, and in specializing and dividing labor lay the key to increasing the productivity of labor.

This idea seemed particularly benign in America, where the losers in the competitive game could simply "go West" rather than starve. *Laissez faire*<sup>2</sup> ruled, so that the

2. *Laissez faire* is a French term that literally means "let do." It became an important slogan in France in the eighteenth century among people who wanted to eliminate trade restrictions imposed by the French government. Later, it came to represent "a doctrine opposing governmental interference in economic affairs beyond the minimum necessary for the maintenance of peace and property rights," in the words of *Merriam-Webster's Dictionary*.

major nineteenth-century manufacturing, banking, and transportation businesses operated with near-complete freedom from either governmental or guild-imposed regulations. If anything, by the last half of the century, government actively promoted business. Government promotion of business and protection of private property rights is itself a form of regulation, although we do not commonly use the term *regulation* in this sense. The economic theory of *laissez faire* favors open competition among capitalists over government control of the economy, but it also relies on the state to protect private property rights and to enforce private business agreements such as contracts. Even Adam Smith recognized that the state played an important role in policing and maintaining order for the “free market.”

Business bought some of this support with outright bribes. Standard Oil, a common joke of the times put it, did everything to the Ohio legislature except refine it. Yet even without bribes the government would have assisted railroad and lumber and cattle interests with huge grants of land. It would have maintained high tariffs, an anti-competitive policy disguised as promoting competition. Local police and the National Guard supported management with physical force in the 1892 Homestead Steel Strike. Facing a devastating labor strike in 1894, the Pullman Company bypassed the more progressive state government in Illinois and took its case straight to President Grover Cleveland, who sent in the Army to break up the strike.

For the bulk of the century, these forces converged to produce a remarkably unrestrained economy: mushrooming industrial technology that climaxed in the electrification of America; tremendously abundant natural resources easily exploited by well-capitalized large corporations; a thoroughly pro-business attitude by government; and a theory of *laissez faire* to call upon for support.

Well before the end of the century, however, this burst of economic freedom, this exception to the more usual course of economic history, began to die. The more successful businesses engaged in powerful domination of the less successful. And when economic panics (recessions or depressions we would call them today) struck, as they have

throughout economic history, even more monopolizing occurred as investors created trusts to restore the blessed protection of the guilds.

Before the end of the century this unrestrained power had begun to impose such crushing costs on the average citizen that democratic politics mobilized to check it. Here, for example, is the farmer’s point of view in 1891:

Farmers are passing through the “valley and shadow of death;” farming as a business is profitless; values of farm products have fallen 50 per cent since the great war, and farm values have depreciated 25 to 50 per cent during the last ten years; farmers are overwhelmed with debts secured by mortgages on their homes, unable in many instances to pay even the interest as it falls due, and unable to renew the loans because securities are weakening by reason of the general depression; many farmers are losing their homes under this dreadful blight, and the mortgage mill still grinds. We are in the hands of a merciless power; the people’s homes are at stake. . . .

From this array of testimony the reader need have no difficulty in determining for himself “how we got here.” The hand of the money changer is upon us. Money dictates our financial policy; money controls the business of the country; money is despoiling the people. . . . These men of Wall Street . . . hold the bonds of nearly every state, county, city and township in the Union; every railroad owes them more than it is worth. Corners in grain and other products of toil are the legitimate fruits of Wall Street methods. Every trust and combine made to rob the people had its origin in the example of Wall Street dealers. . . . This dangerous power which money gives is fast undermining the liberties of the people. It now has the control of nearly half their homes, and is reaching out its clutching hands for the rest. This is the power we have to deal with.<sup>3</sup>

After the close of the Civil War, government was caught between popular cries like Mr. Peffer’s and the appeal of the theory of free competition. The wealthy and influential supporters of free competition gained further strength because *laissez faire* appeared to fit so neatly into Darwin’s theory of evolution. To many, Herbert Spencer’s *Social Statics* established the scientific justification for free

3. W. A. Peffer, *The Farmer’s Side* (New York: D. Appleton & Co., 1891), 42.

competition. (Indeed the term *survival of the fittest* was first Spencer's, later appropriated by Darwinians.)<sup>4</sup>

But this allegedly virtuous logic bringing together social Darwinism and free competition suffers from a terminal defect. The laws of supply and demand produce the greatest good for the greatest number only when laborers, farmers, businessmen, and financiers can easily and quickly enter any market that promises them a better return than they currently get. It works only in the absence of monopolies. The lawyers, railroad owners, industrialists, and bankers who busily constructed trusts and monopolies defended their right to eliminate competition by invoking the rhetoric of free enterprise itself! It is surprising how few people appreciated this inconsistency at the time.

Caught in this ideological squeeze, state and federal governments wriggled inconclusively for decades before breaking free of the unworkable ideology. Between 1870 and 1874 four midwestern states, responding to strong pressure from their voting farmers, passed laws—the “Granger” laws—regulating the prices railroads, warehouses, and grain elevators could charge. In 1877 the United States Supreme Court upheld the constitutionality of these laws,<sup>5</sup> but within a decade the Court began to shift gears. Any time a state attempted to pass a law regulating charges for freight traveling through more than one state, the Court struck it down on the grounds that only Congress could regulate interstate commerce. While its motives were political, the Court's move actually made economic sense, since a multitude of inconsistent state regulations was practically unworkable for something as complex as interstate railroad traffic.

In 1886 the Supreme Court ruled that state regulation of interstate railroad traffic was unconstitutional. Congress in 1887 responded by creating the Interstate Commerce Commission (ICC), the first modern federal regulatory agency. The Interstate Commerce Act prohibited a variety of discriminatory and unfair pricing practices. It required railroads to make their rates public and report them to the five-person agency. It required that rates be “reasonable

and just,” but did not grant to the ICC power to set railroad rates in so many words. The ICC was granted this power in 1906.

This is unfortunate because by the end of the century the *laissez faire* philosophy dominated the political values of the justices on the Supreme Court. Having told the states that only Congress could regulate interstate rail rates, they then announced that Congress hadn't.<sup>6</sup> When the ICC issued a cease and desist order requiring railroads to lower rates, the railroads refused. The ICC possessed no enforcement power of its own, so it had to go to the courts to seek a judicially enforceable order. The courts did not cooperate. Of the first sixteen cases to reach the Supreme Court, the railroads won fifteen. In 1890 Congress passed the Sherman Antitrust Act with virtually no party opposition. The Supreme Court promptly ruled that the act didn't apply to any of the oil, steel, sugar, or other manufacturing monopolies because manufacturing was not part of the “commerce” that Congress had constitutional power to control.

#### *Why Modern Bureaucracy?*

Why, given our present day understanding, was the Supreme Court wrong? What shortcomings in unregulated markets did the Court blindly fail to appreciate? Markets contain within them forces that tend toward collusion, toward eliminating or reducing competition, toward monopoly. The conditions of the economists' perfect market—many buyers and sellers, the ability to enter and exit a market rapidly, and complete information about market conditions available at all times to each buyer and seller—do not occur very often in the real world. The trade in farm products through futures trading is often cited as an example of something close to a perfect market, but neither entering and leaving the business itself nor purchasing and selling farm land and machinery are rapid or easy. As we know, the spike in oil prices in 2008 was due in part to speculative “free trade” gambles, with negative results on, among other things, the cost of food. Agricultural prices can fluctuate wildly,

4. John C. Grene, *The Death of Adam* (New York: Mentor, 1961), 295.

5. *Munn v. Illinois*, 94 U.S. 113 (1877).

6. *Cincinnati, New Orleans and Texas Pacific Railway Co. v. ICC*, 162 U.S. 184 (1896).

often with such potentially ruinous consequences for farmers that the United States government instituted policies designed to control farm prices during most of the twentieth century.

The key to understanding the shortcomings of free markets lies in the fact that “free” markets do not necessarily possess the characteristics of perfect markets. A free market is simply a private, unregulated market. The real-world imperfections of such markets lead some companies (such as Microsoft in the late 1990s) to grow significantly stronger than their competitors. Once a firm holds a position of market dominance, it can wield its power to increase its share of the business in that market, often in collusion with other businesses.

Other market shortcomings also deserve an explanation. Because free markets seem in economic history to go through boom-and-bust business cycles, modern government takes administrative steps to smooth the cycles out. Most modern central banking regulations, to say nothing of other monetary and fiscal policies, exist for this purpose alone. Furthermore, free markets have no mechanism that requires producers of goods to pay for the indirect costs of production, for example, the costs imposed by air and water pollution. There is no incentive to control pollution because producers can sell a product for less if they do not have to recover pollution control costs as part of the selling price of their products. Hence, the creation of the Environmental Protection Agency (EPA).

Even when we imagine markets without tendencies to monopolize, and production techniques that do not impose significant and unrecovered indirect costs, we still can identify evils that may call for regulation. To name the most obvious, people have a tendency to cheat. Commodities sellers in medieval markets were tempted to use false weights. Promoters of new corporate schemes tend to overstate the prospects of their new venture and minimize its risks when they try to convince people to buy stock in the company. Hence, the existence of the Securities and Exchange Commission (SEC). The sudden collapse of the economies of Southeast Asia in 1998 can be directly attributed to the fact that these countries, and indeed Japan, did not have regulatory mechanisms like the SEC to check private greed. A more vigilant SEC and Federal

Reserve Board could, during President George W. Bush’s second term, have regulated the markets in mortgage financing so as to prevent the inflation and subsequent collapse of housing values.

None of these descriptions of free market shortcomings should surprise a reader familiar with basic economics. Three other, and deeper, dimensions to the free market problem, however, may not be so obvious or familiar. First, in the United States, the administrative process plays a major role because of increasing technological complexity. We live our lives surrounded by very dangerous things—elevators, cars, airplanes, industrial wastes and chemical products, radioactivity, and genetically engineered DNA. Such technological complexity and dangers associated with it impact even the remotest areas on the globe. Global warming is one such man-made problem. To be sure, we are safer and better cared for than those who lived and died before the advent of modern medicine. Centuries ago people perceived many of the sources of insecurity to rest in the hands of the gods. People who view their lives theologically would more likely support the church than lobby to create regulatory agencies. Today people believe that, while they cannot control the safety of the things around them, somebody else—experts—can, and this explains much of the support for new governmental programs and agencies.

In a world defined by increasing interconnectedness (what is commonly referred to as globalization), such calls for expert regulation frequently issue beyond the boundaries of a particular country—and this constitutes the second, deeper dimension to the market problem. In general there is very little empirical data about what a market is or how it works. As Douglass North, the 1993 Nobel Prize winner in economics, has summarized it: “It is a peculiar fact that the literature on economics . . . contains so little discussion of the central institution that underlies neo-classical economics—the market.”<sup>7</sup> This lack of clear understanding is not just an academic puzzle, and it has become even more problematic in the process of globalization. As the movement of money and goods has speeded

7. Cited in Michel Callon, ed., *The Laws of the Markets* (London: Blackwell, 1998), 1.

up enormously, the neat view of a “national” market can no longer be taken for granted. Market failures are now much more complex and multidimensional, and a market failure in one part of the world can pose significant risks even for faraway nations.

The third deeper dimension to the market problem is political. Markets do not fail or succeed in the abstract. Like almost anything else in life, failure and success exist only in relation to standards. The standards by which the political culture of the United States judges the effectiveness of free markets have shifted considerably with increased *democracy*. Note the small *d*. In the past century American society has increasingly accepted the validity of the claims of average citizens, of workers, women, blacks, the poor, and other classes previously excluded from voting. The spread of the franchise to these classes has increased the responsiveness of government to their claims, and these groups most keenly feel the effects of all of the free market’s evils. Welfare programs, public education, and consumer protection all seek to promote the interests of those who feel the exploitative effects of business entrepreneurial efforts most directly. The labor movement and the agencies like the National Labor Relations Board (NLRB) and state worker compensation commissions that support the labor movement fit the same category. In short, our commitment to equality of opportunity, coupled with an electorate containing many voters whose self-interest supports programs and candidates that favor those who cannot help themselves, has created a standard of free markets that makes their failures stand out in stronger relief than ever before.

It took the first forty years of the twentieth century for the political process, with the courts very much at the rear, to work free of the impasse between economic fact and free enterprise ideology. The move started with Theodore Roosevelt’s presidency, during which Congress gave the ICC the specific power it had lacked to regulate rates. A year later, in 1907, Congress created the second major national regulatory agency, the Food and Drug Administration (FDA). In 1982 President Reagan urged a shift from national to state regulatory power, but there is little reason to believe that the amount of bureaucratic power in government will dramatically lessen, even if its locus shifts to the states.

On the surface, this history seems a fairly simple story. Powerful government has been the norm during the development of civilization throughout the world. *Laissez faire* flourished only when an educated and industrious people seemed able to combine abundant natural resources with new technologies, and new corporate business forms to accumulate capital and thus produce unlimited wealth without creating problems that required governmental solutions. The problems appeared in due course, and government predictably reasserted its usual control, this time propelled by truly democratic forces.

But this history does not yet fully account for the creation of such a large bureaucracy. Why could the three traditional branches of government not handle the job? The Congress is not structured to do so. Members of Congress are essentially ombudspople<sup>8</sup> who try to help constituents with problems. When the problems seem serious enough, Congress passes laws dealing with them. These functions don’t leave any time for processing large volumes of routine claims, nor for elected officials is there much payoff for doing so. State legislatures, most of which still meet only a few weeks per year, have much less capacity to administer than does Congress.

The executive branch, of course, does contain the large majority of administrative employees, people who work in the regular chain of command in a department headed by a cabinet official. But Congress has often worried that partisan presidential politics and the tremendous presidential powers to exploit the office could seep into regulation of sensitive areas like transportation and communications. Besides, presidents come and go quite frequently, and with them their cabinet appointees. Coping with technologically complex problems needs continuing expertise and leadership.

Why not, then, leave the problems in the hands of the courts? While all federal judges serve for life, only three states have lifetime appointments—Massachusetts, New Hampshire, and Rhode Island. Both federal and state legislatures can create more judgeships any time they wish. Yet, for a mix of reasons, judges do not make good

8. According to *Merriam-Webster’s Dictionary*, an *ombudsman* is “a person, such as a government official or an employee, who investigates complaints and tries to deal with problems fairly.”



administrators. We have already seen how, at the very time the need for regulation became clear to the politicians at all levels, the courts resisted. Moreover, our judicial system, unlike the French legal system, in which judges have played a strong regulatory role, works in ways not well suited to regulation. Our judicial system specializes in resolving disputes between people or organizations *fairly*. It stresses the requirement that judges remain aloof and impartial. The laws of evidence strictly prohibit judges and juries from considering much potentially useful information. Our idea of “due process of law” drastically limits the way judges can communicate with the parties involved. The judge cannot call someone on the phone from her chambers and ask for the missing evidence in the case. Most important, judges cannot initiate investigations. They can constitutionally act only when an injured party files a lawsuit, thus bringing a case to the court. The mechanics of our common law system require people with the best of legal claims to invest considerable money in litigation that often takes years to complete. The farmer, nickel-and-dimed to death by high railroad rates, was in no position to gain judicial help even if the courts had been more sympathetic. Finally, courts cannot effectively cope with the volume of regulatory work. The volume of administrative problems is so unpredictable, and the nature of abuses so potentially complex, that a static body of judges unable to specialize can deal neither efficiently nor effectively with regulatory problems.

Consider by contrast the administrative capacity that something as simple as a family or a small sorority needs in order to solve problems. Even simple problem-solving groups must be able to specialize, divide the labor, budget how to spend their limited resources, and set priorities accordingly. Their members do not want to get bogged down in the formalities of the rules of evidence. They want to be able to meet, haggle, compromise, experiment with a policy, and quickly reject it if it fails. The communications network in any effective problem-solving group must not squelch feedback to policymakers from the field.

In other words, despite the curses leveled at “faceless bureaucracies” in political speeches, bureaucratic organizations have certain characteristics that are functional to the needs of government. They have *continuity* that outlasts

the political two- and four-year cycles. And unlike legislatures they have *memories* that allow them to apply information from past experiences to new situations. Unlike courts, agencies routinely *divide labor* into more efficient specialties. They work, as courts do not and legislatures only partially do, with fairly fixed budgetary limits that require *priority setting and judicious compromising*. Finally, unlike courts, they are *proactive*. They have the *capacity to take sides*, to accept a mission, and to battle in the political arena to complete the mission successfully. Consider how necessary these administrative qualities are to the pursuit of consumer product safety, an area in which the free market has not performed very well.

In 1970, the National Commission on Product Safety reported to Congress some chilling facts about accidental deaths. Over 30,000 people, it reported, were killed and over one-half million were injured annually from accidents around the home. At least 150,000 were seriously cut by broken glass alone, mainly from windows and doors. Congress concluded that this problem required a publicly funded administrative solution.

In order to cope with problems, such as product safety for example, an agency must have the authority to initiate investigations to develop a clear idea of the greatest sources of actual harm around the home. It would need power to initiate specific investigations of suspicious products like rotary lawnmowers, not merely to show that they are dangerous, but also to devise the least costly design changes to reduce the danger. A governing agency needs the flexibility to negotiate and make some compromises with manufacturers if it is to accommodate competing interests satisfactorily. At the same time, however, it must develop a staff sufficiently independent from, yet familiar with, the businesses regulated to decide whether the information is reliable when provided by an industry presumably reluctant to be regulated.

Administrative government, like private business, exists to accomplish results. Both need the resources to do it. The legal system and the judicial process, on the other hand, exist primarily to preserve fairness. Fairness and efficiency, or getting on with the job, often collide with each other. This, as we have seen, is the main reason courts cannot assume the administrative burden directly.

The political debates over regulation are not simple either. It is important not to reduce the differences of opinion about regulation into pro and con positions toward government regulation of the economy. In addition, debates over regulation concern the provision of government benefits or entitlements. Administrative law therefore indirectly but powerfully shapes the role of government regulation of business and the scope and nature of the state. The historical record shows that a multiplicity of interests demanded regulation at the turn of the century, and regulation has served conflicting sets of interests ever since. Two models of regulation that have been in competition with each other are the *public interest model* and the *capture model*. Neither model entirely opposes government regulation. Rather, each provides political justifications for a particular theory of government regulation. As you study the political debates about the purpose and goals of administrative law, you will see that these models, at their core, prescribe who regulates the regulated—officials from within the regulated industries and interests, or public officials who respond to elections and use public procedures of adjudication and rule making.

### *An Overview of Theme One*

The next section will give specific examples of modern regulatory government. Before turning there, one central point deserves repeating: The scope of public regulation has broadened, yet its emphasis today remains primarily where it was when the Congress founded the Interstate Commerce Commission over a century ago. This emphasis focuses, now as then, on private economic power. Just as the ICC sought to offset the monopoly price-setting power of railroads, at its inception in the mid-1970s the Occupational Safety and Health Administration (OSHA) sought to correct a tendency among businesses to maintain unsafe workplaces. Likewise, today's Environmental Protection Agency (EPA) deals primarily with industrial pollution, not only from factories but also from the automobiles and other machines that factories produce. Similarly, today's Consumer Product Safety Commission (CPSC) seeks to force businesses to produce safer and more reliable products. And as the functions of agencies are eliminated from the national policy agenda, so too are

the agencies themselves. In 1995, Congress, perceiving that truckers and airlines created free market competition with the railroads, abolished the ICC by unanimous vote.

In comparing older regulations with newer kinds of regulation like OSHA and EPA, however, Alan Stone argues that the goals have changed somewhat.<sup>9</sup> Older regulation was premised on economic performance goals, such as price, costs, and profits, while post-New Deal regulation addresses intangible costs, such as pain and suffering—costs that Stone equates with social performance goals. The distinction between economic and social regulation captures the changing political orientations of the regulatory state. While the distinction can be helpful, it is important not to overstate the difference between the two. We will see in later chapters how the contemporary debate over the use of a cost-benefit analysis in regulation is essentially a struggle over the weight that should be given to economic and social goals when regulating economic power.<sup>10</sup>

### THEME TWO: THE BROAD REACH OF ADMINISTRATIVE ACTION AND POWER

Just as Charles Dickens begins *A Christmas Carol* by telling his readers that they must accept that Marley was “dead as a doornail” in order to appreciate his story, you must believe in (and understand well) the tremendous reach and power of bureaucratic government in order to appreciate the importance of the study of administrative law. Here are just a few bits of data that document the twentieth-century administrative explosion.

- By law, agencies must publish these actions in the *Federal Register*. The *Federal Register*, which was created in 1935, occupies more library shelf space than all the laws passed by Congress since it first met in 1789. In 2012 alone, 78,961 pages were published in the *Federal Register*.<sup>11</sup>

9. See Alan Stone, *Regulation and Its Alternatives* (Washington, DC: CQ Press, 1982).

10. See Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change*, 2nd ed. (New York: Oxford University Press, 1996).

11. The *Federal Register* is now also published online, and the entire content of volumes 59–78 (1994–2013) can be viewed/searched at <https://www.federalregister.gov>.

- In 2012 the Social Security Administration (SSA) alone processed 8 million applications for Social Security benefits.<sup>12</sup> Most of these raise no legal problems, yet the small fraction that does is twenty times greater in number than all of the civil and criminal lawsuits heard in the regular federal courts each year with the exception of bankruptcy cases.
- There are now approximately 677 federal trial judges in the United States,<sup>13</sup> but there are over 1,400 federal administrative law judges,<sup>14</sup> 86 percent ( $n = 1,200$ ) of whom work for the Social Security Administration.<sup>15</sup>
- Of the 136 million Americans in the civilian (non-farm) labor force,<sup>16</sup> about 2.8 million work for the federal government<sup>17</sup> and over 18 million for state and local governments.<sup>18</sup>

How broad is the reach of regulatory government? Consider these typical news stories, all from the *New York Times*:

- *March 30, 2006.* The Transportation Department announced new fuel economy standards for sport utility vehicles, pickup trucks, and minivans that will make some of them go farther on a gallon of gasoline than the average car does, and will apply to many of the biggest SUVs for the first time.
- *April 20, 2006.* The Food and Drug Administration announced, contradicting a 1999 review by a panel of

highly regarded scientists, that “no scientific studies” supported the medical use of marijuana.

- *March 13, 2008.* The Environmental Protection Agency announced a modest tightening of the smog standard from 84 parts per billion to 75 (overruling the unanimous advice of its scientific advisory council for a more protective standard of 60 to 70 parts per billion).
- *March 20, 2008.* The Federal Communications Commission unanimously approved a rule banning exclusive telephone service agreements between apartment building owners and carriers, giving tenants their pick of providers.

In just one week—June 3 to June 10, 1998—the *New York Times* reported that the Department of Health and Human Services announced its intention to change the rules that determine which, of the tens of thousands of patients who require an organ transplant to stay alive, will get the first chance at available organs; the Food and Drug Administration authorized the first full testing of an HIV vaccine; the Federal Trade Commission filed an antitrust suit against the Intel Corporation for allegedly trying to coerce computer manufacturers to drop their disputes about patent rights against Intel; the Food and Drug Administration challenged as “an illegal and unapproved drug” an over-the-counter remedy for reduction of cholesterol that consists of pulverized rice fermented in red yeast. The substance has been used in Chinese cooking for over 2,000 years.

Figure 1.1 displays the simple number of main federal government agencies. It is awesome, but would be even more so if the chart included all state and local agencies as well.

There are three basic types of federal administrative agencies: (1) independent regulatory commissions; (2) agencies housed within a cabinet level department; and (3) agencies outside the formal structure of a cabinet department. Figure 1.2 on page 13 shows the structure of one independent regulatory commission, the FTC. Following the creation of an independent commission by Congress, five or more commissioners are appointed by the president with the advice and consent of the Senate for

12. Social Security Administration, “Budget Overview,” April 2013. See also “Fast Facts and Figures about Social Security” (Washington, DC: Social Security Administration, Office of Research, Evaluation, and Statistics Publications, 2013).

13. “Federal Judgeships,” *USCourtsGovRSS*, United States Courts, Sept. 26, 2013, available online at <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx>.

14. See Statement of Michael J. Astrue, Commissioner of Social Security, Social Security Administration, on Role of Social Security Administrative Judges before the Subcommittee on Courts, Commercial and Administrative Law, Committee of the Judiciary and the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives (July 11, 2011).

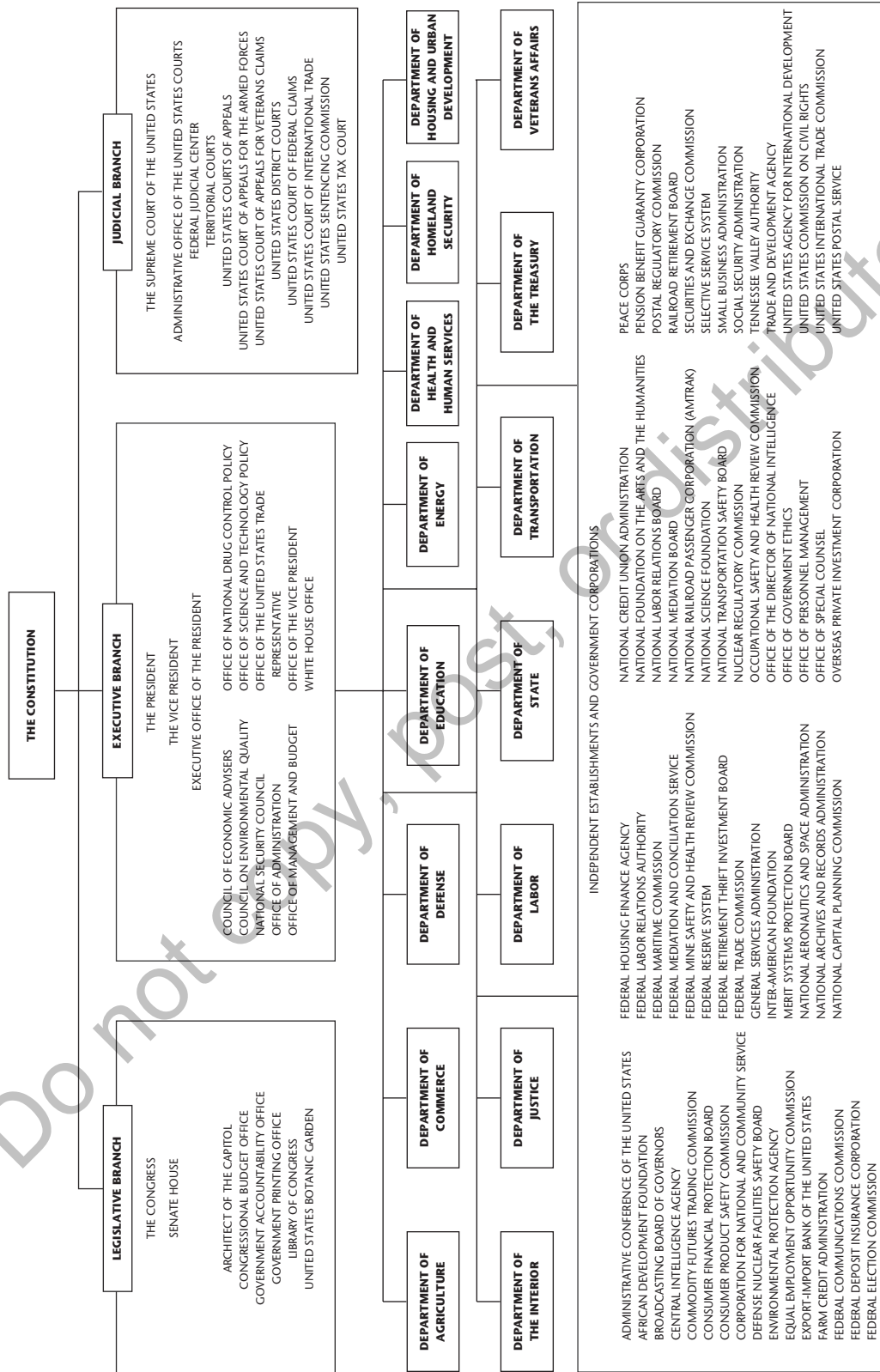
15. *Ibid.*

16. *Monthly Labor Review* (Washington, DC: U.S. Dept. of Labor, Bureau of Labor Statistics, August 2013).

17. *Ibid.*

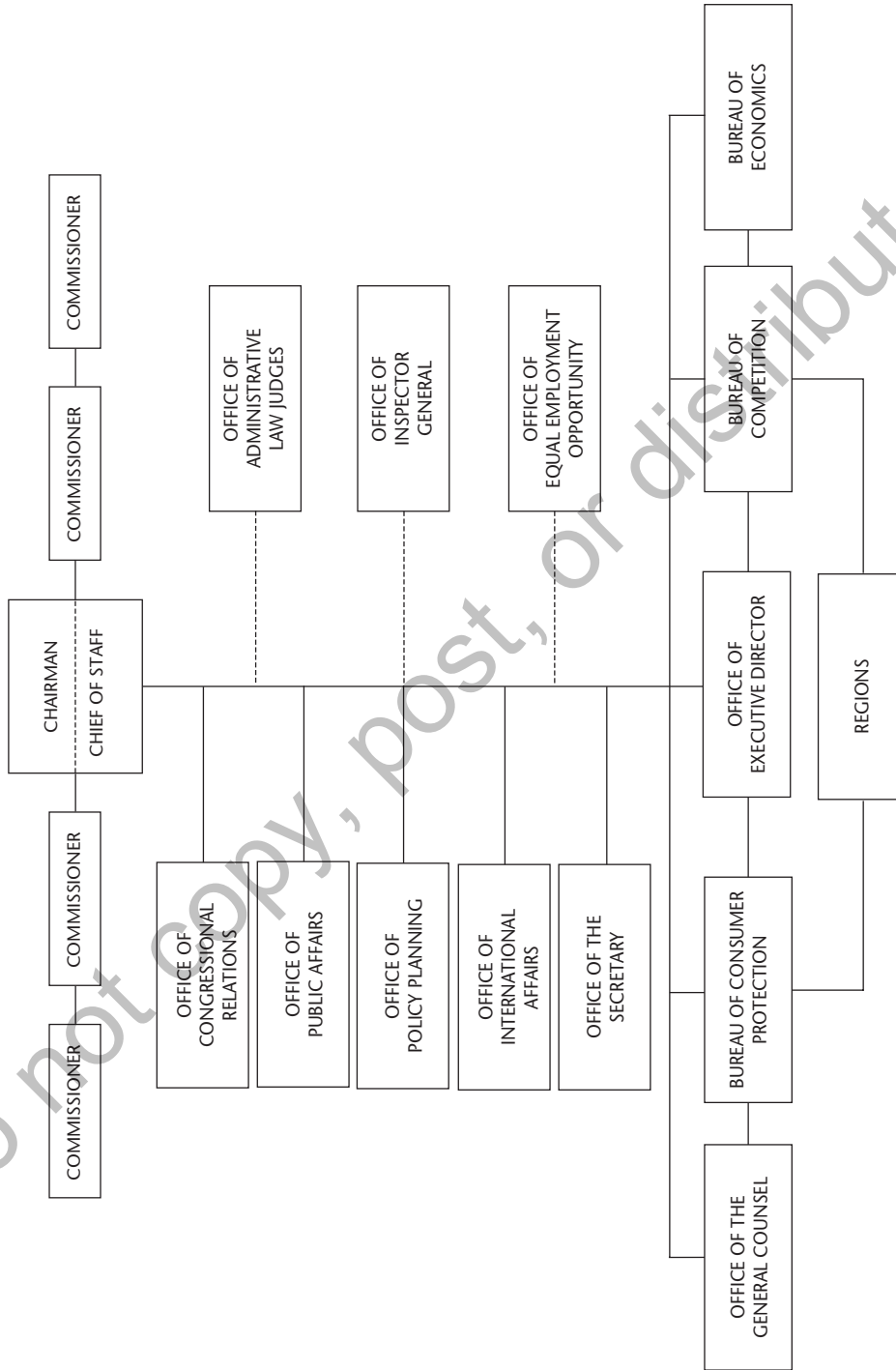
18. *Ibid.*

Figure 1.1 The Government of the United States



Source: *The United States Government Manual 2012* (Washington, DC: Government Printing Office, 2012), 22.

Figure 1.2 The Federal Trade Commission (FTC)



Source: *The United States Government Manual 2012* (Washington, DC: Government Printing Office, 2012), 371.

staggered terms. One commissioner serves as the chair. Although commissions (e.g., FTC, NRC, FCC, SEC, EEOC) are technically within the executive branch of government, they can act more independently from presidential policy programs than officials in other types of agencies primarily because the president cannot remove commissioners without cause, whereas the president may remove heads of other agencies at his discretion. Figure 1.3 on page 15 shows the structure of an agency, OSHA, that is within a cabinet level department, the Department of Labor. You will note that in addition to OSHA, the Department of Labor houses several other agencies, such as the Mine Safety and Health Administration, and Employee Benefits Security Administration. Figure 1.4 on page 16 shows the organization of the Environmental Protection Agency, an agency outside the formal structure of a cabinet department.

Before we move on to the third theme, we would like to draw your attention to the relative fluidity of administrative structures. The figure presenting different types of federal government agencies and the figures of OSHA, FTC, or EPA are snapshots and, as such, change quite frequently. Reorganization is one of the recurring themes in administrative government. With a desire to achieve various goals, including reducing costs, increasing efficiency, scientific management, increasing democratic participation, and so on, administrative units are fused, separated, and ultimately reorganized. The Environmental Protection Agency, for instance, was established with Reorganization Plan No. 3, by President Nixon. A large number of functions and duties were transferred to the EPA from the Departments of Interior; Health, Education and Welfare; Agriculture; Atomic Energy Commission; Federal Radiation Council; and Council on Environmental Quality. The most recent major example of such reorganization is the creation of the Department of Homeland Security (DHS).

The Department of Homeland Security was established in 2002 by bringing together 22 different agencies under one roof. Below, Figure 1.5 shows the flow of departments from within agencies to the newly created Department of Homeland Security. Figure 1.6 displays the structural elements of the DHS.

### THEME THREE: THE SHORTCOMINGS OF REGULATORY GOVERNMENT

The third and final stage-setting theme discussed in this chapter explores and begins to explain what every reader already knows: Human beings run the government, and human beings everywhere sometimes “screw up.” Regulatory government has not satisfactorily resolved all of the problems created by modern, highly technological economies. Worse, some reasonably successful solutions have simultaneously created other problems of their own. For example, the Social Security system has successfully created a support system for millions of retired, disabled, and otherwise disadvantaged citizens. Yet the system lends itself to abuse by citizens who present false claims and by administrators who may arbitrarily withhold benefits recipients are entitled to.

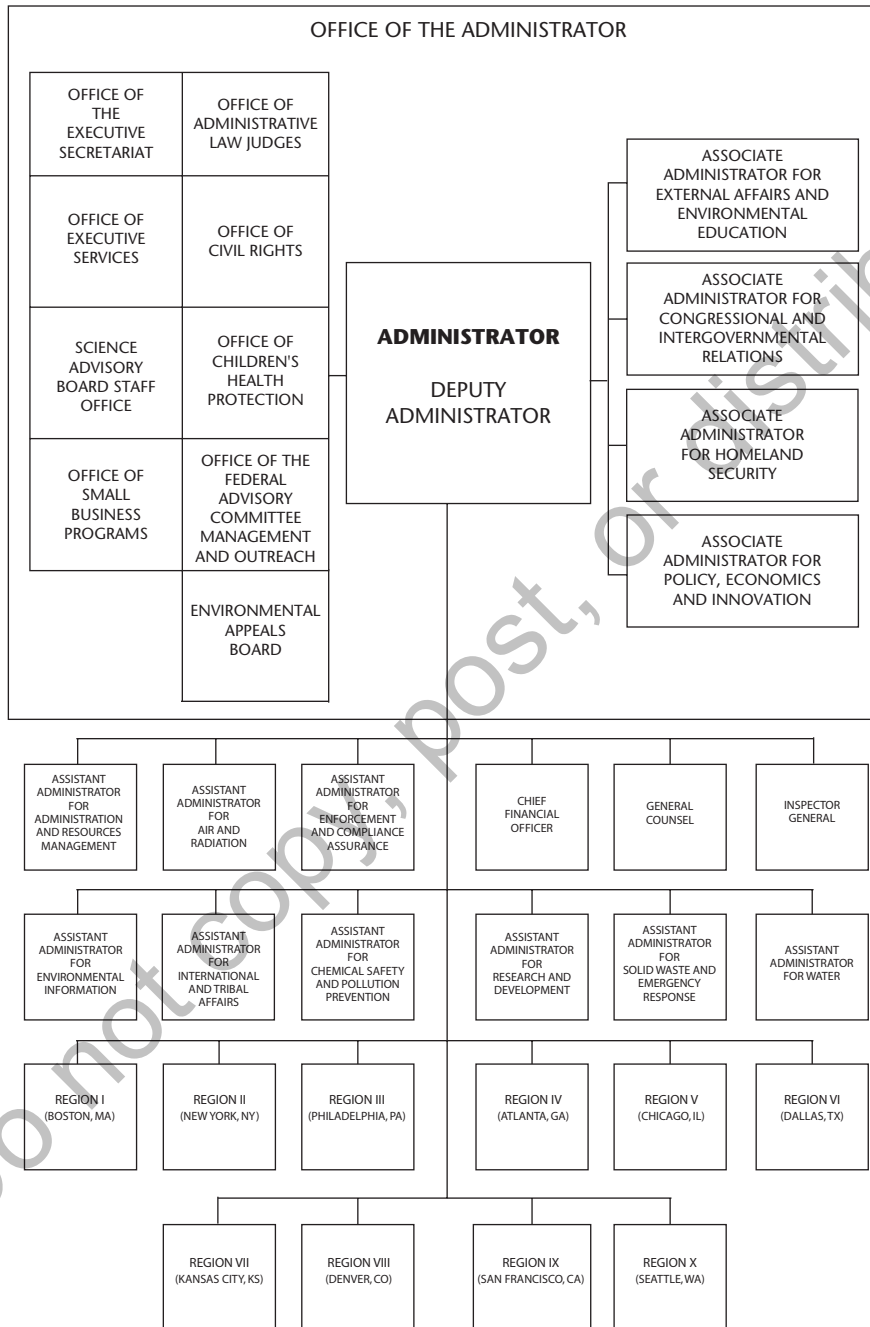
Some shortcomings in regulatory government will never disappear. Probably the most obvious of these results from inevitable economic change. An administrative program, structured and constrained by legislative mandates and its own goals and procedures, does not automatically adjust to technological advances and changes in competition. The regulation of transportation began when railroads had a near monopoly on long-distance carrying of people and cargo. Many of the practices of transport regulation were carried over into the trucking and airline markets and remained there long after economists and businesspeople realized that trucks, buses, trains, and airlines had created a much more competitive and self-regulating market than regulatory policy admitted. Deregulation of transportation began under President Carter in the late 1970s.

#### *The Dilemmas of Goal Attainment*

Another and subtler inescapable shortcoming is the elusiveness of organizational goals. It may help to possess a mental picture of the objectives of administration, but it is essential to understand that goals are, more often than not, the innocent-looking tip of a very extensive iceberg. Americans, with their “can-do” pragmatism are tempted to expect government simply to figure out what needs doing and do it. In this view, administration—either



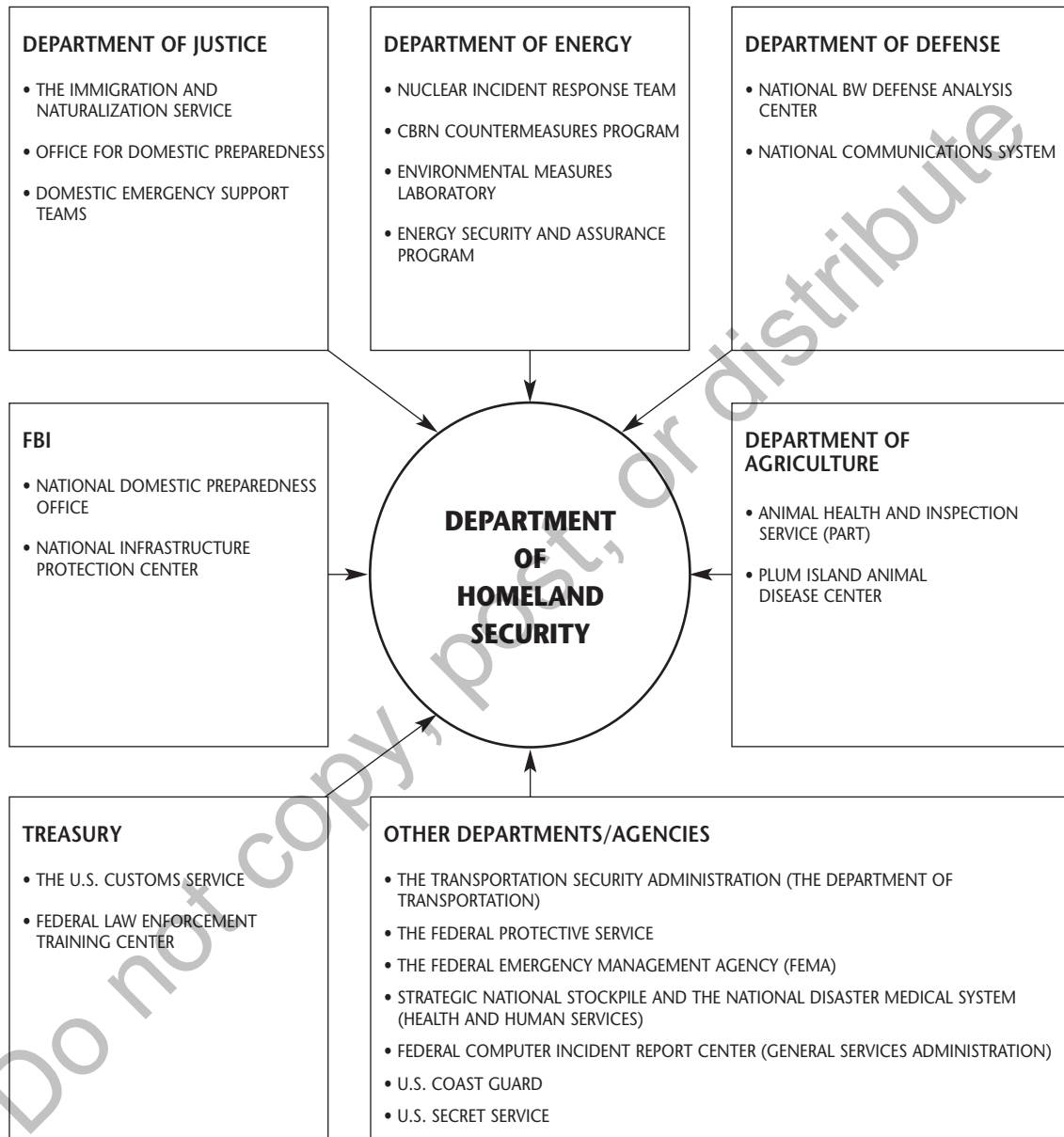
Figure 1.4 The Environmental Protection Agency (EPA)



Source: *The United States Government Manual 2012* (Washington, DC: Government Printing Office, 2012), 334.



**Figure 1.5 The Creation of the Department of Homeland Security**



Source: Created by Ziya Umut Turem in 2008, based on information from [www.dhs.gov/xabout/history/editorial\\_0133.shtm](http://www.dhs.gov/xabout/history/editorial_0133.shtm).



public or private—amounts to formulating goals, choosing the means that will achieve the goals, and then getting on with the job. But several harsh realities make that approach naive. The first harsh reality we may call the *level of goal formation* problem.

Promoting any good—the cleanliness of air, fair wages and healthy working conditions, the nutritional value of granola, television programming that informs and entertains without corrupting—can constitute an administrative goal. So can the prevention of evils: blocking monopolistic mergers, deterring consumer fraud, minimizing traffic fatalities, and so forth. Conceived this way, administrative policy goals are too numerous to count. Virtually every statute creating a federal or state administrative body sets forth, usually in flowery and imprecise language, the agency's mission.

Some analysts prefer to collapse all these goals into one goal: elected and appointed government officials alike should foster the public good. Unfortunately, people cannot agree what constitutes the public good or the “public interest.” Which serves the public good: building nuclear power plants to free ourselves from dependence on foreign energy sources? Or not building nuclear power plants to avoid both the risks of radiation damage and the tremendous expenses of such plants?

At this general level we encounter the second harsh reality. Broadly stated goals prevent us from seeing the trade-offs inherent in policy choices. A trade-off exists whenever people must sacrifice one good to attain another. Trade-offs contrast rather sharply with “good investments.” A good investment of time or money can achieve several goals simultaneously. For example, if a university diverts money from nonrevenue sports to add seats to the football stadium, it may in the short term hurt the university's cross-country or tennis programs. But if the university soon recovers its construction costs by selling tickets for the new seats, and then uses the added revenue to increase support for unprofitable programs, no real trade-off occurs. Both goods benefit in the long run. A trade-off, on the other hand, exists when one good is permanently lost, as in the trade-off between energy self-sufficiency and radiation safety. Thus one of the irksome things about goals is that they tend to fool us into thinking we live in a world

without trade-offs, a world where we can have everything. In fact, useful administrators earn their pay because they must make difficult decisions about which good things we must sacrifice, and how much of them to sacrifice, in order to achieve other good things.

Goals also present themselves at different moral levels. Sometimes national security is not a controversial goal. Without giving it much thought, most people would agree that the United States fought for just causes in World War II. But national security did *not* justify the steps taken by the West Coast military commander to relocate Japanese-American *citizens* in something close to concentration camps. Did national security justify U.S. intervention in Vietnam? In Iraq? Can we justify, by referring to “national security” alone, the extralegal interrogation methods employed at Guantanamo Bay in the aftermath of the September 11, 2001, terrorist attacks? A statement of goals alone does not resolve disagreements about values. Goals are merely an expression of values.

Hugh Heclo, in his excellent descriptive study of middle- and upper-level federal administrators, lists the normative contradictions in government. For Heclo the irresolvable tensions—between the norm of nonpartisanship and the norm of being responsive to citizen needs, between the obligation to behave in a legal and orderly fashion on one hand and to be creative and innovative on the other, and between the human instinct to be cooperative and loyal and at the same time not become corrupted—call for powerful leadership. His book describes how the current system fails to produce such leadership.<sup>19</sup> Jerry Mashaw notes similar normative contradictions among three administrative models: bureaucratic efficiency, professional judgment, and fairness to clients and citizens.<sup>20</sup> Mashaw explains how the Social Security Administration's management efforts to limit the compensation awards made by administrative law judges ran into resistance from the judges because management valued efficiency while the judges valued professional independence and fairness.

19. Hugh Heclo, *A Government of Strangers* (Washington, DC: Brookings, 1977), 103, 111.

20. Jerry L. Mashaw, “Conflict and Compromise Among Models of Administrative Justice,” *Duke Law Journal* (1981): 181.

Consider now the human side of bureaucratic life. Our culture encourages us to develop and pursue our own personal goals: career advancement, good pay, and so forth. Much effort in any organization, be it a private corporation or an administrative agency, goes into keeping its workers happy by meeting as best it can their personal goals. Doing so not only consumes resources but also requires compromising some aspects of the organization's mission. For example, many public defenders in our major population centers are recent graduates of law schools who seek trial experience. Because their superiors generally know this, they may discourage new public defenders from settling cases with plea bargains and encourage them instead to take their clients' cases to trial, even where the chances of a conviction are high, so the lawyer gets the trial experience he or she seeks. Personnel training may undercut the value of fair prosecution or it may add additional—avoidable—costs to the administrative process.

### *Bureaucratic Pathologies*

The psychological reality of a front-lines human service agency or a school or a police department is that it contains high levels of stress. Such stress is one example of a bureaucratic pathology. Charles Goodsell's description of the reaction to stress in an Appalachian county welfare agency illustrates the problem:

The concept of compression . . . refers to the stress of "heat" faced by service delivery workers. The manifestations of such stress are now being widely discussed around the country under the rubric of "burnout." In the department studied perhaps a fifth of the workers exhibited symptoms associated with this syndrome, such as disillusionment, weariness, frustration, and demoralization.

When the subject of personal stress was explored in interviews with workers several factors surfaced. One universally identified by respondents is the activity known pejoratively as "paperwork." The completion of forms, the preparation of reports, and the arrangement for documentation involve an enormous amount of tedious clerical work, taking half or more of the worker's on-duty time. (When inventoried, no less than 65 forms were found to be in use for financial assistance processing alone.)

A second origin of stress is clearly related, namely escalating caseloads. In recent years they have grown dramatically as

a combined consequence of new programs, added accountability requirements, successful outreach activities, and only modest staff growth. Mandated deadlines for acting on benefit applications (ranging from 48 hours to 45 days) increase the pressure to produce. No overtime pay is available in the office to ease the time-bind. Low salaries generally (some receptionists and clerks are themselves eligible for the Food Stamps they issue) offer little compensation for the pressures, and staff turnover is quite high.

To compound matters, some workers complain that in addition to enduring strains of time-crowded routine, they must live with the anxiety of being ready to face the unusual "incident." This is shouted verbal abuse at the office, tire slashings on home visits, or threatening phone calls at home. Drunks, armed men, and distraught or even deranged individuals must occasionally be dealt with. Personnel are cautioned to take no more chances than necessary, yet at the same time departmental norms forbid unpleasantness in kind—workers must simply "take it."<sup>21</sup>

Another illustration of a bureaucratic pathology that need not inevitably occur concerns the tendency of people in all sorts of settings, public and private, to advance their self-interest at the expense of organizational needs. This reality can take the form of outright bribery and other forms of corruption. Far more prevalent and perhaps even more difficult to redress is the phenomenon of *agency capture*. In the process of governing, officials find themselves acting to protect or advance the interests of those they govern. Capture differs from deliberate promotion, that is, when Congress by law authorizes an agency to protect and promote an industry as well as regulate it. The old Atomic Energy Commission operated under the mandate to promote the use of nuclear energy as well as to regulate it, a goal conflict that finally prompted the creation of the Nuclear Regulatory Commission (NRC), which, underfunded though it was, did not suffer from a split administrative personality.

Capture occurs when agencies informally promote the very interests they are officially responsible for regulating. A. Lee Fritschler's study, *Smoking and Politics*, describes

21. Charles Goodsell, "Looking Once Again at Human Service Bureaucracy," *Journal of Politics* 43 (1981): 770, 771, footnotes omitted. For an excellent and disturbing book-length treatment of the problem, see Michael Lipsky, *Street Level Bureaucracy* (New York: Russell Sage, 1980).

why the FDA did not follow through on the Surgeon General's determination that smoking correlated with a variety of illnesses.

The Food and Drug Administration, the agency that the surgeon general suggested as the proper regulator of warning requirements, had demonstrated even less interest in the smoking and health issue than its sister agency, the PHS [Public Health Service]. The FDA's reluctance is due, according to Senator Neuberger's book, *Smoke Screen: Tobacco and the Public Welfare*, to a late Victorian episode in congressional politics. She claims that the item "tobacco" appeared in the 1890 edition of the *U.S. Pharmacopoeia*, an official listing of drugs published by the government. It did not appear in the 1905 or later editions, according to the senator, because the removal of tobacco from the *Pharmacopoeia* was the price that had to be paid to get the support of tobacco state legislators for the Food and Drug Act of 1906. The elimination of the word tobacco automatically removed the leaf from FDA supervision.

The FDA was given what appeared to be another opportunity to concern itself with cigarette smoking when the Hazardous Substances Labeling Act was passed in 1960. It empowered the FDA to control the sale of substances which, among other things, had the capacity to produce illness to man through inhalation. Secretary Celebrezze suggested in a letter to the Senate that the act could be interpreted to cover cigarettes as "hazardous substances." In what had become characteristic behavior of HEW, however, the secretary went on to argue that it would be better to wait and let Congress amend the act to make it more explicit and thereby avoid controversy. Subsequently, Congress rejected such an amendment.

The reluctance of the FDA could be traced to still other factors. During the early 1960s, the agency was having serious problems of its own. It suffered through some devastating investigations conducted by late Senator Estes Kefauver (D-Tennessee). The hearings dealt with the pricing practices, safety, and monopoly aspects of the drug industry. One of the alarming revelations to emerge from the hearings was the extent to which the FDA was dominated and supported by that sector of the business community it was supposed to regulate, i.e., drug manufacturers and distributors. In what might have been simple reflex action, the FDA found it easier to keep quiet and follow Secretary Celebrezze's lead to continue to protect its good standing in the business community. The FDA found it expedient to ignore the cigarette health issue even though scientific

indictments mounted in the early 1960s and other agencies began to take some action.<sup>22</sup>

Fritschler's fascinating study contrasts the FDA's refusal to tackle the tobacco health hazard with the willingness of the FTC to do so. It is remarkable how the differences in the effectiveness of agencies, including their susceptibility to capture, depend on the unique and often idiosyncratic combination of political forces, personalities, and leadership that characterize different agencies. In 1990 President George H. W. Bush appointed Dr. David Kessler, who held both a law degree and an M.D., to head the Food and Drug Administration. When Kessler retired in late 1996, he was praised for "revitalizing a moribund agency." Even though the FDA's efforts to regulate tobacco products were effectively halted by the Supreme Court in *FDA v. Brown and Williamson Tobacco Inc.*, 529 U.S. 120 (2000; see case on p. 113), Kessler's aggressive move to initiate regulating tobacco products as a drug was a critical step in the dramatic collapse of the tobacco industry's political defense against public regulation in the last half of the 1990s. Kessler's revitalized FDA also took on misleading food labels and accelerated the process of approving new drugs and medical devices. He inevitably made a number of political enemies.<sup>23</sup> To repeat a point made earlier, agencies may employ professional experts and Congress may label them "independent," but they are all deeply enmeshed in the political process.

A recent position taken by the EPA on the issue of global warming provides yet another stark view of expertise deeply enmeshed in politics. The *New York Times* reported that during 2002 and 2003, Philip Cooney, the Chief of Staff to President George W. Bush's Council on Environmental Quality, altered or rewrote reports by federal agencies on various aspects of climate change, so that the reports reflected greater uncertainty in the scientific community about global warming than the studies in fact showed. Even more interesting was the fact that Mr. Cooney had been a former lobbyist for the American

22. A. Lee Fritschler, *Smoking and Politics*, 2nd ed. (Englewood Cliffs, NJ: Prentice-Hall, 1975), 34–35.

23. "FDA Commissioner Is Resigning after Six Hectic Years in Office," *New York Times*, November 26, 1996.

Petroleum Institute and that, upon resigning after these revelations, he was immediately hired by Exxon Mobil.<sup>24</sup>

### SETTING THE STAGE FOR THE STUDY OF ADMINISTRATIVE LAW

This chapter has emphasized the tremendous scope and power of administrative agencies of government. These agencies combine legislative, executive, and judicial functions. We ask for and expect extraordinary accomplishments from government. We expect it to protect our personal safety. Obviously police and other law enforcement agencies do that, but so does the national defense establishment, the biggest single consumer of citizens' tax dollars. So does the Environmental Protection Agency, the Federal Aviation Agency (FAA), and the Occupational Safety and Health Administration. We expect government to assure social and economic justice, to protect small businesses from domination by larger ones, and to protect consumers, for whom the costs of gathering information are very high, against the tendency of businesses large and small to provide misleading information about their products. We expect welfare agencies to provide for the poor. We expect the Internal Revenue Service and state and local tax boards to collect tax money fairly. We expect the Federal Communications Commission (FCC) to fairly allocate the limited number of bands in the spectrum of receivable radio waves. We expect the National Science Foundation (NSF) to promote the acquisition of knowledge and the National Endowment for the Humanities (NEH) to promote the liberal arts. And on and on.

This chapter has also discussed certain potential and real imperfections in the administrative process. These failings, which we will look at more closely in the following chapters, fall roughly into four categories. First, agencies charged with protecting the general public by preventing certain monopolies from overcharging for their services have ended up promoting rather than regulating the same monopolies. Second, administrative decisions may be procedurally unfair. We will meet an FTC

chairman who gave speeches condemning a business while he sat in administrative judgment of that same business. Third, administration may be inefficient. And, fourth, we shall meet the beleaguered NRC, which, despite the best of intentions and the most efficient possible use of its resources, still scares some people because they fear it is ineffective.

These imperfections as well as the others mentioned in this section are all embedded in a deeper political and legal structure that you will increasingly come to know as you progress through this book. Agencies exist because, for a variety of reasons, legislatures delegate powers to administrative bodies for the purpose of creating and enforcing specific policies. However, if they choose to, politicians can retain considerable influence in the bureaucratic process. Policy is often forged by interest groups, agencies, and legislators within the so-called iron triangle of compromise. Agencies often act cautiously, as the FDA did in response to growing evidence of the dangers of smoking. And agencies jockey for position among themselves for both authority and secure funding from year to year. Thus it is a mistake to assume that "bureaucracy" is a monolith, immune from political or legal influence. The real problem may arise not because agencies are relatively unresponsive to public claims, but because some organized interest groups sometimes speak much louder than the public at large. You must judge by the end of this book the seriousness of the iron triangle's threat.

This chapter has opened up an immense terrain, but we do not want to lose sight of administrative law's big picture. So we conclude this chapter by returning to its beginning. We need administrative law to check regulatory government. It is a basic tenet of our political theory that perverse things can happen when government operations are hidden from public scrutiny. In the United States, law plays a key role in determining both the process and substance of government. The concept that government must operate within legal limits is the core of our Constitution itself, a document that structures and limits government and calls itself "the supreme law of the land." Administrative law matters because a system that adheres to the concept of the rule of law employs the courts and the constitutional and statutory principles courts enforce

24. Andrew C. Revkin, "Bush Aide Edited Climate Reports," *New York Times*, June 8, 2005; and Andrew C. Revkin, "Ex Bush Aide Who Edited Climate Reports to Join Exxon Mobil," *New York Times*, June 15, 2005.

to check the shortcomings of government. Administrative law is not the only mechanism we have for coping with the bureaucratic shortcomings this chapter has described, but it has become one of the most significant of those mechanisms.

This is why administrative law matters. Now the stage is set to introduce administrative law. Chapter 2 proceeds to explain more precisely what administrative law and the rule of law mean and how they operate.

## EXERCISES AND QUESTIONS FOR FURTHER THOUGHT

1. Shortly after his inauguration as president, Ronald Reagan sought to kill the Department of Energy's (DOE) proposed rules setting minimum standards for energy efficiency for home appliances, including air-conditioning units. One argument for doing so was that the free market would solve the problem, that is, that consumers would naturally buy the most efficient unit over the long run. But officials of the Carrier Corporation, a well-known manufacturer of air-conditioning systems, argued that every apartment house owner and every new home builder would have only an incentive to buy the lowest priced unit regardless of operating costs because the tenants or buyers, not the owners or builders, would pay the energy bills. What potential weakness in the free market system discussed above does this illustrate? What self-interested reasons might a corporation like Carrier have for supporting these rules? See "A Tale of Regulation," *Newsweek*, March 2, 1981, p. 31.

2. Reflect on the nature of political power. What do the powerful have that the less powerful lack? It is often said that the most powerful are those who possess the most political resources. These resources include the capacity to use superior physical force on others, the capacity to coerce others, high status, legitimacy, prestige, money, and finally, information. In terms of this power model, what qualities of "acting in the name of the law" empower otherwise weak people and interests?

3. What justifications for robust administrative regulation does the following story support?

According to the *New York Times* (February 2, 2008) the Humane Society, a nongovernmental organization (NGO), sued the U.S. Agriculture Department

contending that it created a "loophole" in violation of its own procedural requirements that gave the beef industry financial incentives to permit potentially sick cows into the food supply. As evidence, the Humane Society cited a widely publicized undercover videotape of workers at the Westland/Hallmark Meat Company in Chino, California, abusing cows that appeared unable to walk. The lawyers for the Humane Society said that when the agency relaxed the ban, it "did so without really telling people that that's what they were going to do and without explaining how this complies with their obligation to protect consumers and ensure humane treatment."

4. This chapter has stressed the linkage between monopolistic power and the growth of government, but you should not neglect the reality that the profit motive in business leads some people, in both competitive and noncompetitive businesses, to cheat. How, for example, should government respond, if it all, to the case of the "University of Central Arizona," a two-person mailorder house selling doctoral degree certificates to anyone who wanted to buy one? Is it significant that some people, especially in public education, increase their potential for job advancement if they can claim a graduate degree?

Or take the problem of the fraudulent sale of over-the-counter dietary supplements. Suppose I package a mixture of sugar and cornstarch dyed green in a capsule, and sell it as a valuable aid to reducing cholesterol levels in the blood. Can we count on an unregulated private market to discover such a fraud? Note that the fraud does not merely take a few dollars from someone under false pretenses. The consumer may forgo using a product that would actually improve health by lowering blood cholesterol.

5. We hope that by the end of this chapter you do not hold the view that government by administrative agency is a means of escaping from politics. Politics can be good or evil, but it is always with us, and agencies always operate in sensitive political environments. The real question is whether the political environment threatens to cause a violation of basic legal commands. Here are two stories from the *New York Times*. Does either of these situations ring your legal danger bell? What other information might you need to answer that question more confidently? The first story is headlined: "U.S. Documents Said to Show Endowment Bowed to Pressure" (September 18, 1991, p. B1). It continues:

Government documents released yesterday show that the National Endowment for the Arts yielded to political pressure last year in overturning grant recommendations for four sexually explicit performance artists, said spokesmen for a coalition of civil rights groups that obtained the documents. . . . In one of the documents, the transcript of a closed meeting of a grant-recommending panel in May 1990, John E. Frohnmayer, chairman of the arts endowment, is quoted as asking members "if in the very short political run," it is more important to support the controversial performers or to save the endowment "in some sort of recognizable form."

The second story reports on the nomination of Judge Stephen Breyer in 1994 to the U.S. Supreme Court. The *New York Times* described how Judge Breyer had very specific ideas about regulatory government and practical political experience with implementing them. Does this article reveal anything politically objectionable?<sup>25</sup>

Judge Breyer, who is the Chief Judge of the United States Court of Appeals for the First Circuit, in Boston,

25. "For This Court Choice, Policy Is Passion," *New York Times*, July 11, 1994.

has outlined his theories of regulation in two books, the most recent published last year. And as a senior Congressional aide in the 1970s he was able to see his theories put into practice when he was the principal architect of deregulating the nation's airlines. Airline deregulation was a bold policy experiment that continues to provoke heated debate, both from scholars and from ordinary air travelers befuddled by ever-changing and incomprehensible fare schedules.

### Quick to Question Priorities

In his 1993 book, *Breaking the Vicious Circle, Toward Effective Risk Regulation* (Harvard University Press), Judge Breyer painted a portrait of Federal regulators and Congress continually wasting resources because of distorted priorities in areas like toxic dumps and dangerous food additives. The regulators and lawmakers devote resources to the wrong problems, Judge Breyer wrote, because they are too sensitive to public opinion.

Many of the situations he cites in his book are from court cases in which judges ruled on Federal agencies' regulations. Judge Breyer argued that exaggerated public fears about the potential damage of breathing asbestos, for example, have produced an unwise and costly rush to clean up asbestos in buildings.

In a 1992 case he cites with approval, the Fifth Circuit Court of Appeals struck down an ambitious plan by the Environmental Protection Agency to remove asbestos. The agency wanted to spend a quarter billion dollars in hopes of saving an estimated seven or eight lives over a 13-year period. The court said the nation could expect that many deaths from individuals swallowing toothpicks.

Regulators, he wrote, will pay extra attention to risks that come to the public's attention and, he noted, "Study after study shows that the public's evaluation of risk problems differs radically from any consensus of experts."

Ralph Nader, the public interest lobbyist, who is one of Judge Breyer's most vocal critics, has depicted him as instinctively distrustful of all government regulation and a servant of corporate interests.