

PAR

Foundations of Public Administration

Administrative Law

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The Foundations of Public Administration Series is a collection of articles written by experts in 20 content areas, providing introductory essays and recommending top articles in those subjects.

Administrative Law

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What is Administrative Law?

Administrative law is the body of constitutional provisions, statutes, executive orders, and other binding directives that generically regulate public administrative practices. It is the regulatory law of public administration that applies across-the-board to agencies without specific regard for their individual missions. It typically pertains to procedures for rulemaking, adjudication and dispute resolution, transparency, enforcement, and public participation, stakeholder representation, and fairness in administrative decision making as well as to safeguarding individual rights in the course of administrative operations. In the U.S., administrative law extends to specific substantive policy objectives, including paperwork reduction, protection of the interests of small businesses and those owned by members of disadvantaged groups, environmental justice, vibrant federalism, and family viability. An expansive definition of administrative law would include regulations requiring agencies to engage in strategic planning and performance reporting, to pursue equal employment opportunity and representative bureaucracy, and a host of mandates dealing with financial, personnel, and facilities management, among other day-to-day administrative activities. In the U.S., the term 'administrative law' does not encompass the regulatory and other rules made by individual agencies pursuant to their missions, such as



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the Environmental Protection Agency's rules for regulating air and water quality.

Administrative law is central to public administrative practice. Agencies and individual administrators cannot function without reference to it. However, in the U.S., administrative law is not well integrated into public administrative theory, research, and pedagogy. It tends to be treated as a stand-alone subject and is often given short shrift. Most MPA programs do not require an administrative law course and many students receive their degrees without taking one (Rosenbloom and Naff forthcoming). This contrasts starkly with practices in Latin American and some European nations in

which legal education is a prime route to a civil service career. Judging from the mainstream literature, U.S. public administration scholars seem considerably more interested in managerial techniques and tools, organizational theory, design, and behavior, budgeting and finance, and human resources management than in administrative law. Although law school faculty members pay greater attention to administrative law, they tend to view it from the outside in, focusing on government regulation of business, freedom of information/open meetings, and litigation, while neglecting to consider it from the inside out, that is, how to integrate it with public administrative values and practices.

The status of administrative law in the academic field of public administration is, therefore, odd. Administrative law is central to public administrative practice, but not to academic thought, scholarship, and literature. Whatever the root causes of this condition, historically U.S. public administration defined itself as based in management rather than law and the academic field has continued in that tradition (see Lynn 2009). Additionally, administrative law and public administration are largely grounded in different philosophical traditions. Administrative law—especially its constitutional law aspects—reflects the nation's contractarian and natural rights-based origins, as succinctly stated in the Declaration of Independence. Public administration tends to emphasize utilitarian (benefit-cost) and instrumental (cost-effective) values, often with a heavy dose of communitarianism emphasizing cooperation and conflict reduction in contrast to the constitutional design for competitive

political behavior. From a contractarian perspective, rights come first. Rights are rarely absolute, but within their definitional frameworks and structures they must be funded irrespective of whether benefit-cost analysis and public administrative budget theory would direct expenditures elsewhere.

The Constitution's taking clause exemplifies the conflict between contractarianism and utilitarianism. No matter how valuable a parcel of private land might be to promoting the general welfare, through a road, bridge, or dam, for example, it cannot be taken from its owner except with just compensation. If the government cannot afford to pay a fair price, it cannot have the property. Similarly, if a government in the U.S. cannot fund prisons or jails to bring them up to the standards required by the Eighth Amendment's cruel and unusual punishments clause, then it must release the prisoners. It is irrelevant that pursuant to constitutional requirements, prisoners may receive better nutrition and medical care than some members of the general public. Neither can administrative cost-effectiveness trump constitutional rights. Because one purpose of rights is to protect minorities, the courts may disallow wildly popular administrative initiatives if they trench on constitutionally protected liberties.

The purpose of this essay is to explain how administrative law is foundational to public administration. Readers should consult the works listed in the Bibliography and the list of *PAR* articles on administrative law for comprehensive analyses of the history, development, provisions, and impact of administrative law.

PAR

Foundations of Public Administration

Administrative Law

David H. Rosenbloom and Helena Rene

Administrative Law and Academic Public Administration

The first book devoted exclusively to U.S. administrative law appears to be Bruce Wyman's *Principles of the Administrative Law Governing the Relations of Public Officers* (1903). Wyman sought to define administrative law and provide a framework for studying it. He conceptualized administrative law as the regulations that define administrative authority and responsibility. He divided administrative law into two sub-components, external and internal. External administrative law concerned the relationship of public administrators and agencies to the citizenry. Internal administrative law dealt with relations among administrators and agencies.

Wyman's terminology and conceptual distinction are no longer used in the field of administrative law. However, administrative law continues to include both external and internal aspects. For example, rulemaking and freedom of information fit his external categorization whereas internal administrative law encompasses many aspects of administrative adjudication. Wyman's foundational effort fell short and was soon eclipsed by Frank Goodnow's *The Principles of the Administrative Law of the United States* (1905).

Goodnow taught administrative law at Columbia University and was the first president of the American Political Science Association. He is far better known than Wyman to contemporary academics in the field of public administration. *Politics and Administration* (1900) is Goodnow's major contribution to public

administration's intellectual history. It served as a bridge between the civil service reformers of the 1870s-1890s and the Progressive Movement, usually dated from 1890 or 1900 to 1924. His concern with improving the expression of the will of the state, that is, politics, put him in the progressive camp with regard to electoral reforms, such as primary elections. His interest in strengthening the execution of the will of the state, that is, administration, reflected the reformers' interest in promoting merit systems as well as the progressives' subsequent effort to remove large portions of administration from politics via the institution of city management and administrative authorities, as exemplified by the Port Authority of New York and New Jersey. Goodnow is often viewed as a progenitor of the politics-administration dichotomy. However, in his view, the expression and execution of the will of the state were two aspects of the same good governance project.

Given his centrality to the intellectual development of U.S. public administration, it is surprising that Goodnow's earliest works on administrative law had little impact on mainstream public administrative thought. His *Comparative Administrative Law: An Analysis of the Administrative Systems, National and Local, of the United States, England, France and Germany* appeared in 1893, and again in 1903 as a student edition. The latter edition was almost immediately followed by his better known book on *The Principles of the Administrative Law of the United States* (1905). He viewed administrative law as regulating administrative arrangements for executing law and as a supplement to constitutional law in defining governmental organization. He also noted that

PAR

Foundations of Public Administration

Administrative Law

David H. Rosenbloom and Helena Rene

administrative law could provide for the redress of individual rights violated by administrative action.

Why Goodnow was unable to establish administrative law as the basis—or at least a major subfield—of public administration remains a matter of conjecture. Lynn (2009) suggests law was lost in the progressives' emphasis on efficiency, management, and science. Another factor may have been the federal and state courts' hostility toward administrative regulation and adjudication, which they viewed as a threat to the judge-made common law and procedural due process (Rosenbloom 2007). Additionally, Goodnow was unclear about how the judiciary—one of three constitutional branches—and its responsibilities fit into his two function model of government comprised of the expression and execution of the will of the state (Rosenbloom 2006).

Wyman's and Goodnow's early works notwithstanding—and apparently having little impact—the term 'administrative law' did not gain much currency in public administration or law until the 1930s and 1940s. The modern study of administrative law in both public administration programs and law schools began with the publication of James Hart's *An Introduction to Administrative Law with Selected Cases* (1940). Hart contended that public administrative education devoted far too little attention to administrative law. He framed his casebook as an antidote to this failing. He viewed administrative law as controlling administrative authority and action. Rather than a single coherent body of law, it was comprised of legislation, executive

directives, court decisions, and constitutional provisions.

Hart's work started the use of casebooks to teach administrative law. Ironically, many such books lack overall coherence and make it difficult to conceptualize administrative law or place it in a comprehensive analytic framework. As late as 1968, J. Forrester Davison and Nathan Grundstein maintained that the fields of administrative law and public administration were intellectually deficient in complementary ways. One lacked administrative theory and the other legal knowledge.

To a considerable extent, Kenneth Culp Davis was able to put administrative law and public administration together in his two editions of *Administrative Law and Government* (1960, 1975). Davis was the 'dean' of U.S. administrative law scholarship and a major contributor to the development of U.S. federal administrative law. He was acutely cognizant of the myriad connections between public administrative activity and law. He consciously sought to situate the study of administrative law solidly within the framework of public administration.

A variety of excellent articles, texts, and other works from Hart's day through Davis' to our own notwithstanding, administrative law remains well outside the mainstream of public administrative study. This leaves academic public administration incomplete in its understanding of administrative behavior and prone to misjudgments about the efficacy of proposed reforms and the staying-power of new techniques.

PAR

Foundations of Public Administration

Administrative Law

David H. Rosenbloom and Helena Rene

The Main Components of U.S. Federal Administrative Law

Davison and Grundstein maintained that administrative law has no overall theory. However, it does reflect an implicit theory—and a straightforward one at that. Administrative law is part of the multiplicity of institutional arrangements aimed at subordinating public administration to political authority. In the U.S., this means making bureaucracy safe for representative democracy. Developed non-democratic regimes also rely on administrative law to control public administration. For instance, the People's Republic of China has a freedom of information act and is currently developing a body of administrative law, some of which is based on U.S. concepts. In the U.S., administrative law looks toward democratizing public administration by bringing constitutional, legislative, and judicial values into traditionally executive-centered administrative decision making, processes, and operations. From a constitutional perspective, administrative law subordinates public administration to all three branches of government, thereby subjecting it to checks and balances rather than allowing it operate largely as the sole domain of the executive. When public administration engages in a legislative function—rulemaking, for example—administrative law calls on it to incorporate the values that guide legislatures when they legislate: representation, stakeholder participation, openness, standardized procedure, and compatibility with extant law. When public administration adjudicates, administrative law specifies the use of procedural due process, as long embodied in court procedure. When public

administration executes, reflecting constitutional checks on executive power, openness, procedural regularity, accountability, and the protection of individual rights in enforcement come to the fore. The massive amount of detail encompassed in administrative law can certainly obscure its underlying purposes, but they remain largely coherent and fixed nonetheless.

The scope of U.S. federal administrative law is conveniently conveyed by listing several of its main statutory components.

1. Administrative Procedure Act (1946)
2. Freedom of Information Act (1966)
3. Federal Advisory Committee Act (1972)
4. Privacy Act (1974)
5. Government in the Sunshine Act (1976)
6. Presidential Records Act (1978)
7. Regulatory Flexibility Act (1980)
8. Paperwork Reduction Acts (1980, 1995)
9. Administrative Dispute Resolution Act (1990, 1996)
10. Negotiated Rulemaking Act (1990)
11. Government Performance and Results Act (1993)
12. Small Business Regulatory Enforcement Fairness Act (1996)
13. Assessment of Federal Regulations and Policies on Families Act (1998)
14. Data Quality Act (2001)
15. Openness Promotes Effectiveness in our National Government Act (OPEN Government Act, 2007)

PAR

Foundations of Public Administration

Administrative Law

David H. Rosenbloom and Helena Rene

These core statutes are augmented by a variety of executive orders dealing with their implementation and additional procedural and policy concerns such as the aforementioned vibrant federalism and environmental justice.

It is not necessary to review the operation and impact of each of these statutes on public administration here. They all bear on some aspects of public administrative practice and behavior and, as noted earlier, are analyzed elsewhere (see Rosenbloom 2003, for example). However, a few key points should be emphasized.

Rulemaking

Public administration is often defined as an executive or managerial activity. Nevertheless, it includes the legislative function of rulemaking, which is clearly among its major activities. Rules are usually categorized as legislative (or substantive), procedural, and interpretive (or "interpretative"). Generically, legislative rules are like statutes and in a typical year, thousands more of them are promulgated than laws enacted. In theory, legislative rules are valid only when enacted pursuant to an "intelligible principle" in a statute authorizing agency action. In practice, many statutes lack clear standards, definitions, and directions, thereby providing administrative rule makers with considerable discretion. *Legislative rulemaking defeats any notion that public administration is an apolitical endeavor.* Lawmaking is necessarily political policymaking. Of course, one can study the management of rulemaking separately from the politics of rulemaking—but only to the extent that managerial procedure is disconnected from

transparency, public and stakeholder participation in rulemaking, and, ultimately, the substance of final rules. Public administration scholars should also note that in administrative law, 'collaborative governance' and related terms usually refer to negotiated rulemaking rather than other forms of shared authority such as citizen participation and third party government. Administrative law prescribes the procedures that agencies must use for legislative rulemaking and for the publication of rules. Unless prohibited by statute, federal agencies' administrative authority includes the power to make rules.

Adjudication

Public administration also involves adjudication. Adjudication is used to resolve disputes regarding eligibility for benefits and licenses, unfair or illegal labor relations, trade, and personnel practices, the awarding of government contracts, as well as to enforce statutes and agency rules. Some agencies, such as the National Labor Relations Board, make policy almost exclusively through adjudication; others use rulemaking and adjudication in tandem; and still others do not adjudicate at all. Adjudicatory procedure follows judicial trial procedure, but is more flexible. It focuses on legal rights and obligations, rather than administrative cost-effectiveness. Administrative law judges (ALJs), who handle a great deal of adjudication, are by law independent of the hierarchies in the agencies in which they work. This arrangement violates the public administrative canons of unity of command and that authority and responsibility must be commensurate. In theory, agency heads or their

PAR

Foundations of Public Administration

Administrative Law

David H. Rosenbloom and Helena Rene

designees can overturn ALJs' decisions. In practice, the litigation that may well follow such a rejection favors their acceptance. ALJs' decisions determine eligibility for benefits and other matters affecting agency budgets. To the extent that budgeting is inevitably political due to its allocation of resources, adjudication, like rulemaking, combines politics with administration. Public sector human resources management is infused with adjudication involving equal employment opportunity, adverse actions, labor relations, whistle blowing, and employees' rights. In recent years, administrative law has promoted alternative dispute resolution as a means of handling conflicts more cost-effectively than adjudication.

Transparency

Transparency is elemental to government accountability and an informed electorate. The Constitution provides that "a regular Statement account of the Receipts and Expenditures of all public Money shall be published from time to time" (Article I, section 9, clause 7). However, it was not until enactment of the Freedom of Information Act (FOIA) of 1966, that the U.S. federal government adopted a comprehensive and largely functional system for administrative transparency. In 2007, Congress augmented the much amended FOIA with the OPEN Government Act. The act partly closes a gap in transparency by potentially subjecting some contractor records to disclosure through freedom of information requests.

Practicing public administrators are acutely aware of FOIA and other transparency requirements. Public

administrative scholars are perhaps most interested in the relationships between transparency and decision making. What is the impact of open meetings on the decisions of multi-headed administrative boards and commissions? How does FOIA affect pre-decisional discussion over policy and enforcement matters? How does the OPEN Government Act affect third party government?

Individual Rights

In 1946, some legislators considered the Administrative Procedure Act to be a "Bill of Rights" for Americans in the new administrative state that emerged in the 1930s and 1940s (Rosenbloom 2000, 38). Amendments and court decisions have broadly expanded its basic requirements for procedural due process. In addition, since the 1950s, constitutional law has provided public administrative clients, customers, employees, and contractors with a wide array of previously unavailable rights, including procedural due process, equal protection of the laws, and First Amendment freedoms. Prisoners have gained greater Eighth Amendment protection and public mental health patients now have a constitutional right to treatment or habilitation. Individuals caught in street-level regulatory encounters have greater Fourth Amendment protection against unreasonable searches and seizures than at an earlier time—but still not very great.

Public administrators who violate clearly established constitutional rights of which a reasonable person would have known are vulnerable to civil suits for money damages in federal court. This gives almost all

PAR

Foundations of Public Administration

Administrative Law

David H. Rosenbloom and Helena Rene

public administrators who deal with people an incentive to know the constitutional law governing their practice and to abide by it. Social workers, inspectors, public sector educators and human resource professionals, police, and several other categories of public employees are acutely aware of how constitutional law affects their practice and constrains their behavior.

Limitations

Administrative law is frequently criticized for making agency procedures more cumbersome and costly, producing litigation allowing judges to 'interfere' with administration, lacking coherence, being an unrealistic, overly detailed aggregation of minutiae, and much more. It is clearly imperfect; but public administrators must adhere to it and it guides their behavior. Moreover, flaws and all, it is currently being incrementally imposed on contractors through judicial decisions regarding the doctrine of state action, the OPEN Government Act, and some features of the Federal Acquisition Regulation regarding privacy. Notably, administrative law and public administration are proceeding on two separate diverging tracks. Administrative law is expanding while several thrusts in public administration are ignoring it altogether: reinventers call for deregulation of the public service with nary a mention of administrative law—the chief regulatory law of public administrative practice; advocates and researchers of third party and collaborative government also pay scant attention to it; and, it is almost wholly missing from the conceptualization and research of those who would

redefine public administration as public management or congeries of tools.

Conclusion

Public administration combines management, politics, and law, whether expressed in those terms or as sigma, lambda, and theta values or some other set of (sometimes obscurantist) labels (Hood 1991). In the U.S., administrative law is well developed and has major impacts on public administrative operations, practices, procedures, decision making, and other behavior. The apparent temptation in academic public administration to leave administrative law to the lawyers cedes a major area of the field to a different profession. Public administration is distinctive precisely because it combines several subfields in which others are putatively more expert and joins those subfields in a holistic public sector context. As such, public administration scholars have contributed a great deal to theories and practices regarding public budgeting, personnel, organizational design, decision making, and general management. Yet the field has been almost silent with respect to the development and direction of administrative law. Administrative law is undeniably part of the foundation of U.S. public administration. The failure of academic public administration fully to engage it is a self-imposed impediment to gaining a more complete understanding administrative behavior and to prescribing successful administrative reforms.

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