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# On Predicting the Future of Administrative Law

Martin Shapiro

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**A**DMINISTRATIVE LAW can be defined or bounded in many different ways. Here I am going to concentrate on a series of legal doctrines through which courts police the jurisdictional boundaries and decision-making processes of regulating agencies. In this sense administrative law is an arena in which judges and others determine the degree to which courts will participate in the process of regulatory policy making. My argument, briefly stated, is that administrative law doctrines are the legal institutionalization of political theories. Because it takes time to translate theory into practice, this institutionalization is time-lagged. The administrative law of this decade is the political theory of the last. Thus, future relationships between the courts and the agencies can be predicted from current political theory, not the political theory of court-agency relations but the more general theory of the liberal democratic polity.

## **Liberals versus Progressives**

The standard liberal theory of the nineteenth century fundamentally rejected administrative law. On the continent, administrative law was a branch of public law. A basic premise of public law was that where conflicts arose between individual and state (public) interests, judges must give special recognition to the claims of the commonweal over those of the individual. One of the most essential features of Anglo-American rule of law was that disputes between government and the

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individual were to be treated like other legal disputes. The judge would treat both parties as equal, just as he would any two private parties. Thus, disputes that on the continent were administrative law cases tried before special administrative courts were, in England and the United States, private law cases tried before the regular courts. A fundamental element of liberal political theory, the rule of law, determined the most basic doctrine of American administrative law—that there should be none.

American liberals always recognized groups or factions as a third variety of political actor, along with individuals and governments. As rule of law was to curb government in favor of the individual, so constitutional division of powers and checks and balances were to prevent any faction from seizing government and using it to the detriment of individuals. This meant that questions about the powers and jurisdictions of the various components of government were constitutional questions. While many legal disputes that elsewhere would have been handled as administrative law questions were shoved into private law in the United States, the rest were shoved into constitutional law—a constitutional law that emphasized dispersion and limitation of government power.

Against this liberal current of dispersed government power there had always run another strain that in its late nineteenth and early twentieth century version we call Progressivism. Progressivism called for the concentration of government powers to achieve regulatory goals. It handled the dangers of faction by vesting that concentrated power in technocratic experts who would be above the factional struggle. Progressivism gave us the independent regulatory commission, the city manager, and the strong presidency—and with them the birth of American administrative law.

The ultimate collision of traditional liberal with Progressive political theory came at the time of the New Deal. Modern administrative law essentially begins in the disputes over the non-delegation doctrine centering on one of the Supreme Court's great anti-New Deal decisions, *Schechter Bros. v. United States*, in which the Court declared the National Industrial Recovery Act unconstitutional. There a majority of the Supreme Court expressed the traditional liberal theory of dividing government power. It forbade the New Deal to insti-

tutionalize the Progressive political theory of concentrated power by transferring congressional law-making authority to the presidency. The legal debate over delegation summarized the conflict between liberal and progressive political theory that had been going on for the previous four decades. The legal debate was brief. The non-delegation doctrine ceased to be a viable legal doctrine within three or four years after its announcement. Progressive doctrine of concentrated power in the hands of technocrats had clearly become the dominant political theory by the end of the decade before *Schechter* was decided and so became the dominant law by the end of the decade in which *Schechter* was decided. (Those who doubt the theoretical or ideological triumph of Progressive technocracy by the end of the twenties need only read the early writings of the President elected in 1928.)

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The new judges enunciated a theory of review that was simply a restatement of Progressive political theory. Power must be concentrated to be effective; and it must be wielded by experts in order to achieve rational results. Thus judges, who were not technically expert, must defer to the agencies, who were. The central doctrines of the administrative law of the 1940s were the twin presumptions that agencies had correctly found the facts and had correctly interpreted the law. Given such presumptions, there was nothing for the judges to do. They effectively transferred their power over regulation to the agencies at the same time they gave constitutional approval to the delegation of congressional regulatory power to those same agencies. *Voilà* technocracy—rule by expert agencies.

When technocracy replaced division of powers as the instituted political theory of administrative law, the liberal rule of law theory was replaced by a statist theory of administrative law as public law. The Interstate Commerce Commission and the Federal Trade Commission originally had been administrative courts operating under public law norms—that is, hearing cases under the statutory instruction that the public interest was to be preferred to the private. Courts, however, had reprivatized this public law by seizing judicial review power over rate-setting and other actions by such agencies and then treating the rights of the private parties seeking review as constitutionally superior to the interests of government. The New Deal created a number of new administrative courts, most notably the National Labor Relations Board, and endowed them with statutes that clearly placed public ahead of private purposes. The older rule of law theory was still strong enough to compel judicial review clauses in these new statutes. As we have already noted, however, the judges now presumed their review powers away and thus surrendered any chance to reprivatize these new bodies of law. We owe the birth of administrative law to the New Deal, not only in the sense that the New Deal created a vast law-making apparatus in the executive branch but also in the sense that it created a fundamental break in the notion that disputes between the individual and government were to be treated as if they were lawsuits between two individuals. The Administrative Procedure Act (APA) of 1946 is the formal recognition of this break and the formal creation for the United States of administrative law in the European sense. For that act acknowledges that we have administrative courts presided over by a separate set of judges (then called hearing officers, now administrative law judges), using a distinct set of procedures to try cases under laws that subordinate private to public interests.

The APA also modified the older political theory of division of powers in the direction of Progressivist theories of concentration. Basically it sets up two modes of administrative procedure, adjudication and notice-and-comment rulemaking. The APA's "informal" rule-making provisions are cryptic. Where authorized by statute to make legislative rules, an agency must give notice of its intention to do

so, receive comments from the public, and then publish its rules along with a concise statement of their basis and purpose. Thus in 1946 the APA wrote into basic law the transfer of law-making power from Congress to the executive branch that is at the heart of the New Deal political theory rejected by the Supreme Court ten years earlier and accepted by that court in the late 1930s. The cryptic wording of the APA, when combined with the judicial deference to administrative expertise that flowed from the technocratic theory of government that peaked in the 1930s, created two decades of judicial surrender to executive branch law making in the 1940s and 1950s.

### **The Group Theory of Politics**

During the period of surrender, a new political theory began to challenge the 1930s vision of concentrated power in the service of technical expertise. The group theory of politics emerged as the fashionable political theory of the 1950s and became the central orthodoxy of political science by 1960. It held that American politics consisted of ever shifting coalitions of interest groups. Each group found itself with far more decision-making power in some policy areas than others. In this "polyarchy" the relative ease of "access" of each group to the various decision-making arenas was crucial. A good or "public interest"-oriented policy was no longer defined as a technically correct policy designed by experts but as any policy that was the product of a decision-making process to which all the relevant groups had appropriate access.

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This group political theory of the 1950s provides an astonishingly exact blueprint for the administrative law developed by courts in the 1960s and 70s. In those decades the courts took giant steps in lowering barriers to group access to both agencies and courts by loosening

the standing, ripeness, and exhaustion rules. Those rules originally had been designed to exclude from the agencies and the courts everyone except those few individuals who had suffered direct legal injury from government action. Today any interest group that can assert even the smallest and most indirect potential injury may claim a right to appear before the agency and then seek review in the courts, in short may claim access to the decision-making processes of government.

Merely assuring that groups may speak to agencies, however, only assures the façade of access. True access requires not only that the groups get to speak but that the agencies have to listen and to modify their decisions in the light of group demands. It is with this point that the truly marvelous saga of contemporary administrative law begins. Led by the U.S. Court of Appeals for the District of Columbia, the courts employed the cryptic "notice and comment" language of the APA to create legal doctrines of "dialogue," "partnership," and "hard look" that have read group theory directly into law.

"Notice" now means that the agency must announce what facts and methodologies it views as potentially crucial to shaping its rule and what its policy goals and priorities are. For how can a group comment meaningfully unless it knows what the agency has in mind? "Comment" now means that every concerned group can offer as much written material to the agency as it pleases, that each group must be given the opportunity to rebut evidence submitted by other groups, that oral testimony must be received whenever written submissions will not adequately ventilate the issues, and even that parties will be allowed to cross-examine other parties when they can show a specific need to do so.

Both notice and comment, however, only compel the agency to speak and permit the groups to do so. How do we make sure the agency listens and responds by changing its proposed policy? Here the courts seized upon the "concise and general statement" language of the APA and turned it into the requirement that the agency conduct a dialogue with the groups, that the agency's statement contain responses to the comments received. The point of dialogue is, of course, that if the agency must respond to comments, it must listen to the

comments. The only way a court can force an agency to grant real access to groups is to demand that the agency prove it has listened by responding in detail to what the groups said to it.

A parallel development occurs in the final area in which the courts have vastly expanded the administrative law of informal rulemaking. The informal rulemaking provisions of the APA contain no record requirement. Yet the courts have now created the doctrine of a "rulemaking" record which must accompany an informal rule when it is subjected to judicial review. For how could the courts know whether the agency has allowed all relevant comments and responded to them unless it can see the comments?

The law of preliminary questions such as standing and the law of notice and comment rulemaking are now very large and very complex. They constitute one long hymn to group access and to the underlying theme of procedural rationality. The true test of the rationality of a government policy is not its substance but whether or not it is the product of groups interacting with one another and with government.

### **A Revolt against Technocracy**

While group theories of politics provided the substance of the new judge-made administrative law, another intellectual phenomenon provided the impetus to judicial intervention. Democratic and technocratic themes play out a dialectic in American political thought. We believe in rule by the people. We also believe that every productive activity of life is best done by those who know how to do it best. The Jacksonians believed in rotation in office—the spoils system—because it put the common man in office. The Progressives sought to replace the corruption and inefficiency of the spoils system with an expert civil service. The New Deal paraded as the triumph of this technocracy. Judges have no place in technocratic government because they are not expert at any of the technologies of the modern industrial state. Accordingly, judicial deference became the orthodoxy of the 1940s and 1950s, as the men on the bench who did not know deferred to the men in the bureaucracy who did.

By the 1960s Americans were caught up in a reaction to technocracy. We came to view experts not as objective authorities above the political fray but as themselves enlisted in the various groups engaged in the political struggle. Progressive–New Deal theories of the strong executive had sapped our faith in Congress. Once it occurred to New Dealers that strong presidents might be Republicans, they lost their faith in the strong presidency. We desperately needed some hero to bring the bureaucratic experts to heel. The only people left who were clothed with enough governmental authority to do the job and sufficiently devoid of expertise to be trusted were the judges. Now it was precisely their lack of expertise that justified not judicial deference to administrators but judicial intervention. The heroic role of the judge becomes that of breaking into the closed circle of experts, subjecting their decisions to his and her own nonexpert surveillance as a lay representative of a lay public, and democratizing the technocracy by insisting on the access of all groups to the administrative process.

### Group Politics Reconsidered

As group theory was being institutionalized in administrative law during the 1960s, it came under vigorous attack by political theorists. One of the main thrusts of that attack was that group processes did not guarantee rationality because some groups were far better than others in obtaining and exploiting access to government and to the public at large. Instead of constantly shifting winning alliances of groups, certain groups nearly always found themselves on the losing side. Thus, group political theory was a winner's theory rationalizing the status quo.

One cure for the pathologies of group politics might be more group politics: make sure that all interests are organized into groups and seek to equalize the ability of all groups to obtain access. By the late 60s and early 70s administrative law was responding. Agencies were beginning to pay the representational costs of groups that could not afford to make use of their access otherwise. And courts concerned themselves more and more with the question whether the agencies had given a hearing to all

relevant groups. During the 1970s the judicial demands for more and more detailed "reasoned responses" from the agencies to group comments escalated to a perfect frenzy until it appeared that no matter how much dialogue the agency experts engaged in with the groups, it was never quite enough. In the famous *Vermont Yankee* case, the Supreme Court sought to dampen this frenzy by telling the lower federal courts that they must stop inventing new procedural requirements—but it had relatively little success.

### From Procedural to Substantive Rationality

Seeking to cure the pathologies of group politics by more group politics was not, however, the central response of political theory. That response was instead to challenge the proceduralist definition of rationality offered by the group theorists and the positivist ethics that underlay it. In the 1960s moral and political philosophers had again begun to speak as if there were rights and wrongs that rose above the mere preferences of individuals—that some actions or policies were not simply more preferred but more right than others. At the same time public choice theorists led by Kenneth Arrow were demonstrating that we could not attain proceduralist rationality—there was no decision-making procedure which would result in a policy product that perfectly reflected the varying preferences of the multitude of political groups. And on yet a third level, policy analysts were beginning to perfect modes of cost-benefit and systems analysis that promised to tell us that some government policies were substantively more rational than others—that is, that some gave us more benefits for less cost and thus a more rational allocation of scarce resources than others.

By the early 1970s good policy was no longer to be defined as whatever came out of the group struggle because no matter what we did we could not really equalize the access of all groups. Even if we could, there would be no single correct summarization of the various groups' preferences. Furthermore some government policies were clearly more economically rational than others on the basis of objective criteria that were quite independent of the group struggle. And finally some government

policies were more ethically justifiable than others, no matter what particular groups wanted.

At the level of policy analysis the key concept in this movement toward substantive rationality was the "unanticipated consequence." Many government policies were substantively irrational because groups intent upon their immediate interests neglected the ripples of multiple consequences that flowed from actions directly beneficial to them. This concept moved into administrative law through many channels but principally through the requirement for environmental impact statements. It is now often forgotten that that requirement was initially an anti-technocracy device aimed at the expert public works engineers of the Corps of Engineers and the various highway departments. It was predicated on a vision of technicians whose perspectives had been so set in concrete that they must be forced to face up to the costs and benefits being visited on those outside their own interest group circle. Even earlier, systems analysis and cost-benefit analysis had entered the budgeting aspects of administration through schemes first for program planning budgets and then zero-based budgeting. From all these sources came the regulatory analyses and the regulatory impact statements that have pervaded both the legislative and executive agendas of regulatory reform for the last four or five years.

### The Courts Respond

As of the early 1980s the administrative law created by courts is beginning to move in the same direction. By the 1960s courts were again openly proclaiming that they were engaged in substantive review. That review, however, typically took the form of asking not whether the policy chosen by the agency was good or bad but whether it was in accord with the parent statute under which the agency made its rules. Until the 1980s this substantive review took a back seat to the procedural review through which the courts fully incorporated group politics into administrative practice. Even when a court was really intent on reversing what it saw as a bad policy rather than on improving group access, it typically did so by inventing some new procedural hurdle, noting that the agency

had not jumped over it, and then reversing the agency on those grounds. Nevertheless, a judicial urge toward newer ideas of substantive rationality lurked below the judicial commitment to the procedural rationality of group participation.

We are now experiencing a subtle shift in the balance between procedural and substantive rationality in administrative law—a shift clearly foreshadowed by the philosophical reaction against group theory in the 60s and 70s and one which should have fully worked itself out by the end of the 80s. Remember that by the 1970s the courts were saying to the agencies: you must engage in dialogue with the groups and the way to prove to us that you have done so is to provide not only an elaborate notice and an extended rulemaking record of comment but also a statement of basis and purpose that answers the significant comments made by the groups; your answers prove that you really listened to the comments (that is, gave access to the groups). Then responding to the early critiques of group politics that pointed to the inability of many interests to get equal access, the judicial emphasis fell more and more heavily on completeness. Had all the answers been provided to all the significant questions by all the groups? Of course, letting every group participate to the full leads to endless repetition and delay. There is an old bit of town meeting lore that says, "It is not necessary that everyone be allowed to speak but only that everything that needs to be said is said." It is an almost unnoticed judicial step to move from the demand that all the groups be answered to the demand that all the significant questions be answered. That is the step that the courts are taking right now.

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While so subtle as to be almost unnoticed, it is an enormous step, for it is the step from procedural to substantive rationality. The purpose of the dialogue is no longer to prove that

the agencies have granted access to all groups. It is, rather, to prove that the agencies have produced a substantively rational policy, one that adequately anticipates all the consequential costs and benefits. The shift from procedural to substantive review occurs with little noticeable change in the technique or rhetoric of judicial opinions. Moreover, given the style of congressional legislation in the 60s and 70s, which frequently encompassed multiple goals and trade-offs, it is easy for judges to blend newer and older substantive review. They impute their own desires for substantive rationality in administrative performance to the statute and then strike down what they perceive to be substantively irrational policies on the grounds that they are not in accord with the parent statute. For this reason, as well as the Supreme Court's blast at procedural review in *Vermont Yankee*, we can already see the D.C. circuit court moving toward clothing its demands for substantively good policy in commands that the agency follow the substantive requirements of its parent statute rather than in commands that the agency follow newly invented procedures.

Some of the changes I have noted can be expressed in the language of incremental versus synoptic decision making. But it is not possible here to investigate the close ties between incrementalism and group political theories on the one hand and synopticism and the newer political theory of right and wrong on the other. The following must suffice. The incremental strategy of decision making argues that organizations should make decisions by considering only a few alternatives, calculating only some costs and benefits, and not bothering to get their priorities exactly in order. The synoptic strategy says, exactly state your values and assign priorities to them, consider all alternatives and all costs and benefits, and choose the least cost, highest benefit alternative. The incrementalist replies that once the uncertainties of the real world and the information costs of synopticism are taken into account, incrementalism is more rational than synopticism. Incrementalism was highly compatible with group politics. In effect the two combined said, look at whatever alternatives the groups suggest and choose the one with which most of them are at least a little bit happy. The more one moves from group politics to theories of right and wrong or substantive

justice, the more one inclines toward synopticism.

As the courts swing toward substantive rationality, the notes of synopticism are sounding stronger and stronger in their opinions. In the technical jargon of administrative law the new movement is to be seen in the increasing tendency of the courts to substitute the phrase "clear error" for the phrases "arbitrary and capricious" and "substantial evidence." The latter two phrases are deeply imbedded in statutes and represent the New Deal style of judicial review. Both imply that if the agency has acted incrementally, if it has gathered some arguments and evidence to support its choice of alternatives, it wins. Clear error was a phrase that the Supreme Court, probably inadvertently, once applied to a particularly ill-considered administrative decision. The D.C. circuit has gleefully seized on it as its standard for judicial review of agency action. While "clear" is supposed to embody some continued 1950s style judicial deference to administrative policy making, "error" is a far more potent word. If the agency is right, in the judge's eyes, it wins. If it is wrong, it loses. And right or wrong is not a matter of whether there is something to be said for the agency's position. Put as truth or "error," the judicial review question must be a synoptic question: all things considered, did the agency make the right choice? The courts are now demanding more and more tightly built, fully synoptic defenses of agency positions. Only when the judges are convinced that uncertainties verge on the absolute—that there is simply no way of finding out for sure the needed facts—are they willing to label an agency's incrementalism as the kind of administrative discretion to which statutes require the courts to defer.

### **Circa 1990**

If I am correct about the roughly decade-long time lag between theory and law, we should be able to predict the shape of administrative law circa 1990–95 by considering three interrelated projections.

- As the courts shift from the demand that the agencies listen to all the groups to the demand that they answer all the questions, the agencies will make and defend their decisions

in more and more synoptic style. As they do so, a clearer and clearer contradiction will become evident between the technological complexity of the rulemaking records demanded by courts and the lack of expertise of the judges reading those records.

- As emphasis shifts from procedural to substantive rationality, the judge is moved from the one ground in which he can claim expertise, fairness of legal procedures, to the hundreds of substantive policy areas about which he admittedly knows nothing. Reviewing judges will be increasingly faced with the self-assigned task of making the substantively correct decision on something they know nothing about.

- By the late 1980s—and here my argument is at its most speculative—technocracy should be enjoying a dominant position in the continuous American dialectic of technocracy and democracy. Even during populist periods, our belief that the persons who understand a thing ought to run that thing never entirely disappears. Witness Jimmy Carter running against the Washington technocracy as peanut farmer *and* nuclear engineer. The demand for substantively correct decisions itself favors technocrats. Most important, however, the revolt against technocracy of the 60s and 70s was based on the perception that our society was producing such a surplus that we could afford to discount technology in favor of “humanistic values.” As we worry more and more about productivity based on technological advance, the technocrat must inevitably enjoy an increased legitimacy over the lay decision maker. Thus the anti-technocratic wave that raised the know-nothing judge to the status of lay hero will recede, eroding the high plateau of perceived legitimacy that underlay the judicial hubris of the last two decades.

By about 1990 the judiciary will face a crisis of legitimacy vis-à-vis the agencies. The agency will represent the capacity of technical experts to produce substantively correct decisions on the basis of synoptic processes at a time when the strongest desire of the society will be to be technologically right. The courts will represent the democratic virtues of the lay mind, but a lay mind demonstrably incapable of even understanding, let alone making an independent judgment on, the technical matters put before it. The judges will withdraw to await the next know-nothing rebellion.

This prediction must be qualified in a number of ways. It will, of course, turn out to be more true for regulatory areas that involve complex technologies than for those that do not. Judges who matured on the heady wine of the 60s and 70s are likely to have become fixed in their ways and ignore or deny the growing gap between their capacities and the records before them. So the prediction depends in part on changes in personnel and anticipates a considerable lack of uniformity in judicial performance. Finally the outcome predicted depends in part on congressional performance. In the 60s and 70s Congress passed a number of statutes, such as the Clean Air Act, containing extremely detailed norms for administrative decision making. Courts have seized upon these norms as a basis for substantive judicial review. The more detailed the statute, the more opportunity for judicial intervention. Thus, to the extent that Congress persists in this kind of statute-writing, judicial activity will continue at higher levels than would otherwise be expected.

The basic dynamic of judicial retreat seems clear, however. As the courts demand more and more synoptically determined substantively correct decisions, the agencies will respond by producing rules better and better armored in

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technocratic expertise. Having levered themselves off the grounds of procedure where they have special claims to expertise and onto the grounds of highly technical substance where they do not, courts will find themselves claiming to exercise a kind of review for which they will have neither the capacity nor the legitimacy. At that point judicial deference to the agencies will again become the central theme of administrative law. ■