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DEMOCRACY AND BUREAUCRACY

Case in Point:
Whitman v. American Trucking Association,
531 U.S. 457 (2001)

America has a remarkably strong and stable economy. Economists debate about why our economy is so much stronger than others, but many believe that our reliance on the free market has something to do with it. We are, perhaps, the most capitalistic country in the world, which means that we rely on the free market to an extent that other countries do not. That means that market forces (supply, demand, and price) drive most economic decisions in America. That is not true in the rest of the industrialized world, where governments rather than [as well as?] markets make significant economic decisions.

From a public administration perspective, the free market, wonderful though it may be, is not without its flaws. The particular flaw that will concern us in the discussion of the *American Trucking Association* case is market failure. Market failure occurs when the market provides no incentive to incur added expenses to cover costs associated with second-order consequences of doing business. Pollution is the classic example of market failure. If you own a business and your business produces a harmful by-product, your choices are simple and few: (a) you can dump the by-product into the river or on the land or (b) you can incur the added expense of disposing of it safely and properly. Choice A will not affect your profits but has adverse consequences for who live near the business or downstream from it. In the free market system, however, there is absolutely no incentive for Choice B. Indeed, if you exercise Choice B and your competitors do not, the market will actually punish you for having made a “bad” economic decision. One reason for government involvement and regulation of the economy is to force businesses into Choice B.

The Cuyahoga River runs through downtown Cleveland, Ohio, and on the morning of June 22, 1969, the river caught fire.¹ That happened because all the businesses along its banks and all who navigated it exercised Choice A. Although the 1969 fire was neither the first nor the worst fire on the Cuyahoga, this one was covered by the national media; most Americans were aware of it and bothered by the concept of a fire burning on top of a body

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of water. The river fire was one of the events that pressured Congress to pass the Clean Water Act in 1971. The case in point, *Whitman v. American Trucking Association*, involves the Clean Air Act rather than water, but the principal is the same. Government regulation was thought necessary because the market offered no incentive not to pollute the air we breathe.

The original Clean Air Act was entitled the Air Pollution Control Act of 1955. It has been amended and revised several times. It is a complex and lengthy law, but it works like this: Congress has required that certain pollutants be controlled; Congress delegated the power to the Environmental Protection Agency (EPA) to set standards for those pollutants, and these were called national ambient air quality standards (NAAQS); those states that meet the NAAQS need do nothing but maintain their compliance; those states that do not meet the NAAQS are called nonattainment areas, and they must submit plans to the EPA to come into compliance within a certain number of years. Finally, the EPA director is required to reevaluate each NAAQS every five years and “make such revisions . . . as may be appropriate.”

In 1997, President Bill Clinton’s EPA director conducted the required reevaluation and revised the NAAQS for particulate matter and ozone downward, reducing human exposure to both. Solid particles and liquid droplets in the air are what constitutes particulate matter. When the particulate matter is large enough for the naked eye to see, it is called smog, but most frequently, it is too small to see. Combustion is the primary source of particulate matter, whether it comes from gas-burning engines or firewood; the result is all sorts of respiratory problems, including “heightened risk of premature death.” Indeed, the EPA believes that ozone is—and particulate matter may be—*nonthreshold pollutants*,² pollutants that cause adverse health effects at any atmospheric concentration above 0.

Ozone, by contrast, is a colorless, odorless gas that forms when other atmospheric pollutants react in the presence of sunlight. Ozone is beneficial high up in the atmosphere but bad at a level where we can breathe it; it causes all of the same respiratory ailments that particulate matter does.

One of the problems created by the EPA’s revision of the NAAQS for particulate matter and ozone was that several of the states that had been in compliance under the old NAAQS would now be classified as nonattainment areas. They would need to make their air cleaner, which would mean imposing additional environmental costs on businesses in those states. The ink could hardly have been dry on the new NAAQS when the EPA was sued by a whole host of plaintiffs, including business associations, individual businesses, individuals, congressmen, and states, who thought the new standards were too stringent. Environmental groups sued, too, and they thought the new standards were not stringent enough.

The American Trucking Association and other plaintiffs alleged the following: that Congress violated the Constitution when it gave too much discretion to the EPA to set the NAAQS; that the Clean Air Act required the EPA to consider the costs of compliance associated with lower NAAQS, but the agency did not consider such costs; and that the EPA made a legal error in its interpretation of the Clean Air Act. The lower court found that Congress had indeed violated the Constitution in its delegation of power to the EPA and sent the case back to the EPA with orders to fix the NAAQS-setting process so as to eliminate the breadth of the delegation of power. For its part, the EPA appealed to the Supreme Court, arguing that the lower court lacked jurisdiction over the case. The EPA alleged that the case was not ripe (a legal concept that means a suit was brought too early, before anyone was hurt, and hence, the suit is speculative). The EPA also argued that the NAAQS were not final yet, and “final agency action” is required by a different statute before parties can sue a federal agency.

Over the years, courts have developed numerous decision rules, sometimes called precedent, doctrines, or constitutional tests, to help resolve the conflicts between agencies and citizens. Applying those doctrines and legal tests to the issues in the *American Trucking* case, the Supreme Court decided: the delegation of power was constitutional; the EPA was forbidden by congressional intent from considering the costs of compliance when setting the NAAQS; the case was ripe (not filed too early), and the agency's action was final, so the lower court did have jurisdiction. The final issue in the case involved the EPA's interpretation of two apparently conflicting subparts of the Clean Air Act. Basically, the EPA interpreted the Act in a manner that gave the agency considerable discretion in implementing the revised NAAQS, but the Court said the EPA's interpretation was not rational.

The *American Trucking Association* case is a good example of administrative law. Typically, the legislative branch authorizes an executive branch agency to take some action. When the agency takes action, it adversely affects individuals or businesses, and the adversely affected parties sue the agency. The judicial branch is left to clean up the mess.

As you read this text, you will learn administrative law by reading Supreme Court cases. For example, you will read the *American Trucking* case in Chapter 3, where you will learn about delegation of power to agencies. You will read the cases because that is where you will find the doctrines and decision rules that make up the common law body of administrative law. This book is not just about administrative law. It is also a book about democracy. In a democracy, public policy is supposed to be made by individuals whom the voters can hold responsible in an election. Is that how you would describe what happened with clean air?

Questions

1. Ultimately, in the *American Trucking* case, who will decide whether more states and businesses within those states will be required to spend additional billions of dollars to make the air cleaner? Did Congress make the decision? Did unelected bureaucrats make the decision? Did an unelected, job-for-life Supreme Court make the decision?
2. If you are not certain who is responsible for the policy, what does that say about the shape of your democracy?
3. If it seems plausible to you that either the bureaucracy or the Court ultimately made the policy, what does that say to you about your democracy?
4. The issue regarding whether the EPA should consider the costs of complying with more restrictive standards was an important one for the business and state plaintiffs. Do you think it would be a good idea for agencies to be forced to consider the costs of the rules they are about to make? Congress mandated in the Clean Air Act that the EPA "must set primary NAAQS . . . which are requisite to protect the public health—with an adequate margin of safety." If Congress had also mandated that the agency consider the costs of compliance with those NAAQS, then Congress would be delegating to bureaucrats the power to decide between industry profits and the public health. Sometimes, societies must make decisions like that. Who do you think should make such decisions; politicians who will cast their vote based on their desire to be reelected or experts within the agencies, who will base their decision on science and empirical data but who are not accountable to those who must live with the decision?

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DEMOCRACY

If you are like most Americans, you assume that you live in a democracy, but you probably cannot define what that means. Try to define democracy, being concise and definite about what the term means.

Chances are, you did one of two things: (a) you went back to Abraham Lincoln and said, “government of the people, by the people, for the people,” or (b) you tried to define it in terms of a process (elections, political parties, etc.). Without belaboring the point, let us consider these typical responses.

Government of the People

It is difficult to imagine what Lincoln had in mind when he said “of the people,” but we can put the rest of his phrase to a commonsense test. Presumably, “by the people” means some variant of “the people govern.” When was the last time you governed? When was the last time you had significant input into a government policy? When was the last time you had *any* input into a government policy? When was the last time anyone you know had any input into a government policy?

You may be saying to yourself, “But people can’t really govern. We elect representatives to do that for us.” True enough. When was the last time you called your senator or went to Washington, D.C., to see your senator about an issue of concern to you? When was the last time you provided governmental input to any of the following elected officials: U.S. representative, county commissioner, city council person, mayor, governor, U.S. president? If you have provided such input, do you think it was a significant force in shaping policy? The notion “by the people” is too simplistic to describe what part (if any) the American people play in shaping policy.

The concept “for the people” could be difficult to deal with because it would seem possible to govern “for the people” by doing the opposite of what the people want (assuming one could ever assess what the people want). Let us, for now, assume that Lincoln was getting at the notion of governmental responsiveness to citizens’ demands. In the late 1970s, more than 75 percent of all Americans opposed a Panama Canal Treaty, but we got one. For the past 30 years, 65 percent or more of Americans have favored stronger gun control and doing away with the electoral college.³ More recently, 63 percent of Americans did not want the House of Representatives to impeach President Clinton, but he was impeached anyway.⁴ During the last several years of the Clinton presidency, the federal government had budget surpluses. Surveys indicated that Americans generally supported using budget surpluses to pay down the debt and shore up education, Medicare, and social security rather than “giving it back” in the form of tax cuts, but Congress passed tax cuts.⁵ In the case of gun control, a small minority has been able to thwart a policy the vast majority favors. In the case of the electoral college, although proposed constitutional changes have been introduced in Congress, none has passed. Although there is some empirical evidence of association between public opinion and public policy,⁶ we can say that often in the United States, the people do not get the policies they want. Indeed, the founding fathers invented or refined several ingenious devices whose purposes were to thwart government responsiveness to the demands of the masses (for instance, state legislative election of U.S. senators, the electoral college, federalism, and separation of powers—including a judicial branch that later became armed with judicial review). Even conceding that Lincoln’s phrase “of the people, by the people, for the people” was an accurate description of

American democracy in 1860 (which is doubtful), it does not describe what happens in America today.

Democracy as a Process

If you defined democracy by referring to elections and competing political parties, bear in mind that many very authoritarian regimes in the world today have elections and competing parties (e.g., El Salvador, Iran, Nicaragua, and South Korea).

DEMOCRACY DEFINED

One could take a semester-long course about notions and definitions of democracy, but for our purposes, let us simply say that democracy is a form of government in which people have some influence over the policies that affect their lives. Democracy is not an absolute concept in the sense that either you have it or you do not. Rather, it is a continuum, with some countries having a lot of it, and some countries having not very much or none at all.

It can be argued, for example, that many parliamentary systems are very democratic because the political parties take divergent and clearly identifiable stands on issues and possess the party discipline to enact their platforms into law. Hence, when a voter votes for a candidate who says, "If elected, I will help my political party bring about X, Y, and Z," that voter has significant influence if his or her party wins a majority of seats in Parliament because the party will enact policies X, Y, and Z. But in the United States, due to separation of powers, federalism, and weakened political parties, even on those rare occasions when a politician or political party takes a definite and clear stand on a policy issue, the result is not predictable. To cite a popular example, look at what happened in 1988 when candidate George Bush said, "Read my lips. No new taxes." In 1992, it may have cost him reelection when, as President Bush, he was forced to accept a budget compromise containing a significant tax increase.

In any case, although we may not be the most democratic country in the world, we are certainly not the least democratic. If we can agree that a democracy is a form of government in which the people can have an impact on policies that affect their lives, a short discussion addressing how the people do that is in order.

Once a polity gets beyond a certain size (say several hundred), it becomes impossible for all the people to debate and vote on policies. According to the 2000 census, there are more than 281.4 million people in the United States,⁷ so it is unlikely that everyone could have input on public policy. A republic is a democratic form of government in which people elect representatives to act for them. Political scientists use the term *linkages* to describe the devices that link the people to their representatives. Those linkages are public opinion, political parties, voting, elections, and interest groups. So, in theory at least, the people influence policy indirectly by the use of linkages with their representatives—who, presumably, reflect constituency demands in debate and votes on policies.

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How democratic would you think our government was if it were true that 90 percent of the laws that regulate everyday life were made by unelected, politically insulated, job-secure, career bureaucrats?⁸ What if it were true that the policy-making or legislative branch of

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government (at any level—federal, state, county, or city) passed only broad and vague legislation and then delegated the power to agencies to adopt standards, rules, and policies to fill in the gaps and holes, leaving those agencies with a tremendous amount of discretion? The notion of policy making by agencies and bureaucracies rather than by popularly elected (and accountable) representatives is referred to as “the administrative state” or the fourth branch of government.⁹

Specifically, the term *administrative state* connotes policy making by bureaucratic or agency expertise, and the term *fourth branch* simply means bureaucracy as an organization or structure. The latter, however, implies more than a bureaucracy. It implies a bureaucracy coequal with the presidency, Congress, and the courts, and it assumes the policy-making aspect of the administrative state. Apparently, the term *fourth branch* was coined by Justice Robert Jackson in a 1951 case.

The rise of administrative bodies probably has been the most significant legal trend of the last century, and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. Administrative actions also have begun to have important consequences on personal rights (*United States v. Spector*, 343 U.S. 169). They have become a veritable fourth branch of the government, which has disrupted our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive, or quasi-judicial, as the occasion required, to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying *quasi* implicitly confesses that all recognized classifications have broken down; *quasi* is a smooth cover that we draw over our confusion, as we might use a counterpane to conceal a disordered bed.¹⁰

We used to believe that the legislative branch was the policy-making branch, and the executive branch simply implemented the policy. The concept of the administrative state implies that the old distinction between policy making and the administration of those policies no longer exists. In the modern, complex, postindustrial world, policies are initiated, formulated, promulgated, and modified by technocratic experts who hold mid- to high-level positions in America’s bureaucracies (federal, state, and local). The same agencies that make the policies also implement them. Pursuant to implementing their own policies, agencies also investigate infractions of those policies and adjudicate those infractions. The agencies can also impose sanctions. Although there may be academic squabbles over the degree of power that bureaucracies have acquired, there is virtually no disagreement over the fact that the old dichotomy between policy making and policy implementation is gone and that administrative agencies now perform both functions, fused into one institution.

It is a reflection of the administrative state that Congress passed a complex, confusing, and conflicting law to reduce the pollution in the air we breathe. Congress then delegated to the experts in the EPA the power to set the specific standards regarding how much of which pollutants is acceptable. Finally, Congress left it up to the states to decide how to reach the levels set by the EPA. State legislatures are charged with setting broad policies, such as deciding to burn cleaner fuels (that is why gas costs more in California) or

requiring the application of pollution abatement technology. The legislature then delegates the power to state agencies to decide how to reach those goals.

Does the existence of the administrative state mean that there is no democracy? Not necessarily. If it were true that popularly elected officials exercise considerable control over agencies, then the elements of democracy as we have defined them and outlined them would still exist. In Chapters 2 and 3, the argument will be made that neither the chief executive (specifically the president, but governors and mayors as well) nor legislative bodies (Congress, state legislatures, or city councils) effectively control agencies. What all of this has to do with administrative law is that, almost by default, the job of attempting to control agencies has fallen to the courts, and administrative law is the tool that courts use. After readers have digested the cases, concepts, and discussions presented throughout this book, they should be able to reach their own conclusions regarding the state of democracy in America. For now, we need to understand the rise of the administrative state.

FROM GEORGE WASHINGTON TO THE ADMINISTRATIVE STATE

The U.S. polity was founded on certain basic principles, with others evolving early on to form a theoretical framework. The essential components of that framework were as follows: *limited government*, *negative freedom*, and *laissez-faire economics*. In limited government, the powers of government are restricted or limited. Devices such as a written constitution with a Bill of Rights, the separation of powers, and federalism limit governmental power, which is supposed to be limited to the protection of life, liberty, or property. This is the notion that “the government that governs least governs best.” Negative freedom is “freedom from.” A citizen is free to the degree that no other citizen or government interferes with his or her activity.¹¹ According to this concept, people are expected to reach their fullest potential where government does not interfere with individual initiative but simply limits itself to the protection of life, certain liberties, and the ability to accumulate and hold on to wealth. Thus, where the exercise of governmental power is limited to the protection of life, liberty, or property, citizens are truly free. In 1776, Adam Smith published *The Wealth of Nations* and articulated the notion of laissez-faire economics, that government should stay out of the economy and allow the free market to determine economic policy. Laissez-faire fits hand in glove with the two other concepts, negative freedom and limited government, and they became the foundational ideology of America.

Although early America had problems such as poverty, poor health, and poor housing, governing elites did not consider the exercise of governmental power to be a proper tool for addressing these problems. In the early 1800s, the United States had a rural population with an agrarian/cottage industry economy. The process of industrialization brings urbanization, and urbanization exacerbates problems such as poverty, poor housing, poor health, crime, hunger, malnutrition, sewage disposal, and alienation, to list just a few. A government based on concepts such as limited government, negative freedom, and laissez-faire economics (and eventually social Darwinism) is not an instrument for dealing with such problems.

Eventually, political and social movements began to espouse different positions that challenged the older theoretical framework. Farmers and merchants in the West began to demand that government regulate the rates that businesses charged (railroads and grain elevators, for example). Other segments of society began to demand that government take

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some action to deter child labor and that government take responsibility for educating children. Some demanded that women be allowed to vote. Still others demanded that government take responsibility for a wholesome and edible food supply and that government regulate monopolies. Labor unions began to demand that government pass laws regulating the conditions under which laborers worked. The terms that we use to identify the philosophy that encompasses these calls to government action are *positive freedom* and *positive government*. If negative freedom is “freedom from,” then positive freedom is “freedom to.” Positive freedom is the notion that some individuals cannot achieve their fullest potential without help and that help generally will come from government. Positive government is the idea that government has a positive role to play in the economy and in people’s lives and that it should not be limited to simply protecting life, liberty, and property.¹²

The socialist and labor movements had then-German Chancellor Otto von Bismarck so concerned for the future of capitalism that in the 1880s, Germany adopted a social security and national health care system. The British followed suit some 20 years later. In the United States, the federal government’s response to progressive pressure was antitrust legislation and the Federal Trade Commission (FTC). Income taxes and the Federal Reserve Bank were responses to erratic business cycles. Twice, the federal government passed laws against child labor (as did many of the states), but the Supreme Court declared them unconstitutional. This period in American constitutional law brought heavy criticism upon the Court. Many accused the Justices of the Supreme Court of engaging in judicial activism, or substituting their personal policy preferences for those passed by the legislative branch, not because of a constitutional defect but because they personally disagreed with the particular policies.

Although it is something of an oversimplification, it can be said that these two philosophies—positive and negative government—came to a head, after more than 50 years of conflict, in the election of 1932. The philosophy of positive freedom and positive government won out. Although Franklin D. Roosevelt never used the terms, the first hundred days of his first administration and the era referred to as the New Deal were the epitome of positive freedom and positive government. Shortly after FDR became president, a new economic theory, compatible with positive freedom and positive government, gained credence. That theory was Keynesian economics (that government can and should manipulate the demand for goods and services by manipulation of the money supply to lessen the effects of the cycle of inflation and recession/depression). The new public philosophy of positive government, positive freedom, and Keynesian economics replaced the old philosophy of negative freedom, limited government, and *laissez-faire* economics. This is not to say that what I have termed the “old” philosophy has disappeared. Indeed, these two philosophies form the underpinnings of the two major political parties in America today. Republicans generally believe in individual initiative rather than government programs to solve problems (negative freedom). They believe in less governmental regulation of the economy and prefer the free market to government action (*laissez-faire*). Finally, Republicans prefer the federal government to be smaller and more limited in scope and power (limited government). Democrats, on the other hand, generally look to government to solve problems (positive freedom). Democrats are somewhat skeptical of the free market and want it regulated (Keynesian economics). Finally, Democrats believe that the exercise of government power should not be restricted (limited) to the protection of life, liberty, or property rights (positive government). If government is going to play a large part in things such as retirement, health care, college education, housing, unemployment, job training, a clean and safe environment, automobile safety and efficiency, and so on, then

government is going to need to rely on expertise to help it deliver services or implement programs (to set NAAQS, for example). The experts are the public servants who serve in agencies, constituting the situation we have described as the administrative state.

The growth of bureaucracy in the United States closely parallels historical developments. As you would expect from a government founded on the principles of negative freedom and limited government, Washington's administration had only a small bureaucracy: the Department of State, the Department of Treasury, the Post Office, the Department of War, and an Office of the Attorney General. One of the early additional departments was the Army Corps of Engineers (1802), which was created to enhance the flow of commerce through the country. It assisted in projects to make the inland waterways navigable. Another early agency was the Patent Office, which was made a federal bureau in 1803; it is necessary in a capitalistic society to protect ideas and inventions as a society begins to industrialize. Several Cabinet agencies were created after the Civil War, and a few of the first regulatory agencies were created in the clash between the status quo (limited government, negative freedom, and laissez-faire economics) and the progressive movement (positive government and positive freedom). The following is a list of agencies with their dates of creation:

Department of the Interior, 1849
Department of Agriculture, 1862
Department of Commerce and Labor, 1903
Interstate Commerce Commission, 1887
Food and Drug Administration, 1906
Federal Trade Commission, 1914

After the election of Franklin Roosevelt, a host of agencies were created to help the government deliver services:

Federal Communications Commission, 1934
Securities and Exchange Commission, 1934
National Labor Relations Board, 1935
Social Security Board, 1935
National Mediation Board, 1934
Federal Deposit Insurance Corporation, 1933
Federal Home Loan Bank, 1932
Tennessee Valley Authority, 1933

During World War II, federal bureaucracies nearly ran the country. They did everything from rationing commodities such as gas, butter, and rubber tires to controlling rent prices throughout the whole country.

Recall that this chapter began with a discussion of America's reliance on the free market, market failures, and a government policy to protect the environment. If air, water, drivers, workers, and so on are to be protected, then government must do it because the

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market will not. More agencies were created in the 1960s and 1970s to help with market failures and with new problems that the government decided to tackle. These agencies are as follows:

Department of Housing and Urban Development, 1965
 Department of Transportation, 1966
 Peace Corps, 1961
 Equal Employment Opportunity Commission, 1964
 Environmental Protection Agency, 1970
 Occupational Safety and Health Administration, 1970
 AMTRAK, 1970
 Federal Election Commission, 1971
 Commodity Futures Trading Commission, 1974
 National Transportation Safety Board, 1976
 Federal Mine Safety and Health Review Commission, 1977
 Department of Energy, 1977
 Department of Education, 1979

Early in the 21st century, the federal bureaucracy, displayed in Figure 1.1, has grown to 2.7 million employees, (but that is down from 3.1 million in 1990), and it consists of the following: (a) an Executive Office of the President, established in 1939, with about 1,500 employees spread among 10 or 11 offices and agencies, including the Office of Management and Budget, the National Security Council, the Council of Economic Advisors, and the Office of the Vice President (this segment of the bureaucracy is referred to as a *staff agency* as opposed to a *line agency*; staff agencies have no formal administrative functions, their sole function being to advise the president);¹³ (b) 15 Cabinet-level agencies, which employ about 1.6 million people; and (c) 50 or so independent agencies, government corporations, and independent regulatory commissions, hereafter referred to collectively as independent regulatory agencies, which employ slightly more than a million workers.¹⁴ Actually, despite the addition of new agencies and departments, the size of the federal government (in terms of employees) has grown steadily but slowly since the mid-20th century and has actually declined during the decade of the 1990s. The explosive bureaucratic growth has been at the state and local levels. In 1980, the federal bureaucracy had about 2,898,000 employees. By 1998, there were only 2,783,000 federal employees, a decrease of 4 percent. State and local bureaucracies, in contrast, grew by 26 percent over the same time period, from 13.3 million employees in 1980 to 16.7 million employees in 1998.¹⁵ In spite of the clear empirical evidence cited above, showing a reduction in the size of the federal government of 115,000 employees, those statistics are somewhat slippery. The reader should not assume that the work that used to be done by the 115,000 federal employees who are no longer there has been abandoned. What has been happening at both the state and federal levels of government are processes referred to as downsizing, outsourcing, and privatization. What those now-absent federal employees used to do is now being done by private entities that contract with government. Paul Light has estimated that

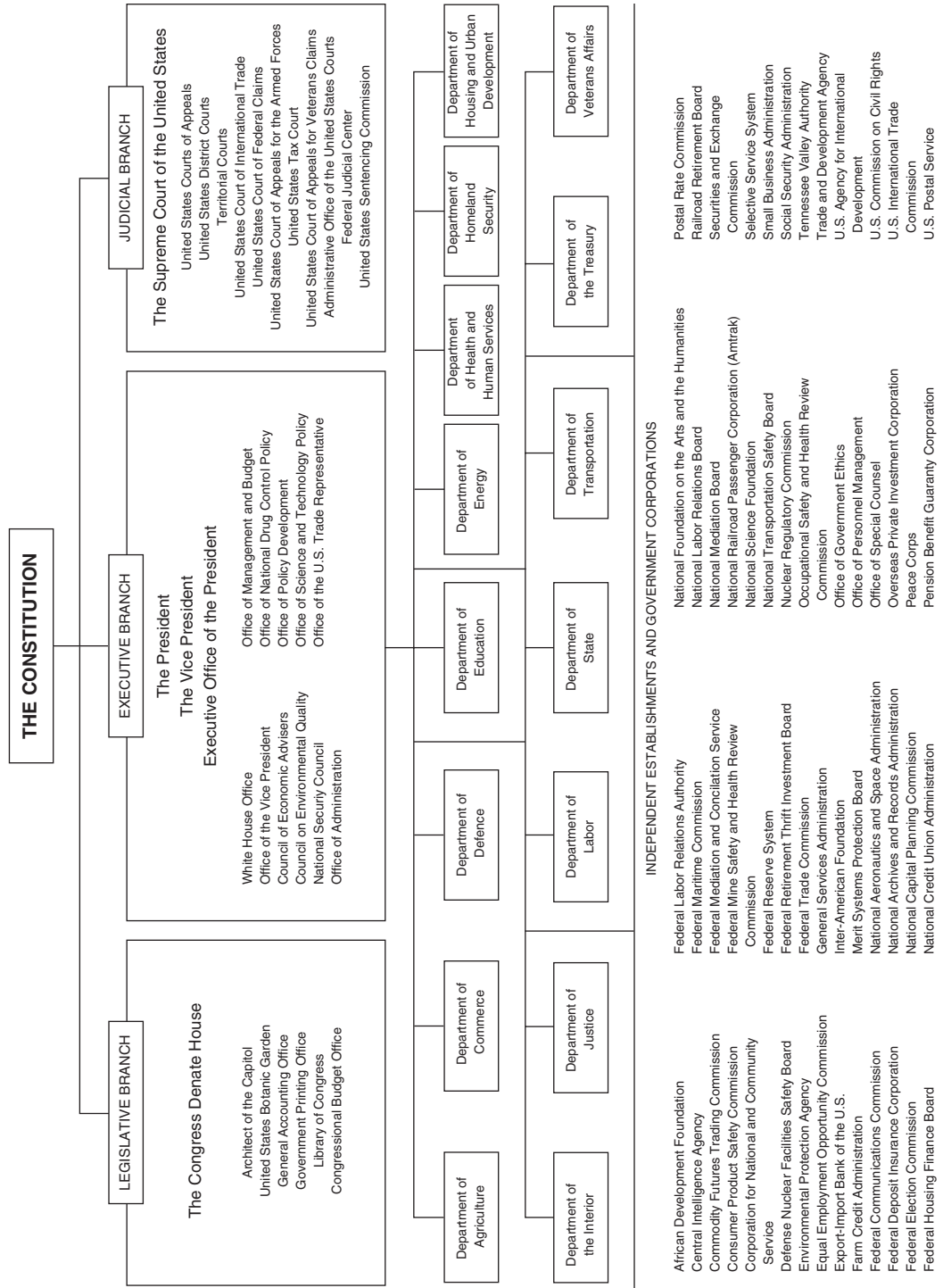


Figure 1.1 The Government of the United States
Source: 2003 United States Government Manual, p. 22

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if you add to the current 2.7 million federal employees: 5.6 million who receive paychecks through federal contracts, 2.4 million who are employed through federal grants, 4.6 million state and local employees whose jobs were created through federal mandates, 1.5 million in the uniformed military, and the 850,000 Postal Service employees, you have a federal workforce of almost 17 million. The era of big government is definitely not over!¹⁶

WHAT ADMINISTRATIVE AGENCIES DO

Most people are aware that there is a bureaucracy and that it is large, but they probably cannot explain with much accuracy what it is that bureaucracies do. Stated very simply, agencies (bureaucracies) do everything that all three branches of government do. They make laws (called rules), sometimes they set standards (NAAQS), they investigate infractions of those rules, they hold trials to adjudicate infractions of those rules, and they impose sanctions for violations of the rules. Agencies also provide services: They deliver mail, keep our national parks, maintain veterans hospitals and services, provide disaster relief, issue food stamps, and provide for social security. Agencies perform functions as well. For example, bureaus collect revenue and supervise and fund the building of our interstate highway system. One agency, the National Aeronautics and Space Administration (NASA), even sent humans to the moon and brought them back to Earth. Providing some evidence that what agencies do actually works, between 1970 and 1995, the incidence of smog dropped by a third, even though the number of autos on the road increased by 85 percent.¹⁷ In 1972, only a third of all bodies of water in America were safe for swimming and fishing; by 1995, nearly two thirds were safe. The motor vehicle death rate dropped from 26.8 percent in 1970 to 15 percent in 1999. The number of workers killed on the job dropped 11 percent in the five years between 1997 and 2002. The infant mortality rate declined by 2 percent during the decade of the 1990s.

Basic to an understanding of agencies is the knowledge that Congress (or the state legislature) is the ultimate source of power. Congress decides whether to create an agency, where it will be located, how long it will live, how much money it will have, and, perhaps most important, how much authority it will have and how that authority will be exercised. The term used for this is *enabling legislation*. If a legal question arises concerning an agency's exercise of authority, the courts first look to the Constitution (as it did in *American Trucking* and found the delegation of power to the EPA constitutional). If there is no conflict with the Constitution, the courts look at the enabling legislation to see if they can discern legislative intent (this is also what the Court did in *American Trucking*). Hence, the first principle of administrative law is this: *Always look to the enabling legislation*.

Frequently, Congress creates agencies to deal with pressing problems of the day. Early in this century, progressive pressure forced Congress to attack the problem of monopolies, which posed a threat to free trade and the market. Congress reacted by passing the Clayton Act in 1914, which made illegal certain business practices recognized as instruments of monopolies. At the same time, Congress passed the Federal Trade Commission Act, which created the FTC and gave it the task of prohibiting "unfair methods of competition" and "unfair or deceptive acts or practices"¹⁸ in interstate commerce. How was the FTC to accomplish this task? Remember that in 1914, the dominant philosophical framework was still a combination of negative freedom, limited government, and laissez-faire economics and that the notion of an FTC is not compatible with those concepts. It could be argued that although Congress succumbed to progressive pressure to attack monopolies by

legislation, Congress was not truly ready to attack the problem by creating an agency with the power to control monopolies. Hence, the FTC was not initially given the power to promulgate rules (that did not come until the early 1970s), nor was it given the power to impose sanctions (it still does not possess such power).¹⁹ The FTC was given the power to issue cease and desist orders for “deceptive trade practices” listed elsewhere in legislation. If a company chose not to comply with the cease and desist order, then all the FTC could do was to file a suit in federal district court. Today, of course, that means backlog and delay for FTC cease and desist orders.

Many of the agencies created more recently, however, are provided with a more impressive array of powers than Congress initially provided for the FTC. By the late 1960s, industrial accidents were a leading cause of death in the United States, so again Congress responded to pressure for federal help in the form of the Occupational Safety and Health Act of 1970. The goal of the Act was to reduce the incidence of fatal industrial accidents and to reduce the number of serious industrial accidents. To accomplish this, Congress created the Occupational Safety and Health Administration (OSHA), which describes its duties and responsibilities as follows:

Develops and promulgates occupational safety and health standards; develops and issues regulations; conducts investigations and inspections to determine the status of compliance with safety and health standards and regulations; and issues citations and proposes penalties for noncompliance with safety and health standards and regulations.²⁰

These powers and duties are typical of most regulatory agencies and even of many Cabinet-level agencies at the federal, state, and local levels of government. The enabling legislation creating OSHA is about 17 pages long. The agency has produced 1,658 pages of rules, regulations, and safety standards.²¹ Charles Goodsell, a leading advocate for bureaucracy, said,

It is in bureaucracy that all the necessary elements for collective social action are brought together—legal authority, public resources, professional expertise, institutional knowledge, and a sense of mission in behalf of all citizens . . . Unlike the policy-making activity of elected officials, this work by bureaucrats is undramatic, hidden, ongoing, and persistent. It is through bureaucracy, directly or indirectly, that much of America’s collective action takes place. Without it, our nation’s widespread accomplishments in recent decades would not have been achieved.²²

Look again at Figure 1.1 and carefully read the names of the line agencies (Cabinet level departments and independent regulatory agencies). It will be clear in most cases that the agencies were created to meet a particular problem or to perform a fairly obvious set of tasks. So what agencies do is attempt to accomplish goals given to them by Congress (e.g., to reduce pollution, to reduce traffic fatalities and industrial fatalities, or to control monopolies) or to accomplish their own goals as implied from congressional direction. Most, but not all, agencies attempt to accomplish those goals by promulgating rules and standards (Chapter 7), investigating infractions of those rules (Chapter 5), adjudicating infractions of those rules (Chapter 7), and, often, imposing sanctions for infractions of those rules. Kenneth Culp Davis, perhaps the foremost authority on administrative law, had this to say about the pervasiveness of public administration in 1958:

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The average person is much more directly and much more frequently affected by the administrative process than by the judicial process. The ordinary person probably regards the judicial process as somewhat remote from his [or her] own problems; a large portion of all people go through life without ever being a party to a lawsuit. But the administrative process affects nearly everyone in many ways nearly every day. The pervasiveness of the effects of the administrative process on the average person can quickly be appreciated by running over a few samples of what the administrative process protects against: excessive prices of electricity, gas, telephone, and other utility services; unreasonableness in rates, schedules, and services of airlines, railroads, street cars, and buses; disregard for the public interest in radio and television and chaotic conditions for broadcasting; unwholesome meat and poultry; adulteration in food; fraud and inadequate disclosure in sale of securities; physically unsafe locomotives, ships, airplanes, bridges, elevators; unfair labor practices by either employers or unions; false advertising and other unfair or deceptive practices; inadequate safety appliances; uncompensated injuries related to employment; cessation of income during temporary unemployment; subminimum wages; poverty in old age; industrial plants in residential areas; loss of bank deposits; and (perhaps) undue inflation or deflation. Probably the list could be expanded to a thousand or more items that we are accustomed to take for granted.

The volume of the legislative output of federal agencies far exceeds the volume of the legislative output of Congress. The *Code of Federal Regulations* is considerably larger than United States Code. The *Federal Register*, the accumulation of less than one-quarter of a century, fills much more shelf space than the Statutes at Large, the accumulation of nearly a century and three-quarters.²³

Although not many used the term in 1958, the fourth branch or administrative state was a reality even then. If democracy is a system in which citizens have some input into policies that affect them, and if increasingly, those decisions are made by bureaucrats rather than by elected officials, then there could be a problem with our democracy. If the president or Congress exercises sufficient control over agencies, then the existence of the administrative state should not be a threat to democracy. An examination of presidential and congressional control of agencies follows in the next two chapters. Before turning our attention to subsequent chapters, however, the student should attempt to ascertain what principles or concepts can be drawn from the case, *Whitman v. American Trucking Association*, presented at the beginning of the chapter. For instance, consider the following:

1. Agencies do, in fact, make rules (or set standards) that have significant impact on people's lives, and those rules have the force and effect of law. (The administrative state is a reality.)
2. Often, presidential control over agencies is marginal. Although we do not know it for a fact, it is a safe bet that President George W. Bush does not like the revised NAAQS and most likely, his EPA director, Christine Todd Whitman, did not like them either, yet they could not change them and were forced to go to court to defend them (and they won in court, securing the more stringent NAAQS).
3. One should always look to the enabling legislation, because Congress determines what agencies do and how they must proceed. Indeed, two of the issues in the case dealt with what Congress intended for the agencies to do.
4. The courts are the final arbiters in conflicts involving public administration.

SUMMARY

In an attempt to keep things simple but realistic, we have defined democracy as a system in which people have some influence over policies that affect their lives. It is recognized that frequently, bureaucratic agencies make policies that affect people's lives (the administrative state). If, however, popularly elected officials, such as the president and members of Congress, exercise sufficient control over agency policy making, then the administrative state is not inconsistent with democracy.

NOTES

1. For information on the river fire, visit www.cwru.edu/artsci/engl/marling/60s/pages/richoux.

2. A fairly detailed discussion of particulate matter and ozone can be found in the case that was remanded back to the circuit court from the Supreme Court; all of the scientific material on particulate matter and ozone come from *American Trucking Association v. EPA* 283 F.3d 355, 359 (2002).

3. Robert Weissberg, *Public Opinion and Popular Government* (Englewood Cliffs, NJ: Prentice Hall, 1976), 126–32.

4. Gallup poll (www.gallup.com/poll/releases/pr981212.asp).

5. Gallup poll (www.gallup.com/poll/indicators/indtaxes.asp).

6. Robert Erikson, Norman Luttbeg, and Kent Tedin, *American Public Opinion: Its Origins, Content and Impact*, 3d ed. (New York: Macmillan, 1988), 348–51.

7. U.S. Census Bureau, *Statistical Abstract of the United States:2000*, 123rd ed., (Washington, D. C., 2003), Table 1, p. 8.

8. Kenneth Warren, *Administrative Law in the Political System*, 2d ed. (St. Paul, MN: West, 1988), 108.

9. See Frederic C. Mosher, *Democracy and the Public Service*, 2d ed. (New York: Oxford University Press, 1982), 83–109; David H. Rosenbloom, "The Evolution of the Administrative State and Transformations of Administrative Law," in *Handbook of Regulation and Administrative Law*, ed. David H. Rosenbloom and Richard D. Schwartz (New York: Marcel Dekker, Inc., 1994), 3–36; David H. Rosenbloom, "Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's Twentieth Century Progress," 60 *Public Administration Review* 39–46 (January/February 2000); Emmette Redford, *Democracy in the Administrative*

State (New York: Oxford University Press, 1969); Dwight Waldo, *The Administrative State* (New York: The Ronald Press Co., 1948).

10. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1951) (Justice Jackson dissenting). See also Kenneth J. Meier, *Politics and Bureaucracy: Policymaking in the Fourth Branch of Government* (North Scituate, MA: Duxbury, 1979); and Peter Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," 84 *Columbia Law Review* 574 (1984).

11. Sir Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (New York: Oxford University Press, 1969), 122–34.

12. *Ibid.*

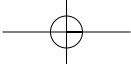
13. One reason the Iran-Contra affair was such a fiasco was that a staff agency (the National Security Council) that is not empowered to accomplish anything assumed the task of selling arms to the enemy and sending the profits to Central America in violation of an act of Congress, whereas line agencies (the Department of State and the Department of Defense), given the authority to sell arms and conduct foreign policy, opposed the scheme.

14. U.S. Bureau of the Census, *Statistical Abstract of the United States: 2000*, 123rd ed. (Washington, D.C., Government Printing Office, 2003), Table 500, p. 337.

15. U.S. Bureau of the Census, *Statistical Abstract of the United States:1999*, 119th ed. (Washington, D. C.: Government Printing Office, 1999), Table 534, p. 338.

16. Paul Light, *The True Size of Government* (Washington, D.C.: Brookings Institution Press, 1999), 1–9.

17. The facts on pollution, auto and job safety, and infant mortality are in Charles Goodsell, *The Case for Bureaucracy* (Washington, D.C.: C.Q.



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Press, 2004), p. 40. See also John E. Schwarz, *America's Hidden Success: A Reassessment of Public Policy from Kennedy to Reagan* (New York: Norton, 1988), Chapter 2.

18. *United States Government Manual 1991/92* (Washington, D.C.: Office of the Federal Registrar, National Archives and Records Administration, 1991), p. 600.

19. See, generally, 15 U.S.C. 45. The rule-making power is granted in 15 U.S.C. 57a.

20. *U.S. Government Manual 1991/92*, p. 418.

21. 29 C.F.R. 17.

22. Goodsell, *The Case for Bureaucracy*, pp. 39 and 41.

23. Kenneth Culp Davis, *Administrative Law Treatise*, Vol. 1 (St. Paul, MN: West, 1958), pp. 7, 8.

