FOUNDATIONS OF ADMINISTRATIVE LAW

SECOND EDITION
LexisNexis Law School Publishing
Advisory Board

William Araiza
Professor of Law
Brooklyn Law School

Lenni B. Benson
Professor of Law & Associate Dean for Professional Development
New York Law School

Raj Bhala
Rice Distinguished Professor
University of Kansas, School of Law

Ruth Colker
Distinguished University Professor & Heck-Faust Memorial Chair in Constitutional Law
Ohio State University, Moritz College of Law

David Gamage
Assistant Professor of Law
UC Berkeley School of Law

Joan Heminway
College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried
Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

David I. C. Thomson
LP Professor & Director, Lawyering Process Program
University of Denver, Sturm College of Law

Melissa Weresh
Director of Legal Writing and Professor of Law
Drake University Law School
PREFACE TO THE SECOND EDITION

In the decade since the publication of *Foundations of Administrative Law*, the institutions and doctrine of administrative law have continued to evolve, and academic commentary on these developments has proliferated. The rapid globalization of the economy has generated novel international regulatory schemes and bureaucracies, enlarging administrative law's domain. Successive presidents have sought to exercise greater control over the increasingly complex administrative state through new institutions, techniques, and ideological claims. Congress has hardly stood by during these assertions of executive power; instead, it has advanced its own. One effect of these political struggles has been to complexify the informal rulemaking process, which in turn has prompted a search for ways to make it more attractive to agencies. Use of the Internet, negotiated rulemaking, decentralized administration, and privatization of previously public activities have grown in significance. Ongoing psychological research on cognitive theory and practice—and on the important and interesting gap between them—has introduced insights about government decisionmaking that are already influencing the discourse, and perhaps in time the doctrine, of administrative law. Courts and agencies, for their part, continue to grapple with the perennial issues of interpretation, delegation, discretion, authority, participation, rationality, expertise, legitimacy, and politics. I have endeavored to reflect all of these developments, and more, in this new edition.

I wish to acknowledge the outstanding research assistance of Brianne Gorod, Yale Law School class of 2005.

Peter H. Schuck
September 2003
FOUNDATIONS OF LAW SERIES

ROBERTA ROMANO, GENERAL EDITOR

Foundations of Administrative Law
Edited by Peter H. Schuck, Yale Law School

Foundations of Contract Law
Edited by Richard Craswell, Stanford Law School and
Alan Schwartz, Yale Law School

Foundations of Corporate Law
Edited by Roberta Romano, Yale Law School

Foundations of Criminal Law
Edited by Leo Katz, Michael S. Moore and Stephen J. Morse,
all of the University of Pennsylvania Law School

Foundations of The Economic Approach to Law
Edited by Avery Wiener Katz, Columbia Law School

Foundations of Employment Discrimination Law
Edited by John Donohue, III, Stanford Law School

Foundations of Environmental Law and Policy
Edited by Richard L. Revesz, New York University Law School

Foundations of International Income Taxation
Edited by Michael J. Graetz, Yale Law School

Foundations of Labor Law
Edited by Samuel Estreicher, New York University Law School
and Stewart J. Schwab, Cornell Law School

Foundations of Tort Law
Edited by Saul Levmore, University of Chicago Law School
IV The Determinants of Agency Behavior, 82

Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development, 83
  Jerry Mashaw
"The Politics of Bureaucratic Structure", 96
  Terry Moe
"Beliefs", 103
  James Q. Wilson
The Science of "Muddling Through", 113
  Charles Lindblom
Cognitive Government and Optimal Government Design, 117
  Jeffrey Rachlinski and Cynthia Farina
Notes and Questions, 126

V Models of Procedural Justice and Effective Governance, 130

Due Process in the Administrative State, 131
  Jerry Mashaw
A Theory of Procedure, 134
  John Thibaut and Laurens Walker
The New Property, 138
  Charles Reich
Reflections on "The New Property", 141
  Robert Rabin
When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy through an Exceptions Process, 144
  Peter Schuck
Adversarial Legalism and American Government, 154
  Robert Kagan
Notes and Questions, 171

VI Controlling Administrative Discretion, 175

1 The Problem of Administrative Discretion, 182
  Discretionary Justice, 182
    Kenneth Davis
  The End of Liberalism, 185
    Theodore Lowi
Prodelegation: Why Administrators Should Make Political Decisions, 197
    Jerry Mashaw
Notes and Questions, 204
2 Review by Courts and Specialized Tribunals, 207
Public Programs and Private Rights, 207
Richard Stewart and Cass Sunstein
Chevron's Nondelegation Doctrine, 214
David Barron and Elena Kagan
Administrative Law and Bureaucratic Reality, 220
R. Shep Melnick
To the Chevron Station: An Empirical Study of Federal Administrative Law, 232
Peter Schuck and E. Donald Elliott
Legal Control of Administrative Policymaking: The "Judicial Review Game", 239
Jerry Mashaw
Specialized Courts in Administrative Law, 245
Harold Bruff
Notes and Questions, 254

3 Presidential and Congressional Review, 259
The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 259
Peter Strauss
Presidential Administration, 270
Elena Kagan
White House Review of Agency Rulemaking: An Empirical Investigation, 278
Steven Croley
"Micromanagement by Congress: Reality and Mythology", 286
Louis Fisher
Notes and Questions, 295

4 Internal Controls: Management, Cost-Benefit Analysis, Culture, and Professional Norms, 300
The Management Side of Due Process, 300
Jerry Mashaw
The Arithmetic of Arsenic, 309
Cass Sunstein
"Culture" and "Compliance", 318
James Q. Wilson
Legality, Bureaucracy, and Class in the Welfare System, 323
William Simon
Notes and Questions, 338
5 Public Participation, 340
The Reformation of American Administrative Law, 340
Richard Stewart
Against (And For) Madison: An Essay in Praise of Factions, 347
Peter Schuck
Bureaucratic Justice: Managing Social Security Disability Claims, 362
Jerry Mashaw
Regulatory Negotiation and the Legitimacy Benefit, 365
Jody Freeman and Laura Langbein
Notes and Questions, 372

6 Market-Oriented Controls, 375
Privatization: Politics, Law, and Theory, 375
Ronald Cass
Public Values in an Era of Privatization: Extending Public Law Norms Through Privatization, 382
Jody Freeman
Notes and Questions, 386

VII Comparative Administrative Process, 389
"National Differences", 390
James Q. Wilson
Comparative Law, 406
Rudolph Schlesinger, Hans Baade, Mirjan Damaska, and Peter Herzog
Notes, 430

VIII The Future of Administrative Law, 432
Administrative Discretion: The Next Stage, 432
Martin Shapiro
Administrative Law in the Twenty-First Century, 438
Richard Stewart
Notes and Questions, 446