

ASPEN CASEBOOK SERIES

BREWER
STEWART
SUNSTEIN
VERKEULE
ET AL.

ADMINISTRATIVE LAW
AND REGULATORY POLICY
Principles, Text, and Cases

*Seventh
Edition*



Wolters Kluwer

Law & Business

ASPEN

S

Administrative Law and Regulatory Policy

Problems, Text, and Cases

Seventh Edition

Stephen G. Breyer

*Associate Justice
United States Supreme Court*

Richard B. Stewart

*University Professor
John Edward Sexton Professor of Law
New York University*

Cass R. Sunstein

*Felix Frankfurter Professor of Law (on leave)
Harvard Law School*

Adrian Vermeule

*John H. Watson, Jr. Professor of Law
Harvard Law School*

Michael E. Herz

*Kaplan Professor of Law
Rabbinical College of Yeshiva University
Yeshiva University*



Wolters Kluwer

Law & Business

Copyright © 2011 Chloe, Nell, and Michael Breyer; William H. and Paul B. Stewart; Cass R. Sunstein; Adrian Vermeule; and Michael E. Herz.

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.wolterskluwerlb.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Law & Business
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-8744-1

Library of Congress Cataloging-in-Publication Data

Administrative law and regulatory policy : problems, text, and cases / Stephen G. Breyer . . . [et al.]. — 7th ed.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-7355-8744-1

1. Administrative law—United States—Cases. I. Breyer, Stephen G., 1938-

KF5402.B74 2011
342.73'06—dc23

2011022861



SFI label applies to the text stock

EDITORIAL ADVISORS

Vicki Been

Elihu Root Professor of Law
New York University School of Law

Erwin Chemerinsky

Dean and Distinguished Professor of Law
University of California, Irvine, School of Law

Richard A. Epstein

Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The University of Chicago

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law
The University of Michigan Law School

Richard K. Neumann, Jr.

Professor of Law
Hofstra University School of Law

Robert H. Sitkoff

John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky

Professor of Law
University of California at Berkeley School of Law

Kent D. Syverud

Dean and Ethan A. H. Shepley University Professor
Washington University School of Law

Elizabeth Warren

Leo Gottlieb Professor of Law
Harvard Law School

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, Best Case, ftwilliam.com and MediRegs family of products.

CCH products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleaves, books, and electronic products for comprehensive information in many areas of international legal practice.

Loislaw is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

Best Case Solutions is the leading bankruptcy software product to the bankruptcy industry. It provides software and workflow tools to flawlessly streamline petition preparation and the electronic filing process, while timely incorporating ever-changing court requirements.

ftwilliam.com offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

MediRegs products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

***To Louis I. Jaffe
Teacher, Scholar, Colleague, Friend***

Table of Abbreviations

The following acronyms are used throughout the text.

ABA	American Bar Association
ACUS	Administrative Conference of the United States
AEC	Atomic Energy Commission
ALJ	Administrative Law Judge
APA	Administrative Procedure Act
CAB	Civil Aeronautics Board
CBA	cost-benefit analysis
CFTC	Commodities Futures Trading Commission
CPSC	Consumer Product Safety Commission
CSC	Civil Service Commission
DEA	Drug Enforcement Administration
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
EO	Executive Order
FAA	Federal Aviation Administration
FCC	Federal Communications Commission
FDA	Food and Drug Administration
FERC	Federal Energy Regulatory Commission
FMC	Federal Maritime Commission
FOIA	Freedom of Information Act
FPC	Federal Power Commission
FTC	Federal Trade Commission
HHS	Department of Health and Human Services
ICC	Interstate Commerce Commission
MSPB	Merit Systems Protection Board
NHTSA	National Highway Traffic Safety Administration
NIOSH	National Institute for Occupational Safety and Health
NIRA	National Industrial Recovery Act of 1933
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
NRDC	Natural Resources Defense Council
NTSB	National Transportation Safety Board
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act
OSHRC	Occupational Safety and Health Review Commission
SEC	Securities and Exchange Commission
SSA	Social Security Administration

Preface to the Seventh Edition

The last several years have seen a great deal of ferment in our favorite field. Issues of regulatory policy continue to be reconceived; new attention has been paid to the uses and limits of cost-benefit analysis, the theoretical foundations of health and safety regulation, and the consequences (for both agencies and courts) of changes from one presidential administration to another. That new attention receives corresponding treatment in this book. The Obama administration arrived in Washington with a much-heralded commitment to unprecedented levels of transparency and openness; while the jury is still out on that project, the issues of openness and transparency receive new attention in this edition. Not unconnected, technology is transforming the *mechanics* of agency operations. Whether it is transforming the *nature* of agency operations is less clear, but many of the most interesting new issues for agencies involve technological developments. Accordingly, matters such as e-rulemaking appear for the first time in this edition.

Recent years have also seen fresh debate on tried and true topics, including the scope of judicial review of agency action, the powers of the president, access to the federal courts, and the process of formulating and promulgating agency policy. As before, we have sought to give users of this book a sense of cutting-edge debates now beginning in the courts and in the agencies that are likely to be prominent in the future.

Although this is a substantial revision, with a number of new cases and interstitial updating throughout, we have maintained considerable continuity with prior editions. The basic structure and coverage is the same. So is the basic goal: to study administrative law in a way that is informed by, and integrated with, an understanding of the issues of regulatory policy that lie beneath, and sometimes at the surface of, every doctrinal problem, however technical or abstract it may seem. Thus, our title is carefully chosen; the book does indeed cover administrative law *and* regulatory policy. In this way, we have sought to help the next generation of lawyers and law students with the endlessly fascinating problems of administrative law — some of them old, some of them new, some of them now barely on the horizon.

Justice Breyer has not participated in the preparation of the last several editions of this book, but we have retained a great deal of material from the editions he co-authored. Cass Sunstein *has* participated in the preparation of the last several editions of this book, but not in this one. Since January 2009, he has been employed in the Obama administration—beginning in September 2009 as Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget—and accordingly did not participate in this latest revision. Of course, Cass's past contributions continue to permeate this edition. This edition also still benefits from the work of Matthew Spitzer, who was a co-author of the fourth and fifth editions.

We would welcome any suggestions, corrections, or other feedback from readers.

Richard B. Stewart
Adrian Vermeule
Michael Herz

June 2011

Preface to the First Edition

The traditional course on Administrative Law primarily concerns the delegation of power to administrative agencies, the procedures that the law requires them to follow, the legal requirements for obtaining judicial review of agency decisions, and the standards applied during that review. Critics of this course persistently and increasingly raise two important objections:

First, isn't such a course too abstract? Too remote from the substantive essence of agency decisionmaking? Aren't efforts to generalize across decisions arising out of many different agencies and substantive fields misleading? Don't those decisions often reflect no more than court efforts to deal with distasteful agency action on a case-by-case basis, perhaps masked by appeals to procedural principle? In a word, is it possible to understand these court decisions without understanding the substantive work of the agency?

Second, doesn't concentration on appellate court decisions mislead the student about what agencies do? The impact of judicial decisions on agency work may often be slight; and court review may constitute only a small part of the work of the lawyers who practice before the agency. Should future lawyers not be given a broader understanding of the many other factors that affect the impact that agency action has upon the world? See R. Rabin, *Perspectives on Administrative Process* 7-14 (1978).

This casebook represents an effort to preserve the essential virtues of the traditional course while adapting it to meet these objections. The materials are organized along traditional procedural lines, as updated to reflect the vast change that has overtaken this body of law in recent years. At the same time the book uses notes and problems systematically to survey regulation, as broadly conceived to deal not only with prices and entry, but also with health, safety, and the environment. It shows the interaction between substance and procedure; and (particularly in Chapter 8) it describes some of the bureaucratic and political factors at work.

Thus, this casebook might be used in two different ways. The teacher who wishes to emphasize the "administrative process" rather than "administrative procedure" might use this book to do so. It will introduce the future practitioner to the substance of much regulation, its interplay with procedural rules, the agency seen as a bureaucratic institution, and the basic steps for obtaining court review. The teacher of the traditional course might teach that course from this book as well, using the substantive notes and comments as supplementary aids.

We recommend that those emphasizing the substantive regulatory aspects of the book in their courses refer to the Teachers Manual, which is based on our teaching notes. The book's cases, questions, and problems are deliberately organized to elicit in class discussion the points and issues that the Manual contains.

The book provides sufficient material for a four-hour course. Those wishing to teach a three-hour course are advised to forgo selected substantive areas of regulation (such as utility rate regulation, food and drug regulation, FTC regulation of false advertising) or procedural topics (such as application of due process, privacy jurisdiction, Freedom of Information Act) or a combination thereof.

We wish to acknowledge the great debt we owe our predecessors, and we mention specifically Professors Clark Byse, Kenneth Gulp Davis, Walter Gelhorn, and Louis Jaffe. Our work is

obviously based upon their achievement. We particularly acknowledge our debt to Louis Jaffe, who, in mastering the intellectual problems of judicial review, laid the foundation on which we erect our own view of administrative law. We also acknowledge our use of the work of many others too numerous to mention, though we wish to point out that the discussion of the Federal Trade Commission in Chapter 8 draws upon that in G. Robinson & E. Gellhorn, *The Administrative Process* (1974), though we put that discussion to somewhat different use.

We have also dealt with the perennial problem of footnoting in casebooks as follows: All footnotes in a chapter are numbered consecutively from its beginning to its end. Thus footnotes belonging to cases within the chapter will not bear their original footnote numbers. The footnotes attached to cases are those written by the court unless the note itself specifically indicates that it was written by the editors.

We gratefully acknowledge the research assistance of Linda Agerter, Dee Carlson, Kenneth Kettering, Kenneth Kleinman, Diane Millman, Joseph Post, Richard Rose, Cass Sunstein, Victor Thuronyi, Jeffrey Wohl, and Michael Young. Alan Morrison and Robert Pitovsky were generous in providing helpful comment and criticism. The unstinting work of our secretaries, Sue Campbell, Astrid Dodds, Cindy Dodge, Sarah Johnson, Karen Lee, Gayle McKeen, Angela O'Neill, and Shane Snowdon, was indispensable and very much appreciated.

April 1979

Acknowledgments

We wish to express our appreciation to the copyright holders for permission to reproduce material from the following publications:

- Bruce Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Economic Incentives*, 13 Colum J. Envtl. L. 171, 172-175, 178-179, 188-190 (1988).
- American Law Institute, *Restatement of Judgments* §1, © 1942 by the American Law Institute. Reprinted with permission. All rights reserved.
- American Law Institute, *Restatement (Second) of Judgments*, §§18, 19, 27, 28, 83, © 1982 by the American Law Institute. Reprinted with permission. All rights reserved.
- Elizabeth Anderson, *Value in Ethics and Economics* (1993). Reprinted by permission of the publisher from *Value in Ethics and Economics* by Elizabeth Anderson, 204-207, 209-211, Cambridge, Mass.: Harvard University Press, Copyright © 1993 by the President and Fellows of Harvard College.
- Stephen Breyer, *Breaking the Vicious Circle* (1993). Reprinted by permission of the publisher from *Breaking the Vicious Circle: Toward Effective Risk Regulation* by Stephen Breyer, 10-11, 18-23, 59-63, Cambridge, Mass.: Harvard University Press, Copyright © 1993 by the President and Fellows of Harvard College.
- Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986). Reprinted by permission of the American Bar Association.
- Ronald Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, Volume 66:1, Boston University Law Review (1986) 18-21. Reprinted with permission. © 1986 Trustees of Boston University.
- Kenneth Culp Davis, *Administrative Law Treatise*, vol. 1, pages 208-209, 211-212, 213-214 (2d ed. 1978).
- E. Donald Elliott, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, Courts and Agencies in Environmental Law*, 16 Vill. Envt'l L. J. 1, 11-13 (2005). Reprinted with permission. Copyright © 2005 Villanova University; E. Donald Elliott.
- William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Georgetown Law Journal 1083, 1090-1091 (2008). Reprinted with permission of authors.
- William Funk, *When is a "Rule" a Regulation?: Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 Administrative Law Review 659, 664 (2002). Reprinted by permission of the American Bar Association.
- John D. Graham, *Making Sense of Risk: An Agenda for Congress, from Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, edited by Robert W. Hahn, pages 183, 183-185, 192-193, 195, 199-200. Copyright © 1996 The American Enterprise Institute for Public Policy Research. Reprinted by permission of the American Enterprise Institute for Public Policy Research, Washington, D.C., and Oxford University Press, Inc.

- Lester Lave, Benefit Cost Analysis: Do the Benefits Exceed the Costs?, from *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, edited by Robert W. Hahn, pages 104, 120-121. Copyright © 1996 The American Enterprise Institute for Public Policy Research. Reprinted by permission of the American Enterprise Institute for Public Policy Research, Washington, D.C., and Oxford University Press, Inc.
- Frederic P. Lee, The Origins of Judicial Control of Federal Executive Action, 36 *Georgetown Law Journal* 287, 295-296 (1948). Reprinted with permission of the publisher, Georgetown Law Journal © 1948.
- Jerry L. Mashaw, Greed, Chaos, and Governance 146-147 (1997), copyright © 1997 by the Yale University Press. Reprinted by permission.
- Nina Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 *Cornell Law Review* 397 (2007).
- Thomas Miles & Cass Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 *University of Chicago Law Review* 823, 825-27 (2006). Copyright © 2006. Reproduced with permission of UNIVERSITY OF CHICAGO LAW SCHOOL in the format Textbook via Copyright Clearance Center.
- Roger G. Noll, Regulation After Reagan, 12(3) *Regulation* 13-20 (1988).
- Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 *EMORY L.J.* 433, 434-438 (2004). Reprinted with permission of the Emory Law Journal and Beth Simone Noveck.
- Antonin Scalia, Judicial Deference to Agency Interpretations of Law, 1989 *Duke L.J.* 511, 514-517.
- David Schoenbrod, Power Without Responsibility 9-12, 126-129 (1993), copyright © 1993 by the Yale University Press. Reprinted by permission.
- Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 *Harv. L. Rev.* 25, 25-27 (1992). Copyright © 1992 by the Harvard Law Review Association.
- Michael Shear, Obama extends hospital visitation rights to same-sex partners of gays, *WashingtonPost.com* (Apr. 16, 2010). Copyright 2010 by WASHINGTON POST WRITERS GROUP. Reproduced with permission of WASHINGTON POST WRITERS GROUP in the format Textbook via Copyright Clearance Center.
- Peter Strauss, *Overseer or "The Decider"?: The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696, 702-704 (2007).
- Cass R. Sunstein, Free Markets and Social Justice 322-326. Copyright © 1997 Oxford University Press. Used by permission of Oxford University Press, Inc.
- Tammy O. Tengs & John D. Graham, The Opportunity Costs of Haphazard Social Investments, from *Risks, Costs, and Lives Saved: Getting Better Results from Regulation*, edited by Robert W. Hahn, pages 167, 172-174, 176. Copyright © 1996 The American Enterprise Institute for Public Policy Research. Reprinted by permission of the American Enterprise Institute for Public Policy Research, Washington, D.C., and Oxford University Press, Inc.
- W. Kip Viscusi, Fatal Tradeoffs: Public and Private Responsibilities for Risk 249-285. Copyright © 1992 by Oxford University Press, Inc. Used by permission of Oxford University Press, Inc.

***Administrative Law
and Regulatory Policy***

Summary of Contents

Contents		xi
Table of Abbreviations		xxxiii
Preface to Seventh Edition		xxxv
Preface to First Edition		xxxvii
Acknowledgments		xxxix
Chapter 1	Introduction	1
Chapter 2	The Constitutional Position of the Administrative Agency	37
Chapter 3	Administrative Discretion, Administrative Substance, and Regulatory Performance	185
Chapter 4	The Scope of Judicial Review — Questions of Fact, Law, and Policy	235
Chapter 5	“Common Law” Requirements: Clarity, Consistency, “Fairness”	429
Chapter 6	Procedural Requirements in Agency Decisionmaking: Rulemaking and Adjudication	501
Chapter 7	Agency Decisionmaking Structure	743
Chapter 8	The Availability and Timing of Judicial Review	789
Appendix A:	<i>Selected Provisions from the Constitution of the United States</i>	989
Appendix B:	<i>Selected Provisions from the Federal Administrative Procedure Act</i>	993
Appendix C:	<i>Selected Provisions from the Unfunded Mandates Reform Act (2 U.S.C. §§1501-1571)</i>	1017
Appendix D:	<i>Negotiated Rulemaking Act (5 U.S.C. §§561-570)</i>	1023

<i>Appendix E:</i>	<i>Congressional Review Act</i>	
	<i>(5 U.S.C. §§801-808)</i>	<i>1029</i>
<i>Appendix F:</i>	<i>Rulemaking Provision from the</i>	
	<i>Clean Air Act (42 U.S.C. §7607(d))</i>	<i>1035</i>
<i>Appendix G:</i>	<i>Rulemaking Provision from</i>	
	<i>the Magnuson-Moss Act</i>	
	<i>(15 U.S.C. §57a)</i>	<i>1039</i>
<i>Appendix H:</i>	<i>Selected Provisions of the</i>	
	<i>E-Government Act of 2002</i>	<i>1043</i>
Table of Cases		1047
Index		1061

Contents

Table of Abbreviations	xxxiii
Preface to Seventh Edition	xxxv
Preface to First Edition	xxxvii
Acknowledgments	xxxix

1. Introduction	1
A. This Book's Content and Organization	1
B. What Is Administrative Law?	2
C. Regulation	3
1. Problems Thought to Call for (Administrative) Regulation	4
a. Market Failures, Economically Defined	4
(1) The Need to Correct for "Externalities" or "Transaction Costs"	5
(2) Collective Action Problems	5
(3) The Need to Compensate for Inadequate Information	6
(4) The Need to Control Monopoly Power	7
b. Less Secure Economic Grounds	8
(1) The Need to Control "Windfall" Profits	8
(2) The Need to Eliminate "Excessive" Competition	8
(3) The Need to Alleviate Scarcity	9
(4) Agency Problems	9
c. Noneconomic Justifications	10
(1) Redistribution	10
(2) Nonmarket or Collective Values	11
(3) Disadvantage and Caste	11
(4) Planning	11
(5) Paternalism	12
2. Regulatory Tools	12
D. The Historical Development of Administrative Government and Administrative Law	15
1. English Antecedents	15
2. The American Experience to 1875	16

3.	1875 to 1930: The Rise of Administrative Regulation and the Traditional Model of Administrative Law	17
4.	The New Deal and Beyond: 1932-1945	19
5.	1945 to 1962: The Administrative Procedure Act and the Maturation of the Traditional Model of Administrative Law	22
6.	1962 to 1980: The Rights Revolution, Critique of Administrative Process and Administrative Substance, and “Public Interest” Administrative Law	24
7.	1980 to ?: Presidential Administration and the Cost-Benefit State	27
8.	The Future	29
E.	What Is an Agency and What Does It Do?	29
	The Federal Trade Commission, 1995/1996 U.S. Government Manual 574-580	30

2. *The Constitutional Position of the Administrative Agency* 37

A.	Introductory Note: Separation of Powers and (or) Checks and Balances	37
B.	The Agency’s Power to Legislate	39
1.	The Nondelegation Doctrine — Analytic and Textual Foundations	39
2.	The Nondelegation Doctrine — Early History and Pre-1935 Supreme Court Decisions	41
3.	The Nondelegation Doctrine’s Short-Lived Triumphs	42
	<i>A.L.A. Schechter Poultry Corp. v. United States</i>	44
	Questions	47
	<i>Industrial Union Department, AFL-CIO v. American Petroleum Institute</i> (The Benzene Case)	50
	Note: The Benzene Problem and Agency Discretion	57
	Note on the Regulation of Carcinogens	59
4.	The Modern Nondelegation Doctrine	64
	<i>American Trucking Associations, Inc. v. Environmental Protection Agency</i>	67
	<i>Whitman v. American Trucking Associations, Inc.</i>	69
	Notes and Questions	71
	Note on Nondelegation and Statutory Interpretation	75
5.	Tools of Congressional Control	76