Regulation 101: Mentoring/Learning the Basics

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I. BASIC PREPARATIONS

A. At Least Generally, Learn State and Federal Administrative Law

1. Law schools usually offer a course on federal administrative law (of which public utility law is a subset) with these basic topics:

- Separation of Powers and Administrative Law (including Appointment and Removal of Executive Branch Officials)
- Agency Choice of Decisionmaking Procedure
- Federal Administrative Procedure Act Rulemaking Procedures
- Agency Adjudication and Due Process
- Agency and Private Enforcement
- Licensing and Ratemaking
- Agency Inspections and Information Gathering
- Preemption and Primary Jurisdiction
- Liability of Agencies and Officials
- Freedom of Information and Open Meetings
- The Availability of Judicial Review of Administrative Decisions
- Scope of Judicial Review of Administrative Decisions

2. For a quick overview, obtain the American Bar Association's A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW (2nd ed.) (for ordering, see https://www.americanbar.org/products/inv/book/213722/) or any of the law school administrative law study aids such as: Kristen E. Hickman, UNDERSTANDING ADMINISTRATIVE LAW (LexisNexis/Carolina Academic Press eBook, 7th ed. 2022); Keith Werhan, PRINCIPLES OF ADMINISTRATIVE LAW (West Academic Publishing, 3rd ed. 2019).

3. For an excellent short introduction to the topic, see Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 Texas L. Rev. 499, 499-510 (2011), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635330.

4. State-specific administrative law consists of the same basic topics but with state appellate court precedents that may differ from federal precedents. An administrative law treatise may be available from West Publishing or another legal publisher, e.g., Administrative Law and Practice, 2d (Vols. 38-40, Massachusetts Practice Series); Administrative Practice and Procedure, 2d (Vol. 21, Minnesota Practice Series); Administrative Practice and Procedure, 4th (Vol. 20-20A, Missouri Practice Series); New

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York State Administrative Procedure and Practice (Vol. 26, N.Y. Practice Series); Administrative Law and Practice, 2d (Vol. 37, New Jersey Practice Series).

B. Develop an Understanding of the History and Purpose of Public Utility Regulation

1. *The Regulatory Compact* - In the first decade of the 20th century, to avoid wasteful duplication and the public nuisance of competing utilities' wires and pipelines cluttering a community's streets and skylines (to say nothing of the unrestrained pricing and inefficient service), the utilities accepted public utility regulation by the government by entering into an informal and unwritten agreement called the "regulatory compact." It meant simply that privately-owned utilities would risk making investments in the infrastructure needed to provide safe, reliable, and efficient service in exchange for government regulators' support of those investments by approving timely recovery of prudently incurred costs, reasonable returns on appropriately invested capital, and regulatory treatment that, in general, was fair, predictable, and balanced between the interests of utilities and customers.

   Under the compact, public utilities are granted an OPPORTUNITY (not a guarantee) (lost if the public utility *egregiously* fails to provide safe, adequate, and reliable service) to earn a fair return within a ZONE OF REASONABLENESS on investments in used and useful property in public service and recovery of *prudently* incurred expenses (costs) incurred to render service.

   The Zone of Reasonableness in determining a fair return means that rates are neither set so low as to effectively confiscate the utility's property nor so high as to be exorbitant to customers (a standard left to the sound discretion of the PUC based on substantial evidence of record established in a rate proceeding conducted according to due process of law).

2. *Sword of Damocles*[2] *Regulation* - Because of limited resources, public utility regulatory agencies depend on voluntary compliance across a broad spectrum of activities by electric, natural gas, telecommunications, water, wastewater, steam, and transportation companies. Regulatory commissions rely heavily on after-the-fact managerial and financial auditing but are incapable of contemporaneous monitoring of actions by utilities and their contractors and subcontractors whose work generates costs that justify a certain level of rates to cover them. Regulation succeeds because it is near certain that a utility's unlawful, abusive, or duplicitous behavior, if discovered, will be met with severe fines, possible loss of certification to do business, and, at a minimum, loss of good reputation essential for favorable

[2] A commonly used catchall term to describe a looming danger. See *What Was the Sword of Damocles?* available at https://www.history.com/news/what-was-the-sword-of-damocles.

and prompt regulatory approvals needed on an ongoing basis (possible consequences: rates set lower on the Zone of Reasonableness; granting of little or no benefits of the doubt as the reasonableness or prudence of expenses; anything filed by the utility is met with increased skepticism).

3. Classic treatises and publications on public utility law and regulation:

James Bonbright, PRINCIPLES OF PUBLIC UTILITY RATES (1961)

Stephen Breyer, Regulation and Its Reform (1982)

Deloitte, REGULATORY UTILITIES MANUAL (2004), available at https://ipu.msu.edu/wp-content/uploads/2017/09/Deloitte-Regulated-Utilities-Manual-2012-2.pdf)

Deloitte, POWER AND UTILITIES, ACCOUNTING, FINANCIAL REPORTING, AND TAX RESEARCH GUIDE (2018), *available at* https://www2.deloitte.com/content/dam/Deloitte/us/Documents/energy-resources/us-er-power-utilities-accounting-financial-reporting-and-tax-research-guide.pdf

Martin T. Farris, PUBLIC UTILITIES: REGULATION, MANAGEMENT, AND OWNERSHIP (1973)

Scott Hempling, *Utility Regulation: What Is It, Why Do We Have It, and How Does It Work?* (2019), *available at* https://docs.bcuc.com/documents/proceedings/2019/doc_54078_a-8-hempling-utility-regulation-report.pdf.[3]

Alfred Kahn, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (2 vols., 1970)

Jim Lazar, ELECTRICITY REGULATION IN THE US: A GUIDE (2d ed. 2016, *available at* www.raponline.org/wp-content/uploads/2023/09/rap-lazar-electricity-regulation-US-june-2016.pdf.

Wayne P. Olson, THE A TO Z OF PUBLIC UTILITY REGULATION (2015) (*see* https://www.purinc.com/products/the-a-to-z-of-public-utility-regulation.

Charles F. Phillips, Jr., THE REGULATION OF PUBLIC UTILITIES, THEORY AND PRACTICE (1993, reprinted 2019).

[3] Scott Hempling is an Administrative Law Judge at the Federal Energy Regulatory Commission (FERC). His website is a treasure chest of public utility regulatory information regarding effective regulation, public utility mergers, regulatory organizations, practice and procedure, ratemaking, market structure, capital projects, corporate structure, renewable energy, climate change, state-federal relations, FERC Order 1000, and much more. *See* https://scotthemplinglaw.com/.

C. Immerse Yourself in Your State's Organic Public Utility Law, the Regulations Implementing It, and the Case Law Interpreting It

1. Your state's equivalent to the Pennsylvania Public Utility Code, Title 66 of Pennsylvania's Consolidated Statutes, 66 Pa.C.S. § 101 *et seq.*, *available at* https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/66/66.HTM

2. Your state's equivalent to the *Pennsylvania Code*, Title 52 Pa. Code (Public Utilities), containing regulations, and the *Pennsylvania Bulletin*, the official legal gazette of proposed and final regulations, *available at* https://www.pacodeandbulletin.gov/

3. Your state's equivalent of the PENNSYLVANIA PUBLIC UTILITY COMMISSION REPORTS in hardcover or on LEXIS or Westlaw.

4. Learn the basic rules of evidence (even if they are not strictly applied in your commission's evidentiary hearings) and the basic procedures utilized by your commission's Administrative Law Judges or hearing officers.

5. If your commission has an internal Procedural Manual, become familiar with its contents.

6. If available, learn how to use your commission's brief bank and procedures used for reviewing draft memoranda, briefs, and other documents before their circulation, submission, or filing.

7. Learn the *scope of review* and the *standard of review* of the appellate courts that hear appeals from your commission's decisions. This is important because the decisional record must contain adequate evidence and stated reasons sufficient to withstand a challenge on appeal (there can be no "post hoc rationalizations," i.e., reasons given for the first time on appeal). In Pennsylvania, as explained in the official note to Pa. Rule of Appellate Procedure (Pa. R.A.P.) 2111, scope and standard of review refer to different concepts:

a. **"**'Scope of review' refers to the confines within which an appellate court must conduct its examination. In other words, it refers to the matters (or "what") the appellate court is permitted to examine. In contrast, "standard of review" refers to the manner in which (or "how") that examination is conducted." *Morrison v. Com., Dep't of Pub. Welfare, Office of Mental Health (Woodville State Hosp.)*, 646 A.2d 565, 570 (Pa. 1994).

In administrative law appeals, the *scope of review* is whether constitutional law has been violated, an error of law has occurred, whether the decision is supported by substantial evidence of record, and whether an abuse of discretion has occurred (essentially, whether the agency has acted arbitrarily or manifestly unreasonably), and the standard of review describes the amount of deference that will be given to the agency's decision depending on whether the issue involves an

interpretation of constitutional or statutory law (little or no deference is given except possibly for decisions involving the agency's expertise in applying its organic law and regulations) as opposed to a discretionary or policy-making decision or a decision involving the credibility of a witness (much greater deference is given).

b. *See* Jeffrey P. Bauman, *Standards of Review and Scopes of Review in Pennsylvania – Primer and Proposal*, 39 Duq. L. Rev. 513 (2001); Harry T. Edwards & Linda A. Elliott, FEDERAL STANDARDS OF REVIEW: DISTRICT COURT DECISIONS AND AGENCY ACTIONS (Thomson Reuters 3rd ed. 2018) (and Edwards, Harry T., Post Publication Update for Federal Standards of Review (August 9, 2023). NYU Law and Economics Research Paper No. 23-03, NYU School of Law, Public Law Research Paper No. 23-04, *available at* SSRN: https://ssrn.com/abstract=4177117 or http://dx.doi.org/10.2139/ssrn.4177117); and Pennsylvania Appellate Advocate, *Pa. Appellate Court Briefing Requirements: Drafting the Brief*, *available at* https://paablog.com/brief-drafting-pa-appeals/.

D. Learn the Basics of Public Utility Rate Regulation

1. Useful texts to learn this complicated subject:

Utility Ratemaking (Wikipedia), *available at* https://en.wikipedia.org/wiki/Utility_ratemaking.

The Ratemaking Formula and Basic Components – NARUC PowerPoint, *available at* https://pubs.naruc.org/pub.cfm?id=538E730E-2354-D714-51A6-5B621A9534CB.

James H. Cawley & Norman J. Kennard, A GUIDE TO UTILITY RATEMAKING (Pa.PUC 2018), *available at* https://www.puc.pa.gov/press-release/2018/puc-announces-availability-of-updated-utility-ratemaking-guide.

Tom Frantz, Overview of Electric Utility Ratemaking (PowerPoint Presentation), New Hampshire Public Utilities Commission (October 2019), *available at* https://www.des.nh.gov/sites/g/files/ehbemt341/files/documents/2020-01/20191004-puc-presentation.pdf.

Lowell E. Alt, Jr., ENERGY UTILITY RATE SETTING (2006), *https://www.amazon.com/Energy-Utility-Rate-Setting-Lowell/dp/1411689593*

USAID, *Primer on Rate Design for Cost-Reflective Tariffs*, *available at* https://pubs.naruc.org/pub.cfm?id=7BFEF211-155D-0A36-31AA-F629ECB940DC.

SEEA (Southeast Energy Efficiency Alliance), *Rate Design Primer: Who Wants What Changes and Why?*, *available at* https://www.energy.gov/scep/slsc/articles/rate-design-primer-who-wants-what-changes-and-why.

Michigan State University Institute of Public Utilities, IPU Reading List (2018), *available at* https://ipu.msu.edu/wp-content/uploads/2018/05/IPU-Intro-to-Regulation-Reading-List-2018-1.pdf.

2. Upcoming courses:

NARUC Rate School (Spring class filled) For Fall and future classes: https://maxxwww.naruc.org/forms/meeting/Microsite/rateschool-spring-2024

Michigan State University Institute of Public Utilities, IPU Accounting and Ratemaking Course, September 17-19, 2024. Details: https://ipu.msu.edu/ratemaking

E. Learn Negotiation and Advocacy Skills

1. Many (especially rate cases, especially in Pennsylvania), cases are settled after a certain amount of evidence is on the record. These are often "black box" settlements, meaning some or several issues are compromised and not specifically decided by the Commission; the settlement is more conclusory rather than detailed. Perhaps most of the case is settled, and the remainder is fully litigated, in which case the Commission votes publicly on the partial settlement and specifically only on the unsettled issue(s).

2. Consequently, it behooves you to learn the fine art of negotiation (and compromise).

3. Regarding advocacy skills, participate in mock arguments with your colleagues in preparation for litigation arguments, especially appellate arguments.

a. Prepare yourself for the hardest question(s) you will receive, and be thankful that you can fashion a good answer beforehand.

b. Be thankful for questions from the bench. They usually provide a window into the judge's thinking, perhaps not only for clarification but also for what's troubling him/her about your argument.

F. Will You Generalize or Specialize?

1. Whether you are responsible for all public utility filings or, at least initially, only certain types of filings, you must familiarize yourself with the technical and operational aspects of specific utility sectors—energy, water, telecommunications, and transportation. Specialize in a particular utility sector to build deeper expertise.

2. How to get up to speed?

- Your Commission's management audit reports, if any.

- The utility's previous filings and the resulting decisions (read the petitions and applications, answers and preliminary objections thereto, witness' written testimonies, hearing transcripts, the parties' briefs and reply briefs, Administrative Law Judge/hearing officer initial and recommended decisions, exceptions and reply exceptions thereto, the Commission's final opinion and order).

II. YOUR PLACE IN THE SCHEME OF THINGS

A. Your Responsibility As a Staff Attorney Versus That of a Commissioner

1. When the government regulates an investor-owned public utility without assuming complete control, the power thus exercised is categorized in constitutional theory as the police power.[4]

2. While state constitutions prohibit delegation of the legislative function, those foundational documents may confer authority and discretion upon another body, such as a public utility regulatory commission, to *execute* a law.

3. Thus, public utility regulatory commissions perform a legislative function. In fact, many state legislatures once directly authorized and governed railroads, utility services, and transportation entities until doing so became too complicated and unpopular.

4. State public utility regulatory agencies are often "independent" agencies, meaning they are legislatively created to be insulated from the Executive Branch over which the Executive (the Governor) completely controls agency officer appointments and removals. The essential attributes of an independent agency are (1) "for cause" job protection of agency heads, (2) a fixed term of office, and (3) staggered terms of office (one member's term expires each year). All of these attributes are designed to reinforce the legislative nature of such bodies (even those public utility regulatory commissions are given quasi-administrative (i.e., enforcing the law(s) they administer), quasi-judicial (i.e., adjudicating disputes by affording due process of law), and quasi-legislative authority (i.e., promulgating regulations with the force of law).

5. Public utility commissioners are appointed by various means, usually by the Governor's nomination and the State Senate's confirmation. State legislatures directly elect others, while some are popularly elected. Some public utility laws or gubernatorial appointment statutes contain a "political minority" provision that provides that no more than a majority of members serving may be of the same political party to ensure that each major political party has at least one member serving.

6. The point is that commissioners are more attuned to public opinion and the direction of political winds without being overtly politically partisan. Staff members, however,

[4] *See Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 582 (1942) (discussing the constitutional power of Congress to address the substantive issues under its police powers to set rates that were "just and reasonable.").

do not share commissioners' constitutional and statutory authority AND MUST NOT BE PARTISANLY POLITICAL OR POLITICALLY BIASED IN ANY WAY.

7. It is vital that commissioners can count on you to be unbiased in your opinions and recommendations. They can accept, reject, or modify them as they see fit. You may suggest policy changes or new interpretations of the law(s) the commission administers and enforces, but you must be clear that a change or reinterpretation is being made.

B. You and the Life Cycle of Regulatory Agencies—Agency Capture

1. Attached to this outline is a segment of my federal administrative law course notes dealing with theories of agency behavior. It describes the background to Marver Bernstein's agency "life cycle" or agency capture theory.

2. Marver Bernstein captured the skepticism of the 1950s in his "life cycle" theory of agencies in REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). He said the normal evolution of government agencies progresses from a pro-regulatory, public-interested fervor to complacency to a pro-industry, pro-status quo bias in four stages: Gestation, Youth, Maturity, and Old Age.

3. By the early 1960s, the Old Age stage of Bernstein's agency life cycle—the industry capture stage—was almost universally regarded as the norm for agency behavior. Across the political spectrum, the expectation was that agencies would engage in narrow, industry-serving behavior, and the regulatory process would, if left to its own devices, serve the interests of powerful economic groups at the expense of the broader public.

4. I urge you to read Administrative Law Judge Scott Hempling's views on the subject of agency capture: *"Regulatory Capture": Sources and Solutions*, 1 Emory Corp. Governance & Accountability Rev. 23 (2014), *available at* https://scholarlycommons.law.emory.edu/ecgar/vol1/iss1/4.

a. The article begins with this quotation:

> [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; *the right of the public must receive active and affirmative protection at the hands of the Commission*.[5]

b. Later in the article, Judge Hempling states:

> A common contributor to capture is a regulatory agency's mistaken view that its purpose is to "balance" the interests of consumers and

[5] 1 Emory Corp. Governance & Accountability Rev. at 23 quoting *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied sub nom*., *Consolidated Edison Co. v. Scenic Hudson Preservation Conference*, 384 U.S. 941 (1966) (emphasis added).

investors. This understanding of regulation as private interest balancing, so deeply embedded in regulatory conversation, practice, and psyche, has five main problems [which he then discusses].[6]

c. Elsewhere, Judge Hempling explains how and why public utility regulation should better serve the public interest than "balancing" the interests of consumers and investors. Merely "balancing" those interests is proper in public utility ratemaking[7] but not as a requirement for serving the public interest generally as a regulatory agency: "What regulation must balance is not competing private interests but the various components of the public interest—long-term versus short-term needs, affordable rates versus efficient price signals, environmental values versus global competitiveness. That is how regulation serves the public interest."[8]

5. *See also* Heather Payne, *Game Over: Regulatory Capture, Negotiation, and Utility Rate Cases in an Age of Disruption*, 52 U. of San Francisco L. Rev. 75 (2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025917.

6. I encourage you to serve the public interest as if your commission is in the second or third phases of its life cycle—during its Youth or Maturity—and to take Judge Hempling's guidance to heart.

WARNING! Your commission may be in the last phase of its life cycle (Old Age) or you may be dissatisfied with the passive approach that your commission takes to regulating. You may also be given assignments with which you disagree. As an agency employee, you have a duty to serve your client with zeal and fidelity, but if you feel increasingly uncomfortable about the passive or even pro-utility attitude of your commission and the work assigned to you in furtherance of that attitude, nothing prevents you from giving adequate notice before you resign and seek work elsewhere.

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[6] 1 Emory Corp. Governance & Accountability Rev. at 29.

[7] The U.S. Supreme Court in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), confirmed its seminal decision in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 602-603 (1944) (holding that the focus of the inquiry is properly upon the end result or "total effect" of a rate order, rather than upon the rate-setting method employed, but the rate-setting method must involve "a balancing of the investor and the consumer interests"). The *Barasch* Court looked to state regulatory commissions to balance the competing interests in rate regulation: "The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs *in balancing the interests of the utility and the public*." 488 U.S. at 316 (emphasis added).

[8] Scott Hempling, *Utility Regulation: What Is It, Why Do We Have It, and How Does It Work?* (2019) at 2, *available at* https://docs.bcuc.com/documents/proceedings/2019/doc_54078_a-8-hempling-utility-regulation-report.pdf.

C. Your Duty to Yourself

1. Similarly, you must protect your good name and reputation at all costs. You have your livelihood to consider and perhaps a family to support, and you certainly didn't go through the three-year forced march of law school and the torture of the bar exam only to throw your career away by committing careless or deliberate improprieties.

2. No one (leastwise a regulated public utility) has the right to ask you to violate the law or your ethical responsibilities as a lawyer. Tolerate no attempts to compromise you or your agency. Countenance no prohibited ex parte communications regarding a contested on-the-record proceeding where due process of law applies.

3. At all costs, preserve your reputation for honesty and integrity. You will be respected for your integrity, but you will not be respected for betraying your client.

   a. Accept no gifts from public utilities or their representatives—no tickets to sporting events, golf outings, meals, favors, or assistance of any kind, not even de minimis ones (where do you draw the line?), even if your agency has not forbidden acceptance of such gifts.

   b. Examples of improprieties: private meetings with utility employees or lobbyists regarding pending contested proceedings; requests that you tilt or shade a recommendation to favor a utility's position or forego or abandon arguments unfavorable to a utility's position.

   c. In the face of imminent impropriety or unlawfulness, you must promptly, firmly, and resolutely say NO—"No, I can't do that." "No, I won't do that." "Stop. I don't want to hear anything more." Period. End of story.

4. Never commit sharp or shady practices to gain an advantage.

5. Always show respect to your superiors, Administrative Law Judges/hearing officers, opponents, colleagues, and members of the public.

C. PERSONAL ADVICE

1. You have been given an invaluable opportunity to do good and to do it well. Public utility regulation, which is inscrutable and often distrusted by the unknowing public, is actually very intellectually stimulating and interesting. It can also be emotionally satisfying when your hard work produces a just result that would not have occurred without your efforts.

2. Always remember that the people of your state depend on you to be the buffer between them and corporate entities with virtually unlimited resources. Utility customers do not have the time, money, or knowledge to protect themselves. You do, and they are relying on you.

3. Your commission is not a super board of directors, but it possesses great discretion in virtually everything it does—determining the "reasonableness" of utility rates, tariff provisions, service, and a wide variety of utility actions; whether and how to enforce the law and its regulations; whether to grant or deny petitions, applications, or motions; etc. That

discretionary authority, fairly exercised, is the great leveler between monopoly power and the public interest. Your job is to exercise that authority responsibly to achieve the public interest.

4. It is pure gold if you can find a mentor who will teach you and care about you and your career.

5. Written and oral skills are your bread and butter. Hone them.

6. Always remember that you are a member of a PROFESSION. In English common law, there were only three—law, medicine, and divinity. You are granted confidentiality privileges but must deserve them by your actions. High ethics, unbridled dedication and loyalty to your client's causes, zeal in your advocacy, all-nighters, and no vacations if necessary. This is not arrogance or snobbery; it is a necessity and an inviolate obligation.

7. After giving your position a reasonable opportunity to prove its worth to your career, assess whether it suits you. If you conclude that it does not, find other work. Stated another way, you will only be good at what you do if you are passionate about it. On the other hand, if you don't want to get out of bed in the morning and go to work, public utility regulation isn't for you. As painful as it may be, no matter how much student loan debt you have, search for something else in the law or seek satisfying non-legal work (your law degree will always serve you well).

From James H. Cawley, Course Outline for Federal Administrative Law, Widener University Commonwealth Law School

B. Theories of Agency Behavior

1. ***Why Agencies Do What They Do***

a. Over time, perceptions of how agencies behave have changed, and Congress has structured agencies accordingly. To understand a particular agency decision, understanding the dominant theory of agency behavior for that period is often helpful.

b. Get into the habit of identifying the dates of the decisions and statutes as you encounter them in this course, i.e., put them in historical context.

c. *A Short History of the Structuring of Administrative Agencies*

(1) Madison: "you must first enable the government to control the governed; *and in the next Place oblige it to control itself*." The "Father of the Constitution" here expresses his deep suspicion of unchecked governmental power, i.e., entrusting people with power over others.

(a) So, should legal institutions of administrative governance be designed with an elaborate system of formal legal controls on administrative behavior (disfavoring an activist administrative government)? This view prevailed between 1787 and the creation of the Interstate Commerce Commission (ICC) in 1887.

(2) Rise of the Progressive movement in the late 19th Century

(a) Progressives believed in activist government by impartial experts.

(b) Governance is a science, and well-educated, well-trained administrators can carry it out as dispassionately as any of the physical sciences.

(3) Joseph Eastman: an ICC Commissioner and an important figure in American transportation law in the first half of the 20th Century.

(a) Agency officials can go about their business without considering partisan bias. Administrators faithfully carry out their statutory mandates in a professional, dispassionate, technocratic fashion.

(b) Under this view, there is an important role for the law in keeping agencies true to their statutory mandates, but there is little room for an aggressive regime of judicial and lawyerly intervention in the administrative process.

(c) After all, agencies have the training, temperament, and expertise to know what they are doing, while lawyers and judges are likely to suffer from defects in knowledge, motives, or both.

(d) Extensive legal intervention would prevent the administrative process from doing what it is designed to do (in Progressives' view): enable technocratic experts to engage in scientific management of human affairs in order to solve social problems.

(e) Thus, Progressive vision counsels a limited role for judges and lawyers in overseeing the administrative process.

(4) James Landis: one of the principal theoreticians and architects of the New Deal. He is possibly the most important figure in American administrative law, and his THE ADMINISTRATIVE PROCESS (1938) is arguably the most important book on American administrative law ever written.

(a) He took the Progressive conception of administration a large step further (Madison would be terrified at Landis's views).

(b) Progressives generally held that representative legislatures and presidents should set basic policies and that the agencies' role was largely *implementational*.

(c) Landis believed that agencies should be given the primary role in policymaking and implementation.

(i) In Landis' view, agencies are not only the best actors at figuring out HOW to get things done, but they are also the best actors at figuring out WHAT TO DO.

(ii) Legislatures and presidents lack the expertise or insulation from political (a dirty word to Progressives) forces to make wise, intelligent policies.

(iii) Accordingly, statutes should simply create and empower the agencies, and the agencies should then set and implement the policy agenda.

(iv) Thus, able administrators should read statutes as a last resort rather than a first resort; the first resort is to identify problems and find solutions.

(d) Landis and the Progressives shared the belief that agencies exist in order to bring scientific expertise to bear on social problems, but the degree of agency discretion that Landis favored is a quantum jump beyond the classical Progressive vision.

(e) So, in Landis' view, the real solution to social problems lies in giving expert agencies the power to order human affairs in accordance with principles of scientific governance, with minimal judicial, presidential, and legislative interference.

(i) The ideal statute is broad, empowering, and gives the agency the tools it needs for effective governance… and then stays out of the way!

(ii) The ideal substantive judicial review is very close to ZERO.

(iii) Congress and the President should have minimal influence because they are subject to political (i.e., evil) forces.

(f) In Landis' view, hearings and formal procedures only get in the way unless they facilitate agency information-gathering, in which case the agencies should be left to choose when and whether to employ them. Consequently, agency personnel should be trusted with enormous, minimally checked powers.

(g) Much of this is faithfully reflected in the design of the New Deal. His treatise was written in 1938 when the U.S. S.Ct. systematically stifled some of the most important New Deal innovations.

(h) Landis' views drove the creation of the New Deal and, therefore, virtually all of the basic institutions that continue to govern the modern administrative state.

(i) Landis' views prevailed from the early 1930's through the end of the 1940's.

(5) Marver Bernstein: Agency "Life Cycle" or Capture Theory

(a) By the 1950's, skepticism of agency performance had set in.

(i) There was then a substantial body of actual experience with a post-New Deal administrative state, and the performance did not meet the expectations of the Landis model.

(ii) Agencies did not, in fact (or at least did not always) scientifically identify an uncontroversial conception of the public interest and then seek to attain it in a disinterested, technocratic fashion.

(b) Bernstein captured this skepticism in his "life cycle" theory of agencies in REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). He said the normal evolution of government agencies progresses from a pro-regulatory, public-interested fervor to complacency to a pro-industry, pro-status quo bias in four stages: Gestation, Youth, Maturity, and Old Age.

(c) By the early 1960s, the Old Age stage of Bernstein's agency life cycle—the industry capture stage—was almost universally regarded as the norm for agency behavior. Across the political spectrum, the expectation was that agencies would engage in narrow, industry-serving behavior, and the regulatory process would, if left to its own devices, serve the interests of powerful economic groups at the expense of the broader public.

(d) Bernstein's theory was echoed through the 1970's by Roger Noll. If the role of agencies should be diminished, can *deregulation* be far behind?

(e) Enter Ralph Nader, who wanted to reform administrative government with a large dose of aggressive judicial review to ensure that the agencies and regulated industries were not left to their own devices. Note that this occurred during the time of the activist Warren Court.

(6) Since the 1980s, there has been a suspicion that no single unitary theory of agency behavior explains everything that we see in a complex world, i.e., one size doesn't fit all.