Contents

Preface		xi
1	ADMINISTRATIVE LAW: AN INTRODUCTION	1
	Objectives of This Book	1
	Organization of This Book	2
	This Book's Approach: Systems Theory	3
	Administrative Agencies Play the Lead Roles	7
	The Nature of Administrative Law	15
	Administrative Law's Increasing Relevance	23
	Summary	25
	Saint Louis University v. Masonic Temple Association, 220 S.W. 3d 721 (2007)	25
	Comments and Questions	30
	Notes	31
2	THE GROWTH OF ADMINISTRATIVE POWER	
_	AND ITS IMPACT ON THE AMERICAN SYSTEM	35
	Growth of the Administrative System	35
	Agency Proliferation: From George Washington to Barack Obama	35
	An Important Historical Development: The Delegation of Power to	
	Administrative Agencies	46
	The Power of Administrative Officials and Agencies	58
	Administrative Growth, the Public Interest, and Administrative Law	(2
	Considerations	63
	Regulating in the Public Interest: Regulation Versus Deregulation	75
	Summary Whitman Administrator of Environmental Protection Agency v. American	88
	Trucking Associations, 531 U.S. 457; 121 S.Ct. 903 (2001)	89
	Comments and Questions	97
	Notes	99
2	LEGISLATIVE ATTEMPTS TO ACHIEVE DEMOCRATIC	
3	LEGISLATIVE ATTEMPTS TO ACHIEVE DEMOCRATIC ACCOUNTABILITY IN THE ADMINISTRATIVE PROCESS	105
		105
	Keeping Administrators Accountable Traditional Congressional Oversight Powers	109

viii Contents

	The Administrative Procedure Act: An Overview of Its Role in Controlling	
	Administrative Behavior	128
	Sunshine and Sunset Legislation	138
	Summary	142
	Rutan v. Republican Party of Illinois, 497 U.S. 62; 110 S.Ct. 2729 (1990)	144
	Comments and Questions	151
	Notes	152
4	PROTECTING ADMINISTRATORS FROM	
	UNDUE INTERFERENCE AND HARASSMENT	157
	Legitimate Versus Illegitimate Meddling in the Administrative Process Protecting Administrators from Themselves and Others:	157
	Conflict-of-Interest Laws	158
	Congressional Influence Peddling	166
	Tinkering with Administrators: The President's Appointment and	
	Removal Powers	179
	Summary	187
	Wiener v. United States, 357 U.S. 349; 78 S.Ct. 1275 (1958)	188
	Comments and Questions	190
	Notes	191
5	RULEMAKING: AGENCIES AS LEGISLATIVE BODIES	195
	The Growing Importance of Agency Rulemaking	195
	What Is Rulemaking?	196
	Rulemaking: Loopholes and Their Significance	
		202
	The Democratic Character of Rulemaking Procedures and Public	
	Policy Outputs	207
	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic	207 216
	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary	207
	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct.	207 216 226
	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983)	207 216 226 227
	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions	207 216 226 227 232
	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes	207 216 226 227
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions	207 216 226 227 232
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes	207 216 226 227 232
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes THE PUBLIC POLICY-MAKING TUG-OF-WAR BETWEEN RULEMAKING AND ORDERMAKING	207 216 226 227 232 233
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes THE PUBLIC POLICY-MAKING TUG-OF-WAR BETWEEN RULEMAKING AND ORDERMAKING What Is Ordermaking?	207 216 226 227 232 233
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes THE PUBLIC POLICY-MAKING TUG-OF-WAR BETWEEN RULEMAKING AND ORDERMAKING	207 216 226 227 232 233 239
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes THE PUBLIC POLICY-MAKING TUG-OF-WAR BETWEEN RULEMAKING AND ORDERMAKING What Is Ordermaking? Differentiating Ordermaking from Rulemaking	207 216 226 227 232 233 239 239 241
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes THE PUBLIC POLICY-MAKING TUG-OF-WAR BETWEEN RULEMAKING AND ORDERMAKING What Is Ordermaking? Differentiating Ordermaking from Rulemaking Pros and Cons of Ordermaking and Rulemaking in Agency Policymaking	207 216 226 227 232 233 239 239 241 243
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes THE PUBLIC POLICY-MAKING TUG-OF-WAR BETWEEN RULEMAKING AND ORDERMAKING What Is Ordermaking? Differentiating Ordermaking from Rulemaking Pros and Cons of Ordermaking and Rulemaking in Agency Policymaking Summary	207 216 226 227 232 233 239 239 241 243
6	Policy Outputs Sensible Suggestions for Making Rulemaking More Democratic Summary Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29; 103 S.Ct. 2856 (1983) Comments and Questions Notes THE PUBLIC POLICY-MAKING TUG-OF-WAR BETWEEN RULEMAKING AND ORDERMAKING What Is Ordermaking? Differentiating Ordermaking from Rulemaking Pros and Cons of Ordermaking and Rulemaking in Agency Policymaking Summary National Labor Relations Board v. Bell Aerospace Company, 416 U.S. 267;	207 216 226 227 232 233 239 241 243 249

Contents	1X

7	AGENCY HEARINGS: HOW FAIR ARE THEY?	257
	Serving Due Process in Agency Hearings	257
	Administrative Hearings Versus Court Trials	260
	Bias, Due Process, and Regulatory Effectiveness	266
	Considering Evidence in Agency Hearings	272
	Decision Making in Agency Adjudications	288
	Summary	297
	State of California v. Federal Energy Regulatory Commission, 329 F.3d	
	700 (9th Cir. 2003)	298
	Comments and Questions	306
	Notes	307
8	ADMINISTERING PUBLIC POLICIES:	
	DISCRETIONARY AGENCY ACTIONS	313
	Formal Versus Informal Agency Actions	313
	Defining Administrative Discretion	315
	A Historical Glance at Discretion: The Rule of Law Versus Discretionary Power	317
	Kenneth Culp Davis on the Problem of Discretion	319
	A Critique of Davis's Discretionary Justice	327
	Reacting to Davis: Gifford's Model of Discretionary Decision Making	330
	The Courts' Role in Controlling Discretionary Agency Actions	333
	Cases Overruling Discretionary Actions	334
	Cases Upholding Discretionary Actions	338
	Nontraditional Alternatives to Controlling Administrative Power	344
	Summary	354
	Federal Communications Commission v. Fox Television Stations,	255
	129 S.Ct. 1800 (2009)	355
	Comments and Questions	361
	Notes	362
9	JUDICIAL REVIEW OF AGENCY BEHAVIOR	369
	Judicial Review: An Overview	369
	The Changing Role of the Courts	371
	The Availability of Judicial Review of Administrative Actions	377
	Scope of Review	393
	Court Orders and Problems of Compliance	404
	Summary	405
	United States v. Mead Corporation, 533 U.S. 218; 121 S.Ct. 2164 (2001)	406
	Comments and Questions	414
	Notes	415
10	SUING THE GOVERNMENT AND ITS ADMINISTRATORS	419
	Tort Liability Issues in a Democratic State: An Overview	419
	The Sovereign Immunity Doctrine	420

x Contents

	Suing Governmental Administrators: The Road to Qualified	
	Immunity for Administrators	424
	Toward Increased Governmental Liability and Decreased Official Liability?	443
	The Question of Presidential Immunity	453
	Summary	459
	Jones v. Byrnes, U.S. App. Lexis 24476 (6th Cir. 2009)	460
	Comments and Questions	467
	Notes	468
11	AN ADMINISTRATIVE LAW CHALLENGE:	
	BALANCING SOCIETAL AND INDIVIDUAL RIGHTS WHEN	
	CONDUCTING ADMINISTRATIVE SEARCHES AND SEIZURES	473
	Balancing: A Tough Challenge for Administrators	473
	Preserving Individual Liberties in the Face of Mass Control Efforts:	
	An Introductory Comment	473
	Administrative Practices and the Bill of Rights	476
	Administrative Actions Under the Fourth Amendment	477
	The Decline of the Individual's Right Against Self-Incrimination	
	During the Rise of the Administrative State	500
	"Administrative" Searches and Seizures Since the Terrorist Attacks of	
	9/11 and the Passage of the USA PATRIOT Act	521
	Summary	535
	Safford Unified School District #1 v. Redding, 555 U.S;	
	129 S.Ct. 2633 (2009)	537
	Comments and Questions	542
	Notes	543
Арр	endix: Federal Administrative Procedure Act	551
Glo.	ssary: Key Legal Terms	563
Cas	e Index	577
Nar	ne Index	587
Sub	ject Index	595