

The Birth of a Legal Doctrine in the Administrative State

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The birth of a legal doctrine often begins when an academician associated with the legal academy has an idea on how to improve the administrative state and publishes it in a journal; a colleague reads it and elaborates on its content. With the passage of time other academicians might endorse the concept.

In the meantime, the doctrine is fertilized by teaching it in law schools, the birthplace of judges who then occasionally endorse it in one of their subsequent legal proceedings which often establish a national precedent. **Absent** from participation in this endeavor is any consistent proactive procedural input from neither the Executive nor the Legislative Branches of government.

The limiting factor is that most judges do not have time to keep up on the cornucopia of publications rendered by academicians. Nonetheless academicians are the irreplaceable authors of the history of the administrative state but they often have a reluctance to recognize the writings of non-academicians, including the press; a process which on occasion leads to an incomplete record of critical events. With the advent of the internet, privately managed websites and most importantly search engines—the gifts that keep on giving—potential game changing events are no longer under the thumb of a select number of keepers of the status quo who traditionally control the debate by demanding publication of articles in law journals. [Enter the generic term

“legal doctrine in the administrative state” and this article will appear as the first entry on the second page of a Google search.]

Hopefully in the near future [interlopers](#) will finally be allowed to at least have an audience with the insular circle who heretofore have in large part [shunned](#) the presence of non-academics; if the monopoly powers granted to the legal profession by state occupational licensing bodies continue to be abused they can always be revisited.

Readers are invited to send their suggestions for:

- those institutions that might benefit from a possible reformation of their curricula by [Contacting CRE](#), and
- an identification of those [common law doctrines](#) which should be subject to review by an impartial governmental body utilizing the [principles](#) set forth in the aforementioned documents as the standard for review. To this end the Administrative Conference of the US could be tasked with the responsibility for identifying alternative institutional structures for conducting the aforementioned impartial review with special consideration given to having a diverse group of disciplines participate in the review.

NB Some of our readers while recognizing the contributions [CRE](#) has made to centralized regulatory review question its expertise in opining on issues regarding the venting of legal doctrines. We appreciate their concern but we are guided, in part, by this [1893](#) publication. In addition we were struck by this [timely publication](#) which highlights the issues presented herein with an emphasis on *Climate Change*.

Statements made by scholars of the administrative state support our view that the functioning of the legal community should comport with the open access recommendations set forth above. Consider the following [quote](#) published on a White House website less than a month ago:

Nearly two hundred years ago, when Alexis de Tocqueville described his observations of democracy in America, he observed that the United States had rejected monarchy but embraced aristocracy. "If you asked me where I place the American aristocracy, I would answer without hesitating," he wrote: "The American aristocracy is at the lawyers' bar and on the judges' bench." Even in the 1830s, Tocqueville observed that American jurists considered themselves a "privileged class among intelligent people" by virtue of "[t]he special knowledge that jurists acquire while studying the law.

The linkage between the establishment of legal doctrines and the contents of law school curricula is clear; if you wish to influence the former you engage the latter.