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SYMPOSIUM ON ADMINISTRATIVE LAW

SYMPOSIUM EDITOR
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INTRODUCTION

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THE RISE AND FALL OF
ADMINISTRATIVE LAW
Richard A. Posner 953

In this keynote address, Chief Judge Posner highlights the insufficiency of formal and traditional modes of academic analysis on Administrative Law. He argues that procedural, constitutional, and policy questions fail to address the underlying issues of agency efficiency and usefulness. Instead, Judge Posner suggests that academics should utilize an economic & practical approach to analyze these more interesting, underlying questions of administrative law.

ARTICLES

PRESIDENTIAL RULEMAKING
Peter L. Strauss 965

President Clinton has openly professed responsibility for a number of recent, prominent rulemakings. This essay examines the tension among the conventional separation of powers observations that “the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker,” our increasingly political understandings of the rulemaking process, and current arguments respecting the unitary presidency.

THE CONSENT OF THE GOVERNED:
AGAINST SIMPLE RULES FOR A
COMPLEX WORLD
Cynthia R. Farina 987

Professor Farina argues that recent proponents of enhanced presidential power overstate the ability of the President to legitimize the regulatory state. It accuses pro-presidentialists of premising their claims on a conception of the “will of the people” that is neither an accurate description of how citizens actually participate in modern government nor an authentic constitutional understanding of how citizens would consent to public policy decisions. The paper concludes by insisting that no single mode of democratic legitimization can “save” the regulatory enterprise; rather, administrative law must look to a plurality of institutions and practices that contribute to an ongoing process of legitimizing the administrative state.
The most remarkable period since the adoption of the Administrative Procedure Act was that from 1967-1983. During these years, the courts dramatically revised administrative common law in order to open up agency processes to new groups and perspectives, and transferred significant authority from agencies to reviewing courts. Since 1983, the tenor of judicial doctrine has been very different, with a turn toward formalism, common law concepts, and a shift in authority back towards agencies. This article seeks to explain these developments in terms of a progression of pessimism about the administrative state. During the 1967-1983 period, courts saw agencies as being vulnerable to capture by industry groups, but did not view legislative or judicial processes as being similarly threatened. In the more recent period, all institutions of government have been seen as being subject to interest group manipulation, with the result that transferring authority from agencies to legislatures or courts no longer holds much appeal.

**The Legal Profession and the Development of Administrative Law**

Professor Zeppos' paper examines the relationship between the legal profession and the development of administrative law. The paper describes traditional accounts of the legal profession's efforts to secure its power and status in society and applies the traditional account to the rise of the administrative state. The paper then offers a critique of the traditional account. While the traditional account offers a convincing version of the profession's resistance to administrative government, it fails to address certain questions or addresses them incompletely. Moreover, missing from the literature is a fuller description for the profession's eventual acceptance of administrative law and assertion of jurisdiction over large parts of the field. This shift cannot be explained solely by the successful imposition of an adjudicative model on administrative government. Rather, the shift from a predominantly common law regime to a legal system controlled by statute and administrative law required a broader reconceptualization of the functions that lawyers perform.


Administrative law scholars and practitioners take largely for granted the development of judicial review of agency action as essentially a process of federal common law. Agencies are held responsible to comply not only with statutory and constitutional commands, but also to a more amorphous set of legal doctrines and principles which represent standards of procedural regularity and substantive "reasonableness." In his treatise, *Judicial Control of Administrative Action*, Professor Louis Jaffe described this independent, trans-statutory scrutiny as "one of the rooms in the magnificent mansion of the law." This paper examines the treatise in order to explore the key conceptual move toward independent review in the administrative law scholarship of the 1950s and 60s. A study of the elements of Jaffe's reformulation of the subject of federal administrative law sheds light on current controversies regarding judicial review and its proper scope.

**Reviewing Agency Action for Inconsistency with Prior Rules and Regulations**

In various contexts, Congress and courts have directed that agency action be unreviewable to prevent judicial second-guessing of certain discretionary administrative acts. Yet, when agencies tie their own hands through regulations or directives, then
the courts have exercised review despite the discretionary resource questions otherwise involved. This paper explores the costs of predicating review on the agency's failure to comply with prior rules and directives, and suggests alternative approaches to minimize such costs.

**The Anatomy of *Chevron*: Step Two Reconsidered**

Ronald M. Levin 1253

The famous case of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) holds that a reviewing court should evaluate an administrative agency's interpretation of its enabling legislation by first asking whether the statute has a clear meaning (“step one”); if the statute is ambiguous, the interpretation should be upheld if it is reasonable (“step two”). But if the agency's interpretation is not clearly contrary to the statute, on what grounds could it be deemed unreasonable? Cases from the United States Supreme Court, which has never set aside an agency action on the basis of step two, do not answer this question. This article examines a line of D.C. Circuit cases that tend to identify *Chevron* step two review with traditional “arbitrary and capricious” review. The article defends this approach and suggests that it offers a better solution to the problem of giving meaning to step two than any of the salient alternatives.

**Discretion and Its Discontents**

Edward L. Rubin 1299

We use the term discretion all the time to describe the role of judges and administrators, but it is in fact a rather empty concept. Perhaps medieval barons or Ottoman satraps had “discretion”; in a modern state, the more relevant question is the extent to which particular government agents are supervised, the mode of that supervision, and their role in formulating public policy. The advantage of this change of terminology is illustrated by a case study of bank regulation in Germany, where the administrator's denial that they exercise discretion, in circumstances where we would say that they definitely do, indicates that the term is being used, by both Germans and Americans, for emotional rather than descriptive purposes.

**Commentary**

**New Wine Bottles: Rethinking Political and Judicial Controls on Administration**

Yvette M. Barksdale 1337

This commentary reviews the principle articles in the symposium, and suggests that they collectively represent a scholarly move away from the ideological left-right battles of the 80s and 90s towards a more apoliticized perspective on administration - with a preference for legislative or administrative controls on administration over executive or judicial ones.

**Ironsies of Administrative Law**

Sanford N. Greenberg 1349

Commenting on the articles by Professors Zeppos and Merrill, Professor Greenberg notes the irony that members of the federal judiciary apparently accepted the expanded administrative state more quickly than did members of the elite bar. He discusses the extent to which the judiciary's acceptance of the administrative state can be explained by the experiences of New Deal insiders who became Justices or by an ideology of judicial self-restraint.

**Waivers, Flexibility, and Reviewability**

Jim Rossi 1359

This Comment examines the implications of Professor Krent's article for regulatory flexibility, particularly agency decisions to waive regulations. Professor Rossi suggests that courts should err in favor of reviewability of agency waiver decisions in order to enhance the accountability of regulatory programs to statutory goals and to
RECONCEPTUALIZING *CHEVRON* AND DISCRETION:  
A COMMENT ON LEVIN AND RUBIN  
Gary S. Lawson 1377

In their contributions to this symposium, Professor Ronald Levin argues that step two of the *Chevron* doctrine should be reformulated into traditional arbitrary-or-capricious review and Professor Edward Rubin argues that the concept of discretion should be replaced by drawing from the theory of bureaucracy. In his Comment, Professor Gary Lawson agrees in principle with both contributions but suggests that the proposals of Professors Levin and Rubin face serious problems of implementation. Professor Levin’s proposal would require courts to force agencies (and the courts themselves) openly to confront questions of interpretative methodology that are perhaps better left buried, and Professor Rubin’s proposal would require such substantial changes in linguistic usage that the gains may not be worth the additional clarity that his substitution would provide.

STUDENT NOTES AND COMMENTS

FEDERAL JURISDICTION AND THE HOBBS ACT:  
*UNITED STATES V. STILLO* AND THE  
DEPLETION OF ASSETS THEORY  
Francis N. MacDonald 1389

This article explores the gradual expansion of federal jurisdiction under the Hobbs Act, a statute that prohibits extortion, bribery, and robbery. Though the Act’s jurisdictional element was broadly written, judicial interpretation has reduced the effect on interstate commerce necessary to permit federal intervention to little more than an afterthought. Through an examination of a representative case, the author demonstrates that the courts themselves have actively contributed to the expansion of federal jurisdiction over the last fifty years.
SYMPOSIUM ON
GENERIC PRODUCTS LIABILITY

Carl T. Bogus
Symposium Editor