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Administrative Law in the 21st Century

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Administrative Law and Regulatory Practice
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By Andrew F. Popper

With regard to the future of administrative law, it is tempting to respond in terms of the information revolution that in all likelihood will allow for a "virtual" administrative practice before an electronic agency. However, I would like to take a different approach, centered on a behavioral analysis, rather than on the Macintosh/Microsoft decade or century that lies ahead.

It is axiomatic that certain current administrative law paradigms will not be repeated in the 21st century. Although there has been some disagreement on form, there is no longer any doubt that alternative dispute resolution (ADR) in administrative practice is here to stay. Whether through refined settlement rules, negotiation, mediation, or other processes, these mechanisms are required because they are accepted by the polity. ADR exists in administrative law because command-and-control regulation costs too much, takes too long, and—if we are to believe political scientists—is no longer accepted by the polity. Similarly, economic regulation, controlling rates, routes, tariffs, entry and exit, the prime subjects of administrative action for 100 years, are no more. Health and safety regulation based on a progressive vision of public safety is in resurgence because of the lack of public acceptability of environmental degradation.

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These examples suggest that changes in administrative law and regulation are tied to broadly defined notions of public acceptability and perception. The legitimacy of agency behavior, in the end, is derived from sources that have an intensely political quality. This field, for better or worse, has the potential to be one of the more accurate mirrors or reflectors of public perception. That is bad news for non-majoritarian interests, interesting news for anthropologists and political scientists, and troubling news for APA purists.

Historically, a discourse on administrative law required separate discussions of its two gigantic subparts: process and substance. The study of how the regulatory state acts, a procedural inquiry, is captured in phrases that experience technical redefinition, such as control of discretion; deference; due process; fairness; efficiency and accountability; congressional oversight; separation of powers, functions and interests; and delegation.

From an anthropological perspective, the field symbols are linguistic and interpretive, and also physical, ranging from arcane format requirements for a title page for agency briefs, to the size, shape, and physical components of a hearing room.

The second domain of administrative law involves the substance of what is regulated. This is the part of administrative law that is of fundamental public and political importance. In this area, a cultural anthropologist could spend years classifying the skeletal remains of regulation, deregulation, re-regulation, efficiency, the substance of cost-benefit analysis, the progressive state, the social welfare agenda, ruinous competition, public health and safety, property values, and wonderful symbols (as in "the greens," "reds ... or pink," eagles, chickens (sick and well), flags (burned or not), and an almost infinite variety of seals, from spinning atoms to bundles of grains).

I am excited by the idea that other disciplines can be used to provide a perspective on the regulatory state. Rather than trying to ask "what is best?" when looking at a regulatory program, it may be more important to ask "what has already happened?" and "has the law caught up with the behavior?"

From a distance, it would seem that we do not create or disassemble regulatory programs because they are "best." Our administrative legal system instead is a rough approximation of continuously evolving ritual and custom that has been captured, codified, cleaned up for public viewing, and recorded for future study. Capturing and codifying constitute a vast investment and cause us to hold on to regulatory substance and process long after the ritual has changed. Too often, our section chiefs and tribal councils (of legislative, executive, and administrative affiliation

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and lineage) are consumed with preserving outmoded rituals long after the masses or the polity have moved on.

Perhaps in the 21st century, power will be possessed by those who comprehend the reflective nature of public regulation, as opposed to the proactive or reactive. It is by no means clear, however, that we will experience this sea change in leadership. In fact, for every case, decision, or practice that seeks to redefine law to capture the constantly changing rituals of our culture, there are counter forces seeking to hold fast to outlived practices. The consequence of this is public dissent and dissonance, followed by failed efforts at command-and-control regulation.

Resistance to this perspective, like resistance to change, is not hard to find. The Administrative Conference of the United States (ACUS) was seen as an organ of change or, in the parlance of this presentation, a group seeking to help agency practice reflect ritual. ACUS died a political, cruel death last fall.

At a very broad level, *Chevron* and *Vermont Yankee* sought to give agencies license to shift models and practices within broadly defined norms by limiting the range of options available to federal courts engaged in judicial review, thus permitting agencies to explore alternatives. The capacity of the *Chevron* doctrine to shield creative (and reasonable) innovation, however, is not clear based on decisions, such as *Arent v. Shalala*, which suggest that *Chevron* deference may be passe.

Negotiated and hybrid rulemaking struggle to survive in the land of the APA, facing a withering field of political and legal fire from APA purists. Again, change and innovation, which are fundamental to an evolving political order, meet their most stern resistance in the stubborn and entrenched character of legal doctrine.

The current tendency of the Supreme Court to limit not only administrative agency innovation, but also the very existence of regulatory enforcement in federal courts, frustrates the necessary flexing and bending of agency life. Instead of liberating the agencies from the political grasp of Congress, the Court has moved into the mode of looking backward in its March 1996 calamity, the *Seminole Tribe of Florida v. Florida* case. This case prohibits access to federal court for enforcement of the federal administrative standards against the states, reverting to an 1880s' vision of anti-federalism consistent with rituals that are about one century out of date.

At a practical level, the administrative adjudication ritual has slowly shifted to a position of not just relaxed rules but different rules for conducting trials. Hopefully, when they formulate rules for formal adjudication, agencies try to assess the current ritual and reality of practice and the needs of the public to participate. In response, and vigorously looking backward, there is regular agitation to straight-jacket agencies with the Federal Rules of Evidence.

Finally, and with a ray of hope, there is the ICC Termination Act of 1995, which followed ritual. It abolished the ICC, which was no longer embraced through behavior or public expectation, and it simultaneously preserved antitrust immunity for collective ratemaking. Despite its ideological and political "unpopularity," collective ratemaking survived because, by practice, need, and ritual, it is the sine qua non of survival for small to medium carriers in a market that is hyper-concentrated and in chaos.

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