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Administrative Law in the 21st Century

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ADMINISTRATIVE LAW IN THE 21ST CENTURY

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These remarks are in response to the generous offer to look into 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. Computer-to-computer communication has become inexpensive and allows for parties to present advocacy statements in adjudication and comments in rulemaking without leaving their place of business. The technology explosion, symbolized by the Internet, creates the potential to assess public opinion, a phenomenon essential to effective governance.[1] 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.[2]

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1. The presence of the Internet and mass interactive communication is not completely separate from this presentation. This technology permits the possibility of accessing public opinion and determining prevailing attitudes and beliefs in a way never before possible. The simple ability to access, on a massive scale, levels of acceptability could provide a different slant on the sources of "authority" to govern. Naturally, accessing public sentiment also involves risks to under-represented groups and raises privacy issues. *See* Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 WAKE FOREST L. REV. 51 (1995) (explaining existing legal doctrines that may provide guidance in structuring access rights to National Information Infrastructure).

2. Up until the last decade, the very idea that an agency could determine "acceptance" by the "polity" was unrealistic. Current technology changes that permanently. *See* Donald E. Lively, *The Information Superhighway: A First Amendment Roadmap*, 35 B.C. L. REV. 1067, 1076 (1994) (discussing use of "must carry" provisions in Cable Television Protection

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.[3] Similarly, economic regulation, controlling rates, routes, tariffs, entry and exit, the prime subjects of administrative action for 100 years, are no more. The world moved on, the rituals have changed, and acceptability by the public ended. 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.

These examples suggest that changes in administrative law and regulation are tied to broadly defined notions of public acceptability and perception.[4] 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.[5] That is bad news for non-majoritarian interests, interesting news for anthropologists and political scientists, and troubling news for APA purists.[6]

Act of 1992 to regulate economic power in "information marketplace").

3. *See* CHARLES L. SCHULTZE, THE USE OF PRIVATE INTEREST (1977); Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 627.

4. The notion that "public acceptability" or, in the parlance of this panel, "public choice," dictates regulatory scripture is not particularly novel and has almost an endless number of variant subthemes. Evaluating public attitudes based on commercial response or consumer-oriented market behavior, particularly those that are susceptible to gross economic quantification, forms one of the more useful ways of measuring collective public reaction to products, services, or even regulatory initiatives. There are most assuredly limits, however, to any theory of quantifying the perspectives of large segments of the population. Herbert Hovenkamp, *The Limits of Preference Based Legal Policy*, 89 NW. U. L. REV. 4 (1994).

5. I have come to believe that law, specifically administrative law, lags behind political reality. Lawmakers and law teachers have a powerful investment in the status quo. This is not a popular perspective, and on those rare occasions when I air this belief, I am usually confronted with the attack: "How can *you* say that the legal system is unresponsive to the polity . . . how do *you* know what is accepted by the public, who are *you* to pass judgment on what the public accepts?" As is evident in this speech, I am making a set of assumptions that are based on non-scientific speculation to push and provoke debate. I am also quite sure that the entire structure of conventional administrative law doctrine supports my thesis that evolving ritual and public acceptability are more important determinants of effective regulatory outcomes than are the inner beliefs of non-elected officials. *See* Christopher F. Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 562, 566 (attributing failure of administrative regulation to "arbitrariness of bureaucrats").

6. In any effort, even a summary one, to ferret out the external sources and pressures in agency action, it goes without saying that there are multiple forces in play. Public

I like the APA. Some of my best friends invest in the APA. Nevertheless, it is not now, nor has it ever been, the APA that dictates private or public behaviors. Something more is involved.

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.[7] (One can just imagine such a space set up in a museum in the 21st century with students walking in asking: "Now why is this chair higher, why just two counsel tables . . . weren't there many parties in these cases?").

The second domain of administrative law involves the substance of what is regulated. This is the part of administrative law that is barely taught in the conventional course in administrative law (a mystery that has survived the last half-century) but 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). Quite clearly, an anthropologist could structure an entire career interpreting the symbolic icons that form a shorthand for the target and consist of most activities,

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reaction, which I have referred to in terms like "polity" and "public acceptability," drives agencies in a powerful manner and must be distinguished from orchestrated interest group activity. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (discussing conceptions of "republican" government in evaluating administrative and legislative action).

7. In the next century, it is my hope that scholars will take a long and hard look not only at the content and predictable impact of regulatory ventures, but also at the more powerful meanings and values these regulations impose. Such inquiries are a regular part of other academic disciplines, such as cultural anthropology and industrial psychology; researchers in these fields will find the administrative legal system a rich source of study. *See* Hugh T. Miller, *Everyday Politics in Public Administration*, 23 AM. REV. PUB. ADMIN. 99 (1993); FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS (1981).

behaviors, and properties that are regulated. In my view, we would benefit from that study.

I am excited by the idea that other disciplines can be used to provide a perspective on the regulatory state.[8] 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 nor 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.[9] 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 and lineage) are consumed with preservation of outmoded rituals long after the masses or the polity have moved on.

This field suffers when it is dominated by those who mistakenly believe that their personal ideological perspective is the basis for creating or

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8. The idea that models can be created for analyzing regulatory behavior that transcend the ideological and purely subjective models common in most legal critiques is invigorating. That is not to say, however, that developing alternate methods of analyzing "public response" is a small task; in fact, it is the challenge of the future, as yet unmet. *See* William H. Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Role of Law and Lawyers*, 69 IOWA L. REV. 47 (1983).

9. Commitment to existing doctrinal anachronisms is understandable, particularly given the difficulties of changing regulatory action. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (holding that "arbitrary and capricious" standard of review is appropriate for adjudicating National Highway Traffic Safety Administration order rescinding crash protection requirements for motor vehicles); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971) (noting that in all cases, agency action must be set aside if action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"); Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281 (1974) (holding that narrow standard of review of "arbitrary and capricious is appropriate for adjudicating Interstate Commerce Commission order authorizing issuance of additional certificates of public convenience and necessity to transport general commodities"). *See also generally* Gregory C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 NOTRE DAME L. REV. 1 (1993) (discussing failure of pre-existing legal norms to legitimize judicial action).

maintaining regulatory action. It is precisely that singular act of arrogance that has led to the discredited condition of the administrative state.[10]

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*[11] and *Vermont Yankee*[12] 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*,[13] which suggest that *Chevron* deference may be passé.

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 enforce-

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10. Although beyond the scope of this panel, underlying this analysis is the fear that regulatory leaders, despite an avalanche of homage to public choice, target their energies in a manner consistent with personal and artificially narrowed political perspectives. In so doing, they earn the label "ideologues," and cultivate significant negative reactions to regulatory programs. *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (concluding "marketplace of ideas" model diffuses pressure for change and fails to protect freedom of expression).

11. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

12. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

13. 70 F.3d 610 (D.C. Cir. 1995).

ment in federal courts (allowing us to understand the true meaning of the word "conservative"), 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*[14] 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.[15]

Finally, and with a ray of hope, there is the ICC Termination Act of 1995,[16] 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,"[17] collective ratemaking survived,[18] 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.

I will end on that heretical note and look forward to the discussion. Thank you.

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14. 116 S. Ct. 1114 (1996).

15. *See* Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudication: A New Approach*, 1991 U. ILL. L. REV. 353 (examining application of rules of evidence in administrative agency formal adversarial adjudications).

16. Pub. L. No. 104-88, 1995 U.S.C.C.A.N. (109 Stat.) 803.

17. 139 CONG. REC. S14,704 (daily ed. Oct. 29, 1993) (statement of Sen. Metzenbaum); 141 CONG. REC. H12,248, H12,259-60 (daily ed. Nov. 14, 1995) (statement of Rep. Oberstar).

18. ICC Termination of 1995, Pub. L. No. 104-88, §§ 10706, 13703, 1995 U.S.C.C.A.N. (109 Stat.) 803, 812-15, 869-72.