

THE COEVOLUTION OF ADMINISTRATIVE LAW WITH EVERYTHING ELSE

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I am, first and foremost, an environmental lawyer. I have practiced, taught, and written in the environmental law field for going on twenty years. That has made me, by necessity, an administrative procedure specialist as well. One cannot practice environmental law at any sophisticated level without knowing the ins and outs of administrative agencies and their powers and procedures. Nevertheless, I remain, at best, a mere dabbler in regulatory theory. And I don't sense that I am different in that respect from most other veteran environmental lawyers: we know administrative law, but we don't often delve into pure regulatory theory. Furthermore, I don't believe environmental lawyers are much different in that respect from the lawyers practicing in other substantive fields touched in some significant way by administrative law.

Why is that? Why do so many lawyers have this strong connection to administrative procedure, but a persistent detachment from regulatory theory? In pondering this I divided the world of lawyers into three types. The first type consists of a small cadre of administrative law junkies—gurus to the rest of us—who probe all the nooks and crannies of administrative law and ask the deep theoretical questions at every opportunity. These “Type I” lawyers are a font of regulatory theory.

At the other extreme are the “Type III” lawyers, those whose practice simply does not involve agencies, directly or indirectly. They never have need of administrative law and thus could care less about regulatory theory. With the growth of the administrative state, this is a small and shrinking group of lawyers, albeit perhaps a happy lot, given their infrequent forays into administrative law and bureaucracy.

In the middle fall the rest of us, the “Type II” lawyers. We are practitioners and academics working in substantive fields that are directly regulated or indirectly affected by the regulatory process. Many of these lawyers don't know they are practicing administrative law, or don't want to admit it, but they are. I'm going to retain my Type II persona and offer an explanation of why we have paid insufficient attention to regulatory theory—and why we should view a symposium such as this as “a good thing.”

My first observation as a Type II is an obvious point, that administrative law would perish on its own. It needs to attach itself to other fields of substantive law for it to live and breathe. Whether the

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relationship it has with other fields is one of parasitism or mutualism, the point is that they coevolve. Coevolution involves feedback loops between the coevolving systems, and these loops can be very loose, very tight, or somewhere in between.¹ We see this all the time between administrative law and environmental law.

A good example is the bubble rule: The Environmental Protection Agency (EPA) came up with the bubble rule in air pollution law; administrative law picked it up as an administrative law issue. Soon the *Chevron* rule of deference to administrative interpretations of legislation was born, and since then environmental law has had to live with it.² Thus, moves that take place in one sphere prompt moves in the other, and so on back and forth.

The environmental lawyers in this tennis game are aware of the serves and volleys administrative law delivers, but we don't get to see its game book. For one thing, we're busy—busy working on the substance and theory of environmental law. We don't have time to keep track of the Type I lawyers. And quite frankly, we're too narrow-minded—mired in substance—to think very broadly about administrative law theory. The Type I lawyers, the administrative law junkies, roam the range of substantive fields and are thus in a better position to connect regulatory theory with regulatory practice. It is a mistake—a mistake I admit committing—for the Type II lawyers not to try to learn more about administrative law's game. When I was in private practice we'd get so excited when a constitutional law issue came along. We'd think *theoretically!* Administrative law issues were too garden-variety to evoke those emotions, and regulatory theory—well, that was even farther from our minds. That's the irony: administrative law did more than constitutional law did to shape our day-to-day practice experience, but we simply took it for granted. Yet given the importance of regulatory theory to administrative law, and of administrative law to environmental law, there's no doubt in my mind today that environmental lawyers could be better *environmental* lawyers by paying more attention to regulatory theory.

1. For more on the description of feedback loops and coevolution in law, see J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996).

2. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* is a standard principal case in both administrative law and environmental law casebooks. See, e.g., WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 139 (1997) (administrative law); JERRY MASHAW ET AL., ADMINISTRATIVE LAW 760 (4th ed. 1998) (same); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 890 (4th ed. 1994) (same); FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION 471 (3d ed. 1999) (environmental law); ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 390 (5th ed. 1999) (same); ZYGMUNDT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 427 (2d ed. 1998) (same).

Indeed, to get to the point of this, my introduction of the excellent principal papers in this symposium, each focuses on some feature of the coevolution process and offers us Type II lawyers insight into the regulatory theory in play. First, Professor Steven Croley's paper on the role of special interests and public interests in regulation goes to the core of the interaction between administrative process and environmental law substance.³ From its birth environmental law has never suffered from a shortage of special interests debating different visions of the public interest.⁴ We're still far from sorting it out.

Using (not surprisingly) for one of his case studies an example from environmental law, Professor Croley explores how outcomes are shaped by the feedback between the administrative process and the environmental law interests at stake. He makes a compelling case that administrative process has played a larger role in shaping outcomes than "interest group" theories of regulation suggest. This tells us much about the coevolutionary dynamics at play.

Next, Professor Jody Freeman's paper on the contracting state offers a fascinating account of how environmental law is beginning to outgrow the box administrative law has built around it.⁵ As the coevolution between administrative law and environmental law progresses, we might say that the wiring between the two becomes tighter and tighter. Environmental law has been a pipeline of cases for administrative law to chew on;⁶ by the same token, however, environmental law has to live with what administrative law spits back. Over time, that has amounted to process rules that channel how environmental law can shape itself. But now we find environmental law experimenting with new forms of operating—such as, to use Professor Freeman's examples, the Department of the Interior's habitat conservation plans and EPA's Project XL—that seem more like con-

3. See Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000).

4. For an excellent overview of this struggle between competing visions of environmental policy, see DANIEL A. FARBER, *ECO-PRAGMATISM* 35-69 (1999).

5. See Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000).

6. In addition to *Chevron*, there are a number of classic examples. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 161 (1997) (discussing the so-called zone-of-interest standing under the Administrative Procedure Act); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978) (invalidating so-called hybrid rulemaking); *EPA v. Mink*, 410 U.S. 73, 92-94 (1973), *superceded by statute as recognized by* *CIA v. Sims*, 471 U.S. 159, 189 n.5 (1985) (Marshall, J., concurring) (discussing the national security exemption under the Freedom of Information Act); *In re Permanent Surface Mining Reg. Litig.*, 653 F.2d 514, 527 (D.C. Cir. 1981) (discussing the scope of an agency's authority under a general rulemaking grant); *Sierra Club v. Costle*, 657 F.2d 298, 386-410 (D.C. Cir. 1981) (discussing the *ex parte* contacts doctrine in rulemaking proceedings); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589-90 (D.C. Cir. 1971) (discussing the reviewability of preliminary agency orders); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1095 (D.C. Cir. 1970) (discussing the reviewability of an agency's failure to act).

tracts than conventional regulation. Professor Freeman questions whether administrative law as presently structured and theoretically grounded is ready for this new spin environmental law has put on the ball. Clearly this is a move by environmental law, and other fields as well, that will require some deliberate and careful coevolutionary response from administrative law.

In the third paper, Professor Matthew Adler also covers topics important to this continuing coevolution.⁷ Environmental law theory is brimming with welfare economics: Pigouvian taxes, Hardin's Tragedy of the Commons, the Coase theorem, and externalities are the bread and butter of environmental law theory.⁸ More recently, however, environmental law has begun to reconsider what "welfare" means, how it is measured, and whether the conventional views really work in the long run.⁹ Similarly, Professor Adler suggests a new theory of regulation based on an updated vision of social welfare. He questions whether neoclassical and proceduralist theories of regulation remain vital, just as environmental law is reexamining its regulatory foundations. Perhaps this is evidence that administrative law and environmental law are so closely wired that their underlying *theories* are also coevolving.

Finally, Professors Linda Cohen and Matthew Spitzer provide a fascinating critique of the emerging positive political theory of administrative law and its emphasis on using Supreme Court cases as the font of regulatory theory.¹⁰ From the first year of law school we are programmed to think that the Supreme Court is where it all happens. But any seasoned environmental lawyer knows the significance of the D.C. Circuit to our field.¹¹ The D.C. Circuit—as well as, to a lesser extent, the other U.S. Courts of Appeals—often is the end of the line. Indeed, some scholars have suggested that the Supreme Court is irrelevant to our field.¹²

7. See Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241 (2000).

8. Most leading environmental law casebooks include an exposition on these key ingredients of welfare economics. See, e.g., ANDERSON ET AL., *supra* note 2, at 70-95; FINDLEY & FARBER, *supra* note 2, at 42-51; PLATER ET AL., *supra* note 2, at 97-124; JOHN-MARK STENSVAAG, MATERIALS ON ENVIRONMENTAL LAW 55-108 (1999).

9. Recent editions of several environmental law casebooks have picked up on emerging themes in environmental law scholarship and research that challenge conventional welfare economics, such as the notion of ecosystem services, "green" accounting proposals, and research on biodiversity values. See, e.g., ANDERSON ET AL., *supra* note 2, at 47-58; FINDLEY & FARBER, *supra* note 2, at 51-62.

10. See Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391 (2000).

11. See, e.g., cases cited *supra* note 6.

12. See Daniel A. Farber, *Is the Supreme Court Irrelevant? Reflections on the Judicial Role in Environmental Law*, 81 MINN. L. REV. 547 (1997); *Does the Supreme Court Still Do Environmental Law?*, ENVTL. F., Jan./Feb. 2000, at 42 (introducing a series of commentaries on the question).

As Professors Cohen and Spitzer suggest, perhaps it's really the Solicitor General who has made this so in both respects, not only for environmental law but for regulatory fields in general, by acting as a filter on the regulatory cases we get to "see" in the Supreme Court. Their findings in this regard extend to explaining the clear bias on the Court for the government when government does seek review. They counsel that we take this "strategic petitioning" effect into account when using Supreme Court jurisprudence as a bellwether of regulatory theory.

All in all, then, the papers speak to me in terms of the coevolution of my world with theirs, of Type II lawyers with Type I lawyers. They have taught me to pay more attention to regulatory theory when I think about environmental law, and to tell my fellow Type II lawyers to do so as well. With that, I gladly turn the proceedings back over to the Type I lawyers and only hope I can keep up.