Administrative Law, Administrative Structures, and Administrative Decisionmaking

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Russell L. Weaver and Steven I. Friedland

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Comparative Perspectives

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Series Note

The Global Papers Series involves publications of papers by nationally and internationally prominent legal scholars on a variety of important legal topics, including administrative law, freedom of expression, defamation and criminal law. The books in this series present the work of scholars from different nations who bring diverse perspectives to the issues under discussion.

Russell L. Weaver*
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Introduction

Administrative structures and administrative processes vary considerably from nation to nation. In some instances, these differences are attributable to history (*e.g.*, in France, all roads lead to the French Revolution). In other instances, they can be traced to differences in governmental structure (*e.g.*, the U.S. governmental structure is based on Montesquiean notions of separation of powers). The articles in this book come from different American, Australian and European countries and reflect on the administrative structures, primarily the executive and judicial structures, in those countries. The papers range from Italy to Sweden, but sweep in other parts of Europe (e.g., Denmark and France), and cross the Atlantic Ocean to the United States, and the Pacific Ocean to Australia.

The papers printed here are discussion papers that were presented during discussions at the Université Paris Dauphine PSL Research University in June, 2017.[1] At that forum, there were three primary discussion topics: "Forms of Administrative Justice," "Executive Administrative Authority & Decisionmaking (broadly defined)" and "Administrative Issues Arising in Your Nation That Others Should Know About." This latter topic could be analyzed comparatively, or could be used to update participants regarding recent administrative law developments from the participant's country.

Professor William Funk's contribution to the forum is entitled *The End of Administrative Regulation?* Professor Funk notes that those subject to administrative regulation have always sought ways to avoid or limit that regulation.

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1. This forum was co-sponsored by the Emory University School of Law, the Washington & Lee University School of Law, the Luxembourg University Faculty of Law, the Institutum Iurisprudentiae, Academia Sinica (Taiwan), the University of Alabama School of Law, and the University of Louisville's Louis D. Brandeis School of Law.

However, he expresses concern that there is "a concerted effort arising in the academy, the Congress, and the courts to undermine agency regulation as fundamentally illegitimate, if not unconstitutional." To illustrate this point, he references Professor Hamburger's book, *Is Administrative Law Unlawful?*, which argues that any agency regulation of private conduct and any agency adjudication that impacts private liberty or property is unlawful as fundamentally illegitimate. Professor Funk is concerned that Hamburger's approach, if adopted, would eliminate all independent regulatory agencies as well as all health, safety, and environmental regulation in the executive branch. Professor Funk also notes that Professor Gary Larson, in his book *The Rise and Rise of the Administrative State*, contends that "the post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution." Professor Funk does not address the validity of these arguments, but instead focuses on the potential impact of these arguments if adopted. He details the history of congressional attempts to rein in administrative authority, including the Congressional Review Act (CRA) and The Regulations from the Executive in Need of Scrutiny Act (REINS), which has not been enacted, as well as efforts to overturn *Auer* and *Chevron* deference. He also discusses recent judicial opinions, and the views of individual justices. He concludes that these attacks on the administrative branch do not "command majority support in any of venues at the present time," and he takes comfort in the fact that the "administrative state is well established and finds support from various constituencies, even from constituencies that complain about particular regulations." Nevertheless, he is concerned about the fact that attacks on the regulatory state have "gained momentum in recent years, and inasmuch as 'originalism' as a method of interpretation of the Constitution was once an outlier and now is the dominant form of interpretation," he suggests that "one cannot simply dismiss this new attack."

Professor Michael Gøtze's article, *Current Challenges to Danish Courts and Administration—Walking the Line Between Law and Politics*, sheds light on two fundamental features of Danish public law: Danish courts, and the relationship between their judicial and political powers, and the image of Danish public administration as open and transparent. Although Danish courts have traditionally exercised a limited political role, the article suggests that judicial attitudes may be changing and that there are now tensions between judicial and political reasoning. In addition, the article highlights a current and high-pitched discussion in Danish law as to the degree of transparency and openness in public administration. He notes that, although there is a stereotypical

image of Denmark as both the happiest and the open and transparent society in the world, he raises questions about how open Danish society remains, noting that both openness and transparency have deteriorated in recent years.

Professor Antoine Louvaris' contribution is entitled *Whither the French model of dual jurisdictions? Sketched observations on "un illustre vieillard" (an illustrious old man)*. Professor Louvaris notes that French principles require separation of administrative and judicial authorities based on the adage that "to judge the administration is still to administer." This concept can be traced to the French Revolution, and explains why the principle of separation has resulted in a fully-functioning administrative justice system which is theoretically separate and apart from the ordinary (judicial) justice system and autonomous from it. The administrative system, being distinct from the private law system, applies different substantive rules. Nevertheless, he notes that over time there has been some convergence of jurisdiction and authority between the administrative and ordinary courts thereby reducing the impact of the dual jurisdiction due to an overlap of principles, ideas and powers.

Professor Jacques Ziller's article, *Protecting Third Parties to EU Administrative Procedure: Rules in Adjudication and Institutional Design*, examines the Pavia Unit of the Italian Research Project of National Interest (PRIN) project 2012 (2012SAM3KM) on Codification of EU Administrative Procedures, which is financed by the *Ministero dell'Istruzione, dell'Università e Della Ricercar*, Italy. In his paper, Professor Ziller explores results achieved by the Pavia Unit regarding the participation of third parties or non-parties in administrative proceedings. He analyzes the results and proposals achieved in the framework of the ReNEUAL, as well as specific case studies at the regional and global level that have looked at institutional design as a way to ensure the protection and participation of third parties and non-parties.

Professor Jane Reichel's article, *The Rule of Law in the Twilight Zone—Administrative Sanctions Within the European Composite Administration*, focuses on models for implementing and enforcing EU law in member states. Traditionally, member states could apply national procedural and institutional law in their implementation of EU law provided that they respected the principles of effectiveness and equivalence. This meant that as long as national law did not render the enforcement of EU law extremely difficult, or treat EU claims less favorably than national claims, national procedural law could be applied to EU claims even if this meant that EU law was implemented differently from one state to another. However, Professor Reichel believes that this approach is rapidly becoming obsolete. Increasingly, attention is being given to the devel-

opment of integrated or composite European administration, consisting of EU and national administrative organs which collaborate in their efforts to turn EU law into reality for EU citizens and their undertakings. However, instead of a clear and coherent legal basis for sanctions, the division of powers between the EU and the member states could be characterized as a constitutional grey zone, or twilight zone. The core problem seems to be that neither the EU nor the member states can steer and control the national authorities single-handedly, and the division of competence between the different parts of the composite administration is continuously evolving.

Professor Margaret Allars' article, *Administrative Decision-Makers Acting Reasonably*, focuses on the Australian legal requirement that administrators act "reasonably." In her article, she notes that the grounds for review in Australia have generally been disconnected from any duty to give reasons for an action. However, Australia does review administrative decisions for "reasonableness," including the requirement of illogicality and irrationality as developed and applied in Australia to jurisdictional facts, including in the decision in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, and she examines the impact of those principles on Australian case law. She concludes by offering some comments on the relationship between a reasonableness standard for decision-making and the giving of reasons.

The final article is Professor Russell Weaver's *Chevron Under Siege in the Trump Era: Does it Matter?* In that article, he notes that, following the election of Donald Trump, questions have been raised regarding the legitimacy of the *Chevron* doctrine, and whether it should be repealed or overridden. Indeed, some have attacked *Chevron* on the basis that it "allows unelected, unaccountable bureaucrats to rewrite the law," and is therefore "inconsistent with the basic duties of judges under the Constitution." However, Professor Weaver suggests that, even if *Chevron* is overruled, the relationship between the courts and administrative agencies may not change much. Although some believe that *Chevron* encourages courts to rubber stamp administrative decisionmaking, leading to a truncated review process, the evidence reveals that deference is never automatic. Indeed, courts differ regarding how they apply the principles of interpretation, and justices can use interpretive principles to override administrative interpretations. The net effect is that *Chevron* has not denuded courts of their interpretive authority, and overruling *Chevron* will not necessarily constitute an earthquake in judicial review of agency interpretations.