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Preface

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by John L. Gedid*

Public law is the natural focus of the Law Review of the Widener University School of Law, Harrisburg Branch. Dean Santoro's Introduction pointed out that many Pennsylvania legislators sought this new branch because of a variety of perceived needs for a law school in Pennsylvania's Capital.

The location of the new branch in the Capital has had numerous effects, some of which were not fully foreseen. When the branch opened, it appeared that, in terms of faculty teaching and research interests and student study, the nearby work of the executive, judicial and legislative branches would provide important subjects for observation and study. In the three years since the branch opened, however, events have outstripped that projection: the proximity of the Capital has had a profound effect upon the direction of this Institution. The reception and support by the legislature, the judiciary, the executive branch, the Attorney General, the administrative agencies, and the Bar (especially as expressed through the Dauphin County Bar Association) have been enthusiastic, helpful, and professional. That cooperation and collaboration have involved many persons and groups of persons within this Law School in many scholarly, research and professional activities in the Capital, where the focus of attention is, not unexpectedly, on public law issues. As a result, it is now very clear that the principal area of interest for all constituencies in this new branch is public law. The public law emphasis of the *Widener Journal of Public Law* is the expression of that institutional interest and commitment.

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Institutional commitments to the study of public law are fairly recent in the American Legal Academy. The relative neglect of the public realm in our constitutional law has been, until recently, a well-recognized feature of our legal system.[1] American constitutional law has been centered on litigation about, and study of, private rights.[2] This is in distinct contrast to European constitutionalism, which recognizes "constitutional duties" and "the notion of the State."[3]

Law is an instrument for accomplishment of public ends. The study and practice of law must therefore include public issues and law. The American legal profession prides itself on being a public profession; it is only fitting, then, that in our organs for communication of professional and academic developments, research and ideas we provide a forum for public law themes. This *Journal* will seek to accomplish that goal.

Sweeping changes are taking place in American public law. One of the most important appears to be a radical transformation of the meaning of federalism in recent decisions of the United States Supreme Court.[4] Examination of those changes leads to the conclusion that old ideas about federalism are probably inadequate, and that the states will have a greater role in the federal system.[5] A similar change in thinking about federalism has occurred in the executive branch. Since at least the beginning of the Ronald Reagan presidency, the executive branch has also enthusiastically supported returning to the states powers which had earlier been taken away from them.[6] This movement has been so strong that one prominent analyst has described it as an attempt to "[r]estore moral hegemony to local institutions."[7] Aspects of this movement

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[1] Gerhard Casper, *Changing Concepts of Constitutionalism, 18th to 20th Century*, 1989 SUP. CT. REV. 311, 312.

[2] *Id.* at 312.

[3] *Id.*

[4] Andrzej Rapacynski, *From Sovereignty to Process*, 1985 SUP. CT. REV. 341 (1986).

[5] *Id.* at 419, 414.

[6] Theordore J. Lowi, *Two Roads to Serfdom*, 35 AM. U. L. REV. 295, 314 (1987).

[7] *Id.*

have been described as a reaction against "gargantuan and obtrusive" and "onerous" government and government programs.[8] Study and discussion of this shift and the reasons for it are important, for it helps to define the relationship between the federal government and the states. That relation is the backbone of the American federal system.

This relational shift also has other indirect, but far reaching, consequences: the change will open more areas to action by the states, so that new ideas, thoughts, strategies and procedures in the public law area will be coming from the states.[9] With fifty states generating new material on public law at a rapidly increasing pace, the subject area, already quite large, is due for explosive growth. This *Journal* will provide a forum to discuss and debate these changes, and, it is hoped, will also provide a clearinghouse for new developments in the public and administrative law area in the states.

There is another major new development in the public law area. The traditional assumption that legislation and law as made by the courts are nearly identical has changed, and in fact is no longer true.[10] Primary social regulation is no longer and has not been for some time the nearly exclusive province of the common law; it has been replaced by legislative policy formation.[11] This change alone is worthy of study, but it is related to another corollary, equally profound, change: the shift to legislation as the primary mode of social regulation has drastically transformed the legislative process.[12] In the past, legislation has consisted in large part of relatively narrow and clear rules. However, that is no longer true. Instead, modern legislation allocates resources, creates

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[8] Paul S. Dempsey, *Market and Regulatory Failure as Catalysts for Political Change: the Choice between Imperfect Regulation and Imperfect Competition*, 46 WASH. & LEE L. REV. 1 (1989).

[9] Paul Verkuil, *Welcome to the Constantly Evolving Field of Administrative Law*, 42 ADMIN. L. REV. 1, 4 (1990).

[10] Peter Strauss, *Legislative Theory and the Rule of Law*, 89 COLUM. L. REV. 427 (1989).

[11] Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

[12] *Id.* at 369.

agencies, and issues vague guidelines and other broad and general standards which are the complete antithesis of traditional statutes.[13] There is no theory to explain, nor are there any systematic descriptions of this new type of statute or style of legislating. It seems fair to provide a forum to examine, explore and discuss this new public law development.

I. ADMINISTRATIVE LAW IN THE TWENTY-FIRST CENTURY

Publication of this Symposium on teaching and practicing administrative law in the twenty-first century is a logical step for the first issue of the *Widener Journal of Public Law*. Administrative law is an important part of public law, as well as a major focus of community and professional interest. It appears in the brief history of the Harrisburg Campus thus far that many faculty members and students have chosen to teach and study at the new Branch because of a particular interest in administrative law issues.

There are many reasons to explore this topic besides personal interest on the part of faculty and students. Recently, we have seen an "administrative law explosion." [14] Administrative law has undergone a period—or, to be more precise—several periods of "unprecedented change,"[15] and continues to be in a "continuous state of flux."[16] There have been few systematic or ongoing reviews of the forces affecting administrative law and policy.[17] The United States Supreme Court has been a powerful agent for change in this area: the Court is attempting to move our legal system and society in the direction of a "democratic model of the administrative state."[18] Similar developments are occurring in the

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[13] *Id.*

[14] Bernard Schwartz, *Recent Administrative Law Issues and Trends*, 3 ADMIN. L.J. 543 (1990).

[15] *Id.*

[16] *Id.*

[17] Ernest Gellhorn, *Shaping Administrative Law*, 43 ADMIN. L. REV. 1 (1991).

[18] Richard Pierce, *The Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1285 (1989).

States. At least one state, Pennsylvania, has an intermediate appellate court, the Commonwealth Court of Pennsylvania, whose jurisdiction is exclusively administrative law. This court and others like it are producing an extensive body of administrative law jurisprudence of the highest quality. This is merely one example of the increasing importance of the states in producing administrative law.

More recently, analysts have observed that the pace of activity in the area of administrative law has increased. In the last decade, the administrative process has become the battlefield for the three branches of government.[19] So much ferment has occurred recently that one commentator observed that those who teach administrative law are rarely bored because of the rapid pace of changes there, and gave as an example that in 1989 the American Bar Association section devoted to administrative issues was forced to change its name to include new areas now thought to be rightfully included in the area of public administrative law.[20]

Separation of powers is an area which has been unsettled since the drafting and adoption of the Constitution. Recently, because of numerous United States Supreme Court and State Supreme Court decisions on the subject, interbranch relations and separation of power issues have been particularly important administrative law issues.[21]

Recently, another new thread of analysis has been identified. One part of the law and economics movement in legal scholarship has focussed on administrative law. Some have argued that a new reformist school of law and economics must be discussed and examined in order to remedy the wealth maximizing assumption of standard law and economic analysis.[22] This new school of analysis makes powerful arguments that it is necessary to adopt a

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[19] Frederick R. Anderson, *Introduction to Symposium on Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277, 278 (1987).

[20] Verkuil, *supra* note 9, at 1.

[21] *See, e.g.*, John L. Gedid, *History and Executive Removal Power:* Morrison v. Olson *and Separation of Powers*, 11 CAMPBELL L. REV. 175 (1989).

[22] Susan Rose-Ackerman, *Progressive Law and Economics*, 98 YALE L.J. 341, 343 (1988).

new mode of analysis which combines public policy and public choice theory to give insights into modern administrative law.[23]

Even though the legal profession has generally recognized the growing importance of administrative law, some prominent observers believe that there has been an insufficient amount of "systematic and ongoing" effort devoted to the study of the varied forces which affect administrative law.[24] In part this is because the administrative process is shaped by and related to the legislative process and politics.[25] Moreover, administrative law issues cut across substantive areas of law, and they are powerful factors in shaping the relationships between the three branches of government.[26] On the other hand, other analysts bemoan the fact that the Constitution does not settle many fundamental questions involved in the modern administrative state, and consequently there is "ambiguity" in the relations between the three branches of government.[27] All of these factors have militated powerfully in favor of attempting to open a dialogue about where administrative law is at present and where it will be in the future.

The responsible branches of government, scholars and the legal profession are in the process of making profound changes in the shape of administrative law which will affect conceptions of that area and the ways in which it is practiced. This first issue of the *Widener Journal of Public Law* in this symposium issue begins a dialogue about these changes.

II. THIS SYMPOSIUM

The first section of this symposium deals with major professional developments and issues in administrative law practice in the twenty-first century.

Chief Administrative Law Judge Alan W. Heifetz focuses upon several problems of administrative adjudication. His authoritative

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[23] *Id.* at 347.

[24] Gellhorn, *supra* note 17, at 1 (1991).

[25] *Id.* at 2-4.

[26] *Id.* at 4.

[27] Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491 (1987).

presentation, informed by many years of study and supervision in his area, addresses the role of the administrative law judge, including the proposal to create a wholly independent Corps of Administrative Law Judges (ALJ); Alternate Dispute Resolution (ADR); and Automated Data Processing (ADP).

His thoughtful analysis concludes that there should be an independent corps of ALJs, but not for all agencies. He advocates what is essentially a pooling concept. This idea seeks to obtain the advantages of an independent corps of ALJs—principally eliminating the appearance of bias and helping to assure the independence of the ALJs—while eliminating the disadvantages—the loss of subject matter expertise—which would occur if the present system were scrapped and completely replaced by a single corps of ALJs.

In the area of ADR, he argues that ALJs have the expertise and are the logical choice for acting as trained dispute resolvers. He reaches this conclusion from the position that adjudication and ADR are components of a similar process, or are different manifestations of what is essentially the same set of skills. He makes a particularly persuasive case for this type of ADR by ALJs by focusing upon the advantages of locating a settlement process within the normal administrative process.

Chief Judge Heifetz also describes the revolutionary effect of improved technology—computerization—on the practice of law. His discussion covers everything from the design of systems to software and the uses to which computerization may be put. His presentation emphasizes that in modern practice in many administrative agencies where vast numbers of cases must be decided, the computer is an indispensable tool.

In the second presentation of the symposium, former Pennsylvania Public Utility Commissioner, James H. Cawley, analyzes the adverse impact of sunshine laws. His thesis, which is powerfully supported by numerous references and examples, is that sunshine acts and open meeting laws have had a seriously deleterious effect on the operation of agencies. He argues that these effects have occurred because the sunshine laws have caused a substantial decline in collegial decision making among the members of commissions and boards. He argues that there exists in certain areas of human conduct a need for secrecy that is as

justified as the need for openness and information which is the basis of the sunshine laws. Mr. Cawley does not argue that the sunshine laws are unjustified or that they do not work in a broad, general way; in fact, he concedes that in the main they do work. However, he makes a forceful and persuasive argument that the sunshine laws should not be applied to the deliberations of commissions and board. He maintains that forcing the deliberative function into public view has caused a disastrous decline in the collegiality of commissions and boards. This decline, in turn, has seriously impaired the effective operation of commissions and boards.

He supports his thesis with extensive examination of the history and philosophy of sunshine laws, the problems which they create, and suggestions for correction. The immediate and the long term problem with the operation of sunshine laws is that they have forced the agency decision making process outside the doors and meetings of the agency: members are not willing to deliberate together in public, so that they must conduct this vital process outside of the meeting room. This unofficial process is truncated or, at times, nonexistent. Thus, the requirements of the sunshine laws destroy the necessary conditions for collegial decision making, and they deprive the public of this valuable and valued quality of agency action.

The second section of this symposium focuses upon teaching administrative law in the twenty-first century. Professor Thomas O. Sargentich addresses a hidden aspect of administrative law: the underlying conception about the administrative process which is part of numerous conflicts and issues in modern administrative law, and how these conceptualizations must be addressed in our teaching. He begins from a vantage point which recognizes the enormous breadth and complexity of materials and problems included within the area described as administrative law, and the difficulty—to which those of us who labor in this vineyard can attest—of teaching it. He also recognizes that the administrative law area has struggled with the problem of defining itself, and nowhere has this struggle been more apparent than in the area of teaching approaches. Historically, he notes that this struggle has been reflected in an alternation between approaches which stress substantive elements and those which stress procedural or process

orientations to teaching administrative law.

Professor Sargentich attempts to move beyond those categories and approaches. He argues that our teaching must be informed by another consideration. In a position of which he is one of the leading exponents in American administrative law,[28] he contends that what present methods of teaching miss—or at least what must be investigated about current teaching materials and methods—is the extent that administrative law has as its basis opposing or conflicting understandings of the process. If we recognize these underlying theoretical bases or understandings, he argues that we will have a better understanding of the real issues in administrative decision making. He asserts that recognizing these conflicts is the first and most important step in resolving them. Thus, theory informs our teaching, and it also has the *practical* effect of helping to resolve conflicts and debate in modern administrative law.

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[28] *See* Thomas O. Sargentich, *The Future of Administrative Law*, 104 HARV. L. REV. 769 (1991); Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987); Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419 (1987).