

The Role of the Judiciary in Sustainable Governance
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Author's Note: This paper constitutes an early draft of one product that will eventually grow out of my current project analyzing the relationship between EPA and the judicial system. It will be presented at Session V, "Policy Paradigms for Sustainable Governance," of the conference on Sustainable Governance, the 5th Annual Colloquium on Environmental Law & Institutions at Duke University, April 27-28, 2000.

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I.

What is the role of an independent judiciary in Sustainable Governance? When this question is posed outside of the environmental context, broad consensus exists that two roles are quite appropriate and perhaps even vital. One relates to the private realm, the other to the public realm. Each undergirds a part of the governance package that the United States is vigorously promoting throughout the world, and around which an equally broad consensus of agreement has currently formed.

That consensus proposes that sound and successful governance starts with two building blocks: free, open and democratic elections, and open and competitive markets. Within the private sphere, an independent judiciary can and should protect property rights, enforce contracts, secure access to markets on nondiscriminatory terms, and compensate tort victims so as to internalize significant externalities to production. Countries that do not provide adequate assurances that property rights will be respected and contracts enforced become relatively unattractive locations for international investment, and this impairs their economic growth in the global economy. Western countries have long experiences with our court systems suggesting that some measure of political independence for the judiciary enhances the courts' ability to provide assurances in these areas sufficient for commerce to grow.

In the public sphere courts can and should protect individuals' political rights to participate in elections, petition government for redress of grievances, and preserve the freedom of speech necessary for democratic systems to remain responsive to the will of the people and also to help secure the legitimacy of governmental actions. Once again, a measure of political independence has seemed essential to the performance of these functions by the judiciary, as well as to the maintenance of the perception that courts are capable of rendering politically unpopular judgments when political rights are infringed by official, government action.

Actual, functioning judicial systems always fall short of these ideals. In the United States, for example, critics have long contended that courts have stretched tort doctrines in ways that end up stifling entire industries, altering research and development priorities, and imposing costs on production beyond any externalities based justifications. Similarly, critics argue that property rights receive insufficient protection and that economic rights generally are subject to an unfavorable double standard when compared to the protections courts give to privacy rights and civil rights.

The exact content of the legal regime that courts ideally should be enforcing in the public sphere is also controversial. For example, the *Buckley v. Valeo* decision establishes free speech protection for campaign expenditures, and places significant limitations on the ability of the legislature to modulate the impact of money on the political system or to level the political playing field. Scholars and analysts regularly debate whether *Buckley* enhances or impairs our overall governance system.

Notwithstanding these disputes, we see remarkably broad agreement with the proposition that the judiciary has a constructive and appropriate role to play in both the private and public spheres. Interestingly, however, in the blended public-private realm of administrative law, whether the courts have a constructive and appropriate role of any significance remains a seriously contested issue. There is much less clarity about whether or not judicial review of administrative action is a good or a bad thing. In a recent article entitled "Shattering the Fragile Case for Judicial Review of Rulemaking," Frank Cross calls for abolishing judicial review entirely. Short of such an extreme position, the sort of "hard look" review that has become commonplace within the federal system and many state systems often comes under severe attack.

Although seldom identified as such, there are two reasons for the controversy surrounding the desirability of judicial review of administrative action. First, unlike the stylized public and private spheres, in this mixing zone between the two there is much less clarity about what courts should be doing when reviewing agency action. Whether or not explicitly characterized this way, scholars have variously claimed that in reviewing administrative action, courts ought to ensure that agencies execute the commands given them by the Congress (the agency theory); or they ought to promote sound policy through statutory interpretation and insistence on reasoned decision making (the policy theory); or they ought to guarantee a fair and open process for all participants in agency action (the representation theory); or they ought almost entirely to eschew superintending agency action, leaving the development and implementation of policy to a struggle between the President and the Congress (the majoritarian theory). As always, there are variants within each category, and different blends of the categories can be advocated.

Strong versions of the agency theory and of the policy theory point in very different directions. Courts operating strictly as agents would ensure that agencies implemented legislative commands faithfully, regardless of whether or not the legislation reflected sound policy or rent-seeking by special interests. Courts operating to promote sound policy would not necessarily enforce legislative commands, but would instead steer agency action so that it more closely implemented social policies

that were sound, as understood by the judges.

The extreme policy view is not seriously advocated by any scholarship with which I am familiar, although some of the early law and economics scholarship tended in that direction. The extreme policy view blatantly transgresses a deeply held professional norm holding that judges are not to "legislate from the bench." Still, the pull of sound policy (by the advocate's own lights) influences approaches to the role of judicial review in important ways. Cass Sunstein and others, for example, argue that where possible statutes ought to be interpreted by courts to compel or permit agencies to employ cost-benefit analysis in their work. More generally, the judicial enterprise regularly encounters questions as to which the statutory command is simply unclear, perhaps because it was unanticipated, perhaps because no legislative consensus emerged, perhaps because the legislature intended the executive to develop its own answer within a range of discretion. In such instances, the courts as agents view needs supplementation. The default assumptions courts bring to such instances need to be informed by some understanding of the courts' appropriate role, and one candidate – now less easy to dismiss as improper judicial legislation – is that courts should promote certain policies.

A number of scholars contend that whatever the outcome of the normative dispute between agency theorists and policy theorists, as a descriptive account some version of the policy view proves superior. In posting the judiciary as compliance police for the legislature vis a vis its agent, the bureaucracy, agency theorists underappreciated the fact that this creates quite a principal/agency problem of its own, this one between the legislature and the judiciary. Here, the independence of the judiciary, thought so necessary in the public and private realms described a moment ago, now produces an enormous amount of slack in this second principal/agent relationship. Nothing can guarantee that judges-as-agents will adhere closely to their oversight function when reviewing administrative action. Accordingly, we should not be surprised to see decisions motivated by, if not justified by, judicial policy preferences.

If this description proves accurate, its countermajoritarian implications would in the eyes of many add strength to Cross's proposal. To others, its implications in this regard would seem to depend importantly on what policies judges pursue when slack in system gives them the leeway to do so. If judges could be shown to move agencies toward greater appreciation of cost-benefit analysis, for example, as Sunstein argues they might appropriately and constructively do, economists and others concerned about the efficiency of government action might find the implications congenial. If, on the other hand, judges declined to allow agencies to adopt strong versions of the precautionary principle because they believed it was sound government policy in cases of uncertainty to err in ways that favored the status quo, environmental advocates might think this an undesirable outcome.

This empirical turn points us toward the second reason for controversy regarding the appropriate stance toward judicial review of agency action. We have surprisingly sparse evidence regarding the effects of judicial review either on agency actions or on the underlying social facts that the agencies are charged with influencing. Insofar as such instrumentalist considerations figure in arguments

about the appropriate judicial role in sustainable environmental governance, we need to gather more information about the consequences of the courts' current role as an aid to that debate.

These issues are particularly germane to developing sustainable governmental systems for environmental quality, because it seems inevitable that such system will continue to operate in the mixing zone between public and private realms where administrative agencies perform some of the necessary functions. Even if the preference for regulatory instruments shifts toward a greater emphasis on incentive-based tools in the future, as I believe it will, these tools will neither be self-implementing nor self-enforcing, and so some government presence will necessarily remain. Specialized bureaus and tribunals developed to deal with the national and transnational features of international environmental agreements will also require some resolution of the proper role of judicial review of agency action.

II.

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Author's Note: At this session of the Sustainable Governance Conference, I will present some preliminary and partial findings from our work in analyzing the interaction between the Environmental Protection Agency and the federal courts of appeals. What follows is a description of that research.

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I will be presenting the preliminary results of a work in progress that examines how the federal courts of appeals have treated cases in which EPA is a party, during the 1990s. This work revisits an earlier project. In 1990, Rob Glicksman and I wrote "EPA and the Courts: Twenty Years of Law and Politics," which explored how the federal courts had treated environmental values during the first twenty years of the Environmental Era. We first presented that work at a conference on EPA's first twenty years. That conference covered a number of different subjects. The papers from which were published in Volume 54 of Law and Contemporary Problems (1991).

I am now co-organizing a follow up conference on EPA, to be held at Duke University on December 7-8, 2000, on the occasion of EPA's thirtieth anniversary. The upcoming conference will concentrate on the last decade, focusing on new issues that have surfaced since the last conference (e.g., environmental justice) and also on developments in on-going issues (e.g., the use of science and economics in EPA decision making). In that spirit, Rob and I have undertaken an examination of the last decade of courts of appeals decisions involving EPA, to see how things have changed during the 1990s from our earlier conclusions.

Our earlier work identified three elements within the judiciary's approach to environmental cases that we argued had evolved significantly between 1970 and 1990. First, early in this period, the

courts viewed environmental legislation as embodying coherent public policy, whereas by the end of the period they viewed such legislation as the result of special interest lobbying, haphazard legislative deal making, and other political pressures, and treated it much more skeptically. Under the first approach, courts took as their role faithfully assisting the Congress, defending its expressed public policy and extrapolating that policy where necessary to ensure effective implementation. Under the later approach, courts took as their role preventing legislation from having any unnecessary consequences outside of Congress' clearly expressed commands.

Second, environmental values moved from being treated as special values early in the Environmental Era, and as such meriting heightened judicial concern, to being treated as ordinary values later in this period, and thus meriting only the same concern as economic interests.

Finally, third, early in this time period theories of agency capture dominated political science and had influences on the judiciary. Capture theory posits that agencies soon become captive to the interests of the regulated community. In EPA's case, this would produce regulation systematically biased against stringent enforcement of environmental legislation. Later in the period, agencies came to be seen as extensions of the President, carrying out his or her policies. Because the President is the only national official chosen by the entire electorate, the policy choices of executive branch agencies are thought to be less vulnerable to special interest pleading than legislative choices, and more likely to express the legitimate broad public interest. Even if those policies are not thought to be necessarily so high-minded, at least agency decisions are being made by a body more politically accountable than the judiciary. On either account, courts began deferring to agency policy decisions more. The Chevron decision became the template through which the courts of appeals reviewed EPA action.

In the early period, these three elements reinforced one another to incline the courts toward decisions that sought to protect and advance an agenda of environmental protection. In the later period, changes in each element produced a different inclination: to treat environmental cases no more solicitously than any other agency review, to eschew any unique or special role for the judiciary in fostering environmental values, and to read statutes narrowly, deferring to agency interpretations where ambiguities were found.

That is a quick review of the main thesis of our earlier work. The current project is going to revisit these three elements to see if they have remained stable or have evolved further.

Our current work also has a quantitative component that our earlier effort lacked. We have identified all the courts of appeals decisions in which EPA or the administrator was a named party for the period January 1, 1991 to July 1, 1999, nearly the entire decade of the 1990s. Requiring EPA or the administrator to be a named party eliminates some cases that involve EPA decision making and clearly raise issues in which we are interested. For instance, it eliminates almost all Superfund litigation. The main reason for this omission is that Rob and I began this project prior to the decision to organize the December, 2000, conference on EPA, and at the time our impetus for the research was to examine

how the courts were addressing standard administrative law issues, especially as they involve administrative rulemaking, such as applying Chevron and State Farm, rather than preparing an analysis parallel to our 1990 paper. We believed we would capture most of the cases relevant to those interests by limiting it in the way we did.

The result is a data set of approximately 200 cases, after we culled it for purely procedural matters such as decisions consolidating appeals, as well as for very brief opinions that appeared to have no significance beyond the particular dispute. We then coded these cases for a number of variables, and we are now engaged in analyzing the results. Below is a short outline of some of the major issues we are examining. I will present some of our preliminary findings.

I. Statutory Interpretation. The Supreme Court's decision in Chevron v. NRDC, 467 U.S. 837 (1984) is the leading modern opinion on the judicial review of statutory interpretation by administrative agencies. It articulates a two step analysis. First, the court determines whether Congress "has spoken to the precise question at issue." If so, the court enforces Congress' statement. If not, the court determines whether the agency has given the statute a "permissible construction." This second step is thought to be highly deferential to the agency's judgment. In subsequent decisions, the Supreme Court has sometimes cited and relied upon Chevron's methodology and at other times has not.

We are examining a number of issues in the area of statutory interpretation:

1. How dominant has the Chevron approach to statutory interpretation become in the courts of appeals?
2. How frequently does EPA lose at the first step of Chevron? (That is, how frequently has the agency failed to follow Congress' clear instructions?) Is there any pattern to these cases?
3. How frequently does EPA lose at the second step of Chevron? (That is, how frequently does a court find that the agency as stepped outside the bounds of reasonableness in interpreting a statute?) Is there any pattern to these cases?
4. In determining whether Congress has spoken to the precise question at issue, to what extent does the appellate court rely upon:
 - a. the plain meaning of an isolated statutory provision
 - b. the meaning and structure of the entire statute
 - c. the "objectives and policies" of the statute
 - d. other statutes
 - e. dictionary definitions
 - f. legislative history
 - g. the amendment history of the statute

- h. considerations of administrative feasibility and practicality

Each of these potential guides to Congress' meaning has been referenced at one time or another in Supreme Court decisions. Textualists, such as Justice Scalia, advocate limiting the guides used by courts to a,b,d and e. Others on the Court, such as Justice Breyer, believe that the additional guides mentioned above can also be useful and are legitimate sources of meaning. Is the textualist view dominating in the courts of appeals?

II. Reasoned Decision making. Agencies must engage in "reasoned decision making" before issuing rules. Over the years, the Supreme Court and the courts of appeals have identified a number of components of reasoned decision making. The lead case here is *Motor Vehicle Mfrs. Ass'n of the United States of America v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

We are examining a number of issues related to the application of the reasoned decision making requirement to EPA's rulemaking:

1. With what frequency are EPA rules remanded because of:

- a. inadequate notice to parties
- b. failure to respond to significant public comments
- c. failure to consider alternatives
- d. failure to consider relevant factors
- e. consideration of irrelevant factors
- f. insufficient factual basis
- g. inadequate explanation
- h. a general determination of "arbitrary and capricious" decision making

2. Do parties from the regulated community raise more reasoned decision making challenges than parties from the environmental community? The hypothesis here is that industrial firms will tend to challenge on every conceivable ground because delay often benefits them financially. Environmental groups, on the other hand, may conserve their resources to litigate when the outcome can have significant programmatic effects, and will be less inclined to litigate when the challenge is fact specific and does not address a significant program element.

3. Is EPA's assessment of the science that is relevant to a particular rule subjected to hard look review, or soft glance review? Some courts have been deferential to EPA determinations when the agency is working on the frontiers of science or the science is controversial. Others have been more skeptical. What is the pattern in the past decade?

III. Temporal Comparison. By sampling a group of cases from the 1980s, and also by relying upon work published by others, we are trying to examine trends over time on most of the issues identified

above.

IV. The Effect of Political Affiliation. Political scientists have long thought that the best determinants of a case outcome were the policy preferences of the judges deciding the case. Legal scholars have also examined this claim, with some conflicting conclusions. When the subject matter involves a topic on which the two national political parties are divided, this thesis translates to the hypothesis that the outcomes in environmental cases will correlate with the political affiliation of the deciding judges. Republicans and Democrats tend to differ on their attitudes toward whether strong environmental protection measures are necessary, as well as on their attitudes toward government regulation versus reliance on private markets and decisions. We are examining the effect of the political party affiliation of the deciding judges on whether the outcome is pro-environmental protection or anti-environmental protection.
