The Birth of a Legal Doctrine in the Administrative State

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The birth of a legal doctrine often begins when an academician associated with the legal academy has an idea on how to improve the administrative state and publishes it in a journal; a colleague reads it and elaborates on its content. With the passage of time other academicians might endorse the concept.

In the meantime, the doctrine is fertilized by teaching it in law schools, the birthplace of judges who then occasionally endorse it in one of their subsequent legal proceedings which often establish a national precedent. Absent from participation in this endeavor is any consistent proactive procedural input from neither the Executive nor the Legislative Branches of government.

The limiting factor is that most judges do not have time to keep up on the cornucopia of publications rendered by academicians. Nonetheless academicians are the irreplaceable authors of the history of the administrative state but they often have a reluctance to recognize the writings of non-academicians, including the press; a process which on occasion leads to an incomplete record of critical events. With the advent of the internet, privately managed websites and most importantly search engines–the gifts that keep on giving–potential game changing events are no longer under the thumb of a select number of keepers of the status quo who traditionally control the debate by demanding publication of articles in law journals.

Hopefully in the near future interlopers will finally be allowed to at least have an audience with the insular circle who heretofore have in large part shunned the presence of non-academicians; if the monopoly powers granted to the legal profession by state occupational licensing bodies continue to be abused they can always be revisited. We would like to emphasize that fortunately only a miniscule number of the regulatory decisions made within the administrative state are subjected to the actions of a select group of entrenched academicians who will sacrifice multi-disciplinary participation for self-preservation.

Readers are invited to send their suggestions for:

- those institutions that might benefit from a possible reformation of their curricula by Contacting CRE, and
- possible Congressional intervention by an identification of those common law doctrines which should be subject to review by an impartial governmental body utilizing the principles set forth in the aforementioned documents as the standard for review. To this end the Administrative Conference of the US could be tasked with the responsibility for identifying alternative institutional structures for conducting the aforementioned impartial review with special consideration given to having a diverse group of disciplines participate in the review. In that the concept of ex post evaluation is returning as a result of its periodic in vogue recognition as an agent of reform, why not proceed with the program identified herein as an ex post evaluation of an ex post evaluation of an existing program?

NB

Some of our readers while recognizing the contributions CRE has made to centralized regulatory review question its expertise in opining on issues regarding the venting of legal doctrines. We appreciate their concern but we are guided, in part, by this 1893 publication. In addition we were struck by this timely publication which highlights the issues presented herein with an emphasis on *Climate Change.*

Statements made by scholars of the administrative state support our view that the functioning of the legal community should comport with the open access recommendations set forth above. Consider the following quote published on a White House website less than a month ago:

"Nearly two hundred years ago, when Alexis de Tocqueville described his observations of democracy in America, he observed that the United States had rejected monarchy but embraced aristocracy. "If you asked me where I place the American aristocracy, I would answer without hesitating," he wrote: "The American aristocracy is at the lawyers' bar and on the judges' bench." Even in the 1830s, Tocqueville observed that American jurists considered themselves a "privileged class among intelligent people" by virtue of "[t]he special knowledge that jurists acquire while studying the law".

Centralized regulatory review addressed a big gap in the administrative process, namely that federal agencies could impose burdens on the American public without the involvement of a duly elected President; the corresponding gap that needs to be addressed is the fact that the rules that dominate the conduct of judiciary can take place as a result of an insular process managed by officials not confirmed by the Senate and which are void of virtually any involvement of the public, the Congress or the President– aristocracy at its best which is sanctioned by state occupational licensing.

The linkage between the establishment of legal doctrines and the contents of law school curricula is clear; if you wish to influence the former you either engage the latter or state occupational licensing.

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