FOREWORD

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This volume collects papers contributed for a conference in honor of my fiftieth year of teaching held by New York University School of Law on January 12, 2021. I am extraordinarily grateful to the School and Dean Trevor Morrison for holding this event; to my colleagues Ricky Revesz, Bryce Rudyk, Danielle Spiegel-Feld, and Katrina Wyman for organizing and participating in the event; to the School and especially Dean and President Emeritus John Sexton for bringing me to New York University and supporting my work over nearly three decades; to the conference participants and authors who contributed the essays contained in this volume; and to the *New York University Environmental Law Journal* for publishing them.

The articles were presented in four different panels at the conference: in the fields of administrative law, environmental law, and global law, and on my experiences in practice. The boundaries of these categories are porous, and a number of the articles bridge the different categories.

ADMINISTRATIVE LAW: INSTITUTIONAL STRUCTURE AND GOVERNANCE

Rachel Barkow addresses the criminal justice system which, she argues, should be restructured to incorporate many of the administrative law innovations that have been adopted in regulatory administration.[1] She argues that the criminal justice system, rather than relying primarily on expertise and the "transmission belt" of statutory authorization to legitimate its decisions, must adopt procedures to ensure greater accountability and responsiveness to the various constituencies impacted by the decisions of its officials. These mechanisms include greater public participation in decision-making by police, prosecutors, and other criminal justice officials through procedures such as notice and comment rulemaking; giving reasons

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[1] Her analysis draws on Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

for decisions; and enhanced judicial review. At the same time, she notes the limits of these mechanisms and the need to consider other strategies such as changing the methods for selecting prosecutors and other criminal justice officials.

Two articles—those by Lisa Heinzerling and David Schoenbrod—deal with recent calls by some Supreme Court justices and scholars for mobilization of the long dormant nondelegation doctrine, which prohibits delegation by Congress of "legislative" powers to administrative agencies.

Lisa Heinzerling mounts a powerful attack on this proposal. She finds that the Justices advocating the nondelegation doctrine equate it with a prohibition on delegation of "important" decisions, but fail to provide a definition of importance other than the magnitude of economic impact on the regulated industry, a criterion that she denounces as reflecting a blatantly political bias against regulation. Heinzerling contends that, given the severe political and institutional difficulties in obtaining precision in major regulatory statutes, this approach would prevent the political branches from meeting important economic and social needs. It would privilege the "liberty" of business firms over the freedom of regulatory beneficiaries to be protected against environmental, health, safety, economic, and other deprivations.

David Schoenbrod argues against broad Congressional delegations, which undercut accountability by enabling Congress to take credit for addressing a problem while shifting blame to agencies for regulatory burdens and shortcomings. He takes as an example Congress's grant in the Clean Air Act of very broad discretion to EPA in phasing out lead in gasoline. EPA took a long time in doing so, causing serious health damage, most notably through neurological injury to children. He contends that if Congress had been forced to decide the phase-out timetable, political pressures would have produced a much prompter phasedown. He argues that the Court should invalidate delegation to agencies of authority to set rules of private conduct, in contrast to administration and enforcement, yet acknowledges the difficulties in developing judicially tractable criteria for applying this principle. He also criticizes the predominant reliance on regulatory central planning through use of command and control techniques and advocates for greater use of economic incentives in order to reduce regulatory burdens and incentivize innovation as well as enhance accountability.

Jerry Mashaw asserts that, notwithstanding the efforts of scholars over the past four decades, we still lack a consistent general theory of administrative legitimacy. He finds that the contemporary American administrative state is governed in accordance with two basic models. One is Presidentialism, under which the Executive directs and implements policy by ensuring that statutes are implemented in ways that further the White House's objectives. The President enjoys wide power to do so by the generality of statutory delegations to agencies and in some cases directly to the President, and by her appointment of high-level agency officials and influence over their decisions.

Mashaw's other model is one of reasoned and publicly responsive administrative decision-making. Agencies must give reasons for their decisions to show that they further statutory programs, advance relevant public norms, and give due regard to public comments. Courts enforce these requirements through hard look review of decisions, which cannot be justified simply on the basis of alignment with presidential preferences. Acknowledging that the two systems are often in conflict, Mashaw argues that ongoing balancing between the two produces a complex system of administrative accountability that secures the legitimacy of the administrative state.

ADMINISTRATIVE LAW: PROCEDURES AND JUDICIAL REVIEW

Jonathan Wiener deals with the problem of disregard by regulatory and administrative bodies of those whose interests and concerns are peripheral to or contrary to the agency's programs and priorities.[2] Agencies are driven by their missions and heavily influenced by the interests of their supporters and clients. They accordingly exhibit a degree of tunnel vision in their policies and decisions, leading to disregard of other values and constituencies. Disregard, operating at both global and domestic levels, prevents us from "seeing" the resulting harms inflicted on others. Wiener proposes extensive use of new procedures to enable the disregarded to have a greater say in agencies' decisions, stronger information systems to identify adverse impacts of decisions and policies, careful design of regulatory systems, and stronger mechanisms of administrative oversight and planning to enable agencies to identify and redress otherwise disregarded impacts. He asserts that these have the

[2] His essay builds on Richard B. Stewart, *Remedying Disregard in Global Administrative Governance*, 108 AM. J. INT'L L. 211–70 (2014).

potential to bridge welfarist interests of efficiency and equity concerns for distributional fairness.

Ricky Revesz attacks the Trump EPA's practice of inconsistent result-oriented use of the rationales it gives for decisions involving different regulations under different regulatory programs. An example is consideration of the health and safety co-benefits of regulatory measures. In declining to adopt more stringent regulations of hazardous air pollutants from power plants, EPA declined, without explanation, to consider such benefits, which would clearly have supported stronger regulation. Yet it invoked such benefits in weakening motor vehicle emissions limitations when considering such benefits supported its actions. Similarly, EPA embraced federalism values in favor of state authority when they supported deregulatory measures but ignored them when they supported regulation. Revesz found a shell game-like inconsistency in EPA's policies regarding treatment of existing versus new pollution sources.

The principle that agencies must provide a reasoned justification for changes in the same regulation is well established. Revesz argues for a major extension of the consistency principle, arguing that agencies should be reasonably consistent in the rationales given for changes regarding different regulations, including under different statutory programs, and that courts should set aside as arbitrary and capricious agency decisions that violate this requirement. He acknowledges that courts must apply the requirement with a degree of flexibility to avoid stifling changes in regulatory policy. Other details need to be worked out – for example whether or not such a requirement should be applied across different agencies. Yet the principle of cross-regulation consistency represents an important and promising innovation for promoting the overall coherence of regulatory policies.

REGULATORY LAW AND POLICY

Cass Sunstein addresses the comparative welfare efficiency of using fees or taxes versus regulatory mandates to address the welfare losses associated with motor vehicle fuel consumption. He notes that economists' standard preference is to use economic incentives such as taxes on fuels because they deal most efficiently with the negative externalities, such as pollution, caused by motor vehicle fuel consumption. He argues, however, that consideration must equally be given to the welfare losses incurred by consumers

because of their consumer behavioral failures in responding fully rationally to higher fuel prices by buying more fuel-efficient cars or driving less. Consumers are inattentive, short sighted, and focus unduly on motor vehicle prices and other attributes, and labels alerting consumers to these failures are ineffective. As a result, consumers bear significant welfare losses. Sunstein argues that these "internalities"—costs borne by consumers—should be counted on par with externalities and that regulatory mandates such as fuel economy standards will be the most efficient tool for dealing with them. He marshals the evidence available on the relative magnitude of internalities and externalities and concludes that more such empirical studies are needed to decide whether economic incentives or mandates are overall the most efficient type of regulatory instrument.

Don Elliott and *Dan Esty* propose an ambitious principle—the polluter pays principle (PPP)—for dealing with liability for harm. They advocate a version of PPP that would require polluters and other generators of environmental harms to compensate those injured or threatened with injury by the residual pollution remaining after maximum feasible regulatory controls are imposed.[3] Rather than the prevailing Kaldor-Hicks welfarist paradigm for regulation, which holds that regulatory controls or liability should be set at the level that maximizes benefits less costs, even though the benefits are enjoyed and costs borne by different parties, they advocate an alternative Pigouvian paradigm under which polluters must bear the external costs generated by their actions by compensating those bearing those costs in the form of harm or risk of harm created by pollution, etc. after regulatory controls have been imposed. They acknowledge a variety of important practical issues to be addressed in implementing this approach, for example, how best to fashion in-kind compensation to a community exposed to that are individually modest but collectively significant using techniques that are efficient and also secure distributional equity (including environmental justice) and respect for personal autonomy. The version of PPP advocated by Elliott and Esty has far-reaching implications, both conceptually and as applied.

Richard Lazarus and *Libby Dimenstein* focus on the appropriate roles of the rules of the federal and state governments in addressing the COVID-19 pandemic. Initially, they strongly criticize

[3] PPP is a principle recognized in international environmental law, but it is directed at foreclosing government subsidies for controlling pollution.

environmentalists who have emphasized the environmental benefits of the economic disruption caused by the virus, arguing that this line will play into the hands of those who oppose of environmental regulation for destroying jobs. Surveying the history of environmental regulation, they note that initially there was a strong reliance on federal regulation, based on the limitations of states' capacity and political will. The balance then shifted to greater reliance on state initiatives, such as those of California, as leadership in Washington faltered. In the case of COVID-19, they contend, the Trump administration failed to assert a sufficiently strong federal role, leaving too much undirected and uncoordinated responsibility to the states, who were ill-equipped to deal with any of the problems that the virus posed. They advocate a strong leadership role by the federal government in addressing the challenges presented by COVID-19 and securing social justice with a cooperative role for the states.

George Van Cleve addresses the recurring problem of nonpoint water pollution in the particularly difficult context of Chesapeake Bay. The huge bay has for decades suffered from serious nonpoint water pollution emitted by an enormous number of sources in six states and the District of Columbia. These sources include agriculture, urban runoff, forestry, and other disparate and relatively small sources. EPA lacks authority to regulate nonpoint pollution. It sets total maximum daily loads (TMDLs), which represent the level of aggregate pollution discharges to a water body that would enable it to meet water quality standards. Regulation of sources, however, is left to state and local governments, which have not proven very effective in doing so. Moreover, states that do not abut the Bay, such as Pennsylvania, have little or no incentive to limit their discharges. Presently, EPA has no effective means of addressing this problem. Van Cleve advocates a number of reforms to address these problems, including, most importantly, providing EPA authority to regulate nonpoint sources and deal with transboundary spillovers.

GLOBAL LAW AND POLICY

Sabino Cassese has been a towering leader in building the field of global administrative law through his own scholarship, organizing conferences and workshop, and supporting scholarship by younger academics. His essay addresses the establishment of higher-order institutions by states and the subsequent role of national principles, practices, and traditions in shaping the evolution

of higher-order legal regimes. He focuses on evolutionary processes of legal principles in the European Union and the dynamics of interaction with and among the Member States. Influences flow from the European Union to the Member States, from the Member States back up to the European Union, and between the Member States. He finds that European and national courts should respect and encourage these processes to promote a balanced and fruitful relationship between the different components of multilevel governance.

Michael Oppenheimer provides an overview of global climate policy and progress over the past thirty years and offers perspectives for moving forward. The United Nations Framework Convention on Climate Change has failed to deliver a robust global agreement on quantitative limits for reducing greenhouse gas (GHG) emissions; the Kyoto Protocol was largely a failure and has been abandoned. He attributes this poor record to the varying levels of support among countries and a lack of concerted commitment by the largest polluter nations for implementing ambitious, costly mitigation measures. The Paris Agreement is a far more decentralized system of voluntary GHG limitation pledges and has the potential to be more inclusive of nonstate and private actors, and thereby stimulate innovative "building block" strategies, driven in many instances by profit considerations. Oppenheimer concludes that the question is whether these bottom-up approaches, combined with Paris's regularized "name and shame" system of non-binding nationally determined contributions by states to GHG limitations, regular reporting on emissions, and mutual review by states of performance, but without strong compliance measures, will perform better than the more centralized command strategies previously attempted.

Kristina Daugirdas emphasizes the importance of the sources of funding for international organizations such as the United Nations and the World Health Organization. As Daugirdas observes, legal scholars have tended to neglect how these organizations are funded, even though the sources of their funding may well influence the policies that they generate. Daugirdas focuses in particular on the significance of voluntary contributions by member states, which as she illustrates account for sizeable shares of the budgets of international organizations. She convincingly emphasizes that reliance on earmarked voluntary contributions from member states may distort organizational priorities and policies, including latitude to criticize member states. She argues for regulating these contributions,

beginning with additional disclosure and discussion of existing organizational approaches as an initial step.

APPLICATIONS TO PRACTICE

Three contributions deal with my engagements in the practical elements of the law in the Justice Department, with the Environmental Defense Fund (EDF), and in law reform projects undertaken with my wife Jane Stewart under the auspices of the New York University Guarini Center on Environmental, Energy, and Land Use Law. They do not include a number of other activities that have made important contributions to my teaching and scholarship.[4]

Annie Petsonk's paper discusses practical application of my scholarship on economic incentives for environmental protection and global administrative law. I had the great pleasure of working with her in the Justice Department and later at EDF. She first addresses my articles from the 1980s advocating use of emissions trading and other economic incentives in lieu of command and control instruments to deal with environmental problems. She emphasizes that I favored economic incentives not only on grounds of economic efficiency, but also the opportunities that they provide to advance equity and democratic accountability. Petsonk examines the emissions trading regulatory system adopted by California, which has made enormous progress in reducing greenhouse gas emissions in a cost-effective way, through a process of setting caps that involved extensive public participation, auction of emissions allowances—with a third of the revenues directed at disadvantaged communities—and a successful program to eliminate hotspots.

Pestonk then links global administrative law to economic incentives in the International Civil Aviation Organization's (ICAO) regulatory program for GHG reductions from international aviation, which relies on a combination of direct limits on emissions to the

[4] These include my clerkship with Justice Potter Stewart and my experience as Special Counsel to the Senate Watergate Committee. These, together with my time at the Justice Department, afforded me the privilege of having worked in all three branches of the federal government. After clerking, I spent three years with the Covington and Burling law firm in Washington, D.C., where I worked on antitrust and regulatory matters, and also the novel environmental law cases generated by the federal government's implementation and enforcement of the new federal environmental statutes. This experience led me to teaching and scholarship in administrative and regulatory law and in the fledgling field of environmental law, which I have pursued ever since.

extent technologically practicable with the purchase of emissions offsets from other sources. She shows how EDF and other civil society organizations helped persuade ICAO, which has traditionally operated in a quite closed and opaque fashion, to adopt extensive provisions for transparency, public participation, and reason-giving that will help ensure the environmental integrity of the program and enable public review and engagement.

Jim Tripp's contribution examines our work together over forty years at EDF and the issues of environmental law and policy that we encountered in the process. Jim began work at EDF in 1973 and eventually became General Counsel, retiring in 2019. Since I joined EDF in 1977, I have been an EDF trustee, Chair of the Board, Advisory Trustee, and member of the Legal Action Committee, which reviews staff proposals for new litigation.

It has been tremendously rewarding to work with Jim over so many years because of his ability to bring together innovative legal thinking, skilled advocacy, economics, and science in his work, demonstrating a pragmatic attention to the political dimensions in which the law works—attributes that EDF has as an organization exemplified. He is also extremely curious and has the flexibility to work effectively on many different sorts of subjects and projects. The matters that we worked on together included promoting cap and trade systems for air pollution, including GHG, at the global, national, and state (California) levels; trading programs to preserve and protect the New Jersey pine barrens while accommodating development; the Trans Pacific Partnership; and an unprecedented project of ensuring that $1.2 billion out of the federal penalties paid by BP following Deepwater Horizon spill be used to fund a Supplemental Environmental Project to promote recovery of the Gulf Delta through environmentally beneficial diversions of the Mississippi River and barrier island projects.[5]

Jane Stewart's contribution describes our environmental law and policy work together since we were married in 1993. Several major projects that we undertook, conducted under the auspices of the Guarini Center, involved legal assistance projects abroad. These included a multi-year program to implement the Aarhus Convention requirements of transparency, participation, and access to justice in

[5] In addition to my projects with Jim, I have over the years been involved in reviewing and advising EDF litigation initiatives, and supervising, with the rest of the Board and senior staff, the organization's overall policies.

eight former Soviet Eastern and Central European states in order to promote protection of the Danube from pollution. This program successfully helped mobilize citizen awareness of the problem and support for environmental measures. Another major project, funded by the Asian Development Bank, was to assist the new Environmental Protection Committee of China's National People's Congress in strengthening several of China's major environmental laws to facilitate their effective implementation and enforcement.

As Jane also describes, we worked together on a project, supported by the Rockefeller Foundation, to examine, through in-country studies, international trade regulatory issues posed by the different policies and laws regarding use of genetically modified crops and foods in nine different countries and the European Union. The project and ensuing report focused particularly on developing countries and the impact on them of the GMO conflicts between the United States and the European Union.

Jane also recounts how, during my stint as Faculty Director of the Global Law School Program, we worked together developing productive contacts with colleagues in law schools abroad, including in Europe, South America, and China, engaging them in continuing relations with New York University and joint environmental and global administrative law projects and enduring friendships.

As Jane recounts, in recent years we have worked with CRESP, an independent multidisciplinary university-based think tank that provides legal and policy analyses to the Department of Energy. We worked in support of a more cost-effective, risk-based approach for addressing the massive, enormously challenging, and costly task of cleaning up the wastes from the nation's production of nuclear weapons. We produced a book, *Fuel Cycle to Nowhere*, that provides the first and only comprehensive examination of U.S. nuclear waste law and policy.[6]

[6] JANE. B. STEWART & RICHARD B. STEWART, FUEL CYCLE TO NOWHERE: U.S LAW AND POLICY ON NUCLEAR WASTE (2011).