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The Appellate Review Model of Agency Adjudications

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Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *Colum. L. Rev.* 939 (2011).



Linda Jellum

In our field, there are a few articles that every academic, even practitioners, should read for an understanding of modern administrative law: the so-called seminal works.¹ In my opinion, Professor Thomas Merrill's latest article—Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law—should be added to this list. In his article, Professor Merrill examines the historical development of the appellate review model as applied to administrative adjudication, and while this choice for judicial review was not inevitable, it has had wide-ranging consequences. Professor Merrill's article explores both the origins and consequences of this model to explain, in part, why the Supreme Court “never seriously grappled with” the constitutionality of administrative adjudication. With this Article, Professor Merrill aims to explain and, perhaps, reignite the age-old question: “How ... do we square adjudication on a mass scale by administrative agencies with text of Article III?”

In the first half of the Article, Professor Merrill details the adoption of the appellate review model in the administrative context and concludes that the adoption of this model explains why the Supreme Court so readily accepted agency adjudication. Prior to the twentieth century, courts either reviewed administrators' actions pursuant to the prerogative writs (e.g., mandamus and habeas corpus) or did not review these actions at all. Yet, around the turn of the century, the courts adopted the appellate review model, which allowed agencies and courts to share decisional authority. Specifically, the appellate review model of judicial review, which mirrors the relationship between appellate and trial courts in civil litigation, has three salient features. First, a reviewing court decides appeals using only the evidentiary record generated below; if more evidence is needed, the court remands the case. Second, the appropriate standard of review varies according to whether the issue falls within the area of expertise of the reviewing court (law) or the lower tribunal (facts). Lastly, the law-fact distinction is the key variable for dividing judicial competence.

Professor Merrill suggests that the Court adopted the appellate review model to address and resolve concerns regarding judicial encroachment into the legislative arena generally and to curtail aggressive judicial oversight of the Interstate Commerce Commission specifically. Along the way, Professor Merrill explains how this model allowed the Court to tailor judicial review to fit the prevailing approach to administrative law of the time. For example, hard look review and Chevron deference both fit the model, yet allow increased judicial oversight during a time of perceived agency capture. After reading his historical account, it comes as little surprise to the reader that, in Crowell v. Benson, 285 U.S. 22 (1932), the Supreme Court rejected an Article III challenge to

agency adjudication of worker's compensation claims. The Court reasoned that, as long as Article III courts had de novo review of any jurisdictional facts (a constraint later abandoned), the remaining fact-finding authority could constitutionally remain with the agency. The constitutionality of such adjudication was "never seriously deliberated by the Supreme Court."

After explaining his theory as to why the Supreme Court adopted the appellate review model so readily while remaining unconcerned about the conflict with the text of the constitution, Professor Merrill refutes two modern, alternative theories regarding this Article III conundrum: the adjunct theory and the public rights theory. The adjunct theory posits that agencies function much like juries or masters in chancery, as adjuncts to federal courts deciding routine factual questions. Professor Merrill believes that this model fails because there is no textual basis in Article III for agencies, unlike juries and masters in chancery, to have such power. Additionally, agency powers today are much further reaching. Modern scholars have adjusted the adjunct theory by suggesting that "judicial power of the United States" simply means appellate power, an approach that would constitutionalize the appellate review model. Yet, Professor Merrill rejects this theory because some agency orders are self-executing and judicial review is discretionary. Similarly, he rejects the public rights theory, which defines agency adjudication as limited to addressing issues of public, rather than private, rights. Professor Merrill notes that the distinction is blurred and the theory fails to explain the emergence of the appellate review model.

At the conclusion of his Article, Professor Merrill suggests the possibility of an alternate universe, one in which Article III courts review only the legitimacy of agency policy-making within the confines of legislative boundaries. Other countries, such as England, have made this choice. Such an option would give "reviewing courts much less influence over the formation of policy." However, the exact contours of this alternative universe are merely posited and not explored. Perhaps he plans a follow-up piece on this topic; although change is unlikely at this point, so any suggestion would likely be theoretical rather than practical. "By the time complications or objections come to the fore, the inertia of institutional change is too great to undo them."

At bottom, Professor Merrill's article is primarily descriptive, but it is thoroughly so, exploring the history of judicial review from the early twentieth century to Chevron and beyond. I have no doubt that this Article will find a place in the proverbial "electronic bookshelf." As I teach administrative law for the seventh time this fall, I am reminded that much, if not all, of modern administrative law revolves around judicial review. Given that reality, understanding how we got here is critical. For all these reasons, Professor Tom Merrill's latest article is a must-read.

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1. E.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). [?]

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