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# Neoclassical Administrative Common Law\*

By JEFFREY A. POJANOWSKI†

Review of **Administrative Justice and the Supremacy of Law in the United States**, by John Dickinson

The Lawbook Exchange, Ltd.: Clark, 2003

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In the legal world, John Dickinson was once a pretty big deal—and I do not mean the Founding Father who wrote “Letters from a Pennsylvania Farmer” and served at the Constitutional Convention. The John Dickinson under consideration here does not even merit a Wikipedia entry, yet he helped shape American administrative law as we know it. A professor at the University of Pennsylvania from 1929 to 1948—and descendant of his more-famous namesake—Dickinson was at his time a leading mind in the legal academy. Despite lively and insightful work at the top of his field, he has largely retreated into the mists of history.

Dickinson offers more than a discomfiting reminder about the ephemeral and parochial character of academic achievement. An enduring part of his legacy is his 1927 book, *Administrative Justice and the Supremacy of Law in the United States*, which administrative law scholars still cite today, though they rarely examine it in depth. Dickinson’s tome stakes out and defends what has become known as the “appellate review” model for judicial involvement in the administrative state. Under this approach, a court’s role is to hear challenges to administrative agencies’ rulings in a manner analogous to reviewing a jury’s verdict or a trial judge’s legal conclusions. If this alone is Dickinson’s legacy, it is not a small one. The appellate review model continues to dominate much thinking, argument, and law on the place of courts in the administrative state.

But to know only Dickinson’s greatest hit is to miss other important notes he struck in the book. In laying the groundwork for the appellate model, Dickinson grasped what he called the “apparent antimony” between administrative governance on the one hand and the supremacy of law on the other. (31) In recognizing value at both poles of this antimony, Dickinson helped establish a mainstream, moderate stance about the shape and legitimacy of the regulatory state. A closer reading of Dickinson’s work, which is rich in jurisprudential reflection and historical learning, offers a better idea about the structure, promise, and limits of the doctrinal world he helped create.

## I.

It is tempting to say John Dickinson is a transitional figure, but for the fact that so much of administrative law has not transitioned beyond him at all. In *both* his worldly wise skepticism about some apolitical Law lurking behind everyday law *and* in his insistence that judicial neutrals supervise and structure administrative agencies’ work, Dickinson anticipated the domesticated legal realism so

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prominent in administrative law today. He saw law, ultimately, as the residue of policy choices, but also insisted that law preside above politics. *Supremacy of Law* is an extended attempt to resolve, or at least cope with, the tension between those two positions.

In both *Supremacy of Law* and his other jurisprudential writings, Dickinson aligned himself against *Lochner*-ism, Langdellian formalism, and what legal realists identified as “conceptual jurisprudence” more generally. His 1929 *Columbia Law Review* article “The Law Behind Law” sought to dismantle systematically the notion of any “Higher Law” standing above and independent of the common law doctrine judges apply. Like his mentor Roscoe Pound, Dickinson rejected strong versions of legal realism’s indeterminacy thesis, yet he insisted that even the most fixed rules of law are the product of judicial legislation. Concealing that creative role under the cloak of “Higher Law”—whether in the form of natural law, custom, or conceptual deduction—inhibits judges from sound use of policy tools when they need to exercise discretion.

Dickinson’s legal metaphysics has practical import for his discussion of administrative law. First, the basic point that law is entrenched policy supports what Dickinson called “regulation by government” (in contrast to “regulation by law”). Regulation by government is rule by public officials’ “intelligent and flexible discretion,” whereas law courts offer a more fixed, durable set of rights and obligations. (13–14) Regulation by government is preventative rather than reactive, draws on technical knowledge inaccessible to judges, acts with regard to the public interest rather than private rights, and offers flexibility in fields not amenable to “rules of a rigid and permanent character.” (15) Warming to a progressive theme, he further observed that regulation by government was an important means for implementing “the newer philosophy of social solidarity.” (30) Once we conclude that regulators and judges alike are government officials operating on the same plane of policymaking, separation of powers reduces to questions of institutional competence and, as Dickinson appreciated, administrative governance has many advantages.

Secondly, Dickinson connected the debunked concept of “Higher Law” with the celebrated Anglo-American tradition of the supremacy of law over the administrative state and its officials. Tracing this notion’s development through the Magna Carta, Bracton, and especially Lord Coke, Dickinson reasoned that the classical idea of legal supremacy had purchase at a time when the “Middle Ages were still near enough at hand for the transcendental to preserve its glamour and its force.” (84) It was with this transcendent idea—one “powerful only in the proportion as it was esoteric” (93)—that “Coke did battle against James” to bring the monarchy under the rule of law. (84)

Central to Coke’s argument was an understanding of law as an “abstract entity” that is “separate from and independent from government.” (80–81) This conception, however, clashes with a mindset that now views judges as “governmental officers of the state.” (77) Once we reject the reification of law that Dickinson saw as central to the jurists’ triumph over the monarchy, it is natural to ask further whether we ought to abandon the claim that law courts should supervise the work of the king’s bureaucratic descendants. The question is all the more pressing once we have traded the royal prerogative for regulators supervised by legislators and politically accountable executive officers. Contemporaneous New Deal thinkers like James M. Landis followed Dickinson’s intellectual thread in that direction, as do contemporary theorists who press for the judiciary’s abnegation on institutional competence grounds. But Dickinson’s book title neither stopped at *Administrative Justice*, nor did it invoke the *Supremacy of Law* to inter it. On what grounds could Dickinson justify a pantheon of judges amid the twilight of the legal idols?

## II.

Dickinson argued that governance in a complex society requires more than flexible policy formulation. There must also be order, which “demands the maintenance of some fixed points of permanence and stability.” (30–31) Supreme law’s ability to meet that demand is the “enduring kernel embedded in our traditional system of adjudication by courts applying a body of *supposedly* definite and permanent law, uninfluenced by changing considerations of political expediency.” (31, emphasis added) From this kernel of truth flowered the appellate review model of administrative law. The worm of doubt spotted in Dickinson’s modifier “supposedly,” however, raises questions about whether it could survive without its original roots. Nevertheless, Dickinson and his successors—and by that I mean many of us in administrative law—have worked to develop the transplant in newer, less efflorescent soil.

Dickinson defined “law” as “general rules which, when applied to the same facts, issue the same results.” (111) In other words, law “isolates particular facts from a great mass of others, binds them together with a conceptual label” and renders a decision based on the applicability of that label. (129) There is nothing glow-in-the-dark about this process. Legal concepts are not “spatial entities” with an “independent or inexorable existence of physical objects,” (135) but rather the products of human choice based on “public policy.” (131) Dickinson recognized that the hard question is deciding “which factor” shall have “critical importance” when we are sorting facts and competing concepts. (131)

So why should judges make these policy choices rather than political branches? Dickinson argued that judge’s law, ideally, offers certainty, is “grounded in what men consider justice,” and is part of a logically coherent system. (112–13) Legal order allows “thorough presentation and testing of issues” before rigorous, neutral adjudicators. (232) These general adjudicators, unlike administrators, can develop law based on the “broader considerations” beyond the particular problem facing an agency, thereby taking into account “the habits and attitude of mind of a whole community.” (234)

Sounding a Burkean note, Dickinson also argued that law “tends to make progress more solid, consistent, and cautious.” (233) Each generation is tempted to reorder society afresh and, while no opponent to reform, Dickinson warned that such efforts often result in “little beside a pathetic waste of good beginnings.” (233) To preserve “stable and consistent gains from these scattering efforts,” we need courts to connect and harmonize present reforms with past practice. (233)

Perhaps. It is unclear whether courts are best suited to identify what “men consider justice” or take the pulse of the community, even assuming the complexities of regulatory schemes register on the collective EKG. And while stability and coherence are important, if law is a residue of policy choice, one can ask whether judges are particularly good about cultivating systemic values in fractious political times. Even if they can, it is also fair to ask whether judges can evaluate the tradeoffs between those systemic values and more immediate, substantive demands animating agencies.

None of this is to say that Dickinson was obviously wrong. In fairness to him, moreover, he recognized that some questions will be more amenable to legal rules than others. Anticipating Legal Process approaches to administrative law, he argued that judicial wisdom depends on identifying types of questions that “admit of reduction to general rules” best announced by courts. (145) Just as contract

and property law may admit to more judicial supervision than tort law, the need and possibility for effective legal supervision will vary in pockets of the administrative state.

But it is also not obvious that he is right, at least on his own terms. For him, law is “little else than long-range and generalized policy” and, as evident in his praise of Justice Brandeis’s work in rate regulation cases, the judicial policy maker needs to combine the stabilizing virtues of traditional adjudication with economic acumen and a grasp of the complexity of a regulatory field. (218, 225) If not a Dworkinian Hercules, Dickinson’s ideal judge is a Voltron-like combination of Lemuel Shaw, Harold Leventhal, and Richard Posner.

### III.

In this respect, modern administrative law does not accept the entirety of Dickinson’s strong form of judicial review, but a substantial portion remains. Much of Dickinson’s analysis pertained to judicial review of orders in agency adjudications steered by little formal legislative guidance. In that context today, a more forgiving arbitrary-and-capricious standard of review governs such open-ended policymaking. Though there are arguments about how stringent such review is on the ground today, it is almost surely not as rigorous as, say, Judge Leventhal’s approach on the D.C. Circuit in the 1970s.

But in other areas, the Dickinsonian impulse remains alive. On agency procedures and decision-making processes—questions courts find closer to their wheelhouse—judicial supervision can remain vigorous, notwithstanding the occasional Supreme Court rebuke. Furthermore, judicial review of agencies’ legal findings remains one of the hottest areas of dispute in administrative law. There, rather deciding whether judges or administrators should build “out new ground for the operation of general rules and principles,” (206) courts usually seek to identify what long-range and generalized policy *Congress* put forth. Dickinson would certainly applaud *Chevron’s* dictate that courts enforce clear congressional instructions. It is less clear that he would accede to *Chevron’s* further requirement that courts defer to reasonable agency conclusions when legal questions are unclear. Rather, he appears to have embraced (or even anticipated) the pre-*Chevron* arrangement of giving courts the final say over law’s content while deferring to agency application of those norms to facts. (313)

Today, arguments about *Chevron’s* wisdom or strength turn on the distinction between “law” (for courts) and “policy” (for agencies): when a statute is unclear, *Chevron* purism suggests, resolving the uncertainty is a policy choice best left to politically accountable and technically expert agencies. On Dickinson’s terms, however, this dilemma is better understood as a conflict between law as “long-range and generalized policy” and short-term administrative policy, with the courts being superior at the former task. But if the long-range policy that is “the law” for Dickinson is unclear, we are back to the debate about whether the courts are any better about filling those gaps. Dickinson’s encomia for legal coherence and stability—echoed by more legalist administrative scholars today—may point toward robust judicial review, though his claims about the court’s special insight into substantive justice and communal common sense is more jarring in the disenchanting legal world we have inherited from the legal realists.

More generally, it is not clear that Dickinson himself, for all the policy-talk and dismissal of transcendental legal nonsense, pulled his second foot out from the past he claimed we’ve passed. He diagnosed the classical common law method as “a science and ‘mystery’ in the medieval sense” (87),

yet later waxed that law is “the endless but necessary quest for certainty.” (235) Legal principles (mysteriously?) “emerge” (170) from a run of cases, often unintentionally even before they “have been formulated in the express language of the court.” (330) Legal text, it appears, is but evidence of the law. He defended the preeminence of courts over agencies in developing the law by noting how the “point of view of the surveyor differs from that of an engineer.” (235) A surveyor does not make the landscape, but traces what he finds. This map is not the territory, but a symbolic declaration of a more concrete reality. We might need to revise the map, but only to refine the representation or respond to shifts in the contours beyond our control.

Over and again he refers to “the law” as a disembodied force, even as he elsewhere rejects the notion that it is anything more than artificial labels judges create to implement policy. And so do many administrative lawyers, judges, and scholars. Before we convict Dickinson of inconsistency, muddle-headedness, or being a man stuck between stations on history’s railway, we should recognize how much his tension is our own. Courts are to defer to agency interpretations of law, except when they are not supposed to (and there is an ever-developing common law on that meta-question). Even the late Justice Scalia, champion of the broad application of *Chevron* deference, was among the least likely on the Court to find the question of deference even relevant, given his faith in the determinacy of legal craft to resolve uncertainty. Members of polite society in administrative law circles do not cotton to Philip Hamburger’s pre-Realist assault on the administrative state. By the same token, however, many stop short of, say, Adrian Vermeule’s minimalism about the limits of legal reason.

One is tempted to say Dickinson’s thought—and mainstream administrative law today—is like a respectable, mainline congregation: denying the void without being embarrassingly enthusiastic about the religion. This need not be the same thing as bad faith in the philosophical sense, but one would expect that position to be an unsustainable one, for schools of legal thought and congregations alike. Yet Dickinson’s moderate legalism has had a tenacious hold on judges and scholars. It is a big tent and not all the congregants agree on everything, but there is no sign of the pews emptying anytime soon.

So perhaps we should look for an alternative, more charitable view of Dickinsonian administrative law. One way of understanding Dickinson is to see him adhering to a more modest, yet nonetheless classical, understanding of the common law tradition. In reading *Supremacy*, you would sometimes be forgiven for believing a straight line connected the thought of Coke to the legal realist’s cartoonish renditions of 19<sup>th</sup> century formalism: substitute out Langdell’s deduction from fixed axioms for Coke’s principles entrenched “from time out of mind,” but the transcendental method remains. But that would be an anachronistic reading of even a common law romantic like Coke, who would recoil at such a rationalistic interpretation of the practice.

Dickinson should have known better, and it seems he did. He closed *Supremacy* with a long quotation by Matthew Hale, who, along with his teacher Selden, offered a common law theory that recognized changes in the law with time. (358) As Gerald Postema [has explained](#) in his reconstructions of classical common law theory, for Hale and Selden it was *continuity* and *method* that defined the common law, not unchanged, ancient principles. Common lawyers, sensitive to the current texture of the law, would extend, develop, and even modify its principles to accommodate developments in society and its norms. They would do so through a traditionalist, artificial method of reason that would maintain coherence in legal doctrine and ensure doctrine was roughly congruent with the society’s shared sense of reasonableness.

This model of the common law judge coheres with Dickinson's role of judges in the administrative state. The court identifies stable principles that the community finds just and sensible and then consolidates and incorporates those norms into existing law. Whether judges are as suited to this role in, say, regulated industries as they are in contracts, is an open question, and Dickinson is careful to note that courts should withhold judgment and defer on matters unamenable to legal craft. It is also telling that much of the "common law" of administrative law today pertains to procedure and allocation of decisionmaking authority, matters that Dickinson (and Hart and Sacks) would say are quintessential lawyers' questions. Hence we argue about *Chevron's* domain, what is required for a reasoned agency explanation, and when agencies must engage in rulemaking. And, like common lawyers, we do so with little attention to the text of the Administrative Procedure Act itself.

Nor should we be surprised that critics of the administrative state have focused on, and have most successfully cultivated some judicial skepticism about, deference to agency's interpretations of statutes and regulations. The meaning of enacted legal texts, Dickinson might say, is just the very precipitate of policy and shared sense of justice that a judge seeks in common law adjudication. Furthermore, the interpretive methods judges use to identify or construct those meanings in unclear cases can also resemble the common law jurist's attempt to integrate the community's public policy into the broader legal fabric that precedes and surrounds it. Such faith in method may explain how Dickinson could be a *Chevron* skeptic notwithstanding his unwillingness to go as far as Hamburger in rejecting administrative authority.

John Dickinson's thought, and by extension much of mainstream administrative law doctrine and scholarship, echoes the classical common lawyer's faith in the artificial reason of the law—a reason whose method gives its practitioners tools to develop law with only indirect engagement in intractable moral disputes. Fitting an era of legislation, regulation, and even deeper skepticism about judicial wisdom on contested questions, this neoclassical common law shies away from making substantive law. Rather, its practitioners focus on the meta-law of procedure, reason-giving, interpretation, and allocation of decisional authority. Whether legal craft is any more determinate and less vexed at this rarified level than in the old, substantive tracts of the common law is a question for another time. Nevertheless, the lawyer's faith endures, even amid the bewildering complexities of regulatory state.