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Serial Litigation in Administrative Law: What Can Repeat Cases Tell Us about Judicial Review

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Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 **Colum. L. Rev.** 1722 (2011).

In *Deference and Dialogue in Administrative Law*, Emily Meazell takes up the topic of serial administrative law litigation. These repeated rounds of challenges and remands, which Meazell finds are particularly prevalent in contexts of risk regulation, provide a new lens on court-agency relationships. Meazell closely reviews several instances of such litigation, spanning topics as diverse as endangered species, potential workplace carcinogens, and financial qualifications of nuclear plant operators. She argues that such close examination reveals a process of dialogue, with agencies ultimately (if not immediately) responding to judicial concerns and courts in turn acknowledging administrative responses.

According to Meazell, serial litigation merits attention because it demonstrates that judicial review may not function as we think it does. In particular, Meazell flags two features of serial litigation that deserve particular note. The first is that agencies frequently considered new information and evidence on remand, even though that might entail greater effort and new rounds of notice and comment. She argues that serial litigation thus can provide an opportunity for agencies to refine their analyses and gain greater expertise over time. The second is that, despite their initial sometimes stern rejections of agency determinations, courts often ultimately took quite a deferential stance. From this Meazell concludes that, when viewed over the long lifetime of some of this litigation, hard look review resembles more the soft look of constitutional rationality review than the more searching scrutiny administrative law cases and scholarship claim it to be.

I agree with Meazell that the serial character of administrative law litigation merits greater scrutiny, and her careful case studies offer a great start. At a minimum, Meazell underscores (along with Wendy Wagner's recent investigation of the impact of judicial review on EPA rulemaking, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 **Admin. L. Rev.** 99 (2011)), the need to take into account what happens after a court reverses and remands in our assessments of the value and function of judicial review. I also appreciate Meazell's effort to examine the extent to which agencies and courts are responsive to each other's concerns and arguments, and the pattern she reveals—that it often takes repeated tries before agencies directly engage the issues flagged by courts—is striking. That pattern seems somewhat in tension with the standard ossification thesis, which argues that the substantial agency resources and time on the line in rulemakings means that agencies are *too* attentive to possible judicial concerns.

Still, I think it remains open whether the instances of serial litigation Meazell identifies actually demonstrate court-agency dialogue, in the sense of a meaningful "conversation in which the participants strive towards learning and understanding to promote more effective deliberation and outcomes." (111 Colum. L. Rev. 1722, 1773). To be sure, Meazell shows how agencies eventually often speak directly to the issues courts raise, and how courts frequently turn deferential when agencies do so. But the cynic in me was left wondering whether a more accurate description than court-agency dialogue is straightforward compromise, with both agencies and courts deviating from their real views of the best answer, perhaps significantly, in order to put an end to litigation that clearly has gone on way too long.

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