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THE GHOST OF *CROWELL V. BENSON* AND THE RESIDUAL ROLE OF JUDGES AND AGENCIES UNDER FEDERAL LAW

Linda R. Hirshman [1/]

I preface this address with the caveat that my work in the administrative law area is an outgrowth of the material I teach in my seminar on the federal courts. Accordingly, my experience and focus has been on the federal system, which has particular characteristics, such as the life-tenured, salary-protected judiciary, which translate only imperfectly into the state systems. Such as they are, the translations are two, I think: One, insofar as state constitutions are modeled on the federal, the separation of powers concerns are analogous. Two, insofar as the states have used as their model for the provision of judicial review of administrative decision-making, the federal Administrative Procedure Act, [2/] the concerns of the relative roles of administrators and judges may be compared between the systems.

With this caveat, there are, it seems to me, two major areas of inquiry in discussing these topics. One is the question of the overall legitimacy of the agency decision-making. This is the issue of the ghost of Crowell v. Benson. As I will ultimately conclude, haunting as the vision is, the courts are unlikely to resurrect Crowell to the point of killing off the governmental developments of the last fifty years. That being the case, the somewhat more interesting question is what the proper division of the business of decision-making should be between the two legitimate structures. This is the subject of my longer piece, "Postmodern Jurisprudence and the Problem of Administrative Discretion", [3/] and a subject I will address in abbreviated form today.

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2/ 5 U.S.C. Section 551 et seq. (1982).

3/ ___ Nw. L. Rev. ___ (1988) (forthcoming).

Crowell v. Benson [4] was, of course, the Supreme Court's most serious attack on the legitimacy of the administrative state. The agency involved happened to be the federal Employees' Compensation Commission, which was charged with enforcement of the federal employment compensation scheme for seamen. The ultimate federal authority to prescribe compensation rested on the workers' relationship to the navigable waters of the United States. While the Court declined to find that the entire agency scheme was unconstitutional as encroaching on the Article III powers of the federal judges, it did hold that the Court could review de novo not only the questions of law normally entrusted to a reviewing court but also the "constitutional facts" underlying the exercise of the agency's jurisdiction. (The Court exercised traditional review of the facts of damage, etc. for support in the agency's record.)

Although Crowell seemed to portend a serious restriction on the agencies in the name of separation of powers, in fact, the Court never followed up on the restrictive implications in the case, and the growth of the administrative state is now beyond cavil. To paraphrase the immortal words of former Supreme Court candidate Judge Robert Bork, one reason not to be afraid of the ghost of Crowell v. Benson is that once legal developments become sufficiently embedded in the society, the Supreme Court is not going to attack them broadside.

Although basically accepting these events, it is true that the Court has thrice in the last four years addressed the question of legislative encroachment on the Article III Courts, striking down the newly created bankruptcy bench in Northern Pipeline Construction Co. v. Marathon Pipeline Co., [5] but sustaining schemes to assign judge-like functions to non-Article III tribunals in Thomas v. Union Carbide Agric. Prod. Co. [6] and Commodities Futures Trading Comm'n v. Schor. [7] Northern Pipeline resulted from the creation of non-life-tenured/salary-protected judges to administer the bankruptcy system, which previously had been administered by

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4/ 285 U.S. 22 (1932).

5/ 458 U.S. 50 (1982).

6/ 473 U.S. 568 (1985).

7/ 106 S.Ct. 3245 (1986).

referees subject to de novo review by the federal district judges. Although the decision had the consequence of voiding the new bankruptcy scheme, what made the decision peculiar is that it involved the decision of a matter of contract, ordinarily subject to state law, and the two judges who concurred to make a bare majority of five rested their opinions solely on the invalidity of allocating a state law matter to a non-Article III tribunal.

The fragility of the Northern Pipeline decision became immediately apparent when, two years later, the Court addressed the issue again in Thomas. Thomas involved the assignment to an arbitrator of the value of data sharing among chemical companies trying to qualify their insecticides for federal approval. Although the value of the data closely resembles a trade secret, the Court found that it could be assigned away from the courts without violating Article III, because the legislation had already taken away the trade secret protection, and, in any case, the arbitration arrangement was essential to the functioning of the federal statutory scheme.

The Court further weakened the significance of Northern Pipeline in Schor. There, the statutory scheme offered people with a complaint against their commodities' brokers the option of pursuing reparations before an administrative tribunal or the federal court. Having opted for the tribunal, the customer found himself defending the brokers' counterclaim for breach of contract for commissions. Despite the analogy to the state contract claim in Northern Pipeline, the Supreme Court sustained the assignment to the agency, emphasizing the voluntariness of the initial decision to submit to the administrative agency and the lack of Congressional intent in the scheme to overreach at the expense of the courts.

These latter two decisions and the generally predictable behavior of the federal courts leads me to conclude that the legitimacy of the administrative state is pretty much beyond challenge either from this earth or the great beyond.

Having established your legitimacy, I turn to the question of more interest to me, of the proper role of the legitimate agencies and courts when confronted with the business of tribunals: finding fact, interpreting law and implementing social policy. As I indicated at the outset, once the legitimacy of agency decision-making under the Constitution is established, the remaining relationship develops largely by application of the federal Administrative

Procedure Act. [8] Under that scheme and the cases since the passage of the Act in 1947, the courts basically leave to the agencies the finding of fact; even when meddling in factual matters the court pays homage to the virtue of agency decision-making by allegedly directing its concern with the relationship of fact to conclusion. [9] The hard questions arise, it seems to me, in the areas of interpretation and policy-making. They arise, of course, because Congress' commands are imperfectly directive and produce the perennial problem of who is to supply the missing meaning.

Almost since the beginning of the administrative state, the precedents have reflected a duality, one line of cases favoring heavy deference to the agencies and another, simultaneous, inconsistent body of law advocating de novo judicial determination of the meaning of the statutory commands. The situation grew more pressing with the advent of deregulation, wherein agencies were found to be reversing their positions without any change in the wording of the statutory mandate. Confronted with the ultimate in statutory flexibility, theorists responded by advocating the revival of the non-delegation doctrine to force Congress to clarify the legislative will; a later school of thought advocated broad deference to agency decision-making on the theory that even an agency was more representative than a federal court. Like their counterparts in the area of judicial review of legislation, the jurisprudence scholars of administrative review thus greatly down-played the role of the courts.

The argument for extreme deference got a shot in the arm a couple of years ago when Justice Stevens made it the central theme of his decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. [10] Affirming the EPA's revision of its standard for calculating certain emissions under the Clean Air Act, the Court asserted that where Congress failed in its statute to address the specific question presented, the court would defer to any reasonable interpretation the agency put forth. Justice Stevens justified assigning the agency the role of statutory interpretation on the grounds that even an administrative agency

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8/ 5 U.S.C. Section 551 et seq. (1982).

9/ Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).

10/ 467 U.S. 837 (1984).

was more politically responsible than a life-tenured federal court.

I think this is a mistake. At least in the federal sphere, where the judges are protected from the political winds by the Constitutional requirements of life tenure and salary guarantees, the ultimate judgment on the permission and requirements of Congress' dictates should continue to rest with the courts. [11]

I make this contention for several reasons. First, while the cases I discussed in the beginning of this paper establish the legitimacy of the administrative state in face of separation of powers arguments, the threat to the continued separation of powers increases greatly if statutory interpretation, as well as fact finding and technical expertise are allotted to the agencies. Second, courts are by Constitutional mandate, [12] as well as by experience and training, suited to the task of wresting meaning from inadequately expressive texts. Third, the courts can play a role in adding to the legislative and administrative process a concern for the public-regarding nature of legislation which, [13] recent scholarship has shown to be particularly relevant. Finally, to ask courts to defer to an administrative reading of a statute the courts consider to be reasonable, but wrong, is strongly counter-intuitive, and recent scholarship has indicated, not surprisingly, that it's not happening. [14]

11/ It is, of course, the guarantees of Article III that mark the greatest distinction between the federal system, which has been the focus of my inquiry, and the state systems, which, like the state court systems, do the lion's share of the business of governing. Accordingly, the caveat in the text is not an insubstantial one.

12/ "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

13/ Fox, The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window, 61 N.Y.U.L. Rev. 554 (1986), citing D. Mueller, Public Choice (1979).

14/ Breyer, Judicial Review of Questions of Law and Policy, 1986 Admin. L. Rev. 363; Mikva, How Should the Courts Treat Administrative Agencies, 36 Am. U.L. Rev. 1 (1986).

This is not to say that the administrators have no role to play. Rather, their expertise, both technical and in their real world experience of the way particularly social or economic segments operate is critical to the court's enlightened execution of their task.

Conclusion

So, administrative law judges, I come to you with bad news and good news. The good news is that you're legitimate. The bad news is that you're not running the farm.