

# ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

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## Judicial Deference In A Post-Deregulation World

### Should Today's Courts Take A Harder Look?

#### Also In This Issue

- Reassessing the Rehnquist Court
- Promoting Uniformity in Pesticide Labeling
- The First Administrative Law Institute
- Review of Government 2.0
- Recap of the 2005 Spring Meeting

# Chair's Message



Randolph May

It seems such a short time ago that I wrote in my first column: "As we begin the new ABA year, I am privileged to lead the Ad Law Section and grateful for the opportunity." Now, as I write my last, I thank you again for the privilege of leading the Section.

In that first column, I said my goal was to help the Section accomplish what I see as its three core objectives: providing opportunities for professional education and career development; improving government administration and regulation; and providing a congenial forum to accomplish the first two objectives. With those objectives in mind, we have had an extremely busy year.

I won't recap here all of what the Section has done over the past twelve months. You can pull out your back issues of the *Ad Law News* for that. Instead, I wish to highlight just some of our recent activities so you can see how they meet our core objectives. At our Spring meeting, organized around the theme, "Administrative Law in the Twenty-First Century," we enjoyed stimulating panel discussions on federal, state, and interstate compact issues. And we were fortunate to have as special guests Philip Lader, former Ambassador to the Court of St. James's, and Bill Eggers, an acclaimed expert on government management. Based on his experience at the most senior levels of government, Ambassador Lader delivered a wide-ranging address on current governance issues facing Europe and the U.S. In this context, he underscored the importance of the Section's EU Administrative Law project as a vehicle for increasing trans-Atlantic understanding. Bill Eggers recounted lessons contained in his latest book, *Government 2.0: Using Technology to Improve Education, Cut Red Tape, Reduce Gridlock, and Enhance Democracy*, which is reviewed by former section chair Ron Cass elsewhere in this issue.

In addition to attracting a number of first-time member attendees, a large number of spouses and significant others attended the Spring Meeting. I hope this trend continues for the upcoming Annual Meeting and beyond, helping to foster a sociability that makes participation in our activities that much more enjoyable. Elsewhere you can read about the full range of Annual Meeting programs. Here I just highlight that Richard Epstein, esteemed University of Chicago law professor and prolific author, will be the guest speaker at our Section dinner.

Also in this issue you will find a full report on our first annual Administrative Law and Regulatory Practice

Institute. Although it may have been a bit bodacious to call the Institute the "first annual" from conception, I am now confident it will become a valuable yearly educational initiative. Jack Young, the Institute's program chair, deserves our thanks for a job well done.

We are completing the year with three more lunch programs, bringing to fifteen the number put on this year. In recent months, committees that had not been active for several years organized interesting and topical programs. This is the type of volunteer activity upon which the Section depends.

Indeed, in the end the success of an organization like this rests on the contributions of a large number of volunteers. I am pleased the Council approved my proposal to create a Chair's Outstanding Volunteer Award to acknowledge a Section member's volunteer activities. While the choice of the first winner won't be easy, this new award will serve not only to recognize the accomplishments of one deserving individual, but to signal to others that the volunteer efforts of so many do not go unnoticed and unappreciated.

As many of you know, the Section recently lost two outstanding leaders, Ernest Gellhorn and Tom Sargentich. Please take time to read about *their* contributions as Section *volunteers* in this issue. Both exemplified the highest standards of professionalism and personal integrity. As importantly, both warmly embodied the collegiality that is a Section hallmark.

Of this I am certain: Like so many of us, over the years Ernie and Tom found the Ad Law Section a special place in which they could make significant contributions to improving government administration and regulation, consistent with the rule of law values at the heart of our democratic republic. They also found a place in which a diversity of legal and philosophical perspectives is respected and encouraged.

Serving as editor of this magazine is another volunteer activity that should not go unnoticed. Bill Morrow deserves our thanks for his hard work on each issue.

Finally, I have no doubt that my successor, Eleanor Kinney, will be a wonderful leader of the Section, and I wish her the best. I'm sure she will enjoy your support. And she will have the support of Kim Knight, our Section Director, and our excellent staff. I know we could not have accomplished what we have this year without Kim's talent, initiative, and dedication. ○

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## ADMINISTRATIVE & REGULATORY LAW NEWS

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*The Administrative & Regulatory Law News* welcomes a diversity of viewpoints. From time to time, the editors may publish articles on controversial issues. The views expressed in articles and other items appearing in this publication are those of the authors and do not necessarily represent the position of the American Bar Association, the Section of Administrative Law & Regulatory Practice, or the editors. The editors reserve the right to accept or reject manuscripts, and to suggest changes for the author's approval, based on their editorial judgment.

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# Nominations



**Section Chair (automatic succession per bylaws): Eleanor D. Kinney.** Eleanor is the Samuel R. Rosen Professor of law and Co-director of the Center for Law and Health at Indiana University School of Law in Indianapolis. She has been a Section Council Member as well as Chair of the Section's Health and Human Services Committee. Her book on Medicare coverage disputes is a strong addition to the Section's publications program.



**Section Chair-Elect (automatic succession per bylaws): Daniel Troy.** Dan is a partner in the firm of Sidley Austin Brown & Wood. He is the former Chief Counsel of the Food and Drug Administration (FDA). Dan has been a co-chair of the Constitutional Law and Separation of Powers Committee and a Member of the Section's Council.



**Section Vice Chair: Michael Asimow.** Michael is a professor emeritus at the University of California at Los Angeles and co-author of a leading textbook on administrative law. He is a former liaison to the Section's Council for State Administrative Law and is completing a term as a Council Member. He is the editor and co-author of a new Section publication, *A Guide to Federal Agency Adjudication*; the drafter of a February 2005 ABA resolution on adjudication; a past chair of the Adjudication Committee; and a co-reporter on the EU administrative law project.

**Section Delegate (renomination of incumbent for 3-year term): Judy Kaleta.** Judy Kaleta is the Senior Counsel for Dispute Resolution for the U. S. Department of Transportation and the Acting Chief Counsel for the Federal Transit Administration. She is currently completing her first term as the Section's delegate. She is also a former member of the Council; has been program chair for a number of Section meetings, chair for Long Range Planning, and the Section representative to the ABA Commission on Women in the Profession; and played a major role in developing ABA resolutions.

**Budget Officer (renomination of incumbent): Dan Cohen.** Dan is Chief Counsel for Regulation at the U.S. Department of Commerce. In addition to serving as Assistant Budget Officer, Dan has served as chair of the Rulemaking Committee and as Program Chair for the Fall 2002 Meeting and other Section programs.

**Assistant Budget Officer: William Morrow.** Bill is the Executive Director and General Counsel of the Washington Metropolitan Area Transit Commission. He is currently the

Editor-in-Chief of the Section's *Administrative and Regulatory Law News* as well as a co-chair of the Section's Interstate Compacts Project and a former chair of the Transportation Law Committee. He is also a Certified Public Accountant.

**Secretary: James Conrad.** Jamie is an Assistant General Counsel at the American Chemistry Council. He currently serves as co-chair of the Section's Regulatory Policy Committee and has organized numerous educational programs for the Section. He is also serving on the Section's ad hoc group working to get ACUS refunded.

**Council Member (each serving three-year terms):**

**Nina Olson.** Nina is the National Taxpayer Advocate and serves as an advocate for taxpayers to the Internal Revenue Service and Congress. She currently serves as a co-chair of the Treasury, Revenue and Tax Committee and is about to become chair of the Ombuds Committee. Nina has also served as the chair of two committees in the ABA Tax Section.

**Michael Herz.** Michael is a Professor at the Benjamin N. Cardozo School of Law at Yeshiva University. He is currently a co-chair on the Rulemaking Committee and was vice-chair of the Section's *Blackletter Statement on U. S. Administrative Law* project. He also is co-editor of a recent addition to the Section's publication program arising out of that project, *A Guide to Judicial and Political Review of Federal Agencies*.

**Richard G. Stoll.** Dick is a partner in the Washington, D.C., office of Foley & Lardner. He is currently co-chair of the Section's Rulemaking Committee and is chair of the Sponsorship Committee. He has also served as chair and a member of the Council of the ABA Section of Environment, Energy and Resources (SEER) and has taught environmental law and policy at the University of Virginia.

**Ann Marshall Young.** Ann is an Administrative Judge with the U. S. Nuclear Regulatory Commission. Currently she serves as a liaison to the Section's Council for the Administrative Judiciary. She also co-chairs the Section's Adjudication Committee and worked closely with Michael Asimow on the recently adopted resolution on adjudication. In addition, she is an active member of the National Conference of the Administrative Law Judiciary.

**APPOINTED AT SPRING MEETING PURSUANT TO THE SECTION'S BYLAWS AND WITH THE CONSENT OF THE COUNCIL:**

**Council Member (one-year term; to fill a vacancy): Richard Parker.** Richard is a professor at the University of Connecticut School of Law. He is currently the co-chair of the Section's Committee on Regulatory Policy. He has also organized and/or participated in several Section programs and drafted Section comments on proposed OMB guidelines for regulatory analysis.

# The Dangerous Allure of Judicial Deference in Deregulated Industries

By Jim Rossi\*

It is tempting to treat all deference in regulatory law alike, but not all judicial intervention deals with the direct appellate review of agency decision making that predominates many discussions of administrative law. Economic regulation has its own kind of deference, reflected in specialized doctrines of regulatory law such as the filed rate doctrine. In a recent article, I use the term “deference trap” to describe the judicial reluctance to intervene in economic regulation disputes involving political institutions, such as regulatory agencies and states.<sup>1</sup>

For most of the twentieth century, courts rarely intervened in regulation of natural monopoly industries. Judges engaged in judicial review of regulatory agency decisions, such as the setting of utility rates by regulators following an adjudicative hearing, but deference characterized this type of review. When asked to intervene outside of the appellate review context, as in antitrust, contract and tort cases, as well as in constitutional challenges to state and local regulators, courts also generally declined to intervene. By-and-large agency decisions were not upset by the judiciary, which routinely deferred to the expertise and political accountability of economic regulators. Judges were never comfortable meddling in these complex and highly technical matters, which courts frequently lacked expertise and competence to resolve.

As industries are deregulated, public law continues to embrace a largely deferential attitude towards regulators. This comes at a serious cost. By embracing deference too broadly courts can easily eviscerate important doctrines of public law for regulated industries, leaving the judicial branch a mere bystander to many disputes. This can have particularly pernicious effects in deregulated industries such as electric power and telecommunications.

Deregulation challenges policy makers and courts to reevaluate many of the traditional public law doctrines that frame the process for defining and implementing the rules in competitive markets. In this brief essay I will discuss three vignettes which illustrate the potential negative effects of overboard deference in this context. First, the filed rate doctrine illustrates a strong judicial bias against intervention in private disputes, giving rise to strategic forum shopping opportunities in regulatory enforcement. Second, if public law is not mindful of the potential for mischief in state and local lawmaking, courts will readily fall into a deference trap when reviewing state or local regulation under the dormant commerce clause and state action immunity to antitrust enforcement. Third, federal preemption, as currently construed by courts, invites a deference trap which can create regulatory commons problems. Together, these vignettes illustrate how a strong norm of deference under traditional doctrines of regulatory law in deregulated markets will not be sufficient for competition policy to succeed. It is a propitious time for courts to re-evaluate the institutional bias against intervention in economic regulation disputes.

## I. Deference to Private Tariff Filings: The Filed Rate Doctrine

Under the filed rate doctrine, courts frequently defer to regulators and refuse to hear alleged violations of antitrust, tort or contract claims whose resolution would require a departure from a utility’s filed rate. When a court applies this venerable doctrine of utility regulation – and courts frequently do – the doctrine serves as a litigation shield for regulated utilities. The doctrine has a long history and has served many important purposes under traditional natural monopoly regulation, where the firm availing itself of a filed rate typically had been subject to a rate hearing. For example, with cost-of-service regulation the filed rate doctrine served to protect similarly situated customers against discrimination in the charging of rates.

As industries are deregulated, however, courts steadfastly continue to adhere to the filed rate doctrine, even where cost-of-service regulation no longer occurs. For instance, firms have successfully referenced filed rates to bar antitrust claims in the deregulated electric power industry. In *Town of Norwood v. New England Power Co.*, the U.S. Court of Appeals for the First Circuit allowed market-based rates to give rise to the filed rate defense. The court reasoned, “[i]t is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine” 202 F.3d 408, 419 (1st Cir. 2000).

The deference trap of automatic application of the filed rate doctrine to the partially deregulated electric power industry can lead to harmful results. With deregulated wholesale electric power markets at the federal level and various degrees of deregulation across the states, both the doctrine’s continued applicability

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<sup>1</sup> *Moving Public Law Out of the Deference Trap for Regulated Industries*, 39 WAKE FOREST L. REV. \_\_\_ (forthcoming 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=657202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=657202). The arguments in this article are elaborated at greater length in *REGULATORY BARGAINING AND PUBLIC LAW* (Cambridge University Press 2005), which addresses judicial intervention in emerging competitive markets.

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## The Dangerous Allure of Judicial Deference in Deregulated Industries

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and usefulness are increasingly suspect. Presumptive application of the filed rate doctrine by both firms and courts can cause affirmative harm for energy market development and policy, as overboard application of the filed rate doctrine may allow anticompetitive and otherwise illegal conduct to escape scrutiny altogether.

One example stands out as especially extreme. A recent U.S. District Court decision in Texas applied the filed rate doctrine in an astonishingly broad manner, precluding antitrust claims against energy suppliers in the deregulated Texas wholesale power market and leaving those harmed by market abuses without any legal or administrative remedy. *Texas Commercial Energy v. TXU Energy, Inc.*, \_\_\_ F.Supp.2d \_\_\_ (S.D. Tex., Corpus Christi 2004). Given that it is increasingly rare for both federal and state regulators to conduct rate hearings, the filed rate doctrine produces new opportunities for firms to strategically manipulate the regulator, taking advantage of such gaps in regulation.

By contrast, in a decision that is more mindful of regulatory gaps, the Ninth Circuit recently rejected any presumption that the filed rate doctrine applies to market-based rates. The court suggested that the filed rate doctrine can apply to FERC's market-based rates, but only if FERC does something more than make a cursory finding of no market power in accepting a rate filing. FERC also needs to exercise remedial authority to more actively monitor market-based rates for market abuses. If FERC does not do this, the Ninth Circuit panel suggested, "the purpose of the filed rate doctrine is undermined" and "the tariff runs afoul of ... the FPA." *Lockyer v. FERC*, 383 F.3d 1006, 1016 (9<sup>th</sup> Cir. 2004). In such a case, an enforcement gap – as in Texas – would exist and the filed rate doctrine could have dangerous effects on the enforcement of rules in emerging competitive markets.

Courts should generally refuse to apply the filed rate doctrine absent a rate

hearing, instead looking to other more accepted defenses (such as federal preemption and primary jurisdiction) where judicial intervention is not appropriate. As a defense in cases involving energy markets, the filed rate doctrine continues to serve an important purpose where three conditions are present: where nondiscrimination remains an important regulatory goal; where regulators possess the authority and in fact do evaluate costs and prices; and where regulators possess an adequate remedy for nondiscrimination. Cost-of-service regulation may have justified a presumption against the exercise of judicial authority in most cases, but absent evidence to the contrary in deregulated markets it must be presumed that the agency has not engaged in an extensive firm-specific evaluation of nondiscrimination.

### II. Deference to State Regulators: The Dormant Commerce Clause and State Action Immunity

The deference trap in regulated industries may also have implications for the formulation of state regulation. If courts are too deferential to state and local regulators, deregulated markets may result in more – not less – use of the political process to engage in socially harmful rent seeking. Doctrinally, concerns over such mischief in state and local lawmaking play out in the contexts of the dormant commerce clause of the U.S. Constitution and state action immunity from antitrust enforcement.

The "dormant" commerce clause, derived from the Commerce Clause of the U.S. Constitution, limits the power of a state to enact barriers to interstate commerce that are blatantly discriminatory against out-of-state businesses, or which have the effect of bringing about such discrimination. As more robust interstate markets develop in electric power, deference to state and local regula-

tors under the dormant commerce clause can have obviously harmful effects.

For example, the dormant commerce clause may preclude a state from refusing to site a power transmission line for purposes of protecting its incumbent utilities. Indeed, such a challenge was brought when Connecticut's Attorney General was successful in delaying the operation of a new transmission line across the Long Island Sound, from New Haven, Connecticut to Long Island, New York. The doctrine also may prohibit a state or local government from siting a power plant to insulate incumbent firms from competition. Such a case was presented in Florida, when a new competitor was denied the opportunity to apply for a siting license because the project was not sponsored by an in-state utility or serving primarily Florida retail customers. *Tampa Electric Co. v. Garcia*, 767 So.2d 428 (Fla. 2000).

State action immunity suspends federal antitrust enforcement under the Sherman and Clayton Acts – statutes designed to enhance competition and free trade norms – where a state actively supervises the private activity. While the dormant commerce clause is pro-competitive (and hence anti-protectionist) in spirit, state action immunity from antitrust enforcement is seemingly pro-regulation, presenting an interesting apparent contrast in goal and approach.

Given state action immunity, and regulatory rate hearings at the state level, price-regulated public utilities (including electric and telecommunications monopolies) have long escaped the scrutiny of antitrust enforcement for their regulated activities. Rate proceedings served to police concerns with the exercise of market power. With deregulation, however, there is widespread recognition that antitrust laws may play an increasingly important role in deregulated industries, such as telecommunications, electric power, and natural gas. To the extent state regulation is not comprehensive in a

deregulated industry, immunity from antitrust enforcement must be approached with extreme caution.

State action immunity – once widely taken for granted by firms in the electric power and telecommunications industries – should also no longer automatically bar antitrust suits in utility industries. Unfortunately, courts have not taken a principled approach to deciding when to suspend state action immunity in utility industries. The Ninth Circuit has carefully assessed the degree of state oversight necessary for state action immunity, but decisions from other circuits are inconsistent with a careful evaluation of state oversight; the Eighth, Tenth and Eleventh Circuit have granted state action immunity even where state regulators had little or no scrutiny over private activity in deregulated electric power markets.<sup>2</sup>

A principled approach to state action immunity in the context of economic regulation would not accept state regulation at face value as providing for immunity from antitrust enforcement. For example, if a state legislature deregulates retail electric power markets but provides for no market rule enforcement mechanism, antitrust law should apply even where the state legislature purports to exempt firms in that state from antitrust challenges. Strong judicial deference in the state action immunity context would actually encourage more mischief in lawmaking, as private firms would be encouraged to lobby for state and local exemption from antitrust enforcement.

At a minimum, state action immunity requires a meaningful evaluation of whether state or local regulators actively supervise private activity in ways that are co-extensive with the pro-competitive goals of the antitrust laws. As with the filed rate doctrine, meaningful supervision by a regulator is necessary. State rate hearings should generally qualify for immunity, but absent at least this degree of supervision

no antitrust state action immunity should be extended in deregulated markets.

### III. Deference to Federal Regulators: Federal Preemption

One final area in which judicial deference may have pernicious effects for economic regulation involves judicial deference to the authority of federal regulators, frequently at the expense of state and local solutions to regulatory problems. Under the Chevron doctrine, which federal courts frequently invoke to defer to reasonable agency interpretations of law, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), a federal agency's construction of its jurisdictional statutes is generally upheld. This type of deference can lead to sweeping federal preemption of some or all aspects of state and local regulation of competition policy.

If federal agency jurisdiction over problems were exhaustive, the judicial willingness to preempt state and local regulation would not present any barrier to competition policy at all. However, in some contexts the authority of federal regulators is limited by Congress. For example, under the Federal Power Act, FERC regulates wholesale sales of electric power, but has no jurisdiction over retail sales or over the decision to site transmission lines and power plants – even those that may be built to sell power in deregulated wholesale power supply markets. Since often federal and state regulators share turf, jurisdictional commons may create problems of regulatory inaction. For example, in the context of California's failed deregulation plan, federal regulators blamed California's retail price cap as a source of the failure of its competitive policies, while California regulators blamed FERC for skyrocketing power procurement costs due to FERC's failure to impose a price cap on wholesale power sales.

In addition to deferring to federal regulators where congressional grants of authority are ambiguous, courts routinely defer to state regulatory processes in the context of economic regulation. The result of broad deference in interpreting ambiguous federal statutes and regulations is to presumptively favor imperfect federal

solutions while largely ignoring the decision making process of states.

A different public law approach would be not to embrace automatic deference to both federal and state systems in this context. Where Congress has failed to enact clear statutes – and Congress certainly is not the institution on which the success of deregulated markets should hinge – federal courts have the power to nudge states towards action by empowering state regulators to take into account federal goals as they make their decisions, even absent explicit state legislative authorization.

For example, one emerging barrier to the development of interstate markets in electric power is state veto over the siting of transmission lines and siting of generation facilities which would supply power in deregulated markets. As others have chronicled, in many states stagnant siting statutes do not authorize state or local regulators to consider national or regional concerns, effectively inviting regulators to avoid opening up their network access facilities to out-of-state competitors.<sup>3</sup> One recognized barrier to interstate power markets is state legislatures, which may lack any institutional incentive to modify old regulatory statutes adopted with a different regulatory model in mind.

To the extent the problem is stale state law, federal courts can draw on preemption principles to overcome the impasse. Rather than deferring to state and local siting laws, federal courts could authorize state or local siting boards to take into account federal goals in interstate transmission markets. The very same preemption principles that courts embrace in evaluating a federal agency's jurisdiction could be put to use in a different way – deferring to clearly articulated national or regional goals, but in a way that authorizes state or local executive actors to make important regulatory decisions, even where delegated authority under state law is stale.

### CONCLUSION

Together, these three examples illustrate the danger of blanket judicial deference to political institutions and states as new

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<sup>2</sup> As is discussed in Jim Rossi, *Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism*, 83 WASH. U.L.Q. (forthcoming 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=669801](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=669801).

<sup>3</sup> Ashley C. Brown & Damon Daniels, *Vision Without Site; Site Without Vision*, ELECTRICITY JOURNAL, October 2003, at 23.

# William Rehnquist, The Rehnquist Court, and Administrative Law

By Michael Herz\*

In January 2005, William Rehnquist marked 33 years on the Supreme Court. Just about everyone expects that O.T. 2004 will be Chief Justice Rehnquist's last. As the assessments of his work and that of the Rehnquist Court begin, it seems safe to assume that not many will focus on administrative law. Administrative law has hardly been a preoccupation of the Chief Justice, nor is it an area in which the Rehnquist Court has made striking or distinctive contributions. Yet an examination of Justice Rehnquist's own administrative law opinions, as well as a review of the Rehnquist Court's administrative law jurisprudence, can tell us something useful about both the individual and the institution.

## Alternative Working Hypotheses

Consider two possible starting points for considering the administrative law decisions of the Court. The academic literature on the Rehnquist Court, and much of the coverage in the press, portrays the Court as overconfident, arrogant, undeferential, and too fond of its own power. The sense one gets is that the Court, like some suspiciously successful athletes, has bulked up on steroids,

becoming more powerful and muscular than is natural. The Court holds laws unconstitutional at a breathtaking rate, refuses to defer to other governmental actors, and trumpets its authority to "say what the law is." This methodological hubris is combined with an obsession with federalism and a tendency toward politically conservative positions: pro-business, anti-criminal defendant, and anti-civil rights.

What sort of administrative law decisions should we expect from such a Court? It would insist on deciding legal questions for itself and define that category expansively. It would second-guess agencies on non-legal issues as well, scrutinize agency fact-finding, be dubious of claims of agency expertise, narrowly construe statutory or constitutional limits on its own authority to review agency action, and hear a lot of cases. Such a Court would be hostile to agency regulations that preempt state law. And its raw political commitments suggest a preference for the market over government regulation that would make it quick to set aside agency regulations.

Alternatively, one might predict the Rehnquist Court's administrative law jurisprudence by examining the administrative law opinions of William Rehnquist himself. This can be quickly done, for there are so few such opinions. Justice Rehnquist wrote only the rare opinion in an administrative law case. Once Chief Justice Rehnquist began assigning opinions, that trickle slowed to a drip. Four important and paradigmatic opinions do stand out, however. First, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,<sup>1</sup> "the Benzene case," Justice Rehnquist, writing only for himself, argued that the Occupational Safety and Health Act ("OSHA") was an unconstitutional delegation of legislative authority to the executive branch because Congress had failed to set out an

intelligible principle to guide or limit agency discretion. Second, dissenting in part in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*,<sup>2</sup> the airbags case, Rehnquist argued against "hard look" review and asserted that the Court should respect the challenged deregulatory action as the product of a popular mandate expressed in a presidential election. Third, in *Heckler v. Chaney*,<sup>3</sup> Rehnquist wrote the opinion for the Court holding that agency inaction, at least with regard to enforcement, is presumptively unreviewable. And fourth, Justice Rehnquist wrote for a unanimous Court in *Vermont Yankee Nuclear Power Corp. v. NRDC*,<sup>4</sup> which brought an end to the lower courts' development of a common law of administrative procedure that went beyond the requirements of particular statutes or the Constitution.

Each of these opinions reflects a hands-off conception of judicial review of agency action, displays a skepticism that there are "right" answers to questions of value or politics, and looks to electorally accountable officials to resolve such questions. Significantly, each arises in a setting in which law gives out; Rehnquist's consistent message is that if there is "no law to apply" then there is nothing for a reviewing court to do.

So we have two possible starting points from which to analyze the Rehnquist Court's administrative law jurisprudence. William Rehnquist's own prominent administrative law opinions lead us to expect the Court largely to leave agencies alone; call it the "hands-off" approach. Much recent literature on the contemporary Supreme Court leads us to expect a much more aggressive, second-guessing, and possibly result-oriented jurisprudence; call it the "judicial hegemony approach." The Court's actual decisions have been much closer to the first model.

\* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. This is a much-shortened version of *The Rehnquist Court and Administrative Law*, 99 Nw. L. Rev. 297 (2004).

<sup>1</sup> 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring) (setting aside workplace safety standard for benzene).

<sup>2</sup> 463 U.S. 29, 57 (1983) (Rehnquist, J., concurring in part and dissenting in part).

<sup>3</sup> 470 U.S. 821 (1985) (holding that FDA's decision not to assert jurisdiction over drugs used by states to administer lethal injections for executions was not subject to judicial review).

<sup>4</sup> 435 U.S. 519 (1978) (holding that agency regulation was not procedurally invalid, despite agency's failure to allow an evidentiary hearing with cross-examination, since neither the Constitution nor any statute required such a procedure).

## Scope of Review

When Rehnquist became Chief Justice, the Court had just decided the hegemonic *State Farm* and the hands-off *Chevron*. At the time, *State Farm* seemed a defining moment; *Chevron* was ignored. But in the ensuing two decades, it is *State Farm* that has been invisible. By my count, the Supreme Court has cited *State Farm* only 25 times since Rehnquist became Chief Justice, and then almost always in a dissent, or only to be distinguished, for a pabulum proposition, or in a mild and revisionist manner. Its unwillingness to undertake hard look review can be seen, for example, in *Verizon Communications v. FCC*,<sup>5</sup> in which the Court, over Justice Breyer's lone, Leventhalian dissent, essentially rubber-stamped an agency decision. Or *Department of Transportation v. Public Citizen*,<sup>6</sup> in which the lower court had demonstrated just how hard a "hard look" can be, but the Supreme Court engaged in no such fact-intensive scrutiny, holding instead that the decision was not, and could not have been, arbitrary and capricious as a matter of law.

In contrast, *Chevron* has proved the kudzu of administrative law. And its basic posture is one of deference rather than assertiveness. The hegemonic Court

might have insisted that the judiciary's "duty to say what the law is" extends equally to statutes and the Constitution. But *Chevron* shows the Court to be much less protective of its turf with regard to the former. Furthermore, in requiring judicial acceptance of agency interpretations, the Court is, it says, following a congressional directive. So the Court is not only deferring to agencies, but doing so because Congress said to: two doses of modesty for the price of one.

Now, this portrait requires some qualifications. For one thing, it is hard to take the congressional delegation theory of deference at face value. More important, the Court is not actually as deferential to agencies as all the fuss about *Chevron* would make it seem. Often the Court cites *Chevron* but stays within step one and does not defer;<sup>7</sup> sometimes it does not cite *Chevron* at all, even when upholding the agency;<sup>8</sup> and sometimes it cites *Chevron* and gives lip service to deference, but interprets the statute completely on its own.<sup>9</sup> In short, there is a gap between the Court's doctrine, or its ideology, and its practice. This is only a gap, however, not a chasm.

## Justiciability

Limits on justiciability are direct limits on judicial power. Accordingly, a hegemonic court would have a narrow understanding of justiciability bars. In contrast, a hands-off court ought, in principle, to limit access to the courts in the first place. In general, the Rehnquist Court has not expanded, and to some extent has narrowed, the availability of the judicial review.<sup>10</sup> The few administrative law opinions that Chief Justice Rehnquist has assigned to himself have all been in cases holding agency action unreviewable.<sup>11</sup>

As with regard to *Chevron*, the surface appearance of judicial moderation is somewhat misleading. In particular, the Court's hands-off approach can be selective, more often closing the door to those seeking more stringent regulation than those seeking laxer regulation. The most prominent instance of this asymmetry occurs with regard to standing; as I discuss below.

## Regulatory Policy

The Rehnquist Court generally, and its five more conservative members in particular, are often perceived as pro-market, pro-business, and antiregulation. Strikingly, those views are invisible where one would most expect to see them—*viz.*, in direct review of agency regulations.

The Rehnquist Court has operated during a period of profound debate about regulatory policy, but one would not know it by reading the Court's opinions. For example, the phrase "cost benefit analysis" does not appear in the U.S. Reports except in occasional informal use in nonregulatory settings such as procedural due process. The Court's federalism opinions are virtually silent about the supposed regulatory advantages of decentralization. Indeed, an important premise of the Court's federalism religion is that decentralization and multiple jurisdictions are valuable precisely because questions of policy do not have single right answers. The Court's agnosticism about regulatory policy was on strong display in *American Trucking*.<sup>12</sup> Though much anticipated, the decision proved an inconsequential nonevent, which is exactly the point. The decision's very modesty underscores the hands-off model of the Court and undercuts the judicial hegemony model.

The strongest counter example is *Brown & Williamson*,<sup>13</sup> which set aside the FDA's effort to regulate tobacco cigarettes and is seen by many as an example of pro-industry, anti-regulation judicial activism. It is certainly suspicious that in this case all the Justices abandoned their usual methodological commitments. The convenient methodological shifts do suggest that the result was driven by the individual Justices' sympathy, or lack thereof, toward the FDA's undertaking.

The trickier question is whether an anti-regulatory agenda is reflected in the indirect consequences of doctrines that are neutral on their face. For example, some see *Chevron* as a tool for furthering the Court's anti-regulation policy goals.<sup>14</sup> It would be such if the White House were always in Republi-

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<sup>5</sup> 535 U.S. 467 (2002).

<sup>6</sup> 124 S. Ct. 2204 (2004).

<sup>7</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>8</sup> See, e.g., *Pub. Lands Council v. Babbitt*, 529 U.S. 728 (2000).

<sup>9</sup> See, e.g., *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (upholding the agency, and invoking *Chevron*, but deciding entirely on the basis of its independent reading of the statute).

<sup>10</sup> See, e.g., *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803 (2003); *United States v. Bean*, 537 U.S. 71 (2002); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

<sup>11</sup> See *McConnell v. FEC*, 124 S. Ct. 619 (2003); *Raines v. Byrd*, 521 U.S. 811, (1997); *Dalton v. Specter*, 511 U.S. 462 (1994); *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991); *Webster v. Doe*, 486 U.S. 592 (1988).

<sup>12</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

<sup>13</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>14</sup> Linda R. Cohen & Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 69 S. CAL. L. REV. 431, 460-61, 474-75 (1996).

## The Rehnquist Court and Administrative Law *continued from previous page*

can hands. Since it is not, then we should look for “no-deference” messages during the Clinton years, and then a rediscovery of deference during the Bush presidency. Yet there does not seem to be such an ebb and flow. On the doctrinal level, if anything, the pattern has been the opposite: The most significant doctrinal pruning of *Chevron* occurred in *Mead*,<sup>15</sup> which involved a Bush administration agency. And the one serious effort to tabulate the Court’s decisions found no decline in deference signals during the Clinton administration.<sup>16</sup>

The strongest argument that an anti-regulatory policy preference is reflected in a facially neutral doctrine can be made with regard to standing. All the justices tend to be more receptive to standing for interests they favor politically than those they oppose; the conservative justices slightly outnumber the liberal ones; and the liberal ones are generally more inclined to find that standing exists. As a result plaintiffs challenging government regulation as excessive are more likely to have access to the courthouse than are plaintiffs challenging the government regulation as inadequate. The

Court has also been hostile to private enforcement of regulatory statutes, even when Congress has created an explicit cause of action or citizen suit provision. The most prominent such case is *Lujan v. Defenders of Wildlife*.<sup>17</sup> And yet . . . in the case that could have meant the death knell for citizen suits, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,<sup>18</sup> the Court stepped back from the brink. Had *Laidlaw* come out the other way, the result would have been dramatic and its impact enormous. As it is, the Court’s restrictions have been meaningful and important, but still at the margin.

The subtlest anti-regulatory aspect of the Court’s standing decisions concerns the hurdles faced by regulatory beneficiaries.<sup>19</sup> *Lujan* explicitly articulates a double standard for regulated entities and regulatory beneficiaries.<sup>20</sup> *Lujan* has not transformed standing doctrine, but it does mean the role of the courts in policing administrative implementation will be one-sided, serving to correct overregulation more than underregulation.

As usual, then, the Court’s bark is worse than its bite. It has not followed through on the most ferocious implications of its opinions. The standing restrictions advance an antiregulatory agenda only indirectly, operating at the meta-level, in the arena of procedure rather than substance.

A final example of an arguable anti-regulatory doctrine can be found in the Rehnquist Court’s preemption decisions. Unexpectedly, the Court has been rather quick to find state regulation preempted by federal statutes.<sup>21</sup> There is some tension between these decisions and the preoccupation with federalism at the constitutional level.

Almost by definition, the plaintiffs in these cases are business interests that are unhappy with state regulations that are stricter than their federal counterparts. Therefore, one might explain these decisions as reflecting the Court’s pro-business, anti-regulatory leanings, which trump its more abstract states’ rights leanings. This

explanation cannot be disproved. However, it seems an oversimplification.

Some additional light is cast by thinking of these as administrative law cases. Preemption claims often involve a set of highly detailed federal regulations. In these instances, if the Court finds preemption, it is not merely rejecting state laws or protecting business from regulations or liability. It is also preserving the authority of a federal agency. In this respect, these decisions are one more instance of the Court’s willingness to let agencies do their job.<sup>22</sup>

### Nondelegation

From time to time, it seems that the Court may actually give teeth to the nondelegation doctrine, as Justice Rehnquist’s opinions in *Benzene* and *Cotton Dust* urged. Yet it never happens.<sup>23</sup> The Rehnquist Court keeps rejecting the invitation to do what it is we are so often told that it likes to do: throw its weight around, refuse to defer to Congress’s judgment, strike down federal statutes with abandon, and return to a pre-New Deal Eden. Like its predecessors, the Rehnquist Court accepts broad delegations of legislative authority. If it differs from its predecessors, it is in a moderately careful insistence that the delegation is to the agency, not to the judiciary. In this, again, it is less aggrandizing, not more.

At least two factors seem to be at work here. The first is simply an assessment of the merits; the Justices have concluded that a nondelegation doctrine with teeth would be unmanageable and unenforceable in a consistent way. Also important, though, is that the nondelegation doctrine enhances the authority of agencies at the expense of Congress. The Court seems not unhappy with such a shift.

It is often said that the nondelegation doctrine has evolved into an interpretative canon under which the judiciary will read into the statute details Congress did not put there so as

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<sup>15</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>16</sup> Matthew C. Stephenson, *Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies*, 56 ADMIN. L. REV. 657, 688-96 (2004).

<sup>17</sup> 504 U.S. 555 (1992).

<sup>18</sup> 528 U.S. 167 (2000).

<sup>19</sup> A useful description is Cynthia Farina, *Standing*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 17, 44-48 (John F. Duffy & Michael Herz eds. 2005).

<sup>20</sup> *Lujan*, 504 U.S. at 561-62.

<sup>21</sup> See, e.g., *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgt. Dist.*, 124 S. Ct. 1756 (2004); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996).

<sup>22</sup> This is the explicit message of Justice Breyer’s concurrence in *Bates v. Dow Agrosiences*, 125 S. Ct. 1788 (2005).

<sup>23</sup> See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472-74 (2001); *Loving v. United States*, 517 U.S. 748 (1996); *Mistretta v. United States*, 488 U.S. 361 (1988).

# Pesticide Litigation and State Law After *Bates v. Dow Agrosciences*

By Alexandra B. Klass\*

Every year, nearly 5 billion tons of pesticides are intentionally applied to the American landscape. Pesticides have eradicated deadly diseases worldwide and allowed the United States to become an agricultural giant, but have also created a significant risk to human health and the environment. The high stakes at issue have caused the federal government to create a comprehensive system of pesticide regulation, which has been subject to a significant amount of litigation.

The bulk of this litigation has tended to fall into two distinct categories. The first category consists of claims by pesticide users against pesticide manufacturers for personal injury or damaged crops where the key issue often involves whether such claims are preempted by the federal pesticide law – the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”). The second category of cases generally involves state common law claims by non-pesticide users against pesticide users (usually neighboring landowners or aerial pesticide applicators), for property damage, crop damage and/or personal injury and relies little on FIFRA preemption principles. This article discusses developments in pesticide law that can promote federal uniformity regarding pesticide labeling while utilizing recent Supreme Court developments to enhance the claims available to obtain relief for pesticide damages.

## Pesticide Use and Pesticide Law

A “pesticide” is defined by federal law as any substance intended for “preventing, destroying, repelling or mitigating any pest” and any substance intended for use as a “plant regulator, defoliant, or desic-

cant.” As of 2004, there were over 1,000 active chemical ingredients being formulated for nearly 20,000 registered commercial pesticides. While many in the agricultural sector give much of the credit for the enormous increase in agricultural productivity in the 20<sup>th</sup> century to pesticide use, others point to the serious adverse impacts of pesticides on human health and the environment. The struggle to balance the risks and benefits of pesticide use has been at the core of FIFRA since its enactment, and continues today.

FIFRA’s primary provisions create and administer a federal, uniform system of registering pesticides. A pesticide cannot be manufactured, distributed or imported until it is registered and approved by EPA. The EPA administrator approves the registration if, among other things, it will perform its intended function when used appropriately without “unreasonable adverse effects on the environment.” FIFRA defines “unreasonable adverse effects on the environment” as “. . . any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide . . .” Precisely because the purpose of pesticides is to kill living things that are part of the environment, EPA’s major policy function is to balance the “collateral damage” against the benefits of pesticide use.

FIFRA defines the term “label” as the written, printed, or graphic material attached to the pesticide or any of its containers or wrappers. EPA review and approval of the “label” to accompany the pesticide is a major component of the pesticide registration process. Because the label sets the conditions under which the pesticide can be used without causing unreasonable adverse effects on the environment, any departure from label requirements constitutes pesticide misuse and is subject to enforcement.

FIFRA provides that a state may regulate the sale or use of any federally-registered pesticide but may not permit any sale or use prohibited by FIFRA. States may ban completely certain pesticides or place additional restrictions on use. The primary area in which FIFRA prohibits state involvement is labeling. In a section entitled “Uniformity,” FIFRA provides that a state “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.” The question of which state actions (whether actions by state agencies, jury verdicts or judicial decisions) are (or should be) subject to preemption under this provision as a result of the Supremacy Clause of the U.S. Constitution has fueled significant litigation.

## Pesticide Damage and Preemption

An obvious consequence of FIFRA’s balancing of benefits and “unreasonable” adverse effects on the environment is scores of individuals, companies and natural areas that are adversely impacted by legally registered pesticides. These injuries take the form of lost crops, loss of organic certification, loss of species, degradation of air, soil and water, significant personal injury and death. A large number of these cases are brought by pesticide users against pesticide manufacturers and claim that additional warnings on the label or other actions that should have been taken by the manufacturer would have prevented the harm. These cases are generally heard in federal court (as a result of diversity jurisdiction) but nearly always rely on state tort theories because, unlike some other federal environmental statutes, FIFRA does not include a private right of action for damages or injunctive relief. These cases all

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## Pesticide Litigation

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involve whether state claims for pesticide damages are preempted by FIFRA's prohibition that a state shall not impose any requirements for labeling "in addition to or different from" FIFRA.

Since the early 1990s, as a result of a Supreme Court decision involving a federal labeling statute similar to FIFRA, federal courts of appeal nationwide have applied FIFRA preemption broadly to hold that most state tort law claims against pesticide manufacturers were preempted by FIFRA. The rationale behind these decisions was that common law claims for damages might cause manufacturers to change their product labels to avoid future lawsuits, thus creating a requirement "in addition" to federal labeling standards. Some, but not all, appellate courts applied FIFRA preemption so broadly as to hold that even state laws that allowed damages for violations of FIFRA's own provisions were subject to preemption.

This extremely broad view of FIFRA preemption came to an end on April 27, 2005, when the U.S. Supreme Court released its decision in *Bates v. Dow Agrosciences*. *Bates* involved claims by Texas peanut farmers for crop damage caused by the herbicide "Strongarm." The plaintiffs claimed that Dow knew or should have known that the herbicide would stunt the growth of peanuts in soil with a particular pH level and asserted numerous state law claims including strict liability, negligence, fraud and breach of express warranty. The Court of Appeals for the Fifth Circuit interpreted the scope of FIFRA preemption very broadly to hold that FIFRA preempted all of the state law claims because a judgment against Dow might induce it to alter its EPA-approved product label and thus would impose a requirement different from or in addition to that under FIFRA in violation of federal law.

The Supreme Court reversed. In an opinion by Justice Stevens, the Court stated that appellate courts across the country had been reading FIFRA's prohibition on state labeling requirements too broadly. The Court confirmed that

FIFRA may preempt common law claims for damages as well as affirmative state laws and regulations, but that it was necessary to determine the *scope* of that preemption. The Court stressed that FIFRA preempted only requirements relating to "labeling or packaging" that were "in addition to or different from" those required under FIFRA. Thus, common law rules that are consistent with federal requirements (i.e., allow for damages for violations of standards consistent with federal requirements) are not preempted. The Court noted that private, state remedies that enforce federal misbranding requirements would aid, rather than hinder, FIFRA and should be encouraged.

### Using FIFRA to Promote Uniformity and Encourage Creation of New Causes of Action for Pesticide Damages

Standing in contrast to cases brought by pesticide users against pesticide manufacturers are claims by non-pesticide users against pesticide users. Plaintiffs in these cases seek damages for lost crops, loss of organic certification, loss to bees and other animals and personal injury under various state common law claims. These cases often present classic cases of disputes over competing land uses (e.g., residential versus agricultural). In contrast to the claims against manufacturers discussed above, the claims by non-pesticide users against pesticide users are heard almost exclusively in state court and rarely discuss FIFRA, preemption or label compliance. Moreover, these cases tend to rely heavily on negligence theory. The reliance on negligence without reference to unifying principles of FIFRA and the EPA-approved label often results in a lack of consistency of analysis within and among jurisdictions and significant uncertainty for litigants. This article proposes that there are FIFRA uniformity principles that can be used to help provide more coherency in these cases without dimin-

ishing the ability of plaintiffs to obtain relief for pesticide damages.

Although cases involving conflicting land uses relating to pesticides are typically areas reserved for state courts drawing on their own state's jurisprudence, it is a mistake to ignore FIFRA and EPA's delegated role in setting the standard of care for pesticide registration and use. Relying on an amorphous common law negligence standard apart from the pesticide label provides little guidance to pesticide sprayers and landowners attempting to use legal pesticides on their own property and also gives insufficient information to litigants regarding what types of expert testimony or other evidence will be necessary to establish liability.

By contrast, using the label to establish the standard of care for negligence claims provides predictability for both sides and is consistent with EPA's delegated role under FIFRA. If a plaintiff is harmed by the pesticide use of another party, the plaintiff can go to the label and build his or her negligence case around the requirements of the label – to the extent the weather conditions were inappropriate for spraying or directions relating to how, when, and where the pesticide should be sprayed were ignored, the defendant would be liable under a theory of negligence per se. To the extent the defendant followed all relevant label directions, it would be entitled to a presumption that its conduct was reasonable. This presumption could be rebutted by a showing that the label did not expressly regulate the conduct in question. This analysis would have no impact on a court's analysis of claims for intentional torts or strict liability which do not turn on reasonable conduct. In this way, the parties and the court can look to the label to help set the standard of care, providing uniformity and predictability among users and victims of the same pesticide nationwide and fulfilling FIFRA's goals.

More important, stepping away from litigants' historic reliance on negligence allows one to posit that traditional claims of intentional trespass and private nuisance are better suited than negligence to

balance benefits and harms of pesticide use on a local level. Trespass, of course, is any intentional invasion of another's property without authorization or privilege by law. Generally, the plaintiff need not prove that the defendant intended to commit a trespass, but only that the defendant intended to commit the act (i.e., the spraying of the pesticide) and the act was done with knowledge to a substantial certainty that it would result in the introduction of the substance onto the plaintiff's property. Thus, there is no reason that evidence of pesticide residues on neighboring land cannot constitute an intentional trespass where it is shown that, based on wind or other conditions, the pesticide was substantially certain to

invade the plaintiff's property. In such a case, the pesticide user's compliance with the label is irrelevant – no breach of a duty of care is required for liability.

Likewise, in the many cases in which a plaintiff alleges pesticide-related damages in the absence of a trespass, private nuisance is a better vehicle than negligence to balance individual circumstances without detracting from the nationally uniform label standards mandated by FIFRA. Significantly, intentional nuisance is actionable even in the face of reasonable care (here, compliance with the label), if, because of nearby residential areas, endangered species, protected waters or other local factors the court may consider, the use of the pesticide is simply not appropriate.

Another complementary means to pursue claims for pesticide damage in the competing land use cases is to utilize other federal environmental laws such as the Clean Water Act and CERCLA (and equivalent state laws) to recover damages and obtain injunctive relief for pesticide-related damages. Even better, since *Bates*, FIFRA is no longer a bar in any jurisdiction to states creating a private right of action for damages for use of pesticides contrary to federal law. These types of statutes, taken together with common law trespass and nuisance claims, can provide plaintiffs in both sets of cases with powerful tools to combat pesticide misuse, while retaining a more unified, federal structure governing use of pesticides. ○

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## The Dangerous Allure of Judicial Deference in Deregulated Industries continued from page 5

markets emerge due to restructuring. Courts need to be mindful of the implications of such a stance for private behavior in the regulatory process. Deference produces opportunities for private manipulation of the regulator in ways that did not exist when rate hearings were the norm. Deference also may encourage recalcitrance in state legislatures where a state's political momentum favors holding out from interstate markets.

Of course, there is an undeniable danger to taking judicial intervention too far. But judicial evaluation of regulatory disputes in emerging markets need not embrace judicial scrutiny of substantive economic arrangements as occurred during the *Lochner* era. Courts can play a positive role without treading on substantive political decisions by focusing on the process concerns that plague the development of competition and enforcement policies in deregulated markets.

If courts are attentive to the bargaining process by which regulation evolves, even when markets are emerging, public law stands to improve the functioning of competitive markets, such as those evolving in telecommunications and electric power. However, with a recognition of some judicial role, courts will no longer be able to hide behind deference to escape blame when deregulatory policies fail. ○

### In Memoriam

Our colleague and friend Thomas O. Sargentich, Professor of Law at American University's Washington College of Law, passed away on April 21, 2005.

Professor Sargentich was a long-time active member of the Section, serving with distinction as a Member of the Council and as Chair and Vice Chair of several Section Committees, and a strong supporter of Section activities.

Professor Sargentich was instrumental in locating the *Administrative Law Review* at American University's Washington College of Law and served as the Chairman of the Faculty Board for the *Law Review*.

Professor Sargentich was a nationally recognized scholar in Administrative Law and Constitutional Separation of Powers, with a strong commitment to understanding and improving government under law, who participated on numerous Section panels and programs.

Professor Sargentich discharged his professional duties and his work for the Section with honesty, integrity, kindness, good humor, and, in the end, consummate courage and grace.

The Section expresses its sadness at Tom's passing and honors his memory for his contributions to this Section, the legal profession, legal education, and legal scholarship and for the friendship he shared with all of us.

## In Memoriam

Our friend and colleague Ernest Gellhorn, University Foundation Professor of Law at George Mason University School of Law and distinguished practitioner of law passed away suddenly on May 7, 2005.

Professor Gellhorn, as author, scholar, and long-time member of the Administrative Conference of the United States, and leader of this ABA Section of Administrative Law and Regulatory Practice, was for decades a leading figure in American administrative law and a mentor to many leaders of the Section—one who challenged received wisdom, made his colleagues better lawyers and thinkers, probed issues relentlessly to find the bottom and

followed where the analysis led, worked tirelessly to support gender and racial diversity, and was unfailingly gracious to professional colleagues and ready to give others credit for work jointly performed.

As a nationally recognized scholar in administrative law and antitrust, Professor Gellhorn also taught with distinction on the faculties of the Duke and Virginia law schools and served as Dean of the Arizona State University, University of Washington and Case Western University law schools.

Professor Gellhorn also practiced law as a partner in the law firm of Jones Day, counseling wisely and arguing cases in the highest courts, including the United States Supreme Court.

As a long-time leader of our Section, Professor Gellhorn served in such crucial roles as a member of the Council, Chair of the Section, Section delegate to the House of Delegates, and Chair of the Fellows of the Section, and through his energy, good humor and insight helped build this Section to its current place of eminence in the field of administrative law, and effectively represented its interests within the larger Bar Association.

The Section expresses our deep sadness at Ernest's passing to his wife Jackie, his daughter Ann, and his son Thomas, and honors his memory for his extraordinary contributions to this Section, the law school world and the legal profession. We are grateful to have had his presence in our midst.

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## The Rehnquist Court *continued from page 8*

to avoid constitutional difficulties. The Rehnquist Court does not actually do that; it has produced a different sort of nondelegation canon, one that gives the courts less power: a clear-statement rule with regard to claims of large-scale, consequential delegations. This idea is present in a number of *Chevron* cases and is at the heart of *Brown & Williamson*.

Once again, in practice, the Court's interpretive approach will usually have anti-regulation consequences, as it did in *Brown & Williamson*. Like any clear statement rule, it makes it harder for Congress to do the thing that requires a clear statement. However, two features dilute this effect quite significantly. First, this principle does not require Congress to make a clear substantive decision, which is hard for Congress to do. It requires only that Congress clearly fail

to make a substantive decision and punt to the agency. Historically, Congress has been up to that challenge. Second, the anti-regulation consequences are contingent. In a *deregulatory* age, the effect could be the opposite.

### Conclusion

The Court that emerges from this review is more timid and deferential than the standard account would have it. As Richard Lazarus has said in a different context, the Rehnquist Court is truly "*Rehnquist's Court*"; its administrative law doctrines match the early opinions of the Chief Justice, not the self-aggrandizing approach one would expect from the hegemonic Court that is often described (and decried).

If the Court is working a revolution, it is doing so by baby steps and through

indirection. Time and again we see an official doctrine that is on the surface deferential and hands-off. Then, beneath the surface, one sees *not* a whole other story, but rather some subtle ways in which things are not quite as they seem. Yet these are partial, indirect, and not especially effective.

This description may be truer of the Court's work in general than is usually recognized. It's a better story if the Supreme Court has gone berserk and its decisions are of monumental importance, but an examination of the dry and dusty land of administrative law supports those who see the Court as a nonextremist institution, whose boldest doctrinal forays are in the areas with the slightest practical consequences and which is in the mainstream of the overall legal and political culture. ○

# The First Administrative Law Institute: A Resounding Success

By Otto J. Hetzel\*

It was a standing room only crowd in the auditorium for the start of the inaugural Administrative Law & Regulatory Practice Institute: "Making Agency Law Through Rulemaking." Following opening remarks by the Section Chair, Randy May, and Program Chair, John Hardin Young, the program kicked off with a dynamic two-session, tour-de-force lecture on "Everything You Need to Know to Effectively Participate in Agency Rulemaking" by Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University Law School, and renowned author of *Administrative Law Treatise* (4th Ed.) and co-author of *Administrative Law and Process* (3rd Ed.).

Pierce's informal "class room" style of presentation during the two morning sessions and his interaction with attendees in answering questions as he went along made for an entertaining and informative performance for the unexpectedly large turnout of some 300 persons attending.

Professor Pierce provided a down-to-earth discourse on the relevant legal issues, the mechanics of rulemaking, and the potential points of legal challenge to rules. His two sessions spanned almost three hours, allowing him to cover: agency power to issue rules; choices between rulemaking and adjudication; the significance of various types of rules, informal, formal, and hybrid; exemptions from rulemaking; petitions for rulemaking; negotiated rulemaking; and judicial review.

He also covered such sophisticated points as the importance of ensuring that rules ultimately generated are consistent with the initial justifications set forth in the original explanation for the proposed rules. Ensuring that final products are



*Section Chair-Elect Eleanor Kinney, Program Chair and Former Section Chair Jack Young, Federal Circuit Chief Judge Paul R. Michel, Section Chair Randy May, and DC Circuit Chief Judge Douglas H. Ginsburg at the First Annual Administrative Law & Regulatory Practice Institute.*

consistent with the original basis set forth in the request for comments, he stressed, is needed to head off challenges on the basis that the final rules were themselves arbitrary and capricious. He also outlined the applicable statutes of limitations that apply to such challenges, which are independent of contentions that arise later and relate to how an agency ultimately applies its rules.

At lunch, the personable Honorable Pat Wood, III, Chairman of the Federal Energy Regulatory Commission (FERC), provided illustrations of the rulemaking issues his agency had encountered during his tenure. He also stressed the important role that legal counsel play in making this an effective process.

The afternoon sessions were based on a case study of *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 57 (1983), which set the standard for review of agency rulemaking. The study also provided a common set of facts to stimulate discussions in the smaller group breakout sessions that followed, where specific issues and agency practices were discussed in the

context of a designated agency, such as the Office of Management and Budget (OMB) or FERC. In these smaller groups, each participant had an opportunity to discuss their perceptions and concerns relevant to the required process applicable to that agency and to seek guidance in handling specific types of situations having broader application to other government agencies, as well.

Afterwards, a panel containing the major players involved in the *State Farm* case provided a unique opportunity to learn about the tactical approaches taken by the various parties to that rulemaking. The panel also contributed their candid, reflective analysis of how they performed in that particular rulemaking given the critical economic and safety effects of what was then perceived as a contentious set of requirements to deal with this safety issue. It was an intriguing vision into how parties prepare for and represent their interests in such matters.

A Judicial Reception for all participants concluded the first day's events. It

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# Review of *Government 2.0: Using Technology to Improve Education, Cut Red Tape, Reduce Gridlock, and Enhance Democracy*

By William Eggers, Lanham, Md.: Rowman & Littlefield, 2005, 243 pages.

Review By Ronald A. Cass\*

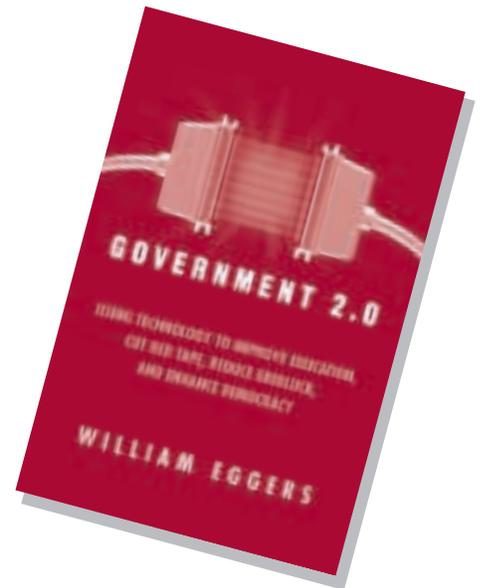
Experience, people say, is what allows us to make good judgments. And how do we get experience? By making bad judgments. Those who fail to learn from experience make the same mistakes repeatedly. Those who learn from experience get to make entirely new mistakes.

In his new book, *Government 2.0*, Bill Eggers provides his assessment of our experience with technology and the lessons we should learn from it. The book is an interesting romp through some of the mistakes government has made in its use of technology, some of the successes government has had in its use of technology, and some of the possibilities that are open to government now. Although its conclusions – and certainly its optimism about technology’s potential role in government – will not be congenial to every reader, the stories about instances in which government uses technology especially well or badly will engage those interested in government. Eggers draws his examples from federal, state, and local government and combines them with thoughtful discussion about what governments can, should, and might do with new technologies to change the way it works.

Eggers’ subject is large. The best way to tackle it is to ask what technology has to offer to different government functions. One function is to gather, process, and disseminate information. Put aside the gathering and processing side for a moment. The use of technology to expand those capacities is problematic in some respects, though Eggers persuasively shows that technology’s enhanced

ability to gather and manipulate information can be a boon to a host of government services (take, for example, Bill Bratton’s use of statistics to improve the operation of the New York police department). The thin edge of technology’s usefulness to improving government can be seen in its role in disseminating information. One thing we want from government is information. We want to know where to go to get things done, to get a passport or register a car, to find a national park along the way, or to get help with our Social Security payments. We want to know which tariff classification to use for a product we are importing or what rulemaking proceedings are coming up in the Department of Transportation. Government is an enormous storehouse of information as well as a vast set of activities and decisions that affect us.

Here, technology can help. Any lawyer who was educated using the West system’s Decennial Digests (much less its Centennial Digests) can appreciate the advance that WestLaw offers in doing research. From your home or office or car, you can search a huge databank electronically, asking many more questions much more quickly to see what cases fit your needs than you ever could do leafing through key cites and indices. From providing a government-wide regulatory index to organizing information about state government services in a readily accessible fashion, technology affords many ways to improve government’s efficiency in providing information to citizens. Even if there are still dinosaurs among us who won’t avail themselves of anything that doesn’t look and feel like paper, Eggers’ prescriptions here are almost certainly worth following. Government can do much more to make its information user



friendly, and technology is surely our friend in this endeavor.

A second thing we can ask of technology is to improve the services government offers. Consider your local Department of Motor Vehicles. The typical DMV requires that you show up in person to renew your car’s registration, your driver’s license, etc. The typical DMV also is organized in a manner that virtually guarantees a wait that is more suited to archaeology than to modern life. I’ve been to Motor Vehicle offices where the wait is timed in days rather than hours. The very concept in some of these offices is to discourage anyone with a regular job or any meaningful or pleasurable activity in his or her life from trying to accomplish the task they had in mind when they first showed up at the DMV. Technology allows simple transactions to be done over the internet in a quick and painless way. As Eggers says, paying parking tickets, renewing your license or registration, or doing a hundred other things you must do with government can be done easily over the

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internet. And doing that saves money for government, money for its citizens, and reduces the friction now generated by our trip to the DMV. The only real losers in this change will be the firms selling ulcer medications. Eggers suggests numerous ways to improve every day government services, and he makes a strong case for a wide array of these changes. The prototype for the vision of improved-service-through-technology is the SpeedPass or EZ Pass. Anyone who used to queue up for traffic tolls, waiting for a small number of toll takers to make change for the drivers who can't quite find where the right dollar bills are in their wallets can appreciate the difference it makes when you can zip past an electronic toll booth.

The most controversial parts of the book will be those that deal with some of the processes of governance and education, where Eggers' proposed solutions for current problems no doubt will find skeptics. Two of those he targets are education and voting. He rightly observes that both processes – which lie at the core of what government does – are troubled. At the purely technical level, voting is the less troubled, as it generally proceeds with relative reliability. It becomes problematic when elections are so terribly close that the error rate in vote counting can affect the outcome. All voting methods have defects – confusing voters, miscounting votes by over- or under-counting, or, worst of all, misclassifying votes (counting a vote for A as a vote for B). The defects of some methods were the subject of intense scrutiny in the aftermath of the 2000 presidential election, but most of the fixes for the perceived defects have turned out to provide no greater reliability than the methods they replace. Eggers believes that technology can cure the problems, and describes a means for voting that he thinks will provide the clarity, certainty and reliability needed. It is far from clear that this can be done without introducing new problems, but it is at least a plausible claim. To his credit, Eggers is more technocrat than visionary on this score – meaning that he limits his proposals to the more pragmatic ones, leaving less

likelihood that unintended (and unwanted) consequences will outweigh the benefits.

The plans he lays out for improving education are apt to provoke more dissent. Of course, *every* plan for improving education seems to provoke dissent. Eggers starts with the sound observation that schools often present learning in a context that is far from inspiring. My own favorite example is history. Tell a kid you've got stories about war, intrigue, feuds, battles, greed, revolution and discovery – you've got a ready audience. Then hand him or her a standard history textbook. It's all over. The book has taken every shred of human interest and everything that would fascinate a child out of the story. Further, the writing by committee that typifies these books sounds as if human interest is absent because no humans participated in producing the book. Eggers gives a different example, linked to technology:

One of the most exasperating things for parents is watching their nine-year-old kid master an exceedingly complex, multilevel computer game—and then flunk math. Obviously, their child has an aptitude for learning, an aptitude that the computer game designer, but not the math curriculum developer, was able to bring out.

Eggers is clearly right that different tools than are used at school, including tools that rely on technology, can provide a richer set of learning possibilities, a set more likely to include something that attracts the attention and energy of each particular child. Curricula that aim at a one-size-fits-all solution to education will miss the opportunity to engage children eager to learn. The learning program almost inevitably will not be right for most of the kids. Eggers is right as well to see the promise of technologies that allow more efficient engagement on an individual basis – that don't require a teacher to guide the individual child's learning, so that twenty-five children can go in twenty-five different directions at the same time. It is far from clear, however, how much of the problem is technological at its root, rather than being the

product of the bureaucratic and political forces that promote centralized, public education for relatively large, heterogeneous classes as the basic educational paradigm. It may well be, for example, that the big issue is not technology but the restriction of educational competition. Where we have competition in education now, it seems to work better, and also seems to produce a far greater diversity of educational options than where we limit the educational alternatives. Still, Eggers may be right that we can make improvements within any model by understanding what technology can do.

The most skeptical responses to Eggers' work will come from those concerned about the privacy and security problems that come along with the new technologies Eggers favors. Eggers recognizes these concerns, but he is more sanguine about the solutions to them than many critics may be. Some problems that technophobes are concerned with may be exaggerated simply because we focus on the risks of the new while accepting the old without question. We may be wary of new technologies that actually present smaller risks than older technologies. Consider what happens with your credit card in a restaurant. You hand it to someone you don't know. He disappears with it for some time. You don't know where he's gone, what he's done, or who else has seen your card. But you probably don't worry much about it. When you give your credit card information to someone over the internet, you may have far greater safeguards built in. But the information is somewhere you can't fathom for a longer period of time – you're not sure just how long – and potentially available to a far wider set of folks. There's reason for concern, even if we can't fully assess the risks. And similar concerns attend a great amount of the proposed uses of technology.

After all is said and done, however, Eggers has provided a rich compendium of potential uses of technology to improve government and a thoughtful discussion of the costs and benefits of the new technology. Anyone interested in administrative law of the coming century would be well advised to take a look at this book. 

# The 2005 Spring Meeting

As Spring Meetings go, the 2005 Spring Meeting in Savannah has to rank with the best of them.

The setting was the Westin Savannah Harbor Golf Resort & Spa, home of the Liberty Mutual Legends of Golf, a major stop on the men's senior professional golf tour. Guided tours, outings for spouses and an opportunity to take in Savannah's best restaurants and waterfront shops rounded out the experience.

Competing with all these wonderful distractions were a variety of panels and speakers on big-picture, long-range, forward-looking topics.

## The Future of State Administrative Law

First on the weekend agenda was a panel on "State Administrative Law Themes for the 21st Century" moderated by former Section Chair Ron Levin. Lois F. Oakley, Chief State Administrative Law Judge, Georgia Office of State Administrative Hearings, commented on the movement in states toward adoption of central administrative hearing panels – twenty-eight so far by her count. She predicted that the strengths of central panels – independence, uniformity, accountability and efficiency – would eventually fuel an expansion in central panel jurisdiction to include matters traditionally reserved for the courts.

James F. Flanagan, Oliver Ellsworth Professor of Federal Practice at the University of South Carolina School of Law, and the reporter for the Rules of Procedure for South Carolina's central panel of administrative law judges, agreed that central panels have become extremely effective but expressed concern that their use creates a disconnect with executive branch policy, that central panels lack any political responsibility. Judge Oakley, on the other hand, saw the relative lack of political influence on central panels as improving impartiality. Neither, however, left any doubt that adoption of central panels was the definite trend.

Paul G. Afonso, Chairman of the Massachusetts Department of

Telecommunications and Energy, conveyed his reservations about the emergence of "corporate federalism" – spurred by Enron and facilitated by Sarbanes-Oxley – that threatens to usurp the traditional role of states as overseers of corporate integrity. Mostly though, his remarks centered on how the states are becoming advocates before federal regulators and how he sees states moving toward interstate greenhouse gas agreements.

H. Lane Kneedler of Reed Smith LLP appeared as an appointee to the National Conference of Commissioners on Uniform State Laws (NCCUSL). NCCUSL is currently in the process of contemplating revisions to the Model State APA. Some of the matters that the drafting committee is expected to address are: the finality of central panel decisions, the boundaries on agency head consultations with staff, administrative civil penalty provisions, suspension and revocation, precedent publication criteria, rulemaking efficiency, and scope of judicial review.

## Priorities for a New ACUS

Immediately following the state administrative law panel, Section Chair Randy May moderated a panel on "An Administrative Law Agenda for the Twenty-First Century: What Should a New ACUS Do." Panelists were asked to recite their short list of major priorities for the recently reauthorized Administrative Conference of the United States.

Jeffrey S. Lubbers, Fellow in Law and Government at American University's Washington College of Law and former ACUS Research Director, listed three: de-ossifying rulemaking, resolving the tension between the need for openness and national security, and helping agencies realize efficiency gains.

Paul R. Verkuil, former Section Chair and Professor at Benjamin N. Cardozo School of Law, believes a reconstituted ACUS should examine the need for



Former Ambassador Philip Lader and Section Chair Randy May, with Randy's wife Laurie, at the Saturday dinner.

limits on the types of governmental functions that may be contracted out to private entities.

Former Section Chair Jack Young of Sandler, Reiff & Young, PC, advocated a role for ACUS as facilitator of change in government's perspective to align with that of its current customers, its future stakeholders.

Past Section Chair Philip J. Harter, currently a professor at the University of Missouri School of Law and formerly a senior staff attorney for ACUS, would have the new ACUS take a hard look at the relationship between agencies and courts and the relationship between government and the private sector.

Finally, Loren A. Smith, Senior Judge of the United States Court of Federal Claims, would advise ACUS to assist agencies in realizing the potential of electronic forums and help agencies simplify their processes in economically meaningful ways that enable the private sector to better manage regulatory risk.

## Interstate Compact APA Project

The Saturday Council meeting featured a panel on the Section's Interstate Compact APA Project. The topic was judicial review and enforcement.

The panel was moderated by project co-chair Bill Morrow who noted that in many, perhaps most, cases the courts have adopted an arbitrary-and-capricious standard of review when passing on compact agency action, but the reasons for doing  
*continued on page 28*



# ADMINISTRATIVE LAW & REGULATORY PRACTICE SECTION

# 2005

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by Robin Kundis Craig\*

## Debates over the Propriety of *Chevron* Deference

In *Smith v. City of Jackson, Mississippi*, --- U.S. ---, 125 S. Ct. 1536 (March 30, 2005), the Supreme Court concluded 8–0 (Chief Justice Rehnquist did not participate) that the plaintiffs’ disparate-impact age discrimination case under the Age Discrimination in Employment Act (ADEA) would have to be dismissed. That unanimity of result, however, belies the very different approaches to interpreting the ADEA that informed the three resulting opinions, particularly with respect to how much deference to give the EEOC on the issue of whether the ADEA permitted disparate impact claims. Even the five Justices who agreed that the ADEA authorized such claims split 4–1 regarding their interpretive reasoning.

In the plurality opinion by Justice Stevens, he and Justices Souter, Ginsburg, and Breyer based their conclusion that the ADEA supported disparate-impact claims on their own textual analysis of the ADEA, referring to the EEOC’s interpretation only for ending confirmation of their own view. The plurality began by analyzing the ADEA’s language in comparison to Title VII of the Civil Rights Act of 1964, noting that “when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.” *Id.* at 1541 (citations omitted). It emphasized that in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court had unanimously interpreted the relevant language of Title VII to allow disparate impact claims, “not[ing] that the [EEOC], which had enforcement responsibility, had issued guidelines that accorded with our view.” *Smith*, 125 S. Ct. at 1541 (citing *Griggs*, 401 U.S. at 433–34). While the “opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view,” the Court later determined that its view of Title VII was also “the better reading of the statutory text.” *Id.* at 1542 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 97, 991 (1988)). As a result, “*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA,” especially given the Courts of Appeals’ uniform interpretation of the ADEA to that effect. *Id.* at 1542–43. Only at the very end of its analysis did the plurality also “note that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, . . . have consistently interpreted the ADEA to authorize relief on a disparate-impact theory.” *Id.* at 1544.

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Justice Scalia concurred in the judgment specifically to argue that the EEOC’s interpretation was entitled to *Chevron* deference. He agreed with all of the plurality’s interpretive reasoning “but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the” EEOC. *Id.* at 1546 (J. Scalia, concurring). According to Justice Scalia, “[t]his is an absolutely classic case for deference to agency interpretation,” because the EEOC was clearly delegated rulemaking authority, had promulgated its interpretation of the ADEA through notice-and-comment rulemaking, and had defended that interpretation in numerous court cases. *Id.* at 1546–47 (J. Scalia, concurring). Justice Scalia moreover concluded that “for the reasons given by the plurality opinion, [the EEOC’s] position is eminently reasonable,” which should have been sufficient to resolve the case. *Id.* at 1549 (J. Scalia, concurring).

Justices O’Connor, Kennedy, and Thomas concurred in the final judgment dismissing the case for failure to state a claim, but they disagreed with the majority’s conclusion that the ADEA allowed disparate-impact claims. These Justices relied heavily on the ADEA’s “reasonable factors other than age” provision and legislative history that indicated that “[t]he drafters of the ADEA and the Congress that enacted it understood that age discrimination was qualitatively different from the kinds of discrimination addressed by Title VII, and that many legitimate employment practices would have a disparate impact on older workers,” *Id.* at 1552 (J. O’Connor, concurring), to conclude that the ADEA did not allow such claims. In reaching that conclusion, moreover, these three Justices also concluded that the EEOC’s interpretations of the ADEA allowing disparate impact claims deserved no deference. They argued that the plurality and Justice Scalia were relying on a 1968 Labor Bulletin and a 1981 EEOC policy statement. *Id.* at 1557–58 (J. O’Connor, concurring). Because the Labor Bulletin did not construe the ADEA’s prohibitory provisions and spoke purely in terms of intentional discrimination in hiring, and because the EEOC policy statement was focused on the “reasonable factors other than age” safe haven, Justice O’Connor “would give no weight to the statements in question.” *Id.* at 1558 (J. O’Connor, concurring). In particular, the EEOC “has not actually exercised its delegated authority to resolve any ambiguity in the relevant provision’s text, much less done so in a reasonable or persuasive manner. As to the specific provision presented, therefore, the regulation is not entitled to any deference.” *Id.* at 1559 (J. O’Connor, concurring).

## Decisions with Federalism Implications

The Supreme Court issued a series of decisions this quarter regarding the proper relationship between state and federal law and judicial decisions. The first of these was *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, --- U.S. ---, 125 S. Ct. 1517 (March 30, 2005), in which the Supreme Court limited the

scope of one of its appellate review doctrines with implications for federal-state relations, the *Rooker-Feldman* doctrine. The *Rooker-Feldman* doctrine prohibits suits in the lower federal courts that seek to overturn state-court judgments. However, the lower courts often confuse the *Rooker-Feldman* doctrine with normal principles of issue and claim preclusion that apply when state courts have ruled on issues relevant to later federal litigation, as was the case in *Exxon Mobil*.

*Exxon Mobil* was at heart a royalty dispute arising out of joint ventures in Saudi Arabia. In July 2000, Saudi Basic Industries sued ExxonMobil in the Delaware Superior Court seeking a declaratory judgment that the royalties it charged were proper. Two weeks later, ExxonMobil sued Saudi Basic Industries in the United States District Court for the District of New Jersey, alleging that Saudi Basic Industries had over-charged ExxonMobil. ExxonMobil answered the state-court complaint in January 2002, and the state suit went to trial in March 2003, resulting in a \$400 million jury verdict in ExxonMobil's favor. Before the trial, however, Saudi Basic Industries moved to dismiss the federal lawsuit, and the federal district court denied the motion. On interlocutory appeal of that denial, the Third Circuit reversed, determining that the district court lacked subject matter jurisdiction over ExxonMobil's federal claims on the basis of the *Rooker-Feldman* doctrine because the state court had already decided those claims. The Supreme Court reversed again, holding that the *Rooker-Feldman* doctrine "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 1521-22. Otherwise, concurrent state and federal proceedings are allowable, subject to comity and abstention doctrines, and "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law." *Id.* at 1527.

States also benefited from the Court's decision in *Bates v. Dow Agrosciences LLC.*, --- U.S. ---, 125 S. Ct. 1788 (April 27, 2005), in which the Court held, 7-2, that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not preempt state law claims for defective design, defective manufacture, negligent testing, breach of express warranty, or violation of the Texas Deception Trade Practices Act; the Court remanded the issues of whether FIFRA preempts state-law fraud and failure to warn claims. The plaintiffs were 29 peanut farmers in Texas who alleged that Dow's new pesticide "Strongarm," a weed killer, destroyed their peanut crops in 2000. According to the plaintiffs, Dow knew or should have known that Strongarm stunted crop growth when soil pH was greater than 7.0, as is typical in western Texas; nevertheless, Strongarm's federally approved label and Dow's sales agents

both asserted that "use of Strongarm is recommended in all areas where peanuts are grown."

Dow defended on the ground that its conditional registration of the pesticide with the EPA under FIFRA, which gave Dow permission to sell Strongarm, preempted the farmers' state-law claims. The relevant language of FIFRA dictates that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those requires under" the Act. 7 U.S.C. § 136v(b). Focusing on the scope of "requirements" in this provision, the Court fashioned a two-factor test:

For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement "for labeling or packaging"; rules governing the design of a product, for example, are not preempted. Second, it must impose a labeling or packaging requirement that is "in addition to or different from those required under this subchapter."

*Bates*, 125 S. Ct. at 1798. Most of the plaintiffs' state-law claims did not satisfy the first condition: "Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or contractual commitments plainly do not qualify as requirements for 'labeling or packaging.'" *Id.* The fraud and negligence failure-to-warn claims, however, were based on state-law rules that qualified as requirements for labeling and packaging, because they were premised on claims that Strongarm's approved label contained false statements and inadequate warnings. The plaintiffs nevertheless argued that their state-law claims imposed requirements that were equivalent to FIFRA's mandates that pesticide labels not contain "false or misleading" statements or inadequate instructions or warnings and hence that the second requirement for FIFRA preemption had not been met. Because this issue had not been adequately briefed, the Court remanded it for lower court resolution.

A day earlier, however, the Court allowed the federal criminal wire fraud statute, 18 U.S.C. § 1343, to displace the common law revenue rule in *Pasquantino v. United States*, --- U.S. ---, 125 S. Ct. 1766 (April 26, 2005). Against the convicted criminal defendants' argument that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles," *Id.* at 1773 [quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)], the Court emphasized that "[t]his presumption is . . . no bar to a construction that conflicts with a common-law rule if the statute 'speaks directly' to the question addressed by the common law." *Id.* at 1773-74 [quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)]. In order to determine whether "Congress intended to exempt the present prosecution from the broad reach of the

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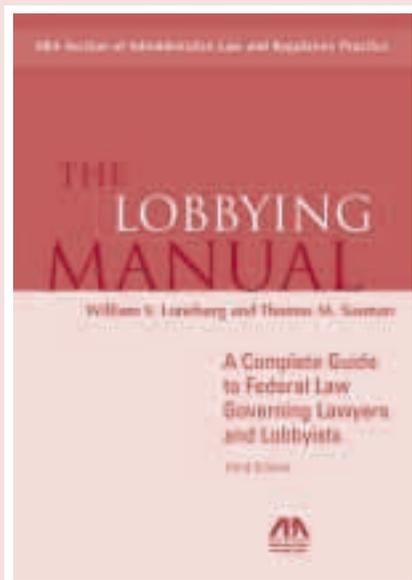
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wire fraud statute, [the Court had to] find that the common-law revenue rule clearly barred such a prosecution,” judged from the state of common law in 1952, when Congress enacted the wire fraud statute. *Id.* at 1774. Because the Court could find no evidence that, by 1952, the common law revenue rule “barred the United States from prosecuting a fraudulent scheme to evade foreign taxes,” neither that rule nor its purposes barred the criminal prosecution. *Id.* at 1774-81.

Federal interests also triumphed over state interests regarding interstate sales of alcohol. In May, the Court determined, 5-4, that Michigan laws that prohibited direct sales from out-of-state

wineries to Michigan residents while allowing such sales from Michigan wineries violated the Dormant Commerce Clause by discriminating against out-of-state commerce. *Granholm v. Heel*, --- U.S. ---, --- S. Ct. ---, 2005 WL 1130571 (May 16, 2005). The Court’s Commerce Clause analysis was unremarkable, given that the Michigan laws facially discriminated against out-of-state commerce. The important federalism aspect of the case was the majority’s determination that states’ powers under the 21<sup>st</sup> Amendment did not trump the dormant Commerce Clause. Thus, state constitutional power to regulate sales of alcohol remains subordinate to the federal insistence that there be no barriers to trade between states. 

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# News from the Circuits

By William S. Jordan III\*

## FACA: D.C. Circuit Dilutes While 9<sup>th</sup> Circuit Signals Possible End to Some Claims

The first Bush Administration practically began with a dispute over the secret workings of the National Energy Policy Development Group (NEPDG), which was headed by Vice President Cheney. As the second Bush Administration begins, an en banc D.C. Circuit decision has finally resolved that dispute in a decision that further minimizes the significance of the Federal Advisory Committee Act (FACA) as a device for achieving open government. The Ninth Circuit, meanwhile, issued and then withdrew an opinion holding that there is no private right of action to enforce FACA.

Soon after his first inauguration, President Bush appointed the NEPDG to develop a national energy policy. The meetings and even the membership of the NEPDG were not revealed to the public. Asserting that energy industry representatives were active members of and participants in the NEPDG, the Sierra Club and others challenged the secret nature of the NEPDG as a violation of FACA. After a detour to the Supreme Court to resolve issues related to the role of claims of executive privilege, *Cheney v. U.S. Dist. Court*, 124 S. Ct. 2576 (2004), the D.C. Circuit ultimately addressed the merits of the FACA claim in *In re: Cheney*, 2005 WL 1083346 (D.C. Cir. 2005) (en banc).

By this point in the litigation, the issue was whether the private participants in the NEPDG constituted members of the body for the purposes of FACA. Since bodies composed entirely of full-time federal employees are exempt from FACA, the status of the private participants would determine whether the statute applied to the NEPDG.

Emphasizing the “severe separation of powers problems” inherent in applying FACA to a body advising the Executive Office of the President, the court first said that it must construe the statute strictly. With that admonition, it held that “such a committee is composed wholly of federal officials if the President has given no one other than a federal official a vote in or, if the committee acts by consensus, a veto over the committee’s decisions.” Administration affidavits stated that the private participants had neither a vote nor a veto, and the challengers could not show otherwise.

The result is a gaping loophole in FACA, which undermines both its already fading significance as a tool of open government and even its role in managing agency resources, as discussed, for example, in *Public Citizen v. Department of Justice*, 491 U.S. 440, 445-446, 453-454 (1989). Any agency, or the President, can avoid the openness and other strictures of FACA simply by creating an advisory body in which any private participants officially cannot vote. Since the balanced representation

requirements of FACA would not apply, the private participants in the advisory group could be drawn entirely from a single industry or other interest, as was true of the NEPDG. In such a group, there would be relatively little need for votes or vetoes since the participants would already be in general agreement. In effect, this decision sanctions traditional old-boy networks, in which votes were not taken, but influence was enormous.

In another intriguing FACA development, the Ninth Circuit held in *Manshardt v. Federal Judicial Qualifications Committee*, 401 F.3d 1014 (9<sup>th</sup> Cir. 2005), that the FACA does not create a private right of action. The District Court had reached the same conclusion in the first of many decisions in the *In re: Cheney* litigation, *Judicial Watch, Inc. v. National Energy Policy Development Group*, 219 F.Supp.2d 20, 33 (D.D.C. 2002), but that litigation had continued as a mandamus action. Two months after issuing the above *Manshardt* opinion, the Ninth Circuit withdrew it, stating that it could not be cited as precedent. *Manshardt v. Federal Judicial Qualifications Committee*, 2005 WL 1119626 (9<sup>th</sup> Cir. 2005). In its place, the Ninth Circuit issued a fairly straightforward opinion on the merits (denying a challenge to committees organized by the two California senators and a private lawyer to advise the president on appointments to judgeships and U.S. attorney positions), while noting that the question of private rights to enforce FACA is still an open question, and citing several cases on the issue. *Manshardt v. Federal Judicial Qualifications Committee*, 2005 WL 1119633, n. 3 (9<sup>th</sup> Cir. 2005). The lesson of the *Manshardt* developments is that the availability of a private right of action under FACA is very much a live question. This may not matter, however, because review will usually be available under the APA or through an action for mandamus.

## FCC Guidance Documents: D.C. Circuit Applies Traditional Notice-&-Comment Test to One and New Non-APA “Crucial Statutory Element” Test to Other

It seems so simple. When you change cell phone companies, you can keep your telephone number. In regulatory terms, you can “port” your number to the new company. Less well known is the fact that you can also port your traditional “wireline” telephone number to either a wireless or a wireline company. The complexities of the regulatory scheme have resulted in various informally issued FCC guidance documents. In companion cases from the D.C. Circuit, one guidance document survives review under fairly traditional analysis. Another is remanded in a decision that both (1) demonstrates the procedural vitality of the requirement to prepare a Regulatory Flexibility Analysis and (2) finds a legislative rulemaking requirement in the substantive statute even where notice and comment would not be required by the APA.

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As it began implementing the statutory mandate to require portability, the FCC used the notice and comment rulemaking process to issue two “orders,” both of which are “rules” under the APA. These orders established two basic principles. First, wireline and wireless carriers are required to provide “number portability” between companies. Second, the various carriers are not required to provide “location portability,” which the FCC defined as “the ability of users of telecommunications services to retain existing telecommunications numbers . . . when moving from one physical location to another.”

The interplay of these principles was fairly straightforward with respect to portability between traditional wireline companies. As one might expect, such portability is not required unless the companies essentially share the same relatively small geographic area. Thus, you can’t move from Washington, D.C., to Phoenix and take your wireline number to your new wireline phone.

More difficult questions arose in two areas. First, was number portability between wireless companies required where a customer had moved to a new location? Second, was number portability required between a wireline company and a wireless company with no physical presence in the wireline company’s relevant geographic area? The FCC answered both questions without expressly complying with the requirements for notice and comment rulemaking.

As to the first question, the wireless industry petitioned for a ruling that local companies (both wireline and wireless) had a duty to port their numbers to wireless companies as long as their service areas overlapped. The FCC invited public comment on the petition and later issued an “order” adopting the proposed position. In *Central Texas Telephone Cooperative, Inc. v. FCC*, 402 F.3d 205 (D.C. Cir. 2005), the local companies challenged the order on the ground that it violated the notice and comment and other requirements governing legislative rulemaking.

Before reaching the procedural challenge, the court discussed the question of whether the agency’s action constituted adjudication or rulemaking, usually not a notable issue. In this case, however, the wireless industry had petitioned under an FCC regulation that referred to 5 U.S.C. 554(e), which involves adjudications. After noting that there is some authority for the proposition a 554(e) petition may be used in informal adjudication, the court assumed, as had the parties, that the FCC issuance constituted a “rule” for purposes of the APA.

In addressing the procedural argument, the court emphasized that an agency statement can be an interpretive rule only if it is “interpreting something.” The court quotes Professor Anthony’s argument that “The substance of the derived proposition must flow fairly from the substance of the existing document.” But then it adds, “If, despite an agency’s claim, a rule cannot fairly be viewed as interpreting – *even incorrectly* – a statute or a regulation, the rule is not an interpretive rule exempt from notice-and-

comment rulemaking.” (Emphasis supplied.) This is a useful clarification of the debate over interpretive rules. In determining whether an agency statement qualifies for the interpretive statement exemption from notice and comment, the crucial question is whether the statement is interpretive in nature, not whether it is correct. If a statement was developed using the interpretive method, relying on language, history, and the like, it qualifies for the interpretive statement exemption even if it is substantively incorrect.

Ultimately, however, the court applied the well-known test of *American Mining Company v. MSHA*, asking whether the FCC statement “repudiates or is irreconcilable with” one of the previous legislative rules. The court held that the statement was consistent with the FCC’s rejection of “location portability” because the customer’s location was not relevant to wireless-to-wireless portability. This was simply number portability as long as the customer was somewhere within the service areas of the two companies. Reflecting established doctrine, the court said that such an interpretive rule can change existing conduct. It also expressly repudiated the “substantial effects” or “substantial impact” tests that it had once used to resolve these issues.

In *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005), the D.C. Circuit resolved the more interesting questions raised by the problem of wireline to wireless portability. First, following the *American Mining Company* principle noted above, the court held that requiring a wireline company to port its number to a wireless company outside its geographic area was inconsistent with the FCC’s rejection of “location portability.” Thus, the statement did not qualify for the interpretive rule exception.

Moreover, the court held that the 1996 Telecommunications Act itself requires the agency to rely upon legislative rulemaking. The Act requires number porting “‘in accordance with requirements prescribed by the Commission,’ . . . requirements that are to be ‘implement[ed]’ in ‘regulations.’” Thus, statements implementing the porting requirement are by definition legislative rules.

Recognizing that it is not possible for legislative rules to “address every conceivable question,” the court articulated a new test for determining whether, for the purpose of statutory rulemaking requirements such as this one, the agency must use legislative rulemaking. Referring to the facts at hand, the court said, “the question of what Congress meant by ‘at the same location’ . . . is not just any ‘conceivable question.’ Rather, it is a *crucial statutory element* of the portability requirement itself . . .” (Emphasis supplied.) Thus, there is now a distinct test for determining when an agency must use legislative rulemaking under a non-APA rulemaking requirement. Under this ruling, an agency cannot necessarily rely upon the interpretive statement exception even if the exception would be available under the APA.

The court went on, however, to hold that the FCC’s failure to expressly conduct a notice and comment rulemaking

proceeding constituted harmless error because the agency had sought and considered comment on the industry petition that resulted in the order. If the FCC thought it was off the hook at that point, however, it had another thing coming.

The court ultimately held that although the agency had, in effect, complied with notice and comment requirements, it foundered on the additional requirement to prepare a Regulatory Flexibility Analysis concerning the effect of its rule on small entities. The court prohibited the agency from implementing the rule with respect to small entities. Thus, an agency risks more than merely additional notice and comment when it incorrectly relies on this (and presumably other) exceptions to notice and comment.

### **D.C. Circuit Denies *Chevron* Deference, Strictly Construes FCC Ancillary Jurisdiction**

Congress has set a deadline of December 31, 2006, to complete the transition from analog TV broadcasting to digital broadcasting. In a rulemaking related to that transition, the FCC required that all new televisions and other equipment capable of receiving a digital broadcast signal be equipped with a “broadcast flag.” The “broadcast flag” prevents the reception equipment from redistributing the broadcast material. The American Library Association challenged the rule as beyond the FCC’s jurisdiction. As discussed below, the D.C. Circuit in *American Library Ass’n v. FCC*, 2005 WL 1047587 (D.C. Cir. 2005), concluded that the rule was invalid because it sought to regulate broadcast receiving equipment after the point that the broadcast had been transmitted and received. The decision suggests an approach to attacking *Chevron* deference when the issue is the scope of an agency’s regulatory jurisdiction.

It is often difficult to determine the precise boundary of an agency’s regulatory jurisdiction. Perhaps the most well known case addressing this sort of issue is *Riverside Bayview Homes, Inc. v. United States*, in which the Supreme Court upheld the Corps of Engineers’ jurisdiction over adjacent wetlands under the Clean Water Act. Noting the difficulty of determining “some point at which water ends and land begins,” the Court deferred to the agency’s judgment that such wetlands “play a key role in protecting and enhancing water quality,” and must, therefore, be subject to Clean Water Act jurisdiction. The Court emphasized “the Corps’ and EPA’s technical expertise” in deferring to their conclusion.

The jurisdictional boundary issue is particularly acute for the FCC due to the nature of broadcasting. It is not enough for the FCC to control the broadcast signal itself, or even the licensing of broadcast stations. It must also control the receiving apparatus in order to assure that the TVs or other receivers available on the market are compatible with the broadcast signal. For all of these, the FCC has express statutory authority. Beyond these areas, however, there are broadcast-related

issues for which the agency’s jurisdiction is not so clear, issues as to which the agency is said to exercise “ancillary jurisdiction.” An example is what we now know as cable television. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The FCC’s ancillary jurisdiction arises from its statutory authority to “make such rules and regulations . . . as may be necessary in the execution of its functions.”

Relying on its ancillary jurisdiction, the FCC adopted the “broadcast flag” rule as part of its effort to promote the transition to digital broadcasting. In *American Library Ass’n v. FCC*, the D.C. Circuit held that the rule was not within the agency’s authority to regulate “all interstate and foreign communication by wire or radio.” The essential problem was that any copying or redistribution of a broadcast after its receipt by a television would not constitute “communication by wire or radio.”

From a broader Administrative Law perspective, the court’s rejection of *Chevron* deference may have considerable influence. While this issue is comparable in some ways to the wetlands jurisdiction question on which the Court deferred in *Riverside Bayview Homes*, the D.C. Circuit refused to defer. Although the FCC is clearly authorized to issue rules with the force of law, the threshold test of *U.S. v. Mead*, the court emphasized here that the agency must have been delegated authority with respect to the particular area being regulated. Reading the statute as limited to regulation of the apparatus at the point that it receives the signal, the court found the broadcast flag rule to be beyond the agency’s authority.

It is possible that this decision and others like it will be read as relatively simple applications of *Chevron* Step One, relying on the seemingly clear statutory language. However, the court emphasized that the result would have been the same under Step Two. Thus, agencies can expect greater difficulty in the future in attempting to rely on *Chevron* deference in arguments about the scope of their jurisdiction.

### **Other Decisions of Interest**

Several courts found agency action to be arbitrary and capricious. At the behest of environmental groups, the Second Circuit in *Waterkeeper Alliance, Inc. v. USEPA*, 399 F.3d 486 (2<sup>nd</sup> Cir. 2005), struck down EPA regulations governing combined animal feeding operations (CAFOs). Although EPA prevailed on several issues, it stumbled over statutory language, inadequate explanation of some issues, and a “logical outgrowth” challenge. In *Jupiter Energy Corp. v. FERC*, 2005 WL 834473 (5<sup>th</sup> Cir. 2005), FERC lost an arbitrary and capricious challenge for the seemingly obvious reason that it characterized a pipeline as “transportation” and subject to its jurisdiction when the pipeline was upstream of a “gathering” pipeline not within FERC’s jurisdiction. Finally, the D.C. Circuit struck down a Surface Transportation Board decision for failure to

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provide a coherent explanation of differential treatment of a shipper and a carrier in a rate reopening decision. *Burlington Northern and Santa Fe Railway Company v. Surface Transportation Board*, 403 F.3d 771 (D.C. Cir. 2005).

On the *Chevron* front, a District Court struck down a DOI interpretation of the Endangered Species Act as unreasonable under *Chevron* Step 2. *Defenders of Wildlife v. Secretary of the U.S. Dept. of the Interior*, 354 F.Supp.2d 1156 (D. Oregon 2005). In *Combs v. Commissioner of Social Security*, 400 F.3d 353 (6th Cir. 2005), the court refused to defer to an agency's interpretation of its statute as authorizing retroactive application of a new regulation.

In *Cathedral Candle Company v. United States International Trade Commission*, 400 F.3d 1352 (Fed. Cir. 2005), the Federal Circuit addressed the problem of deference where statutes conflict, and considered the effects of *Auer* deference on *Chevron* deference. The court also attempted to characterize *Skidmore* deference in a way that would render it distinct from *Chevron* deference, but more than mere agreement: "[W]e believe the Supreme Court intends for us to defer to an agency interpretation of the statute that it administers if the agency has conducted a careful analysis

of the statutory issue, if the agency's position has been consistent and reflects agency-wide policy, and if the agency's position constitutes a reasonable conclusion as to the proper construction of the statute, even if we might not have adopted that construction without the benefit of the agency's analysis." Since this formulation requires a court to accept an agency's reasonable conclusion, this is a version of "strong deference," not the weak variety typically associated with *Skidmore*.

Three other noteworthy decisions are: *Legal Environmental Assistance Foundation, Inc. v. United States Environmental Protection Agency*, 400 F.3d 1278 (11<sup>th</sup> Cir. 2005) (denying standing in a challenge to the procedural provisions of state permitting programs under the Clean Air Act); *Ahmed v. Gonzales*, 398 F.3d 722 (6<sup>th</sup> Cir. 2005) (striking down an Immigration Judge's credibility findings, with a useful discussion of the IJ's responsibilities); and *Tunik v. Dethloff*, 2005 WL 1110975 (Fed. Cir. 2005) (rejecting the Merit System Protection Board's repudiation of the concept of "constructive removal" of ALJs because that concept had been embodied in a regulation after first having been adopted in an adjudication). ○

## The First Administrative Law Institute *continued from page 13*

allowed the Section to recognize the important role of the Federal Courts of Appeals for the D.C. and Federal Circuits in rulemaking. Chief Judge Douglas H. Ginsburg of the D.C. Circuit and Chief Judge Paul R. Michel of the Federal Circuit briefly addressed remarks to those attending. They were accompanied by a number of their judicial colleagues on each bench providing participants a special opportunity to talk informally with these judges and get to know them better.

Richard Wiley, Managing Partner Wiley, Rein & Fielding and former Chair of the Federal Communications Commission started off day two by providing an insightful tour of "The 'Ins' and 'Outs' of Rulemaking: Lessons from Government and K Street." He was followed by an expert panel made up of seasoned practitioners involved in representation of interests in rulemaking proceedings.

The panel included a former White House Counsel, a former Director of OMB, and private counsel who frequently are involved in rulemaking

matters (both on behalf of private and public interest groups). Their perspectives on strategy and tactics in preparing for and influencing rulemaking proceedings were unparalleled. They covered such issues as the relative importance of generating grass roots comments to the need for detailed, documented expert reports to establish the impact of proposed rules.

The Institute's final panel of experts contained a range of experience across the federal agency continuum as well as representatives of special interests affected by rulemaking. Their presentations dealt with such key topics as: the role of special interest groups; Congressional oversight; and the impact of political priorities at the time, both presidential and congressional; to how to structure potential interventions.

The vast majority of the participants at the Institute, some 80 percent, indicated they were government attorneys obtaining further education on the rulemaking process as it affected their agency work. Uniformly, their comments and evaluations showed they

found this first Institute program of significant benefit in performing their work, that it reinforced their theoretical foundation for rulemaking, and provided them a better grasp of the process as practiced government-wide.

Frequently participants in plenary and breakout sessions noted through their questions and comments the similarities of the difficulties they experienced as a result of the extended time periods that often are involved in developing detailed rules. During these periods, the recited policies may vary because of changes in agency leadership and difficulties are encountered simply in handling the sheer volume of comments received along with complying with the complexity of the process, itself.

Overall, this was an auspicious beginning to a new initiative of the Section. Those primarily responsible for conceptualizing and implementing it, Jack Young and Randy May, deserve great credit for their efforts as do all of the 33 others who actively participated in making the Institute the great success it was, far beyond all expectations. ○

# Recent Articles of Interest

By Yvette Barksdale\*

## 1. Many recent articles address the government's legal response to the war on terrorism. These include

- a. *The Sleeper Scenario: Terrorism-Support Laws And The Demands Of Prevention*, 42 Harv. J. on Legis. 1 (2005). The author **Robert M. Chesney** describes, analyzes and critiques post 9/11 Justice Department anti-terrorism challenges and practices including *Padilla*, *Lackawanna* and other litigation. Focusing on government efforts to stop potential ("sleeper") terrorists, Chesney argues that the civilian criminal justice system could effectively address terrorism, without unduly expanding the military's role, if adequate material support laws were available. The author includes legislative proposals to remedy the deficiencies of current law.
- b. See also, articles in 29 N.Y. U. Rev. L. & Soc. Change 459, et. seq. (2005). Included are articles by 1) Federal District Court Judge Frederic Block (E.D.N.Y.) who in *Civil Liberties During National Emergencies: The Interactions Between The Three Branches Of Government In Coping With Past And Current Threats To The Nation's Security*, writes a concise history of federal anti-terrorism and national emergency law and practice from World War I through last term's Supreme Court decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). [p. 459], and 2) Jesselyn A. Radack, who in *You Say Defendant, I Say Combatant: Opportunistic Treatment Of Terrorism Suspects Held In The United States And The Need For Due Process*, critiques the Bush Administration's elastic use of the term "enemy combatant" arguing that it is a tool for "forum-shopping and selective justice." Also included are critical essays by 1) Burt Neuborne, *The Role of Courts in Time of War*, (p.555), and 2) Kevin Lapp, *Pressing Public Necessity: The Unconstitutionality Of The Absconder Apprehension Initiative*, (p.573).
- c. Other recent articles and symposia address the use of immigration powers as tools in the war on terrorism. These include articles by i) Margaret Taylor, who in *Dangerous by Decree: Detention without Bond in Immigration Proceedings*, 50 Loy. L. Rev. 149 (2004) (*Forthcoming*), describes in detail the administration's policies for detaining persons without bond, using various sources of authority including immigration law and the Patriot Act, ii) Rachel Canty, who in *The New World of Immigration Custody Determinations after Zadvydas v. Davis*, 18 Geo. Immigr. L.J. 467 (2004), discusses the effect of post 9/11 developments on the *Zadvydas v. Davis*, 533 U.S. 678

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(2001) rubric for addressing immigration custody determinations, and iii) John W. Guendelsberger, who in *JUDICIAL DEFERENCE TO AGENCY DECISIONS IN REMOVAL PROCEEDINGS IN LIGHT OF INS V. VENTURA*, 18 Geo. Immigr. L.J. 605 (2004), discusses the impact of changes in immigration law and jurisdiction on *INS v. Ventura*, 537 U.S. 12 (2002) which limits Circuit Court review of INS removal proceedings. See also **Symposium** : IMMIGRATION LAW AND HUMAN RIGHTS: LEGAL LINE DRAWING POST-SEPTEMBER 11, 25 B.C. THIRD WORLD L.J. 1-220 (2005), including articles by Daniel Kanstroom, Nancy Morawetz, Mary-Rose Papandrea, Teresa A. Miller, David A. Martin, Stephen H. Legomsky, and Sophie Robin-Olivier.

## 2. Other articles seek attack next-generation environmental problems. The authors argue that complex interconnected multifactor environmental problems require new, flexible solutions which are difficult to implement within the current regulatory context. The authors advocate new strategies. Articles include:

- a. *Environmental Law Grows Up (More or Less), and What Science Can Do to Help*, 9 Lewis & Clark L. Rev. \_\_\_\_ (2005) *Forthcoming*, by author **Carol Rose**. Professor Rose describes the evolution of environmental law from quality controls to behavioral controls and back to market and other new wave approaches). She argues new challenges require more mature environmental science is needed to help resolve difficult predictive and other problems. She suggests better collaboration between scientists and environmentalists
- b. *Regulation by Adaptive Management - Is it Possible?*, 7 Minn. J. L. Sci. & Tech. \_\_\_\_ (200\_) *Forthcoming*, in which author **J.B. Ruhl** advocates "adaptive management" strategies for environmental regulation in which the agency adjusts regulatory solutions based upon new information, and new circumstances. The author argues substantial changes in administrative law may be required to implement the adaptive model.
- c. *A Transaction Cost Economizing Approach To Regulation: Understanding The NIMBY Problem And Improving Regulatory Responses*, 22 Yale J. on Reg. \_\_\_\_ (2005), in which authors **Barak D. Richman** and **Christopher Boerner** wish to attack the NIMBY problem, in which self-interested neighbors block publicly beneficial, but locally troublesome facilities, such as solid waste incinerators, resisting efforts by developers to negotiate compensation for such local harms. The authors argue that viewing NIMBY disputes as a contracting problem leads to insights which may help to address the problem. The authors employ the theory of the firm, specifically transaction cost economics, to articulate the

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# Recent Articles of Interest

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functional purpose of environmental siting regulations and to chart an agenda for regulatory reform.

- d. *Mustering The Missing Voices: A Collaborative Model For Fostering Equality, Community Involvement And Adaptive Planning In Land Use Decisions*, 24 Stan. Envtl. L.J. 3 (2005), in which author **Alejandro Esteban Camacho** wants to replace bilateral negotiated local land use planning between localities and developers with a collaborative decision making model which includes broader participation by all affected interests. (Part 2 of this article will be in the journal's next issue.)

### 3. Still other articles address various aspects of judicial review. These include:

- a. *How MEAD Has Muddled Judicial Review of Agency Action*, 59 Vand. L. Rev. \_\_\_\_ (2005), *Forthcoming*, in which author **Lisa Schultz Bressman** advises how to clarify the post-Mead doctrinal "muddle" regarding the applicability of Chevron deference. The author surveys the lower courts' inconsistency and chaos in applying Mead, and evaluates the prescience of Scalia's dissent. Author Bressman advocates a third approach to best reconcile Mead (and Barnhart). This approach provides Congress and agencies flexibility to design and invoke informal procedures to retain Chevron eligibility, provided the procedures are transparent, rational and binding.
- b. *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 Fla. St. U. L. Rev. \_\_\_\_ (2005), in which author **Jeffrey J. Rachlinski** uses cognitive theory to argue for stronger judicial review of the choice between rulemaking and adjudication. The author contends that because the form of decision making can have a significant effect on the outcome, greater judicial scrutiny of the rulemaking/adjudication choice is warranted.
- c. *Providing Judicial Review For Decisions By Political Trustees*, 15 Duke J. Comp. & Int'l L. 1 (2004) in which author **Henry H. Perritt, Jr.** analogizes from administrative law to argue for judicial review of decisions by "political trustees" – i.e., people who manage countries in reconstruction which are under international supervision.
- d. *Constitutionalism in the Streets*, 78 S. Cal. L. Rev. 401 (2005), in which author **Gary D. Rowe** uses Chief Justice John Marshall's *UNITED STATES V. PETERS*, 9 U.S. (5 CRANCH) 115 (1809), the first United States Supreme Court case to strike down a state law, to examine and reconstruct the origins and extent of the original support for judicial review. The author states the case led to an armed clash between federal and state forces in the streets of Philadelphia after Pennsylvania refused to comply with the Supreme Court's enforcement order.
- e. *Who's so Afraid of the Eleventh Amendment*, 105 Colum. L. Rev. \_\_\_\_ (2005), *Forthcoming*, in which **Jesse H. Choper** and **John C. Yoo** argue that the Rehnquist Court's expansive 11<sup>th</sup> amendment analysis, while doctrinally messy, is of little practical significance given the many alternative means of enforcing state compliance with federal regulation.
- f. *Allocating Power Over Fact-Finding in the Patent System*, 19 Berkeley Tech. L.J. 907 (2004), *Forthcoming*, in which author **Arti K. Rai** evaluates separate and somewhat divergent advisory reports by two agencies, the Federal Trade Commission (FTC) and the National Academy for Science (NAS) on the scope of the Federal Circuit's review of the United States Patent and Trade Office's (USPTO's) heavily policy-dependent fact finding regarding the patentability of an invention. Both reports recommend altering the standard of review, but somewhat diverge on the proper standard. Author Rai marginally sides with the FTC.

### 4. Daryl J. Levinson's *Empire-Building Government in Constitutional Law*, 118 Harv. L. Rev. 915 (2005), Christopher S. Elmendorf's, *Representation Reinforcement through Advisory Commissions: The Case of Election Law*, *Forthcoming*, 80 N.Y.U. L. Rev. \_\_\_\_ (2005) and Rachel E. Barkow's, *Administering Crime*, 52 UCLA L. Rev. 715 (2005) assess the efficacy of various government institutional structures.

- a. In *Empire-Building Government in Constitutional Law*, author Levinson critiques conventional federalism, separation of powers, and other structural models as improperly characterizing governments as greed-driven, imperialistic, self-aggrandizing behemoths pitted against each other in a perennial battle to maximize institutional wealth and power. Instead, the author argues, better predictions of government behavior would arise from constitutional models which root government behavior in a combination of constituent driven political pressures, and independent interests the officials may wish to, and politically can, pursue. The author argues that democratic governments are unlikely to produce officials who are more concerned with institutional, rather than political, power.
- b. In *Representation Reinforcement through Advisory Commissions: The Case of Election Law*, author Elmendorf advocates limiting incumbents' power to enact legislative policies (such as election laws) which entrench their position against outsiders. The author proposes a standing advisory committee as a possible model for doing so.
- c. In *Administering Crime*, author Barkow, seeking to remedy the dearth of scholarship assessing the institutional design of sentencing commissions, parole boards, corrections departments and other administrative agencies critically

responsible for the administration of criminal law, evaluates the efficacy of various models for sentencing commissions. Drawing on administrative law, political science, and the actual experience of federal and state sentencing commissions, the author argues that, contrary to popular wisdom, politically enmeshed sentencing agency models are more efficacious than politically insulated ones, if the structural design objective is to minimize political impulses by maximizing the agency's influence over sentencing policy.

- d. For a historical perspective, see Christopher S. Yoo, Steven G. Calabresi and Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 Iowa L. Rev. 601 (2005). This article is the last in a four part series of articles that have amassed an historical record of the practice of Presidential control of administration from the country's founding through the modern era.

**5. A collection of critical pieces critique 1) the rational actor model of the human being, 2) the market protection model of corporate regulation, 3) the proportionality model of diversity, 4) federal Indian administrative law policy, and 5) the failure of the United States to give significant housing support to veterans.**

- a. In *The Situational Character: A Critical Realist Perspective On The Human Animal*, 93 Geo. L.J. 1 (2004), authors **Jon Hanson** and **David Yosifon** thoroughly (822 footnotes) analyze a wide range of recent social science and other scholarship to argue comprehensively that legal theory must reject the "rational actor" model of the human being, in favor of a "situational" actor whose decision making is unconsciously or subconsciously affected by external matters which he or she does not fully understand.
- b. In *The Illusion Of Law: The Legitimizing Schemas Of Modern Policy And Corporate Law*, 103 Mich. L. Rev. 1 (2004), authors **Ronald Chen** and **Jon Hanson** provide an in-depth critical retrospective on the political and rhetorical development and entrenchment of the current "free hand of the market" predominant policymaking model.
- c. In *Second-Order Diversity*, 118 Harv. L. Rev. 1099 (2005), author **Heather K. Gerken** argues for a different concept of diversity beyond "proportional representation." Instead, she argues for an institutional model of diversity in which minority groups can control some institutions, thus permitting the groups to have a stronger voice, and to more effectively exercise, political power.
- d. In *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 Wash. U. J. L. & Pol. \_\_\_\_ (2005), *Forthcoming*, author **Matthew L.M. Fletcher**

argues that federal Indian administrative law policy undermines Native Americans' right to self-determination.

- e. In *National Ingratitude: The Egregious Deficiencies Of The United States' Housing Programs For Veterans And The "Public Scandal" Of Veterans' Homelessness*, 38 Ind. L. Rev. 103 (2005), author **Florence Wagman Roisman** discusses the United State's failure to provide adequate housing support for veterans.

**6. Richard L. Kaplan's *The Security of Social Security Benefits and the President's Proposal*, 16 Elder L. Rep. 1 (April, 2005)** lucidly summarizes and analyzes 1) current Social Security funding and 2) President George W. Bush's proposed Social Security plan.

**7. James P. Nehf's *Incomparability And The Passive Virtues Of Ad Hoc Privacy Policy*, 76 U. Colo. L. Rev. 1 (2005).** Critiques Congress' minimalist approach to regulation of information privacy outside of government. The author blames dissonant analytical privacy models in which traditional, limited, cost-benefit arguments which weigh the benefits of the free flow of information against the costs of privacy protection, run up against the rhetorical fundamental rights centered arguments favored by privacy advocates.

**8. Finally, two articles gamely undertake daunting interpretive challenges.**

- a. In *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005), author **Seth Barrett Tillman** undertakes to rigorously prove that the Bicameralism and Presentment clause requires Presentment only, if such an option is legislatively authorized by Congress. In response, author Gary Lawson concludes that Tillman is correct, but only with regard to legislative subpoenas. See Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEXAS L. REV. \_\_\_\_ (2005) *Forthcoming*. In reply, Tillman disagrees with Lawson's reply and says why. See, *The Domain of Constitutional Delegations Under the Orders, Resolutions, and Votes Clause*, 83 Tex. L. Rev. \_\_\_\_ (2005) (*Forthcoming*.)
- b. In *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 Geo. Wash. L. Rev. 235 (2005), Author **Gary Lawson** undertakes his own daunting interpretive challenge, by explicitly seeking to rigorously prove that the non-delegation doctrine is properly rooted in the Constitution. No response yet from Eric Posner and Adrien Vermuele. ○

Edited by Michael Asimow\*

## Oregon Annuls Same Sex Marriages: State Statute Controls, Not County Interpretation of Constitution

By William Funk\*

In *Li v. State*, — P.3d —, — Or. —, 2005 WL 852319 (April 14, 2005), same sex marriage met administrative law. The Oregon Supreme Court in 1986 had rendered a decision in which it held that governmental officials have “a duty to follow the Constitution regardless of whether a court has ruled on the constitutionality of a particular issue.” *Cooper v. Eugene School Dist. No. 4J*, 301 Or. 358, 364–65, 723 P.2d 298 (1986). In a thoughtful opinion by then Justice Hans Linde, the Court explained that: “Long familiarity with the institution of judicial review sometimes leads to the misconception that constitutional law is exclusively a matter for the courts. To the contrary, when a court sets aside government action on constitutional grounds, it necessarily holds that legislators or officials attentive to a proper understanding of the constitution would or should have acted differently.”

In early 2004, the county attorney for Multnomah county rendered an opinion to the county council that, while Oregon law required couples wishing to marry to be of opposite sexes, to deny marriage licenses to same sex couples would violate the

Oregon state constitution. Accordingly, under the duty seemingly required in *Cooper*, the county directed its marriage license office to issue licenses to same sex couples, and as a result approximately 3000 same sex marriages were performed before November 2004, when the voters by initiative amended the Oregon Constitution to require that marriages can only be between one man and one woman.

The question in *Li* was the validity of those marriages. Initially, the Court decided that the amendment to the Constitution was only prospective and did not by its terms purport to eliminate existing marriages. Rather than review the decision of the county that the state Constitution before its amendment prohibited discrimination against same sex couples wishing to marry, the Court held that whatever the state Constitution provided, the county was required to follow Oregon statutory law. The Court limited *Cooper* by interpreting it to apply only in situations where the issue arises before a state official in an administrative adjudication – as indeed was the case in *Cooper*. Thus, only where an agency is acting in a quasi-judicial manner can it interpret and apply the Constitution in a manner inconsistent with statute. ○

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\* Professor of Law Emeritus, UCLA Law School; Council Member; Advisory Board Chair; and Contributing Editor.

\* Professor of Law, Lewis & Clark Law School; Former Section Chair.

## 2005 Spring Meeting *continued from page 16*

so have varied from the terms of the compact under review to the prevailing standard of review prior to adoption of the federal APA to considerations of the subject matter of the dispute.

Project co-chair Jeffrey B. Litwak, counsel to the Columbia River Gorge Commission and adjunct professor of law at Lewis and Clark Law School, discussed availability of review, which can be complicated by questions of who the proper respondent is – normally the agency applying the compact but in some cases a signatory state. Litwak said that in some cases provision for review is to be found in congressional consent legislation or may be inferred from state general jurisdiction statutes. He opined that in a case where a court must decide which state has venue, the court may look to general principles resolving conflicts-of-laws or the doctrine of *forum non conveniens*.

Shaun Gehan of Collier Shannon Scott, and a former representative on the Interstate Commission for the Potomac River Basin, used the Atlantic States Marine Fisheries Compact (ASMFC) to illustrate the problems, some unique to that compact, that practitioners face when a compact is silent on availability of review. Under the ASMFC, the function of the Atlantic States Marine Fisheries Commission is to issue recommended fishery management rules for voluntary adoption by the signatory states, but no provision is made for judicial review.

A later-enacted statute mandates the promulgation and adoption of such rules and authorizes the Secretary of Commerce to declare a fishing moratorium in the waters of any non-complying state. Direct review of such rules would only be available under an implied right of action theory. More likely, challengers must wait for the Secretary to hold enforcement hearings – well after the rules have been promulgated – before challenging them in court.

## The Future of Europe and Government Technology

Philip Lader reminisced at the Saturday dinner about his experiences in London while serving as Ambassador to Great Britain in the Clinton Administration. He also previewed the then upcoming British elections for Prime Minister and French vote on the European Constitution. He urged the Section to follow through with its EU project. Breakfast with Bill Eggers the following morning highlighted the potential for technology to transform government in the 21st Century. (See the review of Eggers' book on this topic elsewhere in this issue).

All in all, a memorable meeting and one for the Section to build on. ○

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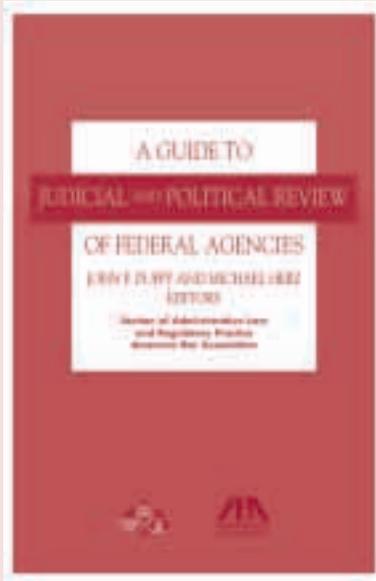
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